

AUSTRALIAN ENVIRONMENTAL MANAGEMENT: A 'DAMS' STORY

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I PROLOGUE: TRACKING THE STREAM BACK TO ITS SOURCE

In the story of Australian environmental law, it seems that dams assume an important role in the ebb and flow of interactions between the political and judicial players.¹ In the 1980s, it was the proposed Gordon-below-Franklin Dam in Tasmania that was the setting for a dramatic judicial reassessment of the Commonwealth's constitutional competence to regulate the environment. The High Court's decision in *Commonwealth v Tasmania*² ('*Tasmanian Dam*') paved the way for an expansive use of the external affairs power to support a range of Commonwealth environmental legislation at the expense of State regulatory powers. Commonwealth/State tensions over environmental management, heightened by the *Tasmanian Dam* case and the series of decisions that followed it,³ receded during the 1990s into the (relatively) calmer waters of a policy of 'cooperative federalism'.⁴ This policy culminated in the Commonwealth's agreement to restrict its involvement in the environmental arena to 'matters of

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1 Coincidentally, dams also feature prominently in the saga of international environmental law. See, eg, *Gut Dam Arbitration (US v Canada)* (1968) 8 ILM 118; *Lac Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101; *Gabcikovo/Nagymaros Dam Case (Hungary v Slovakia)* [1997] ICJ Rep 7. Such disputes have been central to the elaboration of the fundamental principles underlying this area of international law: see Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 463–87.

2 (1983) 158 CLR 1. The case took a broad approach to the scope of the corporations power, in addition to considering the external affairs power. See Geoff Lindell, 'Scope of the Commonwealth's Environmental Powers and Responsibilities' in Paul Leadbeter, Neil Gunningham and Ben Boer (eds), *Environmental Outlook No 3: Law and Policy* (1999) 107.

3 See *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (discussed further in Part II, below).

4 The cooperative approach to environmental management was formalised by Commonwealth, State and local governments in the *Intergovernmental Agreement on the Environment* (1 May 1992) <<http://www.deh.gov.au/esd/national/igae/>> at 1 October 2005 (discussed further in Part III, below).

national environmental significance',⁵ a commitment subsequently enshrined in the Commonwealth's new environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act').⁶ Now, another dispute over a dam proposal – the *Nathan Dam* litigation⁷ in the Federal Courts – seems set to stir the waters of Australian environmental law once more. So far the judicial part in this unfolding story has not been accompanied by the kind of rhetorical flourishes or political dramas that followed in the wake of the *Tasmanian Dam* decision.⁸ Nonetheless, the implications of the Full Federal Court's recent findings in *Minister for Environment and Heritage v Queensland Conservation Council Inc*⁹ ('*Nathan Dam*') – concerning the nature of environmental 'impacts' falling within the ambit of the *EPBC Act* – are potentially far-reaching. They promise to bring about a quiet sea change in Australian environmental law, both in terms of the respective roles and responsibilities of governments for managing the effects of human activities on the environment, and in ensuring that the full extent of those effects is adequately assessed in development-related decision-making.

This article traces the history of involvement of political and judicial players in Australian environmental management, from the *Tasmanian Dam* decision to the recent rulings of the Full Federal Court in the *Nathan Dam* case. Part II explains the origins of the long-standing debate over Commonwealth/State roles and responsibilities with respect to the environment, the implications of the *Tasmanian Dam* decision and subsequent High Court decisions in the 1980s. Part III moves to the next stage of the historical narrative, discussing the solidification of a 'cooperative federalism' approach during the 1990s, which led to the enactment of the *EPBC Act* at the end of the decade. The overall scheme of the *EPBC Act* is summarised, focusing on its requirements for environmental impact assessment ('EIA') and the broad 'third party' provisions that have enabled judicial consideration of the operation of the legislation. In Part IV we discuss the contemporary context, analysing the *Nathan Dam* cases in the Federal Courts and the potential impact of the Full Federal Court's rulings on the scope of operation

5 See Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (November 1997) Australian Government Department of the Environment and Heritage <<http://www.deh.gov.au/epbc/about/agreement/preamble.html>> at 1 October 2005, Preamble [3].

6 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(a).

7 *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24, in which the Full Federal Court upheld the decision of Kiefel J in the earlier case of *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003). Together, the cases are referred to as the '*Nathan Dam* litigation'. The Full Federal Court decision was not appealed by the Commonwealth Environment Minister to the High Court.

8 The Tasmanian dam proposal drew national and international attention, protest and commentary. The *Times* newspaper chronicled the unfolding drama in a series of articles: see Tony Duboudin, 'Worldwide Outrage Jolts Canberra', *The Times* (London), 19 January 1983, 9; Tony Duboudin, 'Tasmania Adamant on Dam Project', *The Times* (London), 24 March 1983, 7; Tony Duboudin, 'Hawke Orders Halt to Work on Dam in Wildlife Region', *The Times* (London), 31 March 1983, 7; Tony Duboudin, 'Battle over Dam Moves into Courts', *The Times* (London), 7 April 1983, 4; Tony Duboudin, 'Hawke Wins Fight to Stop Dam', *The Times* (London), 2 July 1983, 4; Editorial, 'The Wilderness Prevails', *The Times* (London), 5 July 1983, 11.

9 (2004) 139 FCR 24.

of the *EPBC Act*. With this decision, the judiciary seems to be re-emerging as a significant player in a regulatory field long dominated by political wrangling over the relative merits of a ‘centralised’ approach to environmental management.¹⁰ In the final part of the article, we consider how the decision may shift the future focus of environmental management towards a greater role for the Commonwealth and, perhaps even more significantly, facilitate more holistic assessments of the environmental impacts of development by both Commonwealth and state-level decision-makers.

II ACT ONE: FROM FEDERATION TO THE FRANKLIN

Ongoing political struggles over the respective spheres of Commonwealth and State regulatory competence with respect to the environment have their source in a lack of clarity on this matter in the *Australian Constitution* itself.¹¹ While ‘water conservation’ in shared river systems emerged briefly as an issue in the constitutional debates of the 1890s,¹² environmental protection and management (particularly in the sense in which we regard it today) was not within the contemplation of the framers of the *Australian Constitution*.¹³ The omission of an express Commonwealth environmental power, together with the historical control exercised by colonies (later the States) over natural resource and land management within their territories,¹⁴ supported the traditional view that states retained the main responsibility for promulgating environmental laws.¹⁵ However, this view began to change with the increase in environmental awareness during the 1970s, and the recognition that the inter-connected nature

10 See Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of the Commonwealth, ‘Commonwealth Environmental Powers and Australian Federalism’ in *Commonwealth Environment Powers* (1999) ch 6.

11 The only provision of the *Australian Constitution* to deal with natural resource issues is s 100, which prohibits the Commonwealth ‘by any law or regulation of trade or commerce’ abridging ‘the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation’.

12 *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 689–92. ‘Conservation’ in this sense was seen as the conservation of the rights of States to the use of water for irrigation. A suggestion was made by Mr William McMillan that shared rivers ‘if economically managed by one power, equitably dealing with all the rights of the different States’ could be ‘great sources of wealth in the future’: 690. However, the amendment was opposed on the basis that it would interfere too greatly with the powers of the States to deal with ‘[m]atters relating to irrigation and so on, which are intimately connected with property’: 690 (Mr Edmund Barton).

13 Senate Environment, Communications, Information Technology and the Arts Committee, above n 10, [2.9].

14 James Crawford, ‘The Constitution and the Environment’ (1991) 13 *Sydney Law Review* 11, 13. See also David Grinlinton, ‘The “Environmental Era” and the Emergence of “Environmental Law” in Australia: A Survey of Environmental Legislation and Litigation 1967–1987’ (1990) 7 *Environmental and Planning Law Journal* 74, 77.

15 See, eg, Heydon Opie, ‘Commonwealth Power to Regulate Industrial Pollution’ (1976) 10 *Melbourne University Law Review* 577, 578.

of ecosystems often necessitates a national, if not an international approach, to many environmental problems.¹⁶

Following in the footsteps of federal role models like the United States,¹⁷ the 'first generation' of Commonwealth environmental laws enacted during the 1970s¹⁸ relied upon a combination of Commonwealth legislative powers, such as the external affairs, trade and commerce, and corporations powers.¹⁹ The Commonwealth's initial foray into the environmental field did not go without challenge. An early case was that of *Murphyores*,²⁰ which concerned the validity of a regulation purporting to allow a Commonwealth Minister the ability to refuse approval for the export of mineral sands from Fraser Island by reference to the environmental impacts of sand-mining. The High Court held that the Commonwealth could rely upon its 'non-purposive' constitutional powers, like the trade and commerce power, to regulate activities in order to protect and conserve the environment, even though the relevant law used for this purpose 'touches or affects a topic on which the Commonwealth has no power to legislate'.²¹

It was the 'world heritage' disputes of the 1980s, however, that produced the greatest waves in the dynamics of Commonwealth/state relations in the field of the environment. The disputes centred on the Commonwealth Government's implementation of the *World Heritage Convention*, to which Australia became a party in 1974.²² The Convention recognises that parts of the cultural and natural heritage in countries around the globe are of 'outstanding universal value' and should thus be 'preserved as part of the world heritage of mankind as a whole'.²³ Parties like Australia accept the primary 'duty' of 'ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage [of outstanding universal value] situated on

16 Internationally, countries attending the Stockholm Conference on the Human Environment in June 1972 agreed that '[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments': *Declaration of the United Nations Conference on the Human Environment* (1972) 11 ILM 1416, 1416.

