



[Federal Court of Australia

Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190 (30 July 2004)

Last Updated: 30 July 2004

FEDERAL COURT OF AUSTRALIA

Minister for the Environment and Heritage v Queensland Conservation Council Inc [\[2004\] FCAFC 190](#)

ADMINISTRATIVE LAW – judicial review – whether the Minister failed to take into account relevant considerations – whether the decision involved an error of law
STATUTORY INTERPRETATION – ordinary English meaning clear in context of Act – unnecessary in circumstances of case to consider other intrinsic or extrinsic aids to interpretation or approaches to interpreting environmental legislation in other jurisdictions
[Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) Pt 3, ss 75, 391, 523 and 524A
[Environment Protection \(Impact of Proposals\) Act 1974](#) (Cth)
[Environmental Planning and Assessment Act 1979](#) (NSW)
[Water Act 2000](#) (Qld)
MINISTER FOR THE ENVIRONMENT AND HERITAGE v QUEENSLAND CONSERVATION COUNCIL INC and WORLD WIDE FUND FOR NATURE (AUSTRALIA) ACN 001 594 074Q17 of 2004

**BLACK CJ, RYAN and FINN JJ 30 JULY 2004 SYDNEY
(heard in BRISBANE)**

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

**ON APPEAL FROM A SINGLE JUDGE OF THE
FEDERAL COURT OF AUSTRALIA**

BETWEEN: **MINISTER FOR THE ENVIRONMENT AND H**
Appellant

AND: **QUEENSLAND CONSERVATION COUNCIL I**
First Respondent

WORLD WIDE FUND FOR NATURE (AUSTRALIA)
594 074

Second Respondent

JUDGES: **BLACK CJ, RYAN and FINN JJ**

DATE OF ORDER: **30 JULY 2004**

WHERE MADE: **SYDNEY (heard in BRISBANE)**

THE COURT ORDERS THAT: 1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal, such costs to be taxed in default of agreement.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

**IN THE FEDERAL COURT OF AUSTRALIA
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Appellant

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First Respondent

WORLD WIDE FUND FOR NATURE (AUSTRALIA)
594 074
Second Respondent

JUDGES: **BLACK CJ, RYAN and FINN JJ**

DATE: **30 JULY 2004**

PLACE: **SYDNEY (heard in BRISBANE)**

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from orders of a single judge of the Court setting aside parts of a decision by the appellant Minister for the Environment and Heritage ("the Environment Minister") made on or about 16 September 2002 and the whole of a decision of the Environment Minister dated 4 December 2002. Each decision was made under the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) ("the [EPBC Act](#)").

2 The [EPBC Act](#) was enacted to implement the provisions of the *Convention on Biological Diversity 1992* and other international environmental agreements into Australian law. It also represents an attempt to consolidate and clarify the Commonwealth's responsibilities for environmental protection within the Australian Federation (see Second Reading Speech, House of Representatives Hansard, 29 June 1999 at 7770). The objects of the [EPBC Act](#) are set out in [s 3\(1\)](#) as follows:

'The objects of this Act are:

(a) to provide for the protection of the environment, especially

those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(ca) to provide for the protection and conservation of heritage; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.'

3 A central element of the [EPBC Act](#) is [Pt 3](#), which prohibits actions that have or are likely to have a significant impact on a matter of national environmental significance, unless the person taking that action has obtained an environmental approval from the Minister. Matters of national environmental significance under the [EPBC Act](#) presently include: World Heritage properties; National Heritage properties; Ramsar wetlands of international importance; nationally threatened species and communities; migratory species protected under international agreements; nuclear actions; and the Commonwealth marine environment.

4 An example of the terms of the prohibition against taking actions that have or are likely to have a significant impact on a matter of national environmental significance is provided by [s 12\(1\)](#), which stipulates:

‘(1) A person must not take an action that:
(a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or
(b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.’

5 A civil penalty is prescribed for a contravention of [s 12\(1\)](#). Criminal penalties are provided for in [s 15A\(1\)](#) and (2) where a person takes an action that results or will result in a significant impact on the world heritage values of a World Heritage property, or where the person recklessly takes an action that is likely to have a significant impact on the world heritage values of a World Heritage property. Neither [s 12\(1\)](#) or [s 15A\(1\)](#) and (2) apply, however, if:

‘(a) an approval of the taking of the action by the person is in operation under [Part 9](#) for the purposes of this section; or
(b) [Part 4](#) lets the person take the action without an approval under [Part 9](#) for the purposes of this section; or
(c) there is in force a decision of the Minister under Division 2 of [Part 7](#) that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under [section 77](#), the action is taken in that manner; or
(d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).’
(See [ss 12\(2\)](#) and [15A\(4\)](#).)

6 [Part 3](#) of the [EPBC Act](#) provides for similar prohibitions, civil and criminal penalties and exemptions for the taking of actions that have or are likely to have a significant impact on the other listed matters of national environmental significance.

7 A mechanism is provided for by [s 68](#) of the [EPBC Act](#) for a

person proposing to take what is or may be an action prohibited under [Pt 3](#) of the [EPBC Act](#) to obtain the decision of the Environment Minister as to whether or not the action is a "controlled action".

