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# Federal environmental laws consider direct and indirect impacts of an action

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*In 2002 a proposal for a large dam in central Queensland, known as the Nathan Dam, was referred to the Federal Environment Minister under the Environment Protection and Biodiversity Conservation Act 1999 (Cth). A principal purpose of building the dam was to supply water to irrigate cotton farms. In the Nathan Dam Case the Federal Court found that the potential impacts of the irrigation of cotton were impacts of the dam. This case has important implications for the operation of environmental law in Australia. The key principle to emerge is that the impacts of an action include both direct and indirect effects. Significantly, this approach is broadly consistent with other areas of Australian law and international practice.*

## INTRODUCTION

The decision of the Full Court of the Federal Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190; 134 LGERA 272 (the Nathan Dam Case)<sup>1</sup> concerned an important issue for the operation of environmental law in Australia. That issue was the scope of impacts that must be considered when deciding whether a proposed action requires approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). In particular, whether indirect impacts of third parties should be considered when assessing the impacts of a proposed action.

The significance of the EPBC Act in terms of Australian constitutional law and federal environmental laws has been discussed elsewhere and need not be repeated here.<sup>2</sup> It is suffice to note that the Act provides an overarching federal umbrella for environmental decision-making in Australia and “few would deny that it represents a fundamental, comprehensive and long overdue reform of Commonwealth law in this area”.<sup>3</sup>

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<sup>1</sup> No appeal was lodged from this decision to the High Court. See also McGrath C, “Key concepts of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)” (2005) 22 EPLJ 20 at pp 35-38.

<sup>2</sup> See Bates G, *Environmental Law in Australian* (5<sup>th</sup> ed, Butterworths, Sydney, 2002), pp 78-83; Fisher DE, *Australian Environmental Law* (Lawbook Co, Sydney, 2003), pp 87-102; and McGrath, n 2 at pp 20-22.

<sup>3</sup> Scanlon J and Dyson M, “Will practice hinder principle? – Implementing the EPBC Act” (2001) 18 EPLJ 14 at 14.

The focus and purpose of this article is to explain the significance and practical application of the key principle established by the Nathan Dam Case. The consistency of this principle with other areas of Australian law and international practice is also discussed.

## **BACKGROUND TO THE NATHAN DAM CASE**

In 2002 Sudaw Developments Ltd referred a proposal under the EPBC Act to construct and operate an 880,000 megalitre dam, known as the Nathan Dam, near Taroom on the Dawson River in central Queensland. The Dawson River joins the Mackenzie River to become the Fitzroy River, which flows east to the coast and the Great Barrier Reef World Heritage Area (GBRWHA) near Rockhampton.

The Nathan Dam's major purpose was to supply irrigation water to 30,000 hectares of farmland, mostly to grow cotton, in the lower Dawson River Valley and to support other development in the region. Major concerns were raised by the Queensland Conservation Council (QCC), World Wide Fund for Nature (Australia) (WWF) and Great Barrier Reef Marine Park Authority (GBRMPA) regarding the impacts of the dam and associated agricultural development on the GBRWHA. The Fitzroy River catchment is recognised as a high-risk area for activities polluting the GBRWHA.<sup>4</sup> A particular concern raised was the likelihood of the insecticide endosulfan, which is commonly used in cotton growing, polluting water flowing to the GBRWHA.

Despite the concerns raised by the QCC, WWF and the GBRMPA about the impacts of the associated downstream agricultural development on the GBRWHA, the Australian Government Minister for the Environment and Heritage (the Federal Environment Minister) refused to consider these impacts. The Minister stated that:<sup>5</sup>

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.

The QCC and WWF sought judicial review of the Federal Environment Minister's refusal to consider these impacts under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The action relied upon the widened standing provided by s 487 of the EPBC Act. The grounds of review alleged that the failure to consider the impacts of the associated downstream development constituted an error of law and failure to take into account relevant considerations.