17 One of the earliest pieces of Commonwealth environmental legislation, the EIA regime of the *Environment Protection (Impact of Proposals) Act 1974* (Cth), was closely modelled on the US *National Environmental Policy Act of 1969*, Pub L No 91-190, 42 Stat 4321-4347 (1970).

18 In addition to the *Environment Protection (Impact of Proposals) Act 1974* (Cth), 'first generation' Commonwealth environmental laws included the *Australian Heritage Commission Act 1975* (Cth), the *Great Barrier Reef Marine Park Act 1975* (Cth) and the *National Parks and Wildlife Conservation Act 1975* (Cth).

19 Over time, Commonwealth environmental legislation has drawn on a variety of other heads of constitutional power, including the taxation power, the quarantine power, the fisheries power, the race power, the incidental power, the power over Commonwealth instrumentalities and the public service, the power over customs, excise and bounties, the grants power and the territories' power: see Senate Environment, Communications, Information Technology and the Arts Committee, above n 10, [2.14].

20 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

21 *Ibid* 20 (Mason J).

22 *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*'). Australia ratified the Convention on 22 August 1974.

23 *Ibid* Preamble.

[their] territory'²⁴ and pledge to ensure that 'active and effective measures', including legal measures, are taken for this purpose 'in so far as possible, and as appropriate for each country'.²⁵ As the entity required to implement Australia's obligations under the Convention, the Commonwealth Government is responsible for identifying and nominating suitable areas within Australia for inclusion on the World Heritage List, which is overseen by the international World Heritage Committee.²⁶ The rich natural and cultural heritage of Australia means that many areas within the country have universal values that qualify them for acceptance onto the World Heritage List.²⁷

Although the *World Heritage Convention* focuses on parties' obligations to the international community and 'future generations'; in Australia, its enduring significance has been as the site of an intense political battle in the early 1980s between aspirants for Commonwealth Government pursuing the 'green' vote, and conservative state governments committed to policies of resource development.²⁸ Battlelines were drawn in an area of south west Tasmania on the Franklin River where the Tasmanian Government was planning a large hydro-electric dam despite world heritage listing of the area at the behest of the Commonwealth Government. The new Hawke Labor Government, elected in 1983 on the back of a pledge to stop the damming of the Franklin River, enacted the *World Heritage Properties Conservation Act* to implement the *World Heritage Convention*.²⁹ The legislation, which the Government claimed was based principally on the external affairs and corporations powers,³⁰ expressly prohibited the carrying out of the various works that would be necessary to construct the dam, without approval from the Commonwealth Environment Minister.³¹

The result of this battle was the *Tasmanian Dam* case in the High Court, brought by the Tasmanian Government to challenge the constitutional validity of the Commonwealth world heritage legislation.³² In an indication of the seriousness with which the relevant constitutional questions were viewed by the States, three other State governments – New South Wales, Queensland and Victoria – intervened in the case. The states' arguments in favour of a narrow

24 Ibid art 4.

25 Ibid art 5(d).

26 Ibid art 11.

27 There are currently 16 Australian properties included on the World Heritage List: see Department of the Environment and Heritage, *Australia's World Heritage – Location Map* <<http://www.deh.gov.au/heritage/worldheritage/index.html>> at 5 September 2005.

28 See Ben Boer, 'World Heritage Disputes in Australia' (1992) 7 *Journal of Environmental Law and Litigation* 247.

29 Ibid 260. Boer notes that this Act was the only statute enacted by a party to the Convention to ensure its domestic implementation.

30 Ibid. The Commonwealth Government also sought to rely on the 'race' power to support provisions of the *World Heritage Properties Conservation Act 1983* (Cth), given that 'much of Australia's distinctive heritage of universal value consists of relics of Aboriginal culture': Commonwealth, *Parliamentary Debates*, House of Representatives, 21 April 1983, 46–52 (Mr Cohen, Minister for Home Affairs and the Environment).

31 *World Heritage Properties Conservation Act 1983* (Cth) ss 9, 10. This Act was repealed following the enactment of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

32 *Tasmanian Dam* (1983) 158 CLR 1.

construction of relevant Commonwealth heads of power reflected the 'states' rights' line: that an expansive interpretation might otherwise upset the balance of power between the different levels of government agreed to in the Constitution.³³ In the environmental context, the consequences of an expansive interpretation of the external affairs power, in particular, are significant, given the increasing number of environmental problems recognised as ones crossing borders and so requiring international cooperation in the form of a treaty.³⁴ Since it is the executive government of the Commonwealth that is responsible for the negotiation and acceptance of treaties,³⁵ if the external affairs powers is enlivened by this means, domestic implementation of international obligations may become a mechanism for transferring control over natural resources and environmental protection from the States to the Commonwealth.³⁶

'States' rights' objections to an 'expansive' view of Commonwealth powers, such as the external affairs power, were not accepted by the High Court in its *Tasmanian Dam* decision.³⁷ A majority of the justices upheld the validity of the relevant sections of the Commonwealth *World Heritage Properties Conservation Act* as valid expressions of the external affairs power.³⁸ The Court's decision confirmed that Australia's acceptance of obligations under an international treaty – where that treaty is entered into in good faith, and not merely in an attempt to confer legislative power on the Commonwealth Parliament³⁹ – founds the exercise of the external affairs power, whether or not the subject matter of the treaty relates to matters external to Australia.⁴⁰ The only other constraints on the Commonwealth's exercise of the external affairs power are that the relevant law must be reasonably appropriate and adapted to implementing the terms of the treaty⁴¹ and must not contravene any of the express or implied limitations on Commonwealth legislative power imposed by the Constitution itself.⁴² Within

33 Boer, above n 28, 259–261.

34 Australia is a party to some thirty multilateral and regional environmental treaties, including a number of conventions that cover broad areas such as climate change and biodiversity conservation: for details see the Australian Treaties Library, Environment and Resources <http://www.austlii.edu.au/au/other/dfat/subjects/Environment__Resources.html> at 30 May 2005.

35 *Australian Constitution* s 61. Reforms to the treaty-making process introduced in 1996 were designed to give the Commonwealth Parliament a greater role in the process and to allow for consultation with the States and Territories: see Department of Foreign Affairs and Trade, *Australia and International Treaty Making Information Kit* (2001) <<http://www.austlii.edu.au/au/other/dfat/infokit.html>> at 5 September 2005.

36 See Crawford, above n 14, 23–4, although he notes that there are limits on the Commonwealth's power to exercise legislative control over the environment by this means, most notably, that the implementing legislation must be in reasonable conformity with the treaty provisions.

37 These findings build on dicta in previous cases such as *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J).

38 The majority consisted of Mason, Murphy, Brennan and Deane JJ. In the minority, Gibbs CJ and Wilson J found that preservation of the environment was not a matter of 'international concern', which they regarded as a prerequisite for the exercise of the external affairs power (Dawson J expressed no view on this point).

39 *Tasmanian Dam* (1983) 158 CLR 1, 121–2 (Mason J), 129 (Brennan J).

40 *Ibid* 121 (Mason J), 171–2 (Murphy J).

41 *Ibid* 131 (Mason J); 172 (Murphy J); 232 (Brennan J); 259 (Deane J). See also *Richardson v Forestry Commission* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J).

42 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 225 (Mason J).

these broad limits, it is possible for the Commonwealth to enact a wide range of legislation that would prevail over any 'inconsistent' State laws.⁴³

The scope for the Commonwealth to use the external affairs power to override state environmental and natural resource management was confirmed by subsequent decisions of the High Court in two other 'world heritage' disputes that followed the *Tasmanian Dam* case. In the *Richardson Forestry* case,⁴⁴ the issue was whether the external affairs power could be used to support Commonwealth legislation setting up an inquiry to determine whether areas of the Lemonthyme and Southern Forests in Tasmania (adjacent to the already listed world heritage area) were of sufficient heritage value to justify a nomination for world heritage listing. One provision of the relevant Act provided interim protection from logging for the areas subject to the inquiry.⁴⁵ The High Court again upheld the validity of the Commonwealth legislation, with Mason CJ and Brennan J finding that the external affairs power 'extends to support a law calculated to discharge not only Australia's known obligations but also Australia's reasonably apprehended obligations'.⁴⁶ Commonwealth intervention to prevent a State-backed logging proposal was also at issue in the final case in the series of 'world heritage' disputes, *Queensland v Commonwealth*.⁴⁷ The essence of the Queensland Government's argument, following the world heritage listing of the Daintree Rainforest in the Wet Tropics region of the State, was that mere listing of a property on the World Heritage List was not sufficient to invoke the Commonwealth world heritage legislation, nor to transfer control of the area to the Commonwealth; rather, Queensland argued, the High Court could decide for itself whether the forest areas were part of the natural heritage. The High Court rejected this argument, ruling that: 'As the inclusion of the property in the List is conclusive of its status in the eyes of the international community, it is conclusive of Australia's international duty to protect and conserve it'.⁴⁸

The Court was thus not prepared to go behind the decision of the international World Heritage Committee to include the Queensland property on the World Heritage List.