8 [Section 67](#) of the [EPBC Act](#) contains the definition of a "controlled action" and also the definition of a "controlling provision". [Section 67](#) provides;

*‘An action that a person proposes to take is a **controlled action** if the taking of the action by the person without approval under [Part 9](#) for the purposes of a provision of [Part 3](#) would be prohibited by the provision. The provision is a **controlling provision** for the action.’*

9 [Section 68](#) then provides:

‘(1) A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.

(2) A person proposing to take an action that the person thinks is not a controlled action may refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.

(3) In a referral under this section, the person must state whether or not the person thinks the action the person proposes to take is a controlled action.

(4) If the person states that the person thinks the action is a controlled action, the person must identify in the statement each provision that the person thinks is a controlling provision.

(5) Subsections (1) and (2) do not apply in relation to a person proposing to take an action if the person has been informed by

the Minister under [section 73](#) that the proposal has been referred to the Minister.'

10 The subject decisions were made as a result of a referral under [s 67\(2\)](#) by Sudaw Developments Limited ("Sudaw") which proposed to construct a dam to be called the Nathan Dam near Taroom on the Dawson River in Central Queensland. The proposal has been described in these terms by the Environment Minister in his statement of reasons for the decisions:

'The proposed construction of Nathan Dam is to take place near Taroom on the Dawson River. The Dawson River has a catchment area of 50,830 km. The Dawson River joins the Mackenzie River to become the Fitzroy River, which has other major tributaries, and which flows east to the coast entering the Great Barrier Reef World Heritage Area (GBRWHA) near Rockhampton, about 500 kilometres by river from the proposed Nathan Dam.'

11 By his first decision of 16 September 2002, the Environment Minister determined that Sudaw's proposed action was a "controlled action" under [s 75](#) of the [EPBC Act](#) and that the controlling provisions were [ss 18](#) and [18A](#) (relating to listed threatened species and communities). [Section 75](#) of the [EPBC Act](#) provides by subs (1) and subs (2):

'(1) The Minister must decide:

- (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and*
- (b) which provisions of [Part 3](#) (if any) are controlling provisions for the action.*

...

(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

- (a) the Minister must consider all adverse impacts (if any) the*

action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of [Part 3](#); and

(b) must not consider any beneficial impacts the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of [Part 3](#).'

12 A consequence of a decision that a proposed action is a "controlled action" is that the "relevant impacts" of the "controlled action" have to be assessed under [Pt 8](#) of the [EPBC Act](#). A description of what the "relevant impacts" of a "controlled action" are is to be found in [s 82\(1\)](#) which provides:

*'(1) If the Minister has decided under Division 2 of [Part 7](#) that an action is a controlled action, the **relevant impacts** of the action are the impacts that the action:*

(a) has or will have; or

(b) is likely to have;

on the matter protected by each provision of [Part 3](#) that the Minister has decided under that Division is a controlling provision for the action.'

13 Once the Environment Minister has decided that a proposed action is a "controlled action", the Minister is required to choose, pursuant to [s 87](#) of the [EPBC Act](#), one of five specified approaches to be used for assessing the relevant impacts of the action. [Section 87](#) provides, so far as is relevant:

'Minister must choose one assessment approach

(1) The Minister must decide which one of the following approaches must be used for assessment of the relevant impacts of the action:

(a) assessment by an accredited assessment process;

(b) assessment on preliminary documentation under Division 4;

(c) assessment by public environment report under Division 5;

(d) assessment by environmental impact statement under Division 6;

(e) assessment by inquiry under Division 7.

Minister must consult before making decision

(2) If:

(a) the action is to be taken in a State or self-governing Territory and

(b) a controlling provision for the action is in Division 1 of [Part 3](#) (about matters of national environmental significance); the Minister must invite the appropriate Minister of the State or Territory to provide information relevant to deciding which approach is appropriate, before deciding on the approach to be used for assessment of the relevant impacts of the action.

Note: Subsection (2) also applies to actions to be taken in an area offshore from a State or the Northern Territory. See [section 157](#).

Considerations in making choice

(3) In making the decision, the Minister must consider:

(a) information relating to the action given to the Minister in the referral of the proposal to take the action or under section 86; and

(b) any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant (including information in a report on the impacts of actions under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under [Part 10](#) (about strategic assessments)); and

(c) any relevant information received in response to an invitation under subsection (2); and

(d) the matters (if any) prescribed by the regulations; and

(e) the guidelines (if any) published under subsection (6).'

14 By his second decision of 4 December 2002, the Environment Minister determined that the assessment of the

relevant impacts of Sudaw's proposal be by way of public environment report.

15 As the primary Judge noted, the choice of the mode of assessment will be influenced by the view the Minister takes of the likely impacts of the proposal, and therefore by the "controlling provisions" the Minister determines are applicable. Any error in deciding which "controlling provisions" apply will therefore infect with error the choice of assessment approach.

