case notes

Qld Minister's dam decision overturned - Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463

Contributed by Chris McGrath, Barrister-at-Law

In *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463 ("the Nathan Dam Case", decided 19 December 2003), the Federal Court of Australia overturned decisions of the Australian Environment Minister for refusing to consider the impacts of major associated downstream agricultural development on the Great Barrier Reef World Heritage Area ("GBR") when assessing of the impacts of a major dam.[1] This decision has far-reaching implications for the operation of environmental law in Australia.

Justice Susan Kiefel found that when assessing the impacts of a proposal under the Australian Government's principal environmental legislation, the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPBC Act")[2], the enquiry of the Australian 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.

In the Nathan Dam Case, two conservation groups, the Queensland Conservation Council and World Wide Fund for Nature (Australia), sought judicial review of decisions of the Australian Environment Minister under the EPBC Act in relation to 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 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 Australian 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 Australian Government (Commonwealth) land and actions undertaken by the Australian Government). 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 Australian Environment Minister, who must then decide under section 75 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 section 133 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 Australian Environment Minister under section 75 of the EPBC Act of the impacts which a proposed development or activity may have upon the matters protected by the Act.

1 The decision is available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2003/1463.html.

2 In relation to the EPBC Act generally, see http://www.deh.gov.au/epbc/.

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 section 75 of the EPBC Act, the enquiry of the Australian 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 section 75 of the EPBC Act, the Australian 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 Australian Environment 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 Australian Environment Minister under section 75 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 Australian 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.

Recent Cases in WA

(contributed by Sally Marsh and Clare Wood, Blake Dawson Waldron, Perth)

The Supreme Court of Western Australia has recently decided three cases concerning environmental issues in Western Australia:

Shire of Brookton v Water Corporation & Others [2003] WASCA 240 - Statutory Duty and the Environmental Protection Act 1986

In the *Shire of Brookton v Water Corporation & Others* [2003] WASCA 240, the Full Court of the Supreme Court of Western Australia considered whether the Shire of Brookton (the Shire) was negligent in failing to take action to prevent a fire, which damaged several properties. The court held that the Shire had a duty of care to take reasonable care to prevent damage to the respondents' property as a result of a fire at the landfill site. The Shire had breached this duty by failing to take action to address the risk of fire igniting in grain which had been dumped at the landfill, including by failing to instruct its employees to promptly extinguish fires at the landfill.

Whilst the case was decided on the negligence action, the court also considered the respondent's claim that the Shire had breached a statutory duty in failing to comply with a condition in its operating licence pursuant to the *Environmental Protection Act* 1986. The court held that the respondent's claim failed because the statutory purpose of the operating licence provisions is not the prevention of damage to property by fire. Rather, the court considered that the statutory purpose of the licence provisions is to minimise pollution connected with the activity conducted which gives rise to the requirement to be licensed, that is the discharge of waste or emission of noise, odour or electromagnetic radiation. Combined with the licence conditions imposed on the Shire, the court stated that the purpose of the licence provisions is to prevent the Shire from deliberately burning putrescible waste as a general disposal mechanism because of the associated discharge of smoke and odour. Accordingly, the court held that as the statutory purpose of the licensing provisions is not directed at damage by fire, it cannot be said that the legislature intended to create a cause of action at the suit of the respondents for property damage as a result of the escape of fire from the landfill site.