IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY No. Q 17 of 2004

On appeal from a single judge of the Federal Court of Australia

BETWEEN: **MINISTER FOR THE ENVIRONMENT AND HERITAGE**

Appellant

AND: **QUEENSLAND CONSERVATION COUNCIL INC**

First Respondent

WORLD WIDE FUND FOR NATURE (AUSTRALIA)
ACN 001 594 074

Second Respondent

RESPONDENTS' OUTLINE OF SUBMISSIONS ON APPEAL

PART A – CONCISE STATEMENT OF ISSUES THAT THE APPEAL PRESENTS

1. A particularly important issue of law that is raised as the central issue in this appeal[1] is the extent of the enquiry necessary to be undertaken by the appellant ("the Minister") of the impacts which a proposed action may have on the matters protected by the *Environment Protection and Biodiversity Conservation Act 1999* ("the *EPBC Act*"). In particular, whether the Minister is precluded from considering impacts of an action because they involve activities by persons other than the person proposing to carry out the action (i.e. third party impacts).

PART B – OUTLINE OF ARGUMENT

Overview

2. This appeal concerns the decision of Kiefel J in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 setting aside and remitting for further consideration and decision certain decisions of the Minister under ss.75 and 87 of the *EPBC Act* concerning a proposal to construct and operate the Nathan Dam on the Dawson River in central Queensland ("the proposed action").

3. The respondents summarise the main legal principles stated by Kiefel J in the reasons for her decision as follows:

   (a) When assessing "all adverse impacts" of a proposal under the s.75 of the *EPBC Act*, the enquiry of the Minister is a wide one and might extend properly to the whole,

[1] Paraphrasing Kiefel J at paras 2-4 of the Summary of *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463. Note also *Mees v Kemp* [2004] FCA 356 at paras 49-56 and 102-107 in which a similar issue was raised but not ruled upon.

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cumulated and continuing effect of the activity, including the impacts of activities of third parties.[2]

(b) When assessing the impacts of a proposal under the s.75 of the *EPBC Act*, the 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.[3]

(c) 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.[4]

4. The decision of Kiefel J involved a discrete legal point that arose from the reasoning disclosed by the Minister in the reasons for his decision under s.75 of the *EPBC Act* provided pursuant to s.13 of the *Administrative Decisions (Judicial Review) Act 1977*.[5]

5. In paragraphs 15 and 16 of his reasons, the Minister said (emphasis added):

> "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 the proposed action is unlikely to have a significant impact on the World Heritage values of the declared World Heritage property."[6]

6. In paragraphs 23 to 24 of his reasons, the Minister said (emphasis added):

> "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 impacts on any of those migratory species were likely in relation to the proposed construction and operation of the dam.
>
> 24. Some 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**

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[2] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, paras 31, 37 & 38 (noting that Kiefel J's view on third parties is implied). Her Honour's approach is consistent with the ordinary meaning of the words "all adverse impacts". See definitions 1, 2, 4, 5, 6 & 7 of "all" in the *Macquarie Dictionary* (3rd ed) p.53. The whole definition (excluding phrases) reads as follows: **all / /** *determiner* **1.** the whole of (with reference to quantity, extent, duration, amount, or degree): *all Australia*; *all the year round*. **2.** the whole number of (with reference to individuals or particulars, taken collectively): *all women*. **3.** a large number of; many: *he collects all kinds of things*; *all sorts of people were there*. **4.** any; any whatever: *beyond all doubt*. **5.** the greatest possible: *with all speed*. – *pronoun* **6.** the whole quantity or amount: *all of the cake*. **7.** the whole number: *all of us*. **8.** everything: *is that all?* – *noun* **9.** a whole; a totality of things or qualities. **10.** one's whole interest, concern, or property: *to give one's all*; *to lose one's all*. – *adverb* **11.** wholly; entirely; quite: *all alone*. **12.** only; exclusively: *he spent his income all on pleasure*. **13.** each; apiece: *the score was one all*. **14.** by so much; to that extent: *rain made conditions all the worse*. **15.** *Archaic*, *Poetic* even; just.

[3] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, para 39.

[4] Ibid, para 40.

[5] See Appeal Book, pp.44-51.

[6] Paragraphs 11 to 14 make it clear that "the declared World Heritage Property" is the Great Barrier Reef World Heritage Area.

> **find that the construction and operation of the dam were likely to have a significant impact on listed migratory species**."

7. It is important to note that, while consideration of cumulative impacts is part of a broad and common sense approach to impact assessment, the facts of this case and the approach of Kiefel J do not involve consideration of "cumulative impacts" of unrelated development.[7] The facts of this case involve the question of whether "all adverse impacts" of the construction and operation of the dam include the impacts of farming development that is made possible by the dam and for which express purpose the dam is to be built.