16 The report which results from the chosen method of assessment is to be used by the Environment Minister in deciding whether to grant or refuse approval for the taking of the action, for the purposes of a "controlling provision": see [EPBC Act s 133](#). By force of subs (2) of that section an approval must:

- (a) be in writing; and*
- (b) specify the action that may be taken; and*
- (c) name the person who may take the action; and*
- (d) specify each provision of [Part 3](#) for which the approval has effect; and*
- (e) specify the period for which the approval has effect; and*
- (f) set out any conditions attached to the approval.'*

The Environment Minister's Decision

17 As already noted at [11] of these reasons, the Environment Minister decided that Sudaw's proposed action was a "controlled action" under [s 75](#) of the [EPBC Act](#) and that the controlling provisions were [ss 18](#) and [18A](#). [Section 18](#) prohibits a person from taking an action that has, or will have, or is likely to have, a significant impact on various specified listed threatened species or threatened ecological communities. [Section 18A](#), subject to an exception specified in subs (4), makes it an offence punishable by imprisonment for a term of not more than 7 years, a fine of not more than 420 penalty units,

or both, for a person to take an action that is proscribed by [s 18](#) where that action results or will result in a significant impact on a listed threatened species or ecological community, or the person recklessly takes an action that is likely to have a significant impact on a listed threatened species or ecological community. [Section 19\(1\)](#) and(2) render [ss 18](#) and [18A](#) inapplicable to an action the taking of which is the subject of an approval under [Pt 9](#) and [s 19\(3\)\(a\)](#) make [ss 18](#) and [18A](#) inapplicable to an action permitted under [Pt 4](#) without an approval under [Pt 9](#). Similarly, [s 19\(3\)\(b\)](#) takes an action outside the operation of [ss 18](#) and [18A](#) if the Environment Minister has decided that a subsection of [ss 18](#) or [18A](#) is not a "controlling provision" for the action because of the Minister's belief that the action would be taken in a manner specified in the notice of the decision under [s 77](#) and the action has, in fact, been taken in that manner. Finally, [s 19\(3\)\(c\)](#) takes outside the operation of [ss 18](#) and [18A](#) an action the authorisation of which is subject to a special environmental assessment process as described in [s 160\(2\)](#).

18 In the present case, however, the Environment Minister declined to nominate [ss 12](#) and [15A](#), or [ss 20](#) and [20A](#) as "controlling provisions" for the proposed action. As set out at [\[1\]-\[5\]](#) above, [ss 12](#) and [15A](#) respectively:

- prescribe a civil penalty if a person takes an action that has or will have, or is likely to have, a significant impact on the world heritage values of a declared World Heritage property; and
- make it a criminal offence for a person to take an action that results or will result, or is taken recklessly and is likely to result, in a significant impact on the world heritage values of a declared World Heritage property.

19 It is common ground that the Great Barrier Reef World Heritage Area ("the GBRWHA") is a declared World Heritage property.

20 [Sections 20](#) and [20A](#) respectively:

- prescribe a civil penalty if a person takes an action that has or will have, or is likely to have, a significant impact on a listed migratory species; and
- make it a criminal offence for a person to take an action that results or will result, or is taken recklessly and is likely to result, in a significant impact on a listed migratory species.

21 In its referral form, Sudaw noted that 10 species recognised under the migratory species provisions of the [EPBC Act](#) were found in the vicinity of the Nathan Dam. In his statement of reasons, the Minister also acknowledged that migratory species use the GBRWHA (see at par 11). It is not clear, however, whether or not these migratory species were listed under the [EPBC Act](#).

22 The Environment Minister's reasons for declining to nominate [s 12](#) or [s 15A](#) as a "controlling provision" for the proposed action were encapsulated in these paragraphs from his statement of reasons furnished on 20 November 2002:

'14. I found that the natural river flows of the Dawson River are extremely variable and that the river system downstream from the proposed Dam is highly regulated. I found that the existing Fitzroy River catchment is highly modified. In particular, there are a number of weirs and one river barrage in the 500 km between the proposed Nathan Dam and the river mouth where the Fitzroy River flows into the GBRWHA. I found that it was not possible to identify any likely significant impact on the GBRWHA that would be caused by modification of the water flow in the Dawson River as a result of the construction and operation of the dam.

*15. Some public submissions expressed concern about the cumulative impacts of the proposed action resulting from downstream irrigation of agricultural land. The submissions suggested that irrigation of land adjacent to river-beds, has the potential to increase nutrient concentrations and other agricultural pollutants downstream of the dam. **However, 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 referred action, which is the construction and operation of the dam.

16. On the basis of my findings referred to in paragraphs 12 to 15, I found that the proposed action is unlikely to have a significant impact on the World Heritage values of the declared World Heritage property.'

(emphasis added)

23 The Environment Minister's reasons for declining to nominate [ss 20](#) and [20A](#) as the "controlling provision" for the proposed action were also set out in his statement of reasons as follows:

'23. In relation to listed migratory species, I took account of advice from my Department which had examined the potential impacts on listed migratory species and concluded that no significant impact on any of those migratory species were likely in relation to the proposed construction and operation of the dam.

*24. Some public submissions, and in particular that of the Queensland Conservation Council, argued that migratory species would be affected by potential impacts of water flow changes on wetlands and the impacts of irrigation. However, for the reasons given in paragraph 14 above, I found that the evidence did not justify a finding that the referred action would have an impact on migratory species. **For the reasons given in paragraph 15 above, I did not consider that the potential impacts of irrigation were impacts of the referred action. I therefore did not find that the construction and operation of the dam were likely to have a significant impact on listed migratory species.'***

(emphasis added)

24 At first instance, the respondents successfully submitted that the Minister's decision that 'potential impacts of the irrigation of land by persons other than the proponents, using water from the dam, are not impacts of the referred action, which is the construction and operation of the dam' involved an error of law because it construed [s 75\(2\)\(a\)](#) of the [EPBC Act](#) in an impermissibly narrow way.

