



Express law fast track information for clients

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Scope of Commonwealth environmental laws

The Full Federal Court has taken a broad view of the environmental impacts that must be considered under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) in the assessment and approval of environmentally significant actions. Commonwealth agencies should give careful consideration to the requirements of the Act in connection with any proposal that involves direct or indirect environmental impacts.

Minister for the Environment and Heritage v Queensland Conservation Council Inc

Federal Court of Australia (Full Court) 30 July 2004, [2004] FCAFC 190

This case concerned the proposed Nathan Dam project on the Dawson River in Central Queensland. The central question was the scope of the 'relevant impacts' that had to be taken into account by the Minister for the Environment and Heritage under section 75 of the EPBC Act in deciding whether the dam project was a 'controlled action' for the purposes of Part 3 of the Act. Of particular concern was the possible indirect impacts of the dam on the world heritage values of the Great Barrier Reef World Heritage Area. These impacts might occur as a result of the use of water from the dam by farmers for agricultural irrigation, with consequent runoff of chemicals into the Nathan River and downstream to the Great Barrier Reef.

Kiefel J had held that the Minister could not simply decide to exclude from consideration the consequences of activities undertaken by third parties as a consequence of the referred action. In this case, this meant that when the Minister was considering the relevant impacts of the construction and operation of the Nathan Dam, he was obliged to consider the possible impacts of the irrigation activities which the dam would facilitate.

The Minister appealed to the Full Court of the Federal Court, with the aim of obtaining better guidance on the scope of the impacts that must be taken into account in making decisions under the EPBC Act. The Full Court agreed that the Minister was not obliged to exclude from consideration the impacts of activities by third parties that are consequences of the referred action. Following are key points from the joint judgment of Black CJ, Ryan and Finn JJ:

- Decisions on the *Environment Protection (Impact of Proposals) Act 1974* were of little assistance in interpreting the EPBC Act. Decisions from other jurisdictions should also be viewed with caution.
- The word 'impact' in s 75 of the EPBC Act has its ordinary English meaning and includes each way in which a proposed action will, or is likely to, adversely influence or affect the relevant matters of national environmental significance protected by Part 3 of the Act. It includes 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.

- Impacts can thus include influences which are direct or indirect, and may include the results of activities by third parties.
- Impacts include 'each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not'. In this case, the use of water for growing cotton was clearly within the proponent's contemplation.
- The Full Court took no exception to Kiefel J's finding that the Minister can only exclude from consideration those impacts 'which lie in the realm of speculation', provided it is understood that this is predicated on the 'impacts' of an action, with the connotation ascribed to that concept as discussed above.

Implications

Among other things, the decision maintains the potential for an expansive view of the activities of the Commonwealth and Commonwealth agencies which may require assessment and approval under the EPBC Act. Depending on the circumstances, the affected activities might even include dealings with interests in land (eg. leases and licences). Clients should consider the possible application of the Act at a very early stage in planning for such activities, in order to ensure that any applicable environmental assessment and approval requirements under the EPBC Act can be integrated with other relevant processes. The Department of the Environment and Heritage is currently considering the implications of the judgment for users of the EPBC Act and decision-making under the Act.

Text of the decision is available at:

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html>

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