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<sup>4</sup> See Appendix 3 of the State of Queensland and Commonwealth of Australia, *Reef Water Quality Protection Plan: For catchments adjacent to the Great Barrier Reef World Heritage Area* (Queensland Department of Premier and Cabinet, Brisbane, 2003).

<sup>5</sup> At paragraph 15 of the Minister's statement of reasons prepared under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

To understand the grounds of review and the ultimate decision of the Full Court, the statutory context of the Federal Environment Minister's decisions under the EPBC Act must be understood.

## STATUTORY CONTEXT

A thumbnail sketch of the statutory framework of the EPBC Act is sufficient here, as it was clearly explained by the Full Court in the Nathan Dam Case and has been summarised elsewhere.<sup>6</sup> The objects of the Act are stated in s 3 to include the protection of the environment and the conservation of biodiversity. The most important regulatory mechanism in the EPBC Act is the requirement for approval of what are termed "controlled actions". These include actions with a significant impact on "matters of national environmental significance". Matters of national environmental significance are specified to include such things as the world heritage values of a declared World Heritage property, listed threatened species and listed migratory species. Part 3 of the EPBC Act provides civil and criminal offences for taking a controlled action unless approved or otherwise authorised under the Act. Part 7 provides the complementary procedure for a proposed action to be referred to the Federal Environment Minister to decide whether it is a controlled action and what provisions (if any) of Pt 3 apply.

Section 75 in Pt 7 of the EPBC Act contains the beating heart of the approval process under the Act by providing for the central decision of the Federal Environment Minister of whether a proposal referred under the Act is a controlled action as follows:

### **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.

...

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

If the Federal Environment Minister decides, under s 75, that a proposed action **is** a controlled action, it must then be assessed and approved under the Act to proceed. If the Minister decides that a proposed action **is not** a controlled action, it may proceed without further assessment or approval. Part 8 of the Act provides five methods for

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<sup>6</sup> See Bates, n 2; Fisher, n 2; and McGrath, n 1. See also the EPBC Act website at <http://www.deh.gov.au/epbc> (viewed 1 March 2005).

assessing a proposed action that the Minister has decided is a controlled action and Pt 9 provides for the Minister to ultimately approve or refuse the action.

In the Nathan Dam Case the Minister had decided under s 75 of the EPBC Act that the proposed construction and operation of the Nathan Dam was a controlled action on the basis of impacts on threatened species but not on the basis of impacts on the GBRWHA or migratory species. Crucially, as quoted above, in making this decision the Minister had refused to consider the impacts of downstream irrigators using the water supplied by the dam. The Minister had also decided under s 87 of Pt 8 of the EPBC Act that the method of assessment would be by public environment report. The QCC and WFF challenged both of these decisions but the whole focus of the case was the Minister's decision under s 75 because the s 87 decision on the method of assessment was dependent upon the correctness or otherwise of the earlier decision under s 75.

### **TRIAL DECISION OF KIEFEL J**

In the judicial review proceedings against the Federal Environment Minister's decisions under ss 75 and 87 of the EPBC Act regarding the Nathan Dam the trial judge, Kiefel J, found that the Minister erred by refusing to consider the impacts of associated agricultural development when assessing the impacts of the dam.<sup>7</sup> Her Honour focused on the wide scope of the Minister's decision under s 75 in the context of the objects of the Act and held (at [38]-[40]) that:

- When assessing the 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, cumulated and continuing effect of the activity, including the impacts of activities of third parties.
- 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 that lie in the realms of speculation.
- No narrow approach should be taken to the interpretation of the EPBC Act because of the high public policy apparent in the objects of the Act.

Kiefel J remitted the decisions under ss 75 and 87 to the Minister to reconsider in light of these principles.<sup>8</sup>

### **APPEAL TO THE FULL COURT**

The Minister appealed against the decision of Kiefel J to the Full Court of the Federal Court. The Minister contended that his consideration of "all adverse impacts" of an action under s 75(2) of the EPBC Act must be limited to the impacts that are

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<sup>7</sup> *Queensland Conservation Council Inc v Minister for the Environment & Heritage* [2003] FCA 1463.