The Reasons for Judgment at First Instance

25 The learned primary Judge reviewed several authorities which canvassed the application of environmental protection legislation in other jurisdictions, in Australia and overseas, and as embodied in the predecessor of the [EPBC Act](#), the [Environment Protection \(Impact of Proposals\) Act 1974](#) (Cth) ("the [EPIP Act](#)"). After that review, her Honour concluded, at [31]:

'These cases strongly suggest that the question whether there are likely to be significant effects upon the environment requires a wide consideration of the consequences which will follow if a proposed activity proceeds. The question for the Environment Minister under the [EPBC Act](#) is to the same effect. In considering whether an action is 'controlled' by a provision of [Part 3](#) the Environment Minister is to determine whether the proposed action is likely to have a 'significant impact' on an area or species. One would think that when the [EPBC Act](#) was prepared it would have been known that an enquiry as to any likely significant effects of an action had been regarded by the courts as one requiring a full examination.'

26 After noting respects in which the focus of the [EPIP Act](#) differed from that of the [EPBC Act](#), the learned primary Judge observed, at [34]-[35]:

'In my view, so far as concerns the question of the extent of the enquiry under [s 75](#), little of consequence follows from the shift

of focus under the [EPBC Act](#) to a person's intended activity. The objects of the two statutes remain the same. In legislation of this kind the requirements of a provision such as [s 75](#) fall to be determined by reference to the purposes and policy of the Act: Environment Agency v Express Car Co (Abertilly) Ltd [[1998](#)] [UKHL 5](#); [1999] 2 AC 22 at 31E and 1H, and there is nothing to suggest that the considerations relevant to the enquiry whether there are effects which are significant and likely to occur will be different.

The true focus of the [EPBC Act](#) in any event is on the area or species in question. It is concerned with the prospect of damage or some other adverse impact upon them. The Act is not so concerned with persons undertaking particular activities as it is in the consequences of them. The assessments made by the Environment Minister at this point are not as to the extent to which a proponent should be held responsible or whether their proposed action held up. Section 75 directs attention to areas and species and asks the question - what are likely to be the impacts upon them if the proposal proceeds?'

27 Her Honour regarded as central to the regime established by the [EPBC Act](#) the facility afforded by [s 68](#) to a proponent of an action to refer the proposal to the Environment Minister for a decision on whether the action is a controlled action. In this context, she observed, at [37]:

'The legislation no doubt proceeds upon the assumption that persons will properly inform themselves as to the impacts their actions may have upon these aspects of the environment. Importantly, in my view, submissions for the Minister overlook the nature of the process engaged in when there is a referral to the Minister, as there was in the present case. It is one which will provide persons with protection from liability. If the Environment Minister considers that a proposed action will not have a significant impact upon an area or upon a species one might reasonably conclude that a proponent is safe from

prosecution if they proceed. If the Environment Minister determines that it is a ‘controlled action’ assessments will be undertaken which will permit a decision as to whether to approve the action under [Part 9](#). If it is not it will not proceed. If it is approved it is effectively exempt from the prohibitions. Rather than support a view of the enquiry under [s 75](#) as narrow, this suggests a wider enquiry as necessary.’

28 Other provisions in the [EPBC Act](#) enabling the Environment Minister to be provided with information and comment on a proposed action were seen as confirming that the enquiry entrusted to the Minister is not a narrow one. Her Honour then observed, at [38]-[41]:

‘The assessment to be undertaken of a proposed action may be very wide ranging. None of these indicate a focus narrowed to a direct and not an cumulative effect. The enquiry might extend properly to the ‘whole, cumulated and continuing effect’ of the activity of which Cripps J spoke in Kivi v New South Wales Forestry Commission [(1982) 47 LGRA 38 ("Kivi")].

The words used in [s 75](#) and the process to be undertaken also support a wider enquiry than the Environment Minister undertook. In arriving at the ultimate conclusion, that an action is or is not a ‘controlled action’, one which is likely to have a significant impact on an area or species, the Environment Minister is first to consider ‘all adverse impacts’ the action is likely to have. This suggests that 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 Environment Minister will exclude from further consideration those possible impacts which lie in the realms of speculation. The Environment Minister would then determine whether they were significant. ‘Likely’ and ‘significant’ are sufficiently clear in their meaning. In any event there is no issue about their meaning in the present case.

That the Environment Minister's enquiry under [s 75](#) is a wide one, in my view, is I consider, consistent with the high public policy apparent in the objects of the Act. No narrow approach should be taken to the interpretation of legislation having objects of this kind: Marks v GIO Australia Holdings Ltd [\[1998\] HCA 69](#); (1998) 196 CLR 494 at 515, 528, 537.

In my view the Environment Minister did not undertake the full enquiry required by [s 75](#).'

