

FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
FILED
10 FEB 2003

BETWEEN: QUEENSLAND CONSERVATION COUNCIL INC

First Applicant

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

Second Applicant

AND: MINISTER FOR THE ENVIRONMENT AND HERITAGE

Respondent

FURTHER AMENDED APPLICATION FOR ORDER FOR REVIEW
(Order 54)

Application under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* to review the decision of the respondent on or about 16 September 2002:

1. by which, pursuant to section 75 of the *Environment Protection and Biodiversity Conservation Act 1999*, the respondent concluded that the proposal by Sudaw Developments Limited (ACN 078 021 057) to construct and operate the Nathan Dam on the Dawson River in Queensland (application EPBC No. 2002/770) was not a controlled action in respect of any potential impact the proposal might have on the world heritage values of the Great Barrier Reef World Heritage Area as a listed World Heritage property;
2. by which, pursuant to section 75 of the *Environment Protection and Biodiversity Conservation Act 1999*, the respondent concluded that the proposal by Sudaw Developments Limited to construct and operate the Nathan Dam on the Dawson River in Queensland (application EPBC No. 2002/770) was not a controlled action in respect of any potential impact the proposal might have on listed migratory species.

And to review the decision of the respondent on or about 4 December 2002:

3. by which, pursuant to section 87 of the *Environment Protection and Biodiversity Conservation Act 1999*, the respondent determined that the approach to be used for assessment of the relevant impacts of the proposal be assessment by way of public environment report.

FURTHER AMENDED
APPLICATION FOR ORDER
FOR REVIEW
Filed on behalf of the applicants
Form 56, Order 54

Environmental Defenders Office (Qld) Inc
Level 4, 243 Edward Street
Brisbane Qld 4000
Tel: (07) 3210 0275
Fax: (07) 3210 0253

FILED BY JUSTICE KIEFEL ON 14 FEBRUARY 2003

The applicants are aggrieved by the decision pursuant to the widened standing provided by section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*, because:

1. the applicants are incorporated in Australia;
2. during the 2 years immediately before the decisions the applicants have engaged in a series of activities in Australia for protection or conservation of, or research into, the environment; and
3. at the time of the decisions the objects or purposes of the applicants included the protection or conservation of, or research into, the environment.

The grounds of the application are:

1. On or about 19 August 2002, Sudaw Developments Limited referred to the respondent under section 68 of the *Environment Protection and Biodiversity Conservation Act 1999* a proposed action to construct and operate the Nathan Dam on the Dawson River in central Queensland ("the action").
2. The Nathan Dam is proposed to have a water storage capacity of 880,000 ML. Construction on the dam is proposed to commence in July 2003 and be completed by December 2005. Once operational, it will make controlled discharges of water for agricultural, industrial, urban and environmental uses. Ongoing regulation of the downstream flow is proposed to continue for the life of the dam, which is unlimited.
3. The action of constructing and operating the Nathan Dam on the Dawson River in central Queensland will alter water flowing down the Dawson River into the Fitzroy River and ultimately into the Great Barrier Reef World Heritage Area and coastal areas associated with and contributing to the world heritage values of the Great Barrier Reef World Heritage Area, such areas and waters also being the habitat of listed threatened species and listed migratory species under the *Environment Protection and Biodiversity Conservation Act 1999*.
4. The action of constructing and operating the Nathan Dam on the Dawson River in central Queensland will also result in water from the Nathan Dam being supplied to irrigate a large area of agricultural development in the downstream catchment that will or is likely to result in altered water quality flowing down the Dawson River into the Fitzroy River and ultimately into the Great Barrier Reef World Heritage Area and coastal areas associated with and contributing to the world heritage values of the Great Barrier Reef World Heritage Area, such areas and waters also being the habitat of listed threatened species and listed migratory species under the *Environment Protection and Biodiversity Conservation Act 1999*.
5. The Great Barrier Reef World Heritage Area is a declared World Heritage property for the purposes of section 13 of the *Environment Protection and Biodiversity Conservation Act 1999*.