8. "All adverse impacts", as construed by Kiefel J, involves consideration of the whole of the impacts of the proposed action, including the impact of the operation of the dam and of farming development made possible by the dam. Such impacts may be "cumulative" in that they arise gradually over time as the direct and indirect impacts of the dam. This would appear to be how Kiefel J considered them, noting her Honour's reference to the "whole, cumulated and continuing effect of the activity" at paragraph [38].

9. "All adverse impacts", as construed by Kiefel J, does not involve the consideration of the cumulative impacts of development unrelated to the dam (e.g. the impacts of a new sewage treatment plant discharging nutrients into the Fitzroy River at Rockhampton and flowing into the Great Barrier Reef World Heritage Area).[8]

Statutory context

10. As noted by Kiefel J,[9] s.3 of the *EPBC Act* sets out the objects of the legislation. It reads, *inter alia*, as follows:

> "**3. Objects of Act**
> (1) 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 …
>
> (2) In order to achieve its objects, the Act:
> (a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and …
> (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and
> (e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:
> (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species; and …

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[7] "Cumulative" means increasing or growing by accumulation or successive additions; formed by or resulting from accumulation or the addition of successive parts or elements (*Macquarie Dictionary*, 3rd ed, p.530). "Cumulative impacts" may arise either from persistent additions from one process or development or compounding effects involving two or more processes or developments.

[8] If it were relevant to the facts of this case, the respondents would submit that the Minister must consider the cumulative impacts of unrelated development when assessing whether an action will have a "significant impact" on a matter protected under Part 3 of the *EPBC Act* if those impacts are part of the context of the action: *Booth v Bosworth* (2001) 114 FCR 39 at 64, paras 99 and 100. However, that question is not raised on the facts of this appeal and therefore, just as Kiefel J did not, it is unnecessary for the Court to address it.

[9] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, para 6.

(f) includes provisions to enhance the protection, conservation and presentation of world heritage properties …"

11. An assessment and approval system for actions impacting upon matters of national environmental significance is provided by Part 3 (Chapter 2) and Parts 7-9 (Chapter 4) of the *EPBC Act*:

(a) Part 3, Division 1 (ss.12-25) provides requirements for environmental approvals relating to matters of national environmental significance. An action that has, will have or is likely to have a significant impact on a matter of national environmental significance is prohibited by civil[10] and criminal liability.[11] However, the prohibition does not apply to an action that is approved or exempt under the *EPBC Act*.

(b) Part 7, to which s.75 is central, provides a procedure for a proposed action to be referred to the Minister for approval. Section 67 defines "controlled action" by stating that 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 would be prohibited by a provision of Part 3. The prohibiting provision is defined as "a controlling provision".

(c) Part 8, to which s.87 is central, provides five methods for assessment of a proposed action that the Minister has decided is a controlled action. An assessment bilateral agreement with a State or Territory government under Part 5 (Chapter 3) can be substituted for the Commonwealth's procedures under Part 8, although no bilateral agreement currently exists for Queensland.

(d) Part 9, to which s.133 is central, provides for the Minister to approve or refuse a proposed action. The Minister's approval or otherwise (pursuant to s.133) follows the Minister's receipt of a report from the chosen assessment process under Part 8 or a bilateral agreement.

Interpretation of s.75 of the *EPBC Act*

12. Section 75 of the *EPBC Act* provides as follows (emphasis added):

"75 Does the proposed action need approval?

Is the action a controlled action?

(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.

Minister must consider public comment.

(1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:

(a) in response to the invitation (if any) under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and

(b) within the period specified in the invitation.

Considerations in decision

(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:

[10] For example, s.12 relating to impact on world heritage values. Note also ss.481-486D (Civil penalties).

[11] For example, s.15A also relating to impact on world heritage values.

(i) has or will have; or
(ii) is likely to have;
on the matter protected by each provision of Part 3."

13. The ordinary meaning of "all" in the context of Part 3 and s.75 of the *EPBC Act* is the whole of and to the greatest possible extent.[12] As Kiefel J held, impacts that lie in the realms of speculation would be excluded from this ordinary meaning.[13] In doing so her Honour did no more than apply the ordinary meaning of the terms.

14. The ordinary meaning of "impact" in the context of Part 3 and s.75 of the *EPBC Act* is the influence or effect of an action.[14] Since "impact" is often used with regard to ideas, concepts and ideologies, "impact" in its ordinary meaning, may frequently be indirect or operate through the actions of other persons. By expressly using the plural, "impacts", in s.75(2) of the *EPBC Act* the legislature has acknowledged that adverse impacts may be many and varied, direct and indirect.

15. The task to be taken by the Minister, pursuant to s.75(2), is to consider a series of notional causal relationships between future events.[15] One end of each causal relationship is the proposed action. Each causal relationship is, otherwise, open ended and involves many events some of which may be almost certain to occur and others which, at the highest, may be only described as "likely"; some of which may be short term, some long term; some large, some small; some very direct; some more indirect and so on. Those events (impacts), however, are restricted in one sense in that, for present purposes, they must involve detrimental (adverse) impact on either the world heritage values of the Great Barrier Reef World Heritage Area or on one or more migratory species listed pursuant to s.209 of the *EPBC Act*.