29 Accordingly, an order was made setting aside those parts of the Environment Minister's decision of 16 September 2002 by which he concluded that the proposal by Sudaw to construct and operate the Nathan Dam was not a controlled action in respect of any potential impact the proposal might have on the world heritage values of the GBRWHA as a listed World Heritage property and also was not a controlled action in respect of any potential impact the proposal might have on listed migratory species. As well, the whole of the Environment Minister's decision of 4 December 2002 (a decision pursuant to [s 87](#) of the [EPBC Act](#) that the assessment approach to be used should be an assessment by way of public environment report) was set aside.

The Contentions on Appeal

(a) The Appellant

30 Counsel for the appellant Environment Minister contended that the reasoning at first instance proceeded from the erroneous premise that [s 75\(2\)](#) of the [EPBC Act](#) required the Minister to undertake an unlimited enquiry or an enquiry limited only by the likelihood of action on the part of another person. That error was said to entail an obligation on the Minister to consider every likely action that would be stimulated or facilitated directly or indirectly by the proposed action. That obligation, so the argument went, extended to likely action by persons over whom the proponent had no control or activity which the proponent did

not contemplate, intend or desire.

31 As well, counsel for the appellant contended that the error imputed to her Honour would tend to frustrate the "efficient and timely Commonwealth environmental assessment and approval process" which is one of the means said by [s 3\(2\)\(d\)](#) of the [EPBC Act](#) to be adopted by that Act in order to achieve the objects enumerated in [s 3\(1\)](#). In the same context, counsel pointed to the tight timeframes laid down by, for example, [ss 75, 88](#) and [130\(1\)](#), and suggested that the width of the enquiry required by the judgment under appeal would frequently necessitate extensions or suspension of those statutory deadlines.

32 It was also submitted on behalf of the appellant that the learned primary Judge's reliance on *Tasmanian Conversation Trust Inc v Minister for Resources* [\[1995\] FCA 1035](#); (1995) 55 FCR 516, *Tasmanian Conservation Trust Inc v Minister for Resources (No 2)* (1996) 65 FCR 25 ("*Gunn's No 2*") and *Kivi* (supra) had been misplaced. It will be recalled from the passage from her reasons quoted at [\[25\]](#) above that her Honour had regarded those authorities as suggesting that "whether there are likely to be significant effects upon the environment requires a wide consideration of the consequences which will follow if a proposed activity proceeds."

33 Counsel for the appellant pointed out that each of the earlier cases had involved the interpretation of a different statutory regime. The [EPIP Act](#) had been concerned with projects and decisions of, or under the control of, the Australian Government: *Gunn's No 2* at 34. By contrast, it was said, the definition of "action" in the [EPBC Act](#) was expressly framed to exclude governmental decisions or conduct. We were also referred to one of the objects of the [EPIP Act](#), as stipulated in [s 5\(1\)](#) of that Act, which was:

'to ensure, to the greatest extent that is possible, that matters affecting the environment to a significant extent are fully

examined and taken into account in and in relation to "actions" by or on behalf of the Commonwealth or a Commonwealth authority.'

34 Similarly, counsel for the appellant drew attention to the fact that the [Environmental Planning and Assessment Act 1979](#) (NSW) ("the [NSW Act](#)") under which *Kivi* had arisen, was, like the [EPIP Act](#), concerned in a wide-ranging way with environmental impacts. In any event, *Kivi* was said to be distinguishable from the present case because it concerned "site specific" effects on the environment of the proposed logging activity which Cripps J had been considering.

35 The reasoning of the learned primary Judge was next criticised by counsel for the appellant as failing to advert to a causal link between the proposed action and the adverse impacts which that action was likely to have on the world heritage values of a declared World Heritage property. The appellant contended that for a likely impact to be one which the Environment Minister had to consider (ie an impact of the action) it had to be "inextricably involved" with the proposed action: see *Environmental Defence Society Inc v South Pacific Aluminium (No 4)* [1981] 1 NZLR 530 which, it was acknowledged, had arisen in a different statutory context but illustrated a preferable approach to environmental impact legislation by excluding the effects of actions outside the control of the proponent. It was not sufficient, according to the appellant, for a presumed impact to be a "natural consequence" of a proposed action.

36 Counsel for the Environment Minister submitted that the impacts considered necessarily had to be limited to actions that the proponent was in a position to control, for the reason that [Pt 3](#) of the [EPBC Act](#) attaches civil and criminal liability to persons taking prohibited actions without environmental approval. It was argued that legal liability for an action can only legitimately be attached to persons who are in a position to

control the prohibited conduct. It was contended that since the penalties under [Pt 3](#) could only be applied to actions that the proponent was in a position to control, the impacts of an action that the Minister was required to consider could also only extend to impacts that a proponent was in a position to control. This was because the question the Minister has to ask in determining whether a provision is a "controlling provision" is whether the proposed action would be prohibited under [Pt 3](#) of the [EPBC Act](#). The impacts the Minister may consider could, therefore, only extend to the impacts which are prohibited under [Pt 3](#).

37 Counsel conceded that, if the narrow construction contended for by the appellant was not to be accepted, there was an alternative plausible interpretation of the [EPBC Act](#) scheme, which would avoid the unlimited or excessively wide enquiry said to be mandated by the primary Judge's approach. This interpretation would require the Minister to consider only those impacts of the proposed action which were contemplated by the proponent or which were "geographically proximate" to the proposed action.