<sup>8</sup> The Minister's reconsidered decisions had not been made at the time of writing.

“inherently or inextricably involved” in the action. The Minister argued that this did not include the impacts of the associated agricultural development in this case.

The State of Queensland sought, and was granted leave, to intervene in the appeal in support of the Minister’s position.<sup>9</sup> The State of Queensland argued that the plain meaning of s 75 of the EPBC Act required a narrower interpretation than adopted by Kiefel J.

The Full Court (Black CJ, Ryan and Finn JJ) dismissed the Minister’s appeal in a joint judgment. The Full Court found the approach of Kiefel J to be “unexceptionable” and the principles applied by Kiefel J therefore still provide useful guidance. However, while reaching the same conclusion, the Full Court adopted a slightly different approach to Kiefel J. The essential parts of the reasoning of the Full Court were stated at paragraphs [52], [57] and [61]:

[52] 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*, 2<sup>nd</sup> 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 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. ...

[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 [the EPBC Act] 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.

[61] ... 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.

The key principle to emerge from this reasoning is that the impacts of an action include both direct and indirect effects. Third party impacts, particularly those contemplated by

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<sup>9</sup> Both the proponent, Sudaw Developments Ltd, and the State of Queensland had been given the opportunity to join the proceedings before Kiefel J, but declined to do so.

the proponent of the action, can come within the regulatory net cast by the EPBC Act depending on the facts of each individual case.

Almost as a side-issue, but of importance given Australia's federal structure and the wide ambit of State and Territory environmental laws, the Full Court also stated that when considering the likely impacts of an action and whether the action is a controlled action the Minister may consider State and Territory regulatory regimes.<sup>10</sup>

## **DETERMINING THE DIRECT AND INDIRECT IMPACTS IN PRACTICE**

The direct and indirect impacts of an action will undoubtedly often be difficult to determine in practice, particularly for large infrastructure projects with wide-ranging third party impacts that are difficult to know or quantify. This section provides practical guidance on how to resolve this issue.

An important issue not addressed in the Nathan Dam Case but essential for determining the direct and indirect impacts of an action is how, in practice, the "action" is described.<sup>11</sup> In the Nathan Dam Case there was no dispute that the proposed action was "the construction and operation of the Nathan Dam". The issue is by no means always this clear-cut. The EPBC Act defines an "action" inclusively in s 523 to include a project, a development, an undertaking and an activity or series of activities (and an alteration of these things). Government decisions and grants of funding are excluded from the term by ss 524 and 524A. Defining the meaning of "action" in the EPBC Act is one thing – describing what constitutes an "action" given any real life situation is another. Describing what constitutes the "action" for the purposes of the EPBC Act in a factual scenario may be very complex. Until further case law clarifies the concept, the most practical advice that can be given to a person considering what constitutes "an action" under the EPBC Act is to describe the activity in question as widely as logic, commonsense and ordinary terminology allow.<sup>12</sup> It is also vital to fully explain the action in the context of other related actions.

In addition to correctly identifying the "action" in question as an essential preliminary issue, lawyers and others attempting to determine the direct and indirect impacts of an action in practice need to understand that absolute perfection is not required of them, nor must they consider every imaginable topic. They need only reasonably consider the direct and indirect impacts of the action so that the Federal Environment Minister is broadly alert to the true effects of the action. As Cripps J said in an oft-quoted passage in *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 at 417 in relation to s 111 of the *Environmental Planning and Assessment Act 1979* (NSW):

I do not think the obligation in s. 111, that is to take into account "to the fullest extent possible all matters affecting or likely to affect the environment" 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

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<sup>10</sup> (2004) 139 FCR 24 at [62].

<sup>11</sup> For further analysis of this issue see McGrath, n 1 at pp 24-28.