16. Because causal relationships involve philosophic considerations[16] and, on some analyses, extend infinitely,[17] the Minister's task involves the exclusion of some phenomena that might, on some approaches, be categorised as an "impact" of the proposal. The Court's task is to determine whether the Minister's approach in excluding all third party downstream effects was in accord with the intention of the legislature in that respect (Kiefel J restricted "infinite" extension of the causal relationship by excluding possible impacts that were merely "speculative").

17. In addition to the ordinary meaning of "all adverse impacts", there are several other indications in the *EPBC Act* that the legislature did not intend a narrow approach to the impacts comprehended by s.75(2):

    (a) The use of the phrase "must consider all adverse impacts" when less thorough–going phrases (omitting "must" and/or "all") were available.

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[12] *The Macquarie Dictionary* (3rd ed, The Macquarie Library, 1997), p.53. See footnote 2 above.
[13] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, para 39.
[14] *The Macquarie Dictionary* (3rd ed, The Macquarie Library, 1997), p.1070.
[15] The issue of causation must be addressed and applied taking into account the legal context in which it arises. See *Barnes v Hay* (1988) 12 NSWLR 337, 353; *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22, 29 and *Henville v Walker* (2001) 206 CLR 459, para 98.
[16] See *Henville v Walker* (2001) 206 CLR 459, para 97, per McHugh J.
[17] In *Fitzgerald v Penn* (1954) 91 CLR 268 at 277 Dixon CJ, Fullagar and Kitto JJ said: "If one is to enter on a philosophic examination of 'cause and effect', there is no telling where one ought to stop."

(b) As noted by Kiefel J,[18] the prescription of a detailed procedure intended to identify a large array of possible impacts[19] and the requirement, especially, to consider public comment received.[20]

(c) The broad approach taken to the task of predicting that a particular impact will occur in that this is extended to impacts that are "likely"[21] not impacts that the action "has or will have".

(d) As noted by Kiefel J,[22] a broad approach is more in accord with and likely to achieve the objects of the *EPBC Act*, stated in s.3, which are matters of "high public policy in remedial and protective legislation".[23] A broad approach is likely to better "provide for the protection of the environment", "promote ecologically sustainable development" and "promote the conservation of biodiversity".[24] A narrow approach is likely to hinder those objects in an arbitrary manner.

(e) The objects indicate that the Commonwealth role is to be, in many respects, restricted to protecting "aspects of the environment that are matters of national environmental significance".[25] This is achieved by the way in which "controlled actions" are defined by reference to such nationally significant matters as world heritage values of declared World Heritage properties, Ramsar wetlands, listed threatened species and listed migratory species.[26] Once the national significance is identified in this way, it is not necessary to restrict the process further by a narrow construction of "all adverse impacts".

(f) The exclusion of "any beneficial impacts" (subs.75(2)(b)) from the process of identifying "a controlled action" indicates that the legislation, at that point,[27] seeks to cast a wide net. A narrow construction of "all adverse impacts" is not in accord with this.

(g) Section 523 of the *EPBC Act* broadens the meaning of "action" to include a project, a development, an undertaking, an activity or series of activities or an alteration in any

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[18] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, paras 13-14 & 38.

[19] See ss.74(1) (inviting other Commonwealth Ministers to provide information); 74(2) (inviting comments from appropriate State or Territory Minister); and 74(3) (inviting public comment) of the *EPBC Act.*

[20] Section 75(1A) of the *EPBC Act.*

[21] Section 75(2), itself. In *Booth v. Bosworth* (2001) 114 FCR 39 at 64, Branson J found it unnecessary to decide but leaned towards a meaning of "likely" as something less than "more probable than not" but rather meaning "prone", "with a propensity" or "liable". In interpreting "would have or be likely to have" in the *TPA*, as a matter of ordinary language, the expression "likely to have" imports only that loss or damage is a real chance or possibility, not that it is more likely than not: *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 505 per Gaudron J.

[22] *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463, para 40.

[23] As to the remedial intention and high public policy of the *EPBC Act* generally, see the *Environment Protection and Biodiversity Conservation Bill 1999 Explanatory Memorandum*, pp.2-18. Consequently, "No narrow construction of the Act should be adopted. But neither should the words of the Act be stretched beyond their limit": *Marks v GIO Australia Holdings Ltd* (1998) 196 494, 515 per McHugh, Hayne and Callinan JJ, at 528 per Gummow J and 537 per Kirby J.

[24] Section 3(1)(a)-(c) of the *EPBC Act*.

[25] Sections 3(1)(a) and 3(2)(a) of the *EPBC Act*.