6. On or about 16 September 2002 the respondent decided pursuant to section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* that the proposed action of constructing and operating the Nathan Dam was a controlled action on the basis of, and the controlling provisions were, sections 18 and 18A (Threatened species and ecological communities) of the *Environment Protection and Biodiversity Conservation Act 1999*.
- 6A. On or about 16 September 2002, the respondent purported to decide, pursuant to section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* that the proposed action of constructing and operating 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 Great Barrier Reef World Heritage Area as a listed World Heritage Property (where the controlling ~~section is~~ provisions are sections 12 and 15A of the Act).
- 6B. On or about 16 September 2002 the respondent purported to decide, pursuant to section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* that the proposed action of constructing and operating the Nathan Dam was not a controlled action in respect of any potential impact the proposal might have on listed migratory species (where the controlling ~~section is~~ provisions are sections 20 and 20A of the Act).
7. The decision of which the matters set out in paragraphs 6, 6A and 6B hereof formed part was a decision of an administrative character made under an enactment within the meaning of sections 3 and 5 of the *Administrative Decisions (Judicial Review) Act 1977* ("the decision").
- 7A. By reasons for the decision referred to in paragraphs 6, 6A and 6B above, dated 20 November 2002, the respondent (in paragraph 15 thereof) stated that he had found as part of his decision, in respect of impact on the world heritage values of the Great Barrier Reef World Heritage Area as a listed World Heritage property, that the cumulative impacts of the proposed action resulting from downstream irrigation of agricultural land (only made possible by use of the water provided to the users of that land through the construction and operation of the Nathan Dam) including impacts such as increased nutrient concentrations and other agricultural pollutants did not come within the term "all adverse effects (if any) the action has or will have, or is likely to have" on the said world heritage values as that term is used in section 75 of the *Environment Protection and Biodiversity Conservation Act 1999*.
- 7B. In paragraph 24 of the reasons, the respondent stated that he had found, as part of his decision, in respect of impact on listed migratory species, that the cumulative impacts of the proposed action resulting from downstream irrigation of agricultural land (only made possible by use of the water provided to the users of that land through the construction and operation of the Nathan Dam) did not come within the term "all adverse effects (if any) the action has or will have, or is likely to have" on the listed migratory species as that term is used in section 75 of the *Environment Protection and Biodiversity Conservation Act 1999*.
- 7C. The conclusions set out in paragraphs 7A and 7B of these grounds constituted an error of law on the part of the respondent in that he construed the term "all adverse impacts (if any) the action has or will have or is likely to have" in section

75(2)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* in an impermissibly narrow way thereby excluding from consideration adverse impacts of the action arising from agricultural and other activity making use of the water provided as a result of the operation of the Nathan Dam. *Inter alia*, the approach to construction of the section by the respondent is in conflict with the ordinary meaning of the section; is in conflict with the purpose of the *Environment Protection and Biodiversity Conservation Act 1999* as expressly stated in section 3 thereof and offends against the commonsense approach to issues of causality.

- 7D. In addition and in the alternative to paragraph 7C, the conclusions set out in paragraphs 7A and 7B of these grounds constituted an error of law on the part of the respondent in that he construed the term "significant impact" in sections 12, 15A, 18, 18A, 20 and 20A of the *Environment Protection and Biodiversity Conservation Act 1999* in an impermissibly narrow way by not having regard to the context of the impacts of the action by excluding from consideration adverse impacts of the action arising from agricultural and other activity making use of the water provided as a result of the operation of the Nathan Dam.
- 7E. By excluding from consideration, the impacts of the action on the world heritage values of the Great Barrier Reef World Heritage Area and on listed migratory species arising from agricultural activity making use of the water provided as a result of the operation of the Nathan Dam, the respondent failed to take into account relevant considerations, namely, the said impacts on the world heritage values of the Great Barrier Reef World Heritage Area and on listed migratory species.
- 7F. By failing to consider the maintenance of the conditions of integrity forming part of the world heritage values of the Great Barrier Reef World Heritage Area as prescribed by the *Operational Guidelines for the Implementation of the World Heritage Convention*, published on behalf of the World Heritage Committee in March 1999, the respondent failed to take into account a relevant consideration and, thereby, caused his decision to involve an error of law.
- 7G. By failing to construe the phrase "likely to have" in the broader phrase "likely to have a significant impact" in sections 12, 15A, 20 and 20A of the *Environment Protection and Biodiversity Conservation Act 1999* as meaning "that there is a real chance or possibility regardless of whether or not it is more or less than 50 per cent", the respondent caused his decision to involve an error of law.
- 7H. In a response to a request for further and better reasons for his decision, dated 6 February 2003, the respondent stated that "the advice provided by my Department on the potential impacts of the action on matters protected under the EPBC Act ... included a review of information provided in the referral against the EPBC Act Administrative Guidelines on Significance (Environment Australia, July 2000) and other relevant material. I took that advice into account in making my decision."
- 7I. By taking into account the EPBC Act Administrative Guidelines on Significance (Environment Australia, July 2000) in making the decision, in particular the "criteria" for determining whether an action has, will have or is likely to have a significant impact on world heritage values of "one or more of the World