<sup>12</sup> Adopting a similar approach to the concept of "use" in planning law as explained by Kitto J in *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 535.

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.

All parties in the Nathan Dam Case agreed that the principles stated by Cripps J in *Prineas* should be applied under the EPBC Act. Although not directly acknowledged by the Full Court, there is no doubt that this will occur in the future.

In addition to recognising that what is required is limited to what is practical and reasonable the following questions can assist in setting the right frame of reference to determine the direct and indirect impacts of an action in different factual situations:<sup>13</sup>

- What are likely to be the adverse impacts of supplying the raw materials and manufactured products needed to carry out the action (the “upstream impacts”)?
- What are likely to be the adverse impacts to the site at which the action will take place and the surrounding area (the “on-site impacts”)?
- What are likely to be the adverse impacts of the use of the products of the action, the disposal of wastes from the action and the changes caused by the action (the “downstream impacts”)?
- What are likely to be the adverse impacts of third parties who use the products of the action and the changes caused by the action (the “third party impacts”)?
- What are likely to be the adverse impacts of the action when combined with the impacts of other (related and unrelated) actions (the “cumulative impacts”)?
- What are likely to be the adverse impacts of natural events, such as groundwater movement, storms and floods, when combined with the products of the action, the disposal of wastes from the action and the changes caused by the action?

To determine whether or not an action requires approval under the EPBC Act, the subsequent question becomes whether, cumulatively, the direct and indirect adverse impacts of the action have, will have or are likely to have a significant impact on a matter protected by Pt 3 of the Act?

## **CONSISTENCY WITH NATIONAL AND INTERNATIONAL PRACTICE**

As well as the principles to be derived from the decisions of Kiefel J and the Full Court in the Nathan Dam Case and the practical implementation of these principles, another matter is significant and worth considering: the consistency of the decisions with other areas of Australian law and international practice.

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<sup>13</sup> The author framed these questions and only the third and fourth questions were at issue in the Nathan Dam Case. Some questions obviously overlap. For an excellent discussion of causation in the context of pollution to the environment caused by third party and natural events, see the speech of Lord Hoffmann in *Environment Agency v Empress Car Co (Arberrillery) Ltd* [1999] 2 AC 22 at 30-36.

While the decisions clarify that a broad approach must be taken in assessing the scope of relevant impacts under the EPBC Act, this broad approach is really just commonsense and it is unsurprisingly consistent with principles of causation, reasonable foreseeability and impact assessment in other areas of Australian law. It is well established that causation is a question that must be determined by applying commonsense to the facts of each particular case, appreciating that the purpose of the inquiry is to attribute legal responsibility.<sup>14</sup> It is similarly well established that damages for negligence are limited to harm that is reasonably foreseeable, in the sense that a reasonable person would have foreseen the kind or type of harm as not far-fetched or fanciful and therefore a real risk, even if it is extremely unlikely to occur and even if the extent of the injury is greater than expected.<sup>15</sup> The decisions of Kiefel J and the Full Court in the Nathan Dam Case are consistent with both of these principles.

The approaches of Kiefel J and the Full Court in the Nathan Dam Case are also consistent with the general approach in environmental planning where the assessment of the future impacts of a proposal regularly involves taking into account impacts that involve future actions of third parties whose actions are facilitated, encouraged or brought about by the proposal. Thus, proposed shopping centres, hotels, 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.<sup>16</sup> Similarly, in planning for the construction and operation of a highway or airport the impacts of noise and pollution from vehicles and aircraft operated by third parties are considered – indeed, it would be ridiculous not to consider such impacts.<sup>17</sup>

The approaches of Kiefel J and the Full Court in the Nathan Dam Case are also consistent with a wide approach to assessing the impacts of projects taken in other jurisdictions where an assessment cannot be restricted to “site-specific” environmental effects.<sup>18</sup> Cumulative impacts in particular are considered in New South Wales,<sup>19</sup> New Zealand,<sup>20</sup> the United States,<sup>21</sup> Europe and the United Kingdom,<sup>22</sup> Canada,<sup>23</sup> and other

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<sup>14</sup> See generally *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Royall v R* (1991) 172 CLR 378; *Environment Agency v Empress Car Co (Arberrillery) Ltd* [1999] 2 AC 22.