[26] See Division 1 of Part 3, ss.12-25, particularly ss.13 (What is a declared World Heritage property?), 14 (Declaring a property to be a declared World Heritage property), 17 (What is a declared Ramsar wetland?), 17A (Making and revoking declarations of wetlands) and 24 (What is a Commonwealth marine area). See also ss.178-184 (Listing of threatened species, etc) and 209 (Listing migratory species).

[27] As opposed to the decision stage in Part 9 where beneficial impacts are not excluded (s.136).

of these.[28] An arbitrary restriction of what are "impacts" is not consistent with this broad approach.

(h) There would have been no need to enact ss.524 and 524A of the *EPBC Act* to exclude government decisions and grants of funding from the definition of action if the scope of relevant impacts of an action was intended to be limited to the direct, physical impacts of the action itself (or the adverse impacts that are "inherently or inextricably involved" in the action as suggested by the Minister) and the impacts of the actions of third parties that occur as a consequence of the action were intended to be excluded. No physical impact occurs from a government decision or grant of funding itself as it is not a physical act. Limiting the relevant impacts of actions to the direct, physical impacts of the action would render ss.524 and 524A meaningless.

(i) The s.75(2) consideration is that part of a broader process which merely decides whether an inquiry will be carried out. It is unlikely that a restrictive approach would be intended at that point. That is, a s.75(2) decision does not decide whether a resource development of major economic benefit can or cannot be carried out. It merely decides whether it needs to be subject to an assessment process leading to a decision whether it may be carried out;

(j) The narrow approach of the Minister sits uncomfortably with the express application of the precautionary principle to decisions whether an action is a controlled action.[29]

18. In relation to whether a restrictive approach to the interpretation of "all adverse impacts" in s.75 of the *EPBC Act*, avoiding liability for the actions of third parties, should be taken because criminal liability arises under Part 3 of the *EPBC Act*, Kiefel J was right to conclude that such an approach mistakes the very process of avoiding liability with which a decision under s.75 is involved.[30] In addition, such an approach is not consistent with the purpose and language of the *EPBC Act* and the general principles of causation under criminal, tort and contract law and other legislation dealt with in the following section. Further, criminal liability under Part 3 of the *EPBC Act* is not strict or absolute liability[31] for which no fault element must be proven. The effect of ss.5.4(4) and 5.6(2) of the *Criminal Code* is to impose fault elements of intention, knowledge or recklessness for the criminal offences in Part 3 of the *EPBC Act*.[32] Negligence is not sufficient.[33] These

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[28] The *EPBC Act* does not define "action" although ss.523-524A qualify its meaning. In the context of the *EPBC Act*, the plain meaning of "action" is the process or state of acting or of being active; something done; an act; or deed: *The Macquarie Dictionary*, 3rd ed, 1997, p.20. Government decisions and grants of funding are excluded by ss.524 and 524A of the *EPBC Act.* For the purposes of the *EPBC Act*, therefore, actions are physical activities as opposed to a decisions or grants of funding.

[29] Section 391 of the *EPBC Act*.

[30] *Queensland Conservation Council v Minister for the Environment & Heritage* [2003] FCA 1463, paras 36-37. For a modern statement on the correct approach to the construction of provisions creating criminal liability, see *Beckwith v R* (1976) 135 CLR 569, 575 per Gibbs J.

[31] See Division 6, ss.6.1 (Strict liability) and 6.2 (Absolute liability) of the *Criminal Code.*

[32] To establish criminal liability under Part 3 of the *EPBC Act*, the Crown would have to prove beyond reasonable doubt that an action was intentionally taken by a person and that the person either *intended*, had *knowledge* of or was *reckless* as to the fact that the action resulted or will result in, or is likely to have a significant impact on, a matter protected by Part 3.

[33] Note also that the definitions of intention and knowledge in ss.5.2(3) and 5.3 of the *Criminal Code* include a result that a person is aware will occur "in the ordinary course of events." This is consistent with Lord Hoffman's distinction between normal and extraordinary events as a test of causation in *Environment Agency v Empress Car Co (Arbertillery) Ltd* [1999] 2 AC 22 at 34-35 and the "natural consequences" test applied in *Royall v R* (1990) 172 CLR 389 by Mason CJ at 389 and Deane and Dawson JJ at 412-3 (Brennan and McHugh JJ dissenting on this point).

additional fault elements indicate that no restrictive approach to attributing liability for the impacts of third parties need be taken under the *EPBC Act*.