38 Confining the enquiry under [s 75](#) of the [EPBC Act](#) to adverse impacts which were inextricably involved with the proposed action would, counsel for the appellant submitted, be conducive to an "efficient and timely Commonwealth environmental assessment and approval process" which, it will be recalled, is one of the means stipulated in [s 3\(2\)\(d\)](#) for the achievement of the objects of the [EPBC Act](#). By way of giving content to impacts which were "inextricably involved" with the proposed action in the present case, counsel instanced the impact of the downstream water flow generated by the dam. That impact was contrasted with the use of fertilisers by a third party irrigator which would, if the impact of the action were likely to be significantly adverse, be itself subject to the [EPBC Act](#). The cumulative impact of several irrigators' actions, not individually significant, was said to have been intentionally left by the [EPBC Act](#) to 'State planning and land legislation and recovery plans'.

39 Moreover, the impacts of the actions of presumptive irrigators were said to lie "in the realms of speculation" or "within the concept of a hypothetical possibility: see *Mees v Kemp* [2004] FCA 356 and *Sierra Club v Marsh* 769 F 2d (1st Cir, 1985). Those actions were neither imminent nor inevitable. Nor were they part of any developed plan which could be assessed under Pt 3 of the EPBC Act. Finally, they were not "a goal of Sudaw", which we take to mean that they were not a necessary incident of the construction or operation of the dam.

(b) The State of Queensland (Intervening by Leave)

40 Counsel for the State of Queensland, which was granted leave to intervene in support of the appeal, adopted the arguments which had been advanced orally and in writing by counsel for the appellant. They said that the scheme of s 75 of the EPBC Act required concentration on "the action that is the subject of a proposal referred to the Minister," in this case the construction and operation of the Nathan Dam. That concentration was said to entail a narrower focus for the inquiry to be conducted pursuant to s 75 than that favoured by the primary Judge.

41 Counsel for the intervener also referred to the *Water Act 2000* (Qld) which was said to have established a regime under which water allocation entitlements and water use approvals have been separated. That regime requires a landholder desiring to use water from an irrigation allocation to obtain approval for a land and water management plan. In deciding whether or not to grant approval, the decision-maker is required to consider, amongst other things, the risk to land and water arising from the use of water on the land and the public interest. The applicability of that regime to water which might be made available from the Nathan Dam was said to illustrate the "remoteness and futurity" of the impact of the use of such water from the "action" which had been referred to the Environment Minister in the present case.

42 The intervener also contended that to require consideration now of the impacts of actions which would, or might, occur in the future as a consequence of the construction and operation of the dam would give rise to great difficulty. The preferable course, suggested by the natural interpretation of [s 75](#), is to leave assessment of those impacts to the future when the nature of the consequential "action" would be clearer and relevant information better known or more readily ascertainable.

(c) The Respondent

43 Counsel for the respondent drew attention to the Environment Minister's acknowledgment in his reasons for decision that some public submissions had suggested that "irrigation of land adjacent to river-beds has the potential to increase nutrient concentrations and other agricultural pollutants downstream of the dam." Despite that acknowledgement, it was noted, the Minister had made a finding that "potential impacts of the irrigation of the land by persons other than the proponents using water from the dam are not impacts of the referred action which is the construction and operation of the dam." That formulation of the Minister's reasons was said to give rise to a discrete legal point decided at first instance as to whether "all adverse impacts" in [s 75\(2\)\(a\)](#) comprehended impacts of farming development made possible by the dam and so as to enable which the dam was to be constructed. It was contended that the learned primary Judge did not go beyond those impacts to consider the cumulative effects of development unrelated to the dam and that it was unnecessary for her to do so.

44 As an aid in construing [s 75](#) of the [EPBC Act](#), counsel for the respondent referred to the peremptory requirement that the Minister **must** consider **all** adverse impacts which the proposed action has or will have or is likely to have. Consistently with what her Honour had held, "all" was said to embrace the whole of the relevant impacts to the greatest possible extent. In the same context, it was argued that "impacts" connoted the influence or effect of an action and was wide enough to include

consequences brought about indirectly through the actions of persons other than the primary or original actor. By using "impacts" in the plural, the legislature had acknowledged that "adverse impacts may be many and varied, direct and indirect."

45 It was accepted on behalf of the respondent that a causal relation between an action and a presumptive impact was capable of almost infinite extension: see *Fitzgerald v Penn* [\[1954\] HCA 74](#); (1954) 91 CLR 268 at 277. Accordingly, counsel acknowledged that "the Minister's task involves the exclusion of some phenomena that might, on some approaches, be categorised as an 'impact' of the proposal". The question for the Court was whether the Minister had construed his obligation too narrowly in excluding as "impacts" all third party downstream effects. It was submitted that the learned primary Judge had answered that question correctly by holding that the Minister had construed his obligation too narrowly and that infinite extension of the requisite causal link should be avoided by excluding possible impacts that were merely "speculative".