By the end of the 1980s, then, a broad Commonwealth competence to regulate the environment was well-established as result of judicial rulings of the High Court. According to these decisions, all that is needed to found Commonwealth environmental legislation is an international treaty concluded in good faith, which imposes obligations on Australia with respect to natural resource management or protection of the environment. Given the range of multilateral and regional environmental treaties to which Australia is a party, this would provide the basis for extensive Commonwealth legislation, addressing issues such as biodiversity conservation, the management of forests, prevention of air and marine pollution, and Commonwealth control of a variety of areas of

43 *Australian Constitution* s 109.

44 *Richardson v Forestry Commission* (1988) 164 CLR 261.

45 *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth) s 16.

46 *Richardson v Forestry Commission* (1988) 164 CLR 261, 295.

47 (1989) 167 CLR 232.

48 *Ibid* 242 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

recognised international significance.⁴⁹ Supplemented by other broad constitutional powers, such as the corporations power,⁵⁰ the Commonwealth is only just shy of achieving a plenary environmental power.⁵¹ At a practical level, as a Federal Senate Committee noted in 1999:

The Commonwealth Government has the Constitutional power to regulate ... most, if not all, matters of major environmental significance anywhere within the territory of Australia. The panoply of existing Constitutional heads of power confers on the Commonwealth extensive legislative competence with respect to environmental matters.⁵²

III ACT TWO: THE ERA OF COOPERATIVE FEDERALISM AND THE *EPBC ACT*

While the 'reality' of the constitutional position following the *Tasmanian Dam* case may have been one of 'substantial' environmental legislative power on the part of the Commonwealth, the 'imagined' Constitution – limited by traditional states' rights arguments – retained a tenacious hold on the Australian political psyche.⁵³ Thus, despite the theoretically extensive ambit of Commonwealth environmental power, the narrative of Australian environmental law through the 1990s was not one of increasing 'centralisation' of environmental management. Instead, at the Commonwealth level there was recognition that carrying out Australia's international obligations regarding the environment, without coming into direct conflict with the states, would be best pursued through a policy of cooperation. For their part, the states, although reluctant to relinquish their

49 Australia is a party to a number of 'framework' conventions in the environmental area that provide broad coverage over different environmental issues. See, eg, *Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 323 (entered into force 22 September 1988); *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994); *Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 125 (entered into force 5 May 1992); *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993); *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 164 (entered into force 24 March 1994). In addition, Australia has accepted international obligations to protect areas and species of worldwide significance in its territory such as world heritage areas: pursuant to the *World Heritage Convention*, above n 22; wetlands: pursuant to the *Convention on Wetlands of International Significance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Wetlands Convention*'); and migratory species: pursuant to the *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 355 (entered into force 1 November 1983).

50 This power was also expansively interpreted by the High Court in the *Tasmanian Dam* case, the majority judges holding that it extends to regulate the trading and financial activities of any corporation set up under Australian law for the purposes of trade or which has trade as a substantial activity among others. For the purposes of *Tasmanian Dam*, this power extended to regulating the activities of the Tasmanian Hydro-Electric Corporation.

51 Crawford, above n 14, 12–13.

52 Senate Environment, Communications, Information Technology and the Arts Committee, above n 10, [2.19].

53 Crawford, above n 14, 11.

historical dominance over the areas of land use and environmental management, realised that a confrontational approach risked being overridden by Commonwealth legislation.⁵⁴ These concessions on both sides led to the renewal of efforts in the 1990s to establish 'cooperative federalism' in the environmental area.⁵⁵

The principal policy document that encapsulated the new 'cooperative' approach with respect to environmental matters was the *Intergovernmental Agreement on the Environment* ('IGAE'), concluded in May 1992 by Commonwealth, State and local government representatives.⁵⁶ The IGAE clarified the scope of agreed Commonwealth and state roles and responsibilities regarding the environment and set up a process for negotiating cooperative intergovernmental arrangements where Commonwealth and state environmental interests overlapped.⁵⁷ Rather than exercising a general competence to protect and manage the environment, the Commonwealth agreed under the IGAE to limit its involvement to four main areas:

- (i) foreign policy and international agreements relating to the environment (although states were acknowledged to have an interest in the development of that policy and the negotiation of treaties);⁵⁸
- (ii) ensuring that the practices and policies of one state do not have significant inter-jurisdictional environmental effects;
- (iii) facilitating the cooperative development of national environmental standards and guidelines; and
- (iv) managing living and non-living resources on Commonwealth land.⁵⁹

States, on the other hand, were recognised to have continuing responsibility for the environment in relation to matters 'which have no significant effects on matters which are the responsibility of the Commonwealth or any other States', as well as for the policy and legal frameworks under which living and non-living resources are managed within a state.⁶⁰

With the conclusion of the IGAE, intergovernmental policy documents and cooperative legislative schemes covering various environmental issues

54 Gerry Bates, *Environmental Law in Australia* (5th ed, 2002) 73.

55 Previous efforts to achieve 'cooperative federalism' in the environmental field had been made in the early 1970s, prior to the *Tasmanian Dam* decision: see Senate Environment, Communications, Information Technology and the Arts Committee, above n 10, [6.3].

56 The IGAE is set out in a schedule to the *National Environment Protection Council Act 1994* (Cth).

57 IGAE s 2.

58 *Ibid* s 2.3.3.

59 *Ibid* s 2.2.

60 *Ibid* s 2.3.

proliferated.⁶¹ An overarching framework for these developments was provided by the 1992 *National Strategy for Ecologically Sustainable Development* ('NSES D'), which derived from international reports and instruments endorsing the concept of 'sustainable development'.⁶² The NSES D commits Australian governments to a policy of 'ecologically sustainable development' ('ESD'), defined as 'development that improves the total quality of life, both now and in the future in a way that maintains the ecological processes on which life depends'.⁶³ The concept of ecologically sustainable development is underpinned by several environmental goals and principles, a number of which are also endorsed by the IGAE. These include the principles of inter-generational equity (maintaining the environment for the benefit of future generations); conservation of biological diversity and ecological integrity; improved valuation, pricing and incentive mechanisms (through the adoption of cost-effective and flexible policy instruments); and the precautionary principle (that lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious or irreversible environmental damage).⁶⁴ The notion of ecologically sustainable development and its underlying principles have been progressively taken up by subsequent state and Commonwealth environmental legislation.⁶⁵

The commitment to a policy of cooperative federalism was renewed and reinforced following the change in government at the Commonwealth level in 1996. The new Howard Government initiated a review of environmental regulation which culminated in the Council of Australian Governments ('CoAG') signalling its intention to conclude a 'Heads of Agreement' that would 'result in fundamental reform of Commonwealth/State roles and responsibilities for the environment'.⁶⁶ The goal of the CoAG process was to 'deliver more effective measures to protect the environment' and to 'remove duplication and result in a

61 See, eg, the *National Greenhouse Response Strategy* (1992); the *National Forest Policy Statement* (1992); the *National Water Quality Management Strategy* (1992); the *National Strategy for the Conservation of Australia's Biological Diversity* (1996); the *National Action Plan for Salinity and Water Quality in Australia* (2000) and the *National Objectives and Targets for Biodiversity Conservation 2001–2005* (2001). Cooperative legislative schemes dealing with environmental issues have not been as numerous. Examples include the establishment of the National Environment Protection Council pursuant to the *National Environment Protection Council Act 1994* (Cth) and mirroring legislation in the States, and the *Gene Technology Act 2000* (Cth) and gene technology legislation in the States. The implementation of the latter regime, in particular, has been far from the 'nationally consistent scheme' envisioned when the legislation was enacted: see Mark Tranter, 'A Question of Confidence: An Appraisal of the Operation of the *Gene Technology Act 2000*' (2003) 20 *Environmental and Planning Law Journal* 245.

62 These included the report of the World Commission on Environment and Development, *Our Common Future* (1987) and the *Rio Declaration on Environment and Development*, adopted at the United Nations Conference on Environment and Development (Rio de Janeiro, June 1992) UN Doc.A/CONF.151/26 (1992). See also Bates, above n 54, 125–6.

63 Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development* (1992) <<http://www.deh.gov.au/esd/national/nsesd/strategy/index.html>> Australian Government Department of the Environment and Heritage at 1 October 2005.

64 Ibid Pt 1, 'Core Objectives and Guiding Principles'; IGAE s 3.5.

65 Justice Paul Stein, 'Are Decision-Makers too Cautious with the Precautionary Principle?' (2000) 17 *Environmental and Planning Law Journal* 3.