Approaches to Environmental Impact Assessment – A Broad Context

19. The approach of Kiefel J is consistent with national and international approaches to the assessment of third party impacts that are likely to follow a proposed development. "Environmental impact assessment" is the general term used for the assessment of the impact of a proposed development on the environment, such as provided for in Parts 7 and 8 of the *EPBC Act*. Environmental impact assessment is a widely used, practical tool whereby decision-makers and members of the public are informed about the certain and likely impacts of a proposal on the environment, possible alternatives and ways of mitigating those impacts. As a practical tool, absolute perfection is not required.[34]

20. In environmental planning, assessment of the future impact of a proposal regularly involves taking into account impacts of a proposal that involve future actions of third parties whose actions are facilitated, encouraged or brought about by the proposal. Thus, proposed shopping centres, hotels, taverns, entertainment venues, sporting facilities and residential subdivisions are routinely assessed for traffic impacts, which may occur many kilometres from the site of the proposal and necessarily involve the actions of third parties.[35] In planning for the construction and operation of a highway the impacts of noise and pollution from vehicles operated by third parties are considered.[36] In planning for the operation of an airport the impacts of noise from aircraft operated by third parties are considered.[37] Similarly, in the field of planning for the natural environment, one would not ignore the likely effects of visitors to a tourist lodge on the edge of a national park or ignore the effect of possible oil leaks or whale or dugong strikes by boats or ships operated by users of a proposed marina or harbour.[38]

21. The approach taken to other environment impact assessment legislation nationally and internationally is consistent with the common sense and non-restrictive approach taken by Kiefel J as opposed to the arbitrary restrictions which the Minister seeks to impose. For example:

    (a) Environmental impact assessment need not be perfect or cover every topic but it is well recognised that it must at least attempt to broadly alert the decision maker and

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[34] *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417 per Cripps J (quoted at para 18(a) of these submissions).

[35] For example, see *Paramatta City Council v Hale* (1982) 47 LGRA 319, 333 per Street CJ; 341-2 per Moffit P; *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 (HCA) at 113 per Mason CJ; *Zieta No 59 Pty Ltd v Gold Coast City Council* [1987] 2 Qd R 116, 118 and *Arksmead Pty Ltd v Gold Coast City Council* [2001] 1 Qd R 347, 360-361, para 22.

[36] For example, see *Allan v Development Allowance Authority* (1998) 80 FCR 583 (Wilcox, Nicholson and Finn JJ) at 592, paras C-D.

[37] For example, see concerning the Sydney Airport dispute, *Randwick City Council v Minister for the Environment* (1999) 106 LGERA 47 at paras 28 and 32 (Black CJ, Lee and Weinberg JJ) and *Botany Bay City Council v Minister of State for Transport & Regional Development* (1998) 106 LGERA 287 at paras 6-7 (Black CJ, Lee & Weinberg JJ), in addition to the decision of Finn J at first instance.

[38] For example, see *Friends of Hinchinbrook Society Inc v Minster for Environment* (1997) 69 FCR 28 at 41,45, 50, 52, 53 & 64; 77 FCR 153 at 170. The future actions of third parties taken into account for the purpose of impact assessment are subject to unstated value judgements not unlike those involved in the tests for legal causation and remoteness in civil damages set out below. For example, a planning decision with regard to siting of an hotel or restaurant will take into account effects foreseeable or clearly in contemplation such as car parking, local noise and behaviour impacts but probably disregard more remote impacts such as domestic violence contributed to by consumption of alcohol at the premises.

members of the public to the true effect of the activity and the consequences to the community inherent in the carrying out or not carrying out of the activity.

> "I do not think the [statute] … imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion, there must be imported into the statutory obligation a concept of reasonableness … **provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public … to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations.** The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations." [39] (emphasis added)

(b) Although not expressly raising the contribution of future actions of third parties, this Court has approached the relationship between action and impact on the environment raised by s.5 of the *Environment Protection (Impact of Proposals) Act 1974* (one of the predecessor Acts to the *EPBC Act*) in a non-restrictive manner:

> "In considering whether the proposed action would have a significant effect on the environment, it is appropriate, in my view, in the words of Cripps J in *Kivi v Forestry Commission* [(1982) 47 LGRA 38] (at 47) to 'look to the whole undertaking of which the relevant activity forms a part to understand the cumulative and continuing effect of the activity on the environment'. However, this does not mean that the significance of a particular activity can only be assessed by reference to its impact upon the whole area in which some aspect of the activity is to take place. Despite the broad definition of 'environment' in the [*Environment Protection (Impact of Proposals) Act 1974*] (which corresponds to that in s.4 of the *Environmental Planning and Assessment Act* [*1979* (NSW]), site specific impacts can be significant, depending on the circumstances. The impact of logging in particular forests can have a significant impact on the environment, even though there may be other forests nearby which remain untouched: compare *Jarasius v Forestry Commission (NSW) (No. 1)* (1988) 71 LGRA 79 at 90-93."[40]

(c) In elucidating a remarkably undefined "environmental impact report" in s.5 of the *National Development Act 1979* (NZ), the New Zealand Court of Appeal stated:

> "Obviously there must be a real and sufficient link between the less direct effects likely to flow from projected works if they are to be regarded as relevant. But it could not be Parliament's intention that in every context a discussion limited to site-specific environmental implications will satisfy an applicant's responsibility to provide a realistic impact report. If that were the case the 'green light' could well be given to some major industrial project which involved insignificant environmental implications considered by reference only to the site itself, but manifold and adverse effects when assessed against the further construction of another undertaking which alone **could give it industrial meaning and with which it clearly would be inextricably involved.**"[41] (emphasis added)