Heritage values being lost ... degraded or damaged” and for migratory species of “substantially modify ... destroy or isolate an area of important habitat ...; or seriously disrupt the lifecycle ... of an ecologically significant proportion of the population of the species”, the respondent caused his decision to involve an error of law by wrongfully construing the test of “significant impact” for the purpose of sections 12, 15A, 20 and 20A of the *Environment Protection and Biodiversity Conservation Act 1999*.

8. By misdirecting himself in respect of the decision on or about 16 September 2002, the respondent failed to take into account relevant considerations when he made his decision pursuant to section 87 of the *Environment Protection and Biodiversity Conservation Act 1999* on or about 4 December 2002.
10. On 9 October 2002 the applicants requested a statement of reasons for the decision dated on or about 16 September 2002 from the first respondent under section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.
11. On 27 November 2002 the first respondent provided a statement of reasons for the decision to the applicants and the application was commenced within 28 days of receipt of the statement of reasons.

The applicants claim:

1. An order setting aside those parts of the decision of the respondent made on or about 16 September 2002 by which, pursuant to section 75 of the *Environment Protection and Biodiversity Conservation Act 1999*, the respondent concluded that the proposal by Sudaw Development Limited (ACN 078 021 057) to construct and operate the Nathan Dam on the Dawson River in Queensland (application EPBC No. 2002/770) was not a controlled action in respect of any potential impact the proposal might have on the world heritage values of the Great Barrier Reef World Heritage Area as a listed World Heritage property and was not a controlled action in respect of any potential impact the proposal might have on listed migratory species;
2. An order setting aside the subsequent decision of the respondent dated 4 December 2002 pursuant to section 87 of the *Environment Protection and Biodiversity Conservation Act 1999* that the approach used for assessment of the relevant impacts of the proposal be assessment by way of public environment report;
3. An order remitting that part of the decision set aside by paragraph 1 of these orders and the decision set aside by paragraph 2 of these orders to the respondent for further consideration and decision;
4. An order directing the respondent to conduct such further consideration and to make such further consideration and to make such further decision in accordance with the principles set out in the reasons of the court.
5. Costs.

Date: 19th February 2003

.....*Jo Bragg*.....
Jo Bragg (Solicitor)

NOTICE TO THE RESPONDENT

To the respondent, The Hon Dr David Kemp MP, Minister for the Environment and Heritage of Parliament House, Canberra in the Australian Capital Territory:

This application has been set down for the time and place stated below. If you or your legal representative do not attend the Court at that time, the application may be dealt with and judgment may be given, or an order made, in your absence. As soon after the time mentioned as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard;
- (b) directions may be given for the further conduct of the proceeding;
- (c) any application for interlocutory relief may be heard.

Before any attendance at that time you must file an appearance in the Registry.

Time and date of hearing: 9.30am 14 February 2003

Place: Queensland District Registry

Date: February 2003

Registrar

The first applicant's address is 166 Ann Street, Brisbane in the State of Queensland.

The second applicant's address is 490 Upper Edward Street, Spring Hill, Brisbane in the State of Queensland.

The **applicants' address for service** is c/- Jo Bragg (Principal Solicitor), Environmental Defenders Office (Qld) Inc, Level 4, 243 Edward Street, Brisbane, Qld, 4000.

It is intended to serve this application on each person listed below:

Hon Dr David Kemp MP, Minister for the Environment and Heritage, Parliament House, Canberra in the Australian Capital Territory.

Date: 19th February 2003

Jo Bragg
Jo Bragg (Solicitor)

This pleading was settled by Mr Keim of counsel and Mr McGrath of counsel.