66 Council of Australian Governments Meeting, *Communiqué*, 7 November 1997, Canberra, 3.

more efficient development approvals process'.⁶⁷ The central commitments of the *Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment* ('HoA') that followed in 1997 were that the Commonwealth role would be limited to specified 'matters of national environmental significance' and efforts would be made to ensure greater intergovernmental coordination between Commonwealth and state environmental assessment and approval processes.⁶⁸ These proposed reforms attracted substantial criticism, particularly from environmental groups, who argued that the HoA signalled the Commonwealth's abdication of its environmental responsibilities in favour of the States, at the risk of detrimental environmental outcomes.⁶⁹

Similar criticisms were raised when the Commonwealth put forward a proposal in 1998 to turn its policy commitments in the HoA into new legislation in the form of the *EPBC Act*.⁷⁰ Although, in the drafting stages, the *EPBC Act* went through a rigorous process of public consultation, Senate inquiry and amendment,⁷¹ in its final form the Act adopted a vision of an appropriate role for the Commonwealth that, in the view of many, was an unnecessarily narrow one.⁷² The most significant feature of the *EPBC Act* enacted in 1999 is the new process it establishes for Commonwealth assessment and approval of development proposals ('actions') that will have or are likely to have a 'significant impact' on particular 'matters of national environmental significance' ('MNES'). Out of the list of some thirty MNES put forward during the drafting process, the legislation references only seven: world heritage properties,⁷³ national heritage places,⁷⁴

67 Ibid.

68 Council of Australian Governments, above n 5, [3]–[5], 'Preamble'. The agreed 'matters of national environmental significance' to act as triggers for Commonwealth EIA legislation are set out in Attachment 1, Pt 1. Other such matters in which the Commonwealth is acknowledged to have 'interests and obligations' are set out in Attachment 1, Pt 2.

69 Senate Environment, Communications, Information Technology and the Arts Committee, above n 10, [6.47]. See generally Robert Fowler, 'Environmental Impact Assessment: What Role for the Commonwealth? An Overview' (1996) 13 *Environmental and Planning Law Journal* 246, 255–7.

70 See Explanatory Memorandum, Environmental Protection and Biodiversity Conservation Bill 1998 (Cth) 8. The Commonwealth's original proposal was for two bills, one focusing on environmental protection (and EIA) and the other on biodiversity conservation. However, a single bill was eventually put forward on the grounds of the linkages between environment protection and biodiversity conservation: 10.

71 The legislative history of the Act is detailed in Senate Environment, Recreation, Communications and the Arts Legislation Committee, Parliament of the Commonwealth, *Environment Protection and Biodiversity Conservation Bill 1998 & Environmental Reform (Consequential Provisions) Bill 1998* (1999) ch 3.

72 See *ibid* [6.9]–[6.39], for a discussion of criticisms of the MNES triggers. See also Lisa Ogle, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable is It?' (2000) 17 *Environmental and Planning Law Journal* 468.

73 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12. To trigger this provision, the impacts of a proposal must relate to the 'world heritage' values of the property that are defined in terms of the natural and cultural heritage values for which the property is listed on the World Heritage List, maintained under the *World Heritage Convention*. A 'declared' world heritage property also extends to properties which have been proposed by the Commonwealth Government for listing: see ss 13, 14.

74 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15B. This was not one of the original MNES triggers but was added by way of legislative amendment in 2003. A 'National Heritage place' is one that has been included on the 'National Heritage list' because of its 'National Heritage values', pertaining to its natural heritage, indigenous heritage or historic heritage significance: see ss 324C, 324D. As for the world heritage MNES, the national heritage provision is triggered by proposals that impact the 'National Heritage values' of a National Heritage place.

wetlands of international significance listed under the *Ramsar Wetlands Convention*,⁷⁵ nationally listed species and ecological communities,⁷⁶ nationally listed migratory species,⁷⁷ nuclear actions,⁷⁸ and the Commonwealth marine environment.⁷⁹ Other potential MNES, such as the regulation of greenhouse gas emissions, land clearing and salinity control – which were raised during consultations on the draft legislation as issues of pressing national concern – are excluded from the scope of the *EPBC Act* and seem unlikely to be added by way of amendment,⁸⁰ at least in the near future.⁸¹

Despite the narrow range of MNES included in the *EPBC Act*, other aspects of the Act potentially give it a much wider ambit of operation. In line with the NSESD and international commitments to further sustainable development, the objects of the *EPBC Act* endorse the broad goal of 'promot[ing] ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'.⁸² This goal sits alongside twin objectives of

75 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 16. To trigger this provision, the impacts of a proposal must relate to the 'ecological character' of the wetland. This term has the same meaning as in the *Ramsar Wetlands Convention*, above n 49.

76 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 18.

77 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 20.

78 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 21. A 'nuclear action' includes the establishment of nuclear reactor facilities or facilities for the storage or disposal of radioactive wastes: s 22.

79 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 23, 24. The provision applies both to actions taken within Commonwealth-controlled marine areas that significantly impact the environment and actions taken outside Commonwealth-controlled marine areas that significantly impact the environment within such areas.

80 Amendment to the MNES triggers can be made by way of amending legislation or, pursuant to s 25 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), there is the capacity for further MNES to be identified by the Commonwealth Government in regulations under the Act. Any such proposal to extend the triggers must be put before State and Territory governments to allow them an opportunity for commenting and consultation, and for their views to be considered. Section 28A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) also requires the Commonwealth Environment Minister to review the triggers every five years and to prepare a report as to whether further MNES should be included, either by way of legislative amendment or regulations. The first such review is currently underway; public comments closed on 2 May 2005. For a summary of the submissions of the Australian Network of Environmental Defenders' Offices and the Australian Democrats, see Wayne Gumley, 'Calls for New Matters of National Environmental Significance' (2005) 1 *National Environmental Law Review* 43.

81 To date, only the national heritage trigger has been added to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (see *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth)), which was one of the MNES originally listed in the Council of Australian Governments' *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment*, above n 5. At the time the *Environment Protection and Biodiversity Conservation Bill 1999* (Cth) was introduced consideration was given to including a 'greenhouse trigger' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The proposed trigger was to come into effect where major new developments would be likely to result in greenhouse gas emissions of more than half a million tonnes in any 12 month period. However, there has been no further progress on this proposal: see Ogle, above n 72, 470.

82 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b).

environmental protection and biodiversity conservation,⁸³ and is underpinned by ‘principles of ecologically sustainable development’ (including the principle of inter-generational equity and the precautionary principle)⁸⁴ which are factors that must be taken into account by the Commonwealth Environment Minister in deciding on approvals under the Act.⁸⁵ In addition to the legislation’s broad focus on ecologically sustainable development, pivotal concepts for the operation of EIA under the Act, such as what constitutes an assessable ‘action’ and the notion of ‘environment’, are defined expansively. The latter, in line with the rise of ‘ecocentrism’ in environmental law more generally,⁸⁶ takes the environment to include ecosystems and their constituent parts (including people and communities), natural and physical resources, the qualities and characteristics of locations, places and areas, the heritage value of places, and the social, economic and cultural dimensions of those aspects of the environment.⁸⁷ An ‘action’ (which may have impacts on the environment of MNES) extends to projects, developments, undertakings, activities or a series of activities, or alterations to any of those.⁸⁸ While government decision-making that facilitates a project (such as a grant of funding) is excluded from the scope of EIA under the Act,⁸⁹ the legislation has the potential to apply more broadly than previous Commonwealth environmental legislation to development on private land that has detrimental consequences for biological diversity.⁹⁰

Ultimately, the scope of the *EPBC Act* turns on the interpretation of terms which are not defined in the legislation, namely, the notion of ‘impacts’ on MNES that are ‘likely’ to be ‘significant’. Phrases such as ‘likely significant impacts’ are a common feature of EIA legislation in Australia, although they are rarely defined.⁹¹ Moreover, their scope is difficult to determine in the abstract given the influence of ‘context’ and ‘value judgments’ in determining whether a

83 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a), (c). ‘Biodiversity’ is the shorthand term used to describe biological diversity consisting of genetic diversity, species diversity and ecosystem diversity.

84 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A. Other ‘principles of ecologically sustainable development’ included in this section are that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations; that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and that improved valuation, pricing and incentive mechanisms should be promoted.

85 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2)(a). Section 391 contains an additional requirement for the Minister to take account of the precautionary principle in making various decisions under the Act, including a decision whether or not to approve the taking of an action.

86 An ‘ecocentric’ approach to the environment is one which sees humans as part of a wider ‘web of life’, as opposed to former ‘anthropocentric’ notions which viewed humans as separate from (and superior to) the environment. On the development of an ecocentric approach to the environment in Australian environmental law, see Douglas Fisher, *Australian Environmental Law* (2003) 14–24, 32–3.

87 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528.

88 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 523.

89 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 524, 524A.

90 Murray Raff, ‘Environment Protection and Biodiversity Conservation Act and the Draft Bilateral Agreement with the State of Victoria’ (2000) 17 *Environmental and Planning Law Journal* 369.

91 See Ian Thomas and Mandy Elliott, *Environmental Impact Assessment in Australia: Theory and Practice* (4th ed, 2005) 140.

particular impact on a particular environment at a particular time is or is not 'significant'.⁹² This leaves substantial scope for interpretation by the courts on a case-by-case basis,⁹³ guided by fairly general, 'commonsense' rules of statutory construction.⁹⁴

The judicial interpretative role assumes even larger importance in the *EPBC Act* context because of the broad standing provisions in the legislation. In line with the NSESD 'guiding principle' that 'decisions and actions should provide for broad community involvement on issues which affect them',⁹⁵ the *EPBC Act* provides an expansive definition of 'interested persons' who are able to seek injunctive relief⁹⁶ and initiate judicial review of decisions taken by the Commonwealth Environment Minister under the Act.⁹⁷ An 'interested person' for these purposes extends to individuals or organisations who have 'engaged in a series of activities for the protection or conservation of, or research into, the environment' at any time in the two years prior to the challenged conduct or decision.⁹⁸ These standing provisions open the way for a range of non-governmental actors, such as environmental groups, to explore the scope of environmental impacts to which Commonwealth assessment and approval powers now extend, through actions before the federal courts.⁹⁹

Under the scheme of EIA in the *EPBC Act*, the crucial point for determining whether a particular 'action' will invoke Commonwealth decision-making powers or be left to state regulation, is at the stage when the Commonwealth Environment Minister determines whether there is a 'controlled' action. That is,

92 The main case to consider the concept of 'significant impact' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), to date, *Booth v Bosworth* (2001) 114 FCR 39, 65, accepted a definition of the term as connoting 'an impact that is important, notable or of consequence *having regard to its context and intensity*' (emphasis added). In assessing the relevant 'context' of impacts on a world heritage area that derived from the culling of spectacled flying foxes, Branson J looked to factors such as international recognition of the significance of the 'deterioration' of natural heritage and the fact that outside of Australia the spectacled flying fox is found only in Papua New Guinea and even there only in less than ten locations.