(d) The United States *National Environmental Policy Act of 1969*, 42 United States Code § 4332 ("the *NEPA*"), provides, in s.102(2)(C) that "all agencies of the Federal Government shall … include in every recommendation or report on proposals for … major Federal actions significantly affecting the quality of the human environment, a

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[39] *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, 417 per Cripps J.
[40] *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd* (1995) 55 FCR 516, 541 per Sackville J.
[41] *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 4)* [1981] 1 NZLR 531, 534 per the Court (Woodhouse P, Cooke, Richardson and McMullen JJ).

detailed statement by the responsible official on … the environmental impact of the proposed action." The *NEPA* has spawned a massive amount of jurisprudence and, in many respects, has been the forerunner for environmental impact legislation in other jurisdictions, including Australia and including the *EPBC Act*. The following passage exemplifies both an unrestricted approach to construction and the importance of the purpose of legislation in determining that approach:

> "The National Environmental Policy Act of 1969, 42 U.S.C. § 4332 requires that agencies of the Federal government consider the impact of an overall program and not just isolated aspects of facilities. A restricted impact analysis is prohibited because it 'would frustrate the vitality of NEPA by allowing piecemeal decisions'. Thus, an agency may not engage in segmentation, i.e. 'an appraisal of each tree to one of the forest.'"[42] (citations omitted)

(e) Similarly, in Europe and the United Kingdom,[43] Canada[44] and other jurisdictions[45] using environmental impact assessment processes based upon the *NEPA* and similar in nature to the *EPBC Act*, a wide approach is taken to determining impacts of projects and the obligation to undertake environmental impact assessment. In short, there is a global family of laws to which the *EPBC Act* is directly related that have adopted environmental impact assessment processes in which direct and indirect effects of projects, including the impacts of third parties, must be assessed.

Liability for causation in other areas of the law

22. Although Kiefel J did not consider it necessary to address in detail her reasons, the narrow approach to construction of s.75 of the *EPBC Act* adopted by the Minister is not supported by the common sense approaches to causation and acts of third parties in other areas of the law.[46] The Minister, it is submitted, abandoned a common sense approach to future impacts for an arbitrary cut-off point.

(a) In criminal law, a common sense approach is applied to causation:

> "The issue of causation was left to the jury to decide as one of fact. In this respect … it is 'enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter'"[47]

(b) In criminal law the independent actions of the victim or third parties do not necessarily break the chain of causation in determining criminal liability provided that the accused's conduct substantially or significantly contributed to the harm suffered:

> "The basic proposition relating to causation in homicide is that an accused's conduct, whether by act or omission, must contribute significantly to the death of the victim. It need not be the

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[42] From *Atchison, Topeka and Santa Fe Railway Co. v Callaway* 382 F.Supp. 610 (1974), 620-1 per Richey J (United States District Court, District of Columbia).

[43] See the wide view of the obligation to prepare an environmental impact assessment taken in *Berkeley v Secretary of State of the Environment & Ors* [2001] 2 AC 603 at 615-8 per Lord Hoffmann.

[44] See *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)* [2001] 2 FC 461 at 482, paras 38 and 41 (Canadian Fed CA).

[45] For example see *Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment* [2004] UKPC 6, paras 15-16 and 69-70 (Privy Council on appeal from Belize).

[46] It is submitted that statutory provisions which involve causal relationships "[invoke] the common law concept of causation" but not such that "common law concepts should be rigidly applied without regard to the terms or objects of the [relevant legislation]". See *Henville v Walker* (2001) 206 CLR 459, paragraphs 95-96, per McHugh J.

[47] *Royall v R* (1991) 172 CLR 378 per Mason CJ at 387. See also Brennan J at 398; Deane and Dawson JJ at 411; Toohey and Gaudron JJ at 423; and McHugh J at 441.

> sole, direct or immediate cause of the death. However, when death is not caused directly by the conduct of the accused but by something done by the victim or by a third person in response to the conduct of the accused, there is a question whether the chain of causation has been broken." (citation omitted) [48]

(c) A common sense approach is also taken to questions of causation in the law of negligence:[49]

> "what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case.'"[50]

(d) Similarly, the approach taken in negligence law to the intervening acts of third parties also supports a broader approach than that taken by the Minister:

> "As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or *novus actus interveniens* when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the 'but for' test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it."[51]

(e) For the purpose of the law of negligence, where two or more events combine to bring about the result in question, an act is legally causative if it materially contributes to that result.[52]

(f) Even the outer limits test for remoteness (thereby cutting off the relationship of legal causation) in the law of negligence, that of reasonable foreseeability of damage (impact), is inconsistent with the Minister's narrow approach.[53]

(g) The common sense approach to causation applies in the field of contract law as well as negligence.[54]

(h) The "but for" test although superseded by the common sense approach remains part of the law of causation of damages.[55]

(i) In the law of contract, the test for remoteness – the value based cut off point for legal causation – is what was in the reasonable contemplation of the parties, particularly the defendant, either because of imputed knowledge ("arising naturally, that is, according to the usual course of things"[56]) or because of actual knowledge.[57]

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[48] *Royall v R* (1991) 172 CLR 378 per Brennan J at 399. See also Mason CJ at 388; Deane and Dawson JJ at 411; Toohey and Gaudron JJ at 423; and McHugh J at 441.