46 Counsel for the respondent relied on other indications internal to the [EPBC Act](#) as supporting the view that it imposed on the Minister a duty to consider a broad, but not unlimited, range of actual, future or likely impacts of a proposed action. Those indications included the facility afforded by [s 74](#) to obtain information from a wide range of sources including: members of the public ([s 74\(3\)](#)); the generality of the objects specified in [s 3](#) and the fact that a broad approach was likely better to "provide for the protection of the environment", "promote ecologically sustainable development" and "promote the conservation of biodiversity"; and the definition of "controlled actions" by reference to such nationally significant matters as the world heritage values of declared World Heritage properties, Ramsar wetlands, listed threatened species and listed migratory species (EPBC Act [Pt 3](#) Div 1). The exclusion by [s 75\(2\)\(b\)](#) of "any beneficial impacts" from the consideration of the Environment Minister was also said to reinforce the "wide net" which, the respondent contended, the Minister has to cast. As well,

reference was made to the broad definition of "action" in [s 523](#) of the [EPBC Act](#), which is in these terms:

‘(1) Subject to this Subdivision, action includes:

(a) a project; and

(b) a development; and

(c) an undertaking; and

(d) an activity or series of activities; and

(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).’

47 It was next said on behalf of the respondent that [ss 524](#) and [524A](#) of the [EPBC Act](#) excluding government decisions and grants of funding from the definition of "action" would have been unnecessary if Parliament had intended to limit "impacts" to the direct, physical consequences of a proposed action. Moreover, the consideration required by [s 75\(2\)](#) is a "gateway" process which does not permit or prohibit a proposed action but merely determines whether it should be subject to one of the prescribed modes of assessment, and is one of the processes to which is made applicable the "precautionary principle" defined in [s 391](#) of the [EPBC Act](#).

48 The respondent also supported a wide view of "all adverse impacts" by reference to a general approach to "environmental impact assessment" said to be discernible from approaches taken in different contexts by this Court and in other jurisdictions. By contrast, the narrow view of [s 75](#) taken by the Minister, and his submissions that the broad view is inappropriate because of the presence of civil and criminal penalties, were said to be inconsistent with the "common sense approaches to causation" in criminal law, the law of negligence and the law of contract. On those approaches, there would be a sufficient and foreseeable causal link between the construction and operation of the dam and their "downstream" effects. Even the test propounded by the Minister at first instance of whether the impacts were "inherently or inextricably involved" with the

proposed action would be satisfied by the "downstream" effects of irrigation.

49 The respondents also submitted that the primary Judge was correct to differentiate between the scope of the process of ascertaining relevant impacts with which a decision under [s 75](#) is concerned and the scope of the civil and criminal penalty provisions in [Pt 3](#) of the [EPBC Act](#). In support of this argument, the respondents pointed to a difference in the language used in [Pt 3](#) and in [s 75, Part 3](#) penalties apply to 'significant impacts', whereas under [s 75\(2\)](#), the Minister is required to consider all 'adverse impacts' be they significant or not.

50 Finally, the respondent contended that the assessment of whether an action has, will have or is likely to have a "significant impact" requires consideration of the context in which the presumptive impact will, or might, occur. In the present case, that context included use downstream of water from the dam. That was a matter excluded from the Minister's consideration which was not "so insignificant that the failure to take it into account could not have materially affected the decision": *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [\[1986\] HCA 40](#); (1986) 162 CLR 24 at 40.

Resolution of the Issues

51 We accept that little assistance in interpreting the relevant parts of the [EPBC Act](#) is to be derived from decisions on the [EPIP Act](#), which was the Commonwealth's earlier venture into the regulation of environmental impacts. The explanatory memoranda and other preparatory material which accompanied the enactment of the [EPBC Act](#) made it clear that the new legislation was framed to regulate such impacts in a new way and in reliance on a different constitutional source of power.

52 We would also view with caution invitations to construe the [EPBC Act](#) by reference to analogous concepts developed in relation to environmental protection in New Zealand, the United

States or under State legislation in Australia. The Court can legitimately look for assistance to such sources where the legislature has used technical legal expressions or terms of art derived from usage in the practice of environmental protection, as may occur in legislation which seeks to give effect to international agreements. It is, however, unnecessary to do so in this case where the ordinary English meaning of "impacts" mandates an inquiry consistent with the objects of the [EPBC Act](#).

53 It is unhelpful, we consider, to attempt to paraphrase the expression "all adverse impacts" in [s 75\(2\)\(a\)](#) of the EPBC by recourse to phrases like "inextricably involved" or "natural consequence". "Impact" in the relevant sense means the influence or effect of an action: *Oxford English Dictionary*, 2nd ed, vol VII, 694-695. As the respondents submitted, the word "impact" is often used with regard to ideas, concepts and ideologies: "impact" in its ordinary meaning can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as "the impact of science on society" or "the impact of drought on the economy" serve to illustrate the point. Accordingly, we take [s 75\(2\)](#) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. "Impact" in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of [Pt 3](#) of Ch 2 of the [EPBC 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. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an "impact" of a proposed action. However, we do not consider that the Minister did apply the

correct test in answering the question of fact which had arisen in the present case.

54 In our view, the learned primary Judge correctly identified the legal question raised by the test which the Minister is required to apply when answering the question of fact to which we have referred. Her Honour added emphasis to par 15 of the Minister's reasons for decision (also set out at [22] above). She then noted that counsel for the Minister had contended for essentially the same application of the test. The argument was summarised by the learned primary Judge as follows (at [25]):

'The Environment Minister submits that the ordinary and natural meaning of the phrase 'all adverse impacts ... the action ... is likely to have' in s 75(2) is limited to the impacts that are likely to arise from the construction of the dam and from its operation, including the modification of water flows in the Dawson River. It does not comprehend the impacts of activities undertaken by other persons as a result of their own decisions, such as those to use pesticides on crops grown on land irrigated with water released from the dam. The phrase does not comprehend environmental consequences that arise from decisions to engage in activities that may have adverse impacts upon the environment, when those activities are neither proposed by the development under consideration and its operation nor form an inherent or inextricable part of them.'