<sup>15</sup> See *Overseas Tankship (UK) Ltd v Millar Steamship Co Pty Ltd* [1967] 1 AC 617 (the Wagon Mound (No 2)); and *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47. For recent cases discussing reasonable foreseeability with facts analogous to environmental impacts, see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (oysters contaminated by sewage) and *Dovuro v Pty Ltd v Wilkins* (2003) 215 CLR 317 (imported canola seed contaminated with weeds).

<sup>16</sup> For example, see *Paramatta City Council v Hale* (1982) 47 LGRA 319 at 333 and 341-2 (major sporting facility) and *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 113 (residential subdivision).

<sup>17</sup> For example, see *Allan v Development Allowance Authority* (1998) 80 FCR 583 at 592 (highway); and *Randwick City Council v Minister for the Environment* (1999) 106 LGERA 47 at paras 28 and 32 (aircraft noise).

<sup>18</sup> See Raff M, “Ten Principles of Quality in Environmental Impact Assessment” (1997) 14 EPLJ 207.

<sup>19</sup> See *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 and the large amount of later case law concerning Pt 5 and ss 111 and 112 of the *Environmental Planning and Assessment Act 1979* (NSW). Note also clause 228 of the *Environmental Planning and Assessment Regulation 2000* (NSW).

<sup>20</sup> See generally *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at paras [37]-[39].

<sup>21</sup> See *National Parks & Conservation Association v Babbitt* 241 F.3d 722 (9th Cir 2001).

<sup>22</sup> See *Berkeley v Secretary of State of the Environment & Ors* [2001] 2 AC 603.

jurisdictions.<sup>24</sup> Even environmental impact assessment in the Australian Antarctic Territory under Pt 3 of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) includes “cumulative impacts” and “consideration of possible indirect impacts of the activity”.<sup>25</sup> In short, the decisions in the Nathan Dam Case are consistent with a national and global family of laws that have adopted environmental impact assessment processes in which a wide approach must be taken to the assessment of the impacts of proposed activities. This is an important part of the significance of the Nathan Dam Case for Australian law generally.

## CONCLUSION

The decision to reject the Federal Environment Minister’s approach does not ultimately stop the Nathan Dam being built (that matter still has to be decided under the EPBC Act), but the decision will help to ensure that a proper assessment is made of the likely impacts of the dam in deciding whether to build it or not. At its heart, the decision is just commonsense: a decision-maker cannot assess the impacts of a project without looking at what it is being built for. Large infrastructure projects such as dams, ports, roads and power stations that facilitate other developments, as well as resource development such as coal mining, will be most affected by this decision. The principles established in the case are broadly consistent with other areas of Australian law and international practice but the influence of the decision on other Australian jurisdictions is also being felt. In *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 the Full Court’s decision in the Nathan Dam Case was cited in support of a finding that a planning scheme amendment to allow an expansion of a coalmine must consider the indirect impacts of greenhouse gas emissions resulting from the burning of the coal at a power station. The Nathan Dam Case is therefore important for the future assessment of the environmental impacts of major projects throughout Australia by refusing to allow indirect impacts to be divorced from a project.

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<sup>23</sup> See *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)* [2001] 2 FC 461 (Canadian Fed CA).

<sup>24</sup> See generally Canter L, “Cumulative Effects Assessment”, Ch 18 in Petts J (ed), *Handbook of Environmental Impact Assessment* (Blackwell Science, London, 1999).

<sup>25</sup> See rr 6 and 8 of the *Antarctic Treaty (Environment Protection) (Environmental Impact Assessment) Regulations 1993* (Cth).