[49] Generally speaking, negligence cases involve the question of causation looking back at what has in fact occurred. Of course, impact assessment looks into the future and addresses causes of notional events considered "likely" to happen.

[50] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 515 per Mason CJ citing Lord Reid in *Stapley v Gypsum Mines* [1953] AC 663, 681.

[51] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 518–519 per Mason CJ.

[52] *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 512–514 per Mason CJ.

[53] *Chapman v Hearse* (1961) 106 CLR 112, 122. The test of foreseeability of the matters excluded from consideration by the Minister is satisfied by the clear identification of the farming in question by the proponent in its referral of the action. See para 23 of these submissions where the relevant parts of the referral are quoted.

[54] *Chappel v Hart* (1998) 195 CLR 232, 242 at para 23, per McHugh J.

[55] See *Chappel v Hart*, at 269, para 93, per Kirby J. See, also, Kirby J's list of matters which would displace apparent causation at 271. None of them, applied by analogy, would support the Minister's approach in the case.

[56] From the *locus classicus* in *Hadley v Bexendale* (1854) 9 Exch. 341, 354.

(j) The majority of the High Court[58] held that, for the purposes, both of liability and calculation of damages pursuant to s.82 of the *Trade Practices Act* 1974 ("*TPA*"), careless conduct on the part of an applicant did not impact upon the causal relationship between a breach of s.52 of the *TPA* and the loss incurred by the applicant.[59]

(k) The House of Lords has developed a distinction between normal and extraordinary events for determining whether deliberate acts of third parties negative causal connection for the purpose of criminal offences where the causation of harm to the environment is an element of the offence.[60]

23. The third party downstream effects excluded from consideration by the Minister would clearly satisfy the tests for causation and remoteness in those areas of the law considered in the preceding paragraph. This is immediately evident from a consideration of the referral document:[61]

(a) The action is described in the referral to the Minister by the proponent as:

> "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."[62]

(b) The referred action is not restricted to mere construction of the dam in question.[63] The proponent is, therefore, seeking to establish its rights to operate the dam not just construct it. A common sense approach clearly indicates the third party down stream effects as impacts of the operation of the dam. An action restricted to construction of the dam may not reveal such a clear-cut causal relationship.

(c) The actions of the third parties (in using water made available by the operation of the dam) and any resulting impacts are certainly foreseeable and in the contemplation of the proponent. The referral document refers, *inter alia*, to:

> "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 … stagnating or in decline."
>
> "… a series of weirs with a combined storage capacity of 62,000 ML with annual distributions for irrigation, industrial and urban use of around 50,000ML … 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 … within 5km 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

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[57] See the discussion in *Hungerfords v Walker* (1988) 171 CLR 125 at 140-144, per Mason CJ and Wilson J. See paragraph 23 of these submissions for the impacts in the reasonable contemplation of the parties here.
[58] McHugh, Gummow and Hayne JJ; contra Gleeson CJ and Gaudron J.
[59] *Henville v Walker* (2001) 206 CLR 459, paras. 128-129 and 147-150, per McHugh J and paras. 159-166, per Hayne J.
[60] See *Environment Agency v Empress Car Co Ltd (Arbertillery) Ltd* [1999] 2 AC 22, 35 per Lord Hoffman. Interestingly, this is reflected by McHugh J in *Henville v Walker* (2001) 206 CLR 459 at paragraph 106 where he allows a possible exception to the usual attribution of common sense causation if "an abnormal event" intervenes.
[61] Appeal Book, pp.17-40. The information required in a referral is prescribed by reg. 4.03 and Schedule 2 of the *Environment Protection and Biodiversity Conservation Regulations 2000*.
[62] Appeal Book, p.17.
[63] Section 68 of the *EPBC Act* provides for referral ("must refer") to the Minister of an action the person proposing to take the action thinks "may be or is a controlled action".