55 It is clear from this analysis that the Environment Minister has consistently adopted an interpretation of "adverse impacts... the action ... is likely to have" in s 75(2) of the [EPBC Act](#) which excludes from that concept the consequences of conduct of persons other than the proponent of the proposed action and activities which were not proposed as part of that action and did not form an inherent or inextricable part of it.

56 The Minister's approach, on a fair reading of his reasons, was not to find, as a matter of fact, that downstream pollution by

irrigators was not likely to occur as a consequence of the construction and operation of the dam. Rather, the Minister seems to have considered that such downstream pollution, whether likely or not, was incapable, on a proper interpretation of the [EPBC Act](#), of constituting an adverse impact of the proposed action being the construction and operation of the dam. We agree with the learned primary Judge that this view was erroneous.

57 As mentioned previously, it is undesirable in the circumstances for this Full Court to attempt to paraphrase the expression in [s 75\(2\)](#) to which we have just drawn attention. Nor is it appropriate to essay an exhaustive definition of "adverse impacts" which an "action" within the meaning ascribed by [s 523](#) may be likely to have. It is sufficient in this case to indicate that "all adverse impacts" includes 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.

58 In the present case the proposed action was described in the referral form from the proponent as being:

'To construct and operate the Nathan Dam on the Dawson River in Central Queensland. The dam will have a capacity of 880,000ML. Once in operation it will make controlled discharges of water for agricultural, industrial, urban and environmental uses.'

59 The "context" for the proposed action provided by the proponent, also reproduced in the reasons for judgment of the primary judge, included these paragraphs:

'The lower Dawson River Valley is a region with substantial development potential, currently constrained by the lack of increased reliable water supply. It currently has a grazing, cropping and mining economy and in common with similar

regional areas is stagnating or in decline.

Existing demand for water is provided for by a series of weirs with a combined storage capacity of 62,000ML with annual distributions for irrigation, industrial and urban use of around 50,000ML. This system is at capacity and consequently the region is not able to attract new development.

*The agricultural and industrial potential of the region is substantial. There is 60,000ha of land identified designated as suitable for sustainable irrigation, (Theodore to Duaringa and within 5 km of the river thus avoiding the need for major channels). Potential exists for **cotton ginning**, food processing, development of sustainable forests, **the expansion of the existing cotton growing industry** and diversified cash crops, leading to enhanced employment opportunities and improved quality of life. Existing resource based activity includes coal mining, coal seam methane extraction, a traversing gas pipeline, high capacity rail infrastructure from the centre of the region to port and major electricity generation. The expansion and integrated development of these activities in the region is constrained by the lack of one element: water.'*

(emphasis added)

60 The inference from that material is inescapable that the use of water downstream from the dam, including its use for growing and ginning cotton, was within the contemplation of Sudaw as the proponent of the action. Indeed, the Environment Minister did not suggest to the contrary. Rather, as already noted, he took the view that such "cumulative" or "potential" impacts of, or resulting from, downstream irrigation were incapable, as a matter of law, of constituting "impacts" of the referred action, which he confined to the construction and operation of the dam.

61 That identification of the Minister's error suffices to require that the appeal be dismissed. We do not consider that the learned

primary Judge adopted a construction of [s 75](#) which imposes on the Minister an obligation to conduct an excessively wide enquiry. For the reasons which we have endeavoured to explain, the width of the enquiry in each case will depend on its facts and on what may be inferred from the description of the "action" which the Minister is required to consider at the threshold of the process that leads to the permitting or proscribing of the action. We do not understand her Honour to have taken a different view when she focused in [39] of her reasons (quoted at [28] above) on the words "likely" and "significant". That focus led her Honour to conclude that the Minister can exclude from further consideration only those potential impacts "which lie in the realm of speculation." When it is understood that those remarks are predicated on the "impacts" (with the connotation we have ascribed to that expression) of "actions" as defined in [s 523](#), they are unexceptionable.

62 Finally, we would note that the short answer to the intervener's submissions that the regulatory regime set up by the [Water Act 2000](#) (Qld) should be considered is that the regime is indeed relevant. Its relevance is not, however, to exclude consideration of third party actions resulting from the construction and operation of the dam, but as a factual matter for the Minister to take into account in making his [s 75](#) decision, and indeed perhaps more appropriately during the environmental assessment stage of the approval process.

Conclusion

63 Accordingly, the appeal must be dismissed. The appellant should pay the respondent's costs of the appeal. There should be no order as to the intervener's costs.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Court.

Associate:Dated: 28 July 2004

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Solicitor for the Appellant: Australian Government Solicitor

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Solicitor for the Respondent: Environment Defenders Office Quee

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Solicitor for the Intervenor: Crown Solicitor (Queensland)

Date of Hearing: 19 May 2004

Date of Judgment: 30 July 2004

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