93 A point emphasised by Sackville J in *Minister for Environment & Heritage v Greentree (No 2)* 138 FCR 198, 244. See also *Greentree v Minister for Environment & Heritage* [2005] FCAFC 128 (Unreported, Kiefel, Weinberg and Edmonds JJ, 13 July 2005) [42] (Kiefel J).

94 These include the literal rule, the so-called 'golden' rule and the purposive approach to statutory interpretation: see John Carvan, *Understanding the Australian Legal System* (4th ed, 2002) 100–5. For Commonwealth Acts, the *Acts Interpretation Act 1901* (Cth) s 15AA requires that 'a construction that would promote the purpose or object underlying the Act' be preferred.

95 Ecologically Sustainable Development Steering Committee, above n 63, guiding principle 7.

96 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475(1).

97 Judicial review actions are brought pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth), however, s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides an extended definition of a 'person aggrieved' for this purpose.

98 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475(6)–(7). To be 'interested persons', organisations must also have objects relating to the environment. For the provisions relevant to judicial review actions, see s 487(2)–(3).

99 Bates, above n 54, 160–1. As a consequence of the broad third party provisions, standing is rarely challenged as an issue in cases concerning the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). An exception is the recent case of *Paterson v Minister for Environment & Heritage* [2004] FMCA 924 (Unreported, Baumann FM, 26 November 2004).

one that has, will have, or is likely to have, significant impacts on MNES.¹⁰⁰ If this ‘threshold’ decision is that there are potential adverse impacts on MNES, the Commonwealth, alongside the state in which the action is taking place, will be involved in the decision-making process. Pursuant to the provisions of the Act that are designed to ‘strengthe[n] intergovernmental cooperation’¹⁰¹ and ‘provid[e] for intergovernmental accreditation of environmental assessment and approval processes’,¹⁰² the actual impact assessment process that follows the determination of a ‘controlled action’ may be devolved via a ‘bilateral agreement’¹⁰³ or a one-off ‘accredited process’¹⁰⁴ to the relevant state to carry out in accordance with state-based EIA laws.¹⁰⁵ Even in these circumstances, however, the assessment will need to encompass a consideration of the potential impacts of the proposal on aspects of the environment designated as being of ‘national significance’.¹⁰⁶ Hence, for all projects that fall within the scope of the *EPBC Act*, environmental issues of national concern will be assessed in addition to those of state-level significance, and the Commonwealth Government, in addition to state governments, will play a role in deciding whether the project has any unacceptable environmental impacts that should prevent it proceeding.

IV ACT THREE: THE NATHAN DAM LITIGATION

Left to the quiet backwaters of a policy of cooperative federalism, the *EPBC Act* may well have brought about little change in the dynamics of environmental management in Australia. The limited range of MNES included in the legislation, together with the cautious approach of the current Commonwealth Government towards extending the number of EIA triggers under the Act,¹⁰⁷ mean that the Act could have a restricted ambit of operation, if construed narrowly. In that case it would be limited to projects with direct, physical consequences for Commonwealth-protected areas, such as a dam in a world heritage listed area that

100 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 67, 75.

101 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(a).

102 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(b)–(c).

103 Bilateral agreements permit the Commonwealth Government to devolve to the relevant state government either the assessment process (via an *assessment bilateral*), or the entire assessment and approval process (via an *approval bilateral*), for ‘actions’ occurring within a State: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 46–7. To date, the Commonwealth Government has only concluded assessment bilateral agreements with Queensland, Western Australia, Tasmania and the Northern Territory.

104 State governments may become involved, on a case-by-case basis, in the assessment of proposals designated ‘controlled actions’ under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) if the Commonwealth Environment Minister decides that assessment is to be by way of an ‘accredited assessment process’ under a State or Territory law: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 87(4).

105 For example, in Victoria, the assessment process used for this purpose may be the land use planning regime of the *Planning and Environment Act 1987* (Vic) or the major projects EIA process of the *Environmental Effects Act 1978* (Vic).

106 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 87(4)(c)–(d).

107 See above n 81 for a discussion of the limited amendments to the triggers to date and of failed proposals to extend them further.

requires the removal of large tracts of forest during the construction phase. This approach to interpretation of the *EPBC Act* would be consistent with the political trend of reducing the direct involvement of the Commonwealth Government in environmental management which began with the IGAE and has been consolidated by policy developments since 1996.¹⁰⁸

However, environmental groups, prompted by the broad standing provisions in the *EPBC Act*,¹⁰⁹ saw the potential for a much more expansive role for the new Commonwealth assessment procedures, if they were to be interpreted in a broad fashion by decision-makers.¹¹⁰ The first 'test' case brought under the legislation with the backing of environmental organisations signalled the *EPBC Act's* promise in this regard. In her decision in *Booth v Bosworth*,¹¹¹ Branson J of the Federal Court held that, pursuant to the *EPBC Act*, electrified grids surrounding a North Queensland lychee farm, which killed large numbers of spectacled flying foxes, could have a 'significant impact' on the values of the nearby Wet Tropics World Heritage Area.¹¹² Although the culling of flying foxes at issue took place outside the borders of the world heritage property, the impacts of this activity were found to be 'significant' because of the species' contribution to the biological diversity and ecological distinctiveness of the Wet Tropics World Heritage Area.¹¹³ The *Booth* decision indicates that, rather than being limited to an assessment of the 'direct' impacts of development within the boundaries of protected areas that are MNES, the Act may extend to activities which occur outside a protected area but which have environmental consequences for species or ecosystems inside that area.¹¹⁴

The extension of EIA processes to consideration of the 'indirect' impacts of human activities on the environment is a development for which environmentalists and environmental lawyers have long advocated.¹¹⁵ Giving EIA the capacity to evaluate 'indirect' environmental impacts brings within the scope of assessment the 'flow-on' consequences of a proposal as well as its immediate and direct effects. This provides a means to reconcile the law's focus

108 While the Commonwealth has been reluctant to assert direct legislative control over the environment, in recent years, the Government has embraced a range of 'indirect' measures, such as financial incentives to encourage states to reform natural resource and environmental legislation: see Rosemary Lyster, '(De)regulating the Rural Environment' (2002) 19 *Environmental and Planning Law Journal* 34.

109 In many cases, the standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) are broader than those of State environmental legislation. For a discussion of standing provisions under State environmental laws in Australia, see Bates, above n 54, 153–60.

110 This litigation strategy has been pursued by groups such as the Conservation Councils in Queensland, with the assistance of the Environmental Defenders' Office, and seems likely to continue. See Chris McGrath, 'Key Concepts of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2005) 22(4) *Environmental and Planning Law Journal* 20.

111 (2001) 114 FCR 39.

112 *Booth v Bosworth* (2001) 114 FCR 39.

113 *Ibid* 66 (Branson J).

114 See Fisher, above n 86, 296.

115 See Ralf Buckley, 'Cumulative Environmental Impacts: Problems, Policy and Planning Law' (1994) 11 *Environmental and Planning Law Journal* 344; Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 *Environmental and Planning Law Journal* 207; and John Harte, 'Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System' (2001) 27 *Ecology Law Quarterly* 929.

on discrete projects with the inherent interconnectedness of ecosystems.¹¹⁶ The ‘indirect’ environmental impacts of human activities can potentially encompass a wide range of effects which are linked to a particular project, including effects that:

- are the result of activities taken beyond the boundaries of a protected area;
- stem from activities carried out by actors other than the proponent of a development, although they are facilitated by the proponent’s project;
- are persistent and additive over time; or
- compound together with the effects of other similar projects to produce a ‘cumulative’ environmental impact.¹¹⁷

In particular, it is cumulative impacts – additive over time or space – that have proven particularly elusive for EIA regimes that assess the environmental effects of development on a project-by-project basis.¹¹⁸ Nevertheless, there is growing recognition that many of our most significant environmental problems (land degradation, salinity, marine pollution and climate change) have their source in the compounding of smaller scale impacts over a number of years.¹¹⁹ Legislation with the scope to include an evaluation of the ‘indirect’ environmental impacts of development activity could thus substantially improve the effectiveness of EIA, from an environmental standpoint, and take a tangible step in the direction of achieving ‘ecologically sustainable development’ in the management of the Australian environment.