> diversified cash crops … The expansion … of these activities is constrained by the lack of one element: water."
>
> "The availability of reliable water supply in the region will … [allow] Gladstone style development to move 100km west …"[64]

24. The impacts of the downstream agricultural development would even logically be included as impacts of the dam in the test of "adverse impacts that are inherently or inextricably involved in the proposed action" advocated by the Minister[65] and the State of Queensland[66] in this appeal (although this did not form part of the original reasons given by the Minister and was first advanced during oral submissions before Kiefel J). The dam is being built *for the purpose* of supplying water for the proposed downstream agricultural development – that downstream agricultural development is therefore inherently and inextricably involved in the construction and operation of the dam. However, the respondents do not support the Minister's and the State of Queensland's suggested test of "inherently or inextricably involved" because it is not consistent with the objects or language of the *EPBC Act.* The test is drawn from a reference in *Environment Deference Society Inc v South Pacific Aluminium Ltd (No 4)* (1981) 1 NZLR 530 at 534 and it strains the significance that the context of that passage suggests the New Zealand Court of Appeal intended to apply to the words "inextricably involved". It is also not consistent with the vast amount of national and international case law on environmental impact assessment and causation discussed above.

25. The State of Queensland argues that the correct starting point in interpreting s.75(2) of the *EPBC Act* is to determine the meaning of the words used[67] but then does not define the ordinary meaning of "all adverse impacts". As was discussed above in these submissions (see footnote 2), the ordinary meaning of "all" in s.75(2), is the whole of and to the greatest possible extent. Kiefel J's approach is consistent with this ordinary meaning. Kiefel J's approach is also supported by applicable canons of construction, the approaches taken by the courts to environmental impact assessment generally and the approaches taken by the courts to analogous "causal relationship" issues in other areas of law.

26. The State of Queensland's reliance on processes under the *Water Act* 2000 (Qld)[68] are factual issues to be determined by the Minister in making his s.75 decision and do not affect the interpretation of the scope of impacts that must be considered under s.75 of the *EPBC Act*.

27. It is therefore submitted that there is no logical or contextual basis for excluding third party impacts from consideration in this case pursuant to s.75(2) of the *EPBC Act*.

28. Further, although Kiefel J did not consider it necessary to address in the reasons for her decision, the respondents contend that the Minister erred in another way, namely, by construing the test of "significant impact" wrongly.[69] The civil and criminal provisions that give rise to a controlled action in ss.12, 15A, 20 and 20A of the *EPBC Act*, respectively, involve the notion of an action that has, will have or is likely to have a

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[64] See Appeal Book, pp.18-19.
[65] Notice of Appeal, paragraphs 2.3 and 2.4(b) (see Appeal Book, pp.73-74).
[66] Para 2 of the State of Queensland's Outline of Submissions.
[67] Para 6 of the State of Queensland's Outline of Submissions. The respondents accept that the ordinary and natural meaning of the words is fundamental to any statutory interpretation but the authorities cited by the State of Queensland do not suggest that other principles are not relevant. See, for example, *ASIC v DB Management Pty Ltd* (1999) 199 CLR 321, 338 per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.
[68] Para 11 of the State of Queensland's Outline of Submissions.
[69] This ground of review was raised in para 7D of the Application for an Order of Review (Appeal Book, p.4).

significant impact on either the world heritage values of a declared World Heritage property or a listed migratory species. To determine whether an action has, will have or is likely to have a "significant impact" requires a consideration of the context of the impact of the action.[70] To consider the construction and operation of the dam in isolation from the impacts of users of the water is to fail to consider the context of the action. The Minister's reasons indicate that the impacts of users of the water supplied by the dam were excluded from consideration completely. By doing so, the Minister's decision involved an error of law and a failure to take account of relevant considerations.

29. As a final issue, this is not a case where the matter that the Minister was bound to consider but excluded from consideration was "so insignificant that the failure to take it into account could not have materially affected the decision."[71] This is at least implied in the Minister's reasons. The material before the Minister and excluded from consideration clearly raised matters for consideration going to the existence of the further aspects of a controlled action.[72]

Conclusion

30. Kiefel J was right to consider that the Minister's decision under s.75 of the *EPBC Act* was affected by an error of law and failure to take it into account considerations that the Minister was bound to consider, that can not be said to be so insignificant that they could not have materially affected the decisions. Her Honour's reasoning applied the natural and ordinary meaning of the words used in s.75(2) and is also the approach most calculated to achieve the purpose of the *EPBC Act*. Because the Minister's s.75 decision was too narrowly constrained, Kiefel J was right to consider the Minister's subsequent s.87 decision was similarly vitiated. These were fundamental errors in the Minister's reasoning and decision-making that were contrary to the objects and provisions of the *EPBC Act*. Consequently, the Full Court should dismiss the appeal.

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13 MAY 2004

[70] In *Booth v Bosworth* (2001) 114 FCR 39, 64 at paras 99 and 100, Branson J held that a significant impact is "an impact that is important, notable or of consequence having regard to its context or intensity."
[71] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 per Mason J.
[72] The evidence included in the Appeal Book does not include these primary documents, but see the relevant extracts from the evidence before Kiefel J at paragraphs 4-8 in the [Minister's] Amended Summary of Relevant Facts (Appeal Book, pp.11-13).