The *Nathan Dam* cases,¹²⁰ involving a proposal for an 880 000 megalitre dam near Taroom on the Dawson River in Central Queensland, provided a ready vessel for environmental groups to bring before the Federal Court arguments about the scope of ‘impacts’ covered by the *EPBC Act*. Like its predecessor in Tasmania twenty years before, the Nathan Dam project has strong backing from the relevant State government, due to its potential benefits for development and economic growth in the State. The Dam has been some eighty years in the

116 See Joseph Sax, ‘The New Age of Environmental Restoration’ (2001) 41 *Washburn Law Journal* 1, 1. Professor Sax acknowledges that the ‘move toward a more regionally-oriented management of land and water’ will have ‘dramatic and fundamental’ implications for law and governance concerning environmental issues.

117 See also Commonwealth Department for Environment and Heritage, *EPBC Act Administrative Guidelines on Significance* (2000) Australian Government Department of the Environment and Heritage <<http://www.deh.gov.au/epbc/publications/pubs/draft-principle-nes-guidelines.pdf>> at 1 November 2005. These Guidelines state that when deciding whether an action is likely to have a significant impact ‘it is necessary to take into account the nature and magnitude of potential impacts’ including all on-site and off-site impacts, all direct and indirect impacts, the total impact which can be attributed to that action over the entire geographic area affected, and over time, and the degree of confidence with which the impacts of the action are known and understood. It seems that the role of these Guidelines is primarily as an advice to potential applicants ‘to assist in determining whether an action should be referred to the Environment Minister for a decision on whether approval is required’; they have not been relied upon by the courts in considering the interpretation of terms used in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

118 See Buckley, above n 115.

119 See Australian State of the Environment Committee, *State of the Environment Report 2001* (2001).

120 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003); *Nathan Dam* (2004) 139 FCR 24.

planning and, if built by its proponent, Sudaw Developments Ltd, will have twice the capacity of Sydney Harbour and become the fourth largest dam in Queensland.¹²¹ In August 2002, Sudaw referred the project to the Commonwealth Environment Minister for a decision as to whether the proposed dam could have potential impacts on any MNES, triggering the necessity for Commonwealth approval.¹²² In its referral documentation provided to the Minister, and publicly advertised in accordance with the *EPBC Act*,¹²³ Sudaw described the project as allowing for realisation of the area's agricultural and industrial potential by providing irrigation that would facilitate primary production activities including 'cotton ginning' and 'the expansion of the existing cotton growing industry'.¹²⁴ Despite the scale of the project, the proponent expressed the view that the development of the proposal 'in close consultation and cooperation with the Queensland Government which has itself undertaken a number of environmental impact assessments and reports' supported its belief that the project did not constitute a 'controlled action' under the *EPBC Act*.¹²⁵

Public submissions made to the Commonwealth Environment Minister in respect of the proposed dam did not take so sanguine a view of its potential environmental impacts, especially its cumulative, long-term effects. In addition to impacts on nationally listed threatened species and migratory species, environmental groups, such as the Queensland Conservation Council ('QCC'), raised the prospect of adverse environmental effects from the project for the Great Barrier Reef, a world heritage listed property. Concern over the environmental threats posed to the health of the Reef's fragile ecosystems by diffuse pollutants, such as sediments, nutrients and agricultural chemicals, has grown in recent years with the release of reports on the area's declining water quality by bodies such as the Great Barrier Reef Marine Park Authority¹²⁶ and the Productivity Commission.¹²⁷ The QCC highlighted the potential for such problems to be exacerbated by increased irrigation in the Dawson River floodplain for the purposes of cotton farming, leading to pesticide run-off into nearby waterways. It argued that agricultural chemicals and sediment from an expansion of the area's cotton growing industry could eventually flow via the Dawson and Fitzroy river systems into the Great Barrier Reef catchment,

121 Leanne Edmestone, 'Dam Stays on Hold as Appeal Fails', *Courier Mail* (Brisbane), 31 July 2004, 19.

122 Under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(1), a proponent must refer to the Commonwealth Environment Minister any proposal that the proponent thinks may be a controlled action.

123 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 74(3).

124 *Nathan Dam* (2004) 139 FCR 24, 39 (Black CJ, Ryan and Finn JJ).

125 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003) [3] (Kiefel J).

126 The Authority's 2001 *Great Barrier Reef Water Quality Current Issues* report identified land-based run-off from agricultural activities in the Great Barrier Reef Catchment as one of the greatest threats to the health of the inshore ecosystems of the Great Barrier Reef World Heritage Area: Great Barrier Reef Marine Park Authority, *Great Barrier Reef Water Quality Current Issues* (2001). This finding led to the development of the Great Barrier Reef Water Quality Action Plan, which involves cooperation between the Authority and the Queensland government.

127 Productivity Commission, *Industries, Land Use and Water Quality in the Great Barrier Reef Catchment* (2003).

harming the Reef's unique species and ecosystems.¹²⁸ The QCC's contentions about the predicted effects of the dam on the world heritage values of the Reef depended upon the Commonwealth Environment Minister accepting an interpretation of the *EPBC Act* that extended the legislative notion of 'impacts' to include the 'indirect' effects of development on MNES such as world heritage properties.

In making a decision whether a particular proposal involves a 'controlled action' with 'impacts' on one or more MNES, the Commonwealth Environment Minister is instructed by the *EPBC Act* to consider 'all adverse impacts' that the proposed action has, will have or is likely to have on any MNES, and is specifically instructed not to consider any beneficial impacts in this regard.¹²⁹ In his 'controlled action' decision regarding the Nathan Dam project, the then Commonwealth Environment Minister, David Kemp, determined that construction of the dam could have potential impacts for MNES but identified only listed threatened species as a relevant trigger for the *EPBC Act*. Elaborating the reasons for his decision, the Minister did not deny that irrigation of land in the Dawson River floodplain using water from the dam might have 'potential impacts' for nationally listed migratory species and the ecosystems of the Great Barrier Reef World Heritage Area. However, he explained that, in his view, any such impacts associated with actions taken 'by persons other than the proponents ... are not impacts of the referred action, which is the construction and operation of the dam.'¹³⁰ It was in respect of this finding that the QCC sought judicial review of the Commonwealth Environment Minister's decision before the federal courts.

In the *Nathan Dam* litigation, the Minister's interpretation of the nature and extent of 'impacts' covered by the *EPBC Act* was rejected by the federal courts, at first instance by Kiefel J and then by the Full Federal Court bench consisting of Black CJ and Ryan and Finn JJ. Justice Kiefel's decision was heavily based upon her consideration of the purpose of the *EPBC Act* and the 'high public policy apparent in the objects of the Act.'¹³¹ Her Honour referred to the 'true focus of the *EPBC Act*' as being on the environmental consequences of activities, rather than the persons undertaking them,¹³² to justify her finding that in making a 'controlled action' decision, 'the enquiry undertaken by the Environment Minister is not a narrow one.'¹³³ Justice Kiefel concluded that the Act's direction to consider 'all adverse impacts' an action is likely to have on MNES:

128 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003) [4] (Kiefel J).

129 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2).

130 *Nathan Dam* (2004) 139 FCR 24, 284–285.

131 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003) [40]. See also, Douglas Fisher, 'Dams, Irrigation and World Heritage Areas – Case Note: *Queensland Conservation Council Inc v Minister for Environment and Heritage*' (2004) 21(2) *Environmental and Planning Law Journal* 85.

132 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003) [35].

133 *Ibid* [38].

suggests that the widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening. By that means the Environment Minister will exclude from further consideration those possible impacts which lie in the realms of speculation.¹³⁴

Both in its tone and its reasoning, the decision of the Full Federal Court in the *Nathan Dam* case was markedly different from that of Kiefel J. Perhaps with one eye to the possibility of an appeal to an increasingly 'legalist' High Court bench,¹³⁵ the Full Federal Court focused closely on the plain meaning of the words used in the relevant *EPBC Act* provisions, with only the merest hint of teleology in its statement that a textualist interpretation was justified in the circumstances, given that it 'mandates an inquiry consistent with the objects of the *EPBC Act*'.¹³⁶ Referring to the *Oxford English Dictionary*, the Court therefore looked to the 'ordinary English meaning' of the term 'impact' as connoting 'the influence or effect of an action [which] can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor'.¹³⁷

From this consideration of the ordinary meaning of the word 'impact', the court then constructed a general test to determine the extent to which effects fall within the scope of the Minister's 'controlled action' decision under the *EPBC Act*:

'Impact' in this sense is not confined to direct physical effects of the action on the [MNES] ... 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.¹³⁸

Provided the *EPBC Act* notion of 'impacts' is understood and applied correctly in this way, the Court stressed 'it is a question of fact'¹³⁹ for the Commonwealth Environment Minister whether a particular adverse effect is an 'impact' of a proposed action, or merely one that lies 'in the realms of speculation'.¹⁴⁰ The Full Federal Court did not feel it appropriate 'to essay an exhaustive definition of "adverse impacts" which an "action" within the meaning ascribed by s 523 may be likely to have', instead finding that it was sufficient for the purposes of the 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

134 Ibid [39].

135 See Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163.

136 *Nathan Dam* (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ).

137 Ibid.

138 Ibid.

139 Ibid.

140 Justice Kiefel's comments, to the effect that such impacts are not ones that the Minister must consider, were approved by the Full Federal Court as 'unexceptionable' when 'it is understood that those remarks are predicated on the "impacts" (with the connotation we have ascribed to that expression) of "actions" as defined in s 523': *ibid* 40. Given the relevance of the precautionary principle to the Minister's controlled action decision (pursuant to s 391 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)), arguably an impact could not be regarded as 'speculative' simply on the basis that there is scientific uncertainty regarding its nature or full extent.

not.¹⁴¹ According to the court, an ‘inescapable’ inference from Sudaw’s referral documentation for the proposed dam was that the developer contemplated the use of water downstream from the dam for agricultural purposes, including the growing and ginning of cotton.¹⁴² In light of those ‘facts and circumstances’,¹⁴³ the Court found that the Minister’s failure to consider the potential impacts on MNES from the downstream activities of third parties – simply on the basis that such impacts were not relevant ‘impacts’ for the purposes of the *EPBC Act* – involved an error of law which vitiated his decision.¹⁴⁴

In his commentary on the *Nathan Dam* case, Professor Douglas Fisher points out that the test of ‘impacts’ developed by the Full Federal Court is an objective one in the sense that ‘[w]hich impacts are relevant is a matter of law. But it is a matter of fact what are the impacts in any particular set of circumstances provided they are as a matter of law relevant’.¹⁴⁵

Rather than dictating how decision-makers must apply the ‘impacts’ test to the facts before them, the Full Federal Court in *Nathan Dam* merely outlines the nature of the question to be asked by a decision-maker in his/her evaluation of those facts, although making it plain that the necessary enquiry is to be a wide one. In any case, depending on the facts before the decision-maker, consideration of the effects of an ‘action’ assessable under the *EPBC Act* might extend to a range of ‘indirect’ environmental impacts on MNES provided it would not ‘strain the language’ to call a given effect the ‘impact’ of a particular proposal. The critical question is whether adverse environmental effects can be said to have some reasonable nexus to the project being proposed, as opposed to being purely ‘speculative’ or, as Weinberg J termed it in the *Mees* case, a ‘hypothetical possibility’.¹⁴⁶ Included in this category of ‘indirect impacts’ potentially caught by the *EPBC Act* are likely to be:

- a) the effects upon any MNES, of a project taking place outside those MNES boundaries which nevertheless causes harm within the protected area;
- b) detrimental environmental changes from activities which are connected to an action even though they are undertaken by third parties; and

141 *Nathan Dam* (2004) 139 FCR 24, 39.

142 *Ibid* 40.

143 See Douglas Fisher, ‘The Meaning of Impacts – the *Nathan Dam Case* on Appeal’ (2004) 21 *Environmental and Planning Law Journal* 325, 326.

144 *Nathan Dam* (2004) 139 FCR 24, 40.

145 Fisher, above n 143, 327.

146 In *Mees v Kemp* [2004] FCA 366 (Unreported, Weinberg J, 31 March 2004) (*‘Mees’*), concerning the Commonwealth Environment Minister’s consideration of a proposal referred by VicRoads to build the northern section of the Mitcham-Frankston Freeway, Weinberg J characterised further actions to complete a ring road as a ‘hypothetical possibility’. The judge noted in this respect ‘the Victorian Government’s strenuous denials that any such link is intended’: [107]. On appeal, this finding was not disturbed by the Full Federal Court, which merely noted that in making this finding, Weinberg J ‘was addressing the question whether the hypothesised further link was an ‘adverse impact’ of the proposed action for the purposes of s 75(2)(a)’: *Mees v Kemp* [2005] FCAFC 5 (Unreported, Weinberg J, 11 February 2005) [63].

- c) the 'cumulative' effects of a development proposal in the sense of its persistent additive effects on the environment of MNES.¹⁴⁷

Given that the Full Federal Court's rulings in *Nathan Dam* are premised on the undertaking of a single 'action', the 'impacts' test propounded by the Court would not seem to extend to other types of 'cumulative' impacts, which are produced as the result of the compounded effect of multiple, discrete projects. It is not entirely 'in the realms of speculation', however, to contemplate that future decisions may extend the ambit of the Act to encompass such impacts. As barrister Chris McGrath notes, the 'plain meaning' of the term 'action' as it is used in the *EPBC Act* includes a 'series of activities' that could logically extend to a group of related activities, such as cattle grazing, which consists of a wide variety of individual tasks (mustering, grazing, clearing, spraying pesticide etc) spread over many years or generations.¹⁴⁸ It is possible, therefore, that the Full Federal Court's decision in *Nathan Dam* is simply the cusp of a wave of future judicial development of the *EPBC Act* that is to come. Certainly, if the courts continue to interpret the Act's provisions according to the plain meaning of the terms used, and in light of the legislation's broad objectives of environmental protection, biodiversity conservation and the promotion of ecologically sustainable development, there is scope for the Act's EIA regime to have a greatly expanded operation from that envisioned when it was drafted as a response to the policy commitments of 'cooperative federalism'.

V EPILOGUE: A QUIET SEA CHANGE

Twenty years ago, when the High Court's *Tasmanian Dam* decision was handed down, the case generated legal and political debate of almost 'tsunamic' proportions.¹⁴⁹ By contrast, the rulings of the Full Federal Court in the *Nathan*

147 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 74A provides a further safeguard against 'piecemeal' applications, allowing the Federal Environment Minister to refuse the referral of a proposal if the Minister is satisfied the proposed action is a component of a 'larger action'.

148 McGrath, above n 110, 25–6.

149 See, eg, John Goldring, 'Initial Reactions to the Dam Case: Dams or Floodgates?' (1983) 8(4) *Legal Services Bulletin* 156; Patrick Lane, 'The Federal Parliament's External Affairs Power: the *Tasmanian Dam Case*' (1983) 57 *Australian Law Journal* 554; Gerry Bates, 'The *Tasmanian Dam Case* and its Significance in Environmental Law' (1984) 2 *Environmental and Planning Law Journal* 325; Philip Tighe, 'Environmental Values, Legalism and Judicial Rationality: the *Tasmanian Dam Case* and its Broader Political Significance' (1987) 4 *Environmental and Planning Law Journal* 134; Richard Darrell Lumb, 'The External Affairs Power and Constitutional Reform' (1988) 62 *Australian Law Journal* 679; and Bruce Davis, 'Federal-State Tensions in Australian Environmental Management' (1989) 6 *Environmental and Planning Law Journal* 66.

Dam case have, to date, produced barely a ripple in the literature.¹⁵⁰ This may simply reflect the fact that, unlike *Tasmanian Dam*, the *Nathan Dam* decision does not deal in the high political stakes of constitutional interpretation. Nonetheless, the ramifications of the latter case are likely to be no less significant than those of the more celebrated *Dam* decision. In particular, the *Nathan Dam* case promises to turn the page to a new chapter in the unfolding story of the law's management of the impacts of human activities on the Australian environment. Rather than Commonwealth and state governments, non-governmental actors and the courts are emerging as the most prominent players in this new era, and the theme is changing from 'centralisation' to that of 'ecologically sustainable development'.

Echoes of the previous chapters of the Australian environmental law narrative will no doubt continue to sound in the wake of the *Nathan Dam* decision. The case has been heralded by some environmental groups, for instance, as confirming a 'major expansion of federal environmental powers'.¹⁵¹ Such commentary is likely to revive debates about the merits of more 'centralised' control over environmental and natural resource management, which has long been a topic of discussion in Australia and in other countries with federal systems, such as that of the United States.¹⁵² Proponents of centralisation have argued that an expanded role for federal government in environmental management is the most effective means of preventing States from competing for development through lowering environmental standards in a 'race for the bottom',¹⁵³ and also allows for the implementation of national regulations to deal with environmental problems that cross jurisdictional boundaries.¹⁵⁴ However, in recent decades, a competing view has gained strength, which premises arguments for decentralised environmental decision-making on the capacity of governments to harness local knowledge and the participation of affected communities in order

150 Most of the commentary to date on the decision are case notes: see Fisher, above n 143; Sally Marsh, 'Broad Scope of Enquiry under the EPBC Act Confirmed on Appeal' (2004) 19(4) *Australian Property Law Bulletin* 43; Chris McGrath, 'Dam Decision Overturned – Case Note: *Queensland Conservation Council v Minister for the Environment and Heritage*' (2004) 24 *Proctor* 25. Indeed, it has been the commercial law firms that have so far demonstrated the most interest in the case: see, eg, Ian Hodgetts, 'Nathan Dam Decision Goes against Federal Minister for Environment and Heritage' *Focus – Environment and Planning*, Allens Arthur Robinson, August 2004 <<http://www.aar.com.au/pubs/env/foenvaug04.htm>> at 5 September 2005.

151 See World Wildlife Fund, 'Nathan Dam Court Win Confirms Major Expansion of Federal Environmental Powers' (Press Release, 30 July 2004) <http://www.wwf.org.au/News_and_information/News_room/viewnews.php?news_id=142> at 5 September 2005.

152 See Fowler, above n 69. For US perspectives on the 'centralist' debate see Daniel Esty, 'Revitalising Environmental Federalism' (1996) 95 *Michigan Law Review* 570 and Richard Revesz, 'The Race to the Bottom and Federal Environmental Regulation: A Response to Critics' (1997) 82 *Minnesota Law Review* 535.

153 This rationale has been particularly dominant in the US: see Kirsten Engel, 'State Environmental Standard-Setting: Is there a "Race" and is it to the "Bottom"?' (1997) 48 *Hastings Law Journal* 271.

154 Shared natural resources, such as water, provide paradigmatic examples of the difficulties of ensuring environmental protection within regulatory structures oriented to the consideration of each State's interests and economic development needs: see Alex Gardner, 'Administrative Framework of Land and Water Management in Australia' (1999) 16 *Environmental and Planning Law Journal* 212.

to achieve ecologically sustainable outcomes.¹⁵⁵ No clear winner emerges from this debate,¹⁵⁶ which, in any event, tends to ebb and flow in response to the changing political context and the environmental aspirations of the parties in power at the federal and State levels.

Like the *Tasmanian Dam* decision before it, the *Nathan Dam* case could provide the stimulus for the Commonwealth Government to take a greater role in managing the effects of development activities on the Australian environment. By giving the notion of 'impacts' under the *EPBC Act* an expansive meaning, the Full Federal Court decision makes it more likely that a greater range of projects will pass the legislation's 'threshold' stage of decision-making about 'controlled actions' and so become subject to the Commonwealth assessment and approval requirements, in addition to any relevant state law. The overall effect is that the narrow definition of MNES in the *EPBC Act* (which was intended to limit Commonwealth involvement in environmental management) is offset by the application of a broad interpretation of the types of 'impacts' on MNES which bring in to play the Commonwealth's EIA regime. As a result, the *Nathan Dam* case re-establishes an important role for the Commonwealth in the field of development-related environmental decision-making. Those projects now falling within the scope of the *EPBC Act*, due to their potential for 'indirect' impacts on MNES, will need to be assessed in terms of their consequences for environmental resources and protected areas of national significance, and will be subject to approval by the Commonwealth Environment Minister in light of a range of considerations, including the principles of ESD. If the Minister were to exercise these approval powers stringently (as occurred in the era of *Murphyores* and *Tasmanian Dam*), the Commonwealth could block development projects on environmental grounds despite their having state-support and authorisation.

The likelihood of this scenario occurring in practice, however, does not seem high in the current political climate. The present Commonwealth Government has shown little inclination to extend its influence over environmental management in Australia through direct legislative means.¹⁵⁷ On the contrary, it was responsible for agreements to restrict the number of MNES included in the *EPBC Act*¹⁵⁸ and has since adopted a cautious approach to any proposal to broaden the scope of EIA under the legislation.¹⁵⁹ The arguments made on behalf of the Commonwealth Environment Minister in the *Nathan Dam* case are also not suggestive of a government bent on acquiring broad legislative control over environmental management in Australia: counsel for the Minister contended that a wide enquiry into the impacts upon MNES of a proposed development would

155 These sentiments are reflected in the *Rio Declaration on Environment and Development*, above n 62. Principle 10 states that: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level'.

156 Hence some commentators, such as Daniel Esty, above n 152, 571, argue that 'what is required is a multi-tier regulatory structure that tracks the complexity and diversity of environmental problems'.

157 Indeed, the current Commonwealth Government's preference seems to be to assert indirect influence over the form of State environmental legislation through the provision of financial incentives or by agreements necessary reforms in other areas such as competition law: see Lyster, above n 108.

158 See Council of Australian Governments, above n 5, [3] discussed in 'Part III' above.

159 See the discussion, above n 81, regarding extensions to the MNES triggers in the Act.

tend to frustrate the efficiency and timeliness of the Commonwealth environmental assessment and approval process.¹⁶⁰ In addition, the Commonwealth Government has enthusiastically embraced the provisions of the *EPBC Act* that allow for state-based regimes to be accredited for the assessment of projects that attract a Commonwealth assessment requirement,¹⁶¹ notwithstanding criticisms of this practice because it is an abdication by the Commonwealth of its proper role in environmental decision-making.¹⁶²

Although the *Nathan Dam* case is, in our view, unlikely to produce a dramatic, immediate shift in the exercise of Commonwealth/state roles and responsibilities with respect to the environment, the decision may have more lasting consequences for the quality of EIA-based decision-making in Australia, both under the *EPBC Act* and potentially under a range of state-based environmental legislation. Techniques of EIA have been much-maligned in the last few decades, with the principal criticisms focusing on the poor quality of the information presented to decision-makers as the basis for determinations about the 'likely environmental impacts of a particular project.'¹⁶³ Predicting environmental impacts is an uncertain business at the best of times given the variability seen in natural ecosystems and the paucity of available knowledge about the effects of development activities on biological diversity and ecological integrity.¹⁶⁴ Despite these uncertainties, most Australian EIA regimes leave responsibility for the preparation of environmental impact statements in the hands of proponents, who are often accused of glossing over areas of ignorance, or poor knowledge, in order to present favourable predictions of likely environmental impacts to decision-makers.¹⁶⁵ When these problems are coupled with a legal framework that tends to subdivide the environment into different regulatory spheres of influence,¹⁶⁶ EIA can often fall far short of the ESD goal of ensuring that the wider, long-term environmental implications of human actions are effectively integrated into decision-making processes.¹⁶⁷

The rulings of the Full Federal Court in *Nathan Dam* take an important step in the direction of ensuring the provision of better quality information to processes of EIA-based decision-making. By mandating a broader consideration of the

160 *Nathan Dam* (2004) 139 FCR 24, 33.

161 Bilateral assessment agreements have been concluded with the Queensland, Western Australian, Tasmanian and Northern Territory governments. Draft agreements were issued by the Commonwealth Government for the other States soon after the coming into force of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

162 See Ogle, above n 72; Raff, above n 90. See also Laura Hughes, 'Environmental Impact Assessment in Environment Protection and Biodiversity Conservation Act 1999' (1999) 16 *Environmental and Planning Law Journal* 304, 309–14.

163 See the criticisms summarised in Bates, above n 54, 325–33.

164 See Peter George Fairweather, 'Links between Ecology and Ecophilosophy, Ethics and the Requirements of Environmental Management' (1993) 18 *Australian Journal of Ecology* 3.

165 Alan Stewart, 'Environmental Risk Assessment: the Divergent Methodologies of Economists, Lawyers and Scientists' (1993) 10 *Environmental and Planning Law Journal* 10, 14.

166 Ross Ramsay and Gerard Rowe, *Environmental Law and Policy in Australia: Text and Materials* (1995) 227–9.

167 See Ecologically Sustainable Development Steering Committee, above n 63, 'What is ESD', 'Guiding Principles'.

'impacts' on MNES, assessments performed under the *EPBC Act* should be able to map more closely to the inter-linkage of ecosystems and environmental problems seen in the natural world. In the context of the *Nathan Dam* scenario, this means that the large dam proposed will not be able to proceed without a full assessment first being undertaken of its effects on downstream environments like the Great Barrier Reef.¹⁶⁸ The same principle could see other water resources projects – whether involving dams or the extraction of water out of rivers or groundwater systems – being considered in light of their influence on water flows and water quality in linked ecosystems (such as the sixty-odd 'Ramsar wetlands' dotted across the Australian landscape).¹⁶⁹ Taken together with ESD principles, such as the principle of inter-generational equity and the precautionary principle,¹⁷⁰ the expanded notion of 'impacts' adopted in the *Nathan Dam* case could lead to the assessment of the environmental consequences of projects under the *EPBC Act* in a more holistic, long-term and cautious fashion.¹⁷¹

While the proponents of development projects will remain responsible under the Commonwealth EIA scheme for presenting the initial documentation regarding the 'impacts' of their proposals to the Environment Minister, the *Nathan Dam* rulings would seem to make it more difficult for proponents to present a biased or limited view of this information for the purposes of the Minister's 'controlled action' decision. In circumstances where the 'impacts' the Commonwealth Environment Minister must consider extend to the 'indirect' consequences of an action as well as its direct physical effects, there is likely to be pressure on proponents to present more comprehensive information on environmental effects, which in turn may encourage more wide-ranging and thorough preparatory studies of the possible consequences for MNES of a proposed development. Attempts to avoid these requirements by the division of a larger project into a series of smaller developments are unlikely to stand up to judicial scrutiny¹⁷² and may fall foul of the *EPBC Act's* 'false and misleading information' provisions.¹⁷³ In *Mees v Roads Corporation*,¹⁷⁴ decided before the *Nathan Dam* decision, Gray J of the Federal Court declared that the information

168 Chris McGrath reports that the Commonwealth Environment Minister 'reconsidered the likely impacts of the Nathan Dam on 12 April 2005 and decided that when the impacts of associated downstream agriculture are considered the dam is likely to have a significant impact on both the GBRWHA and listed migratory species. The dam must now be assessed in the context of these impacts': Chris McGrath, 'Minister Reconsiders Nathan dam Impacts' (2005) 1 *National Environmental Law Review* 20.

169 For details of the listed 'Ramsar Wetlands' in Australia see Department of Environment and Heritage, *Fact Sheet – Australia's Ramsar Sites*, June 2004 <<http://www.deh.gov.au/water/wetlands/publications/index.html>> at 5 September 2005.

170 ESD principles feature prominently in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): the promotion of ESD is a relevant legislative object: s 3; the Minister must take account of the principles of ESD in deciding whether or not to approve an action: s 136; and for a number of decisions under the Act, the Minister is required to take account of the precautionary principle: s 391.

171 Implementation of the precautionary principle has been said to require a 'cautious' approach to decision-making on the part of courts and other decision-makers in the environmental field: see *Leach v National Parks and Wildlife Service & Anor* (1993) 81 LGERA 270, 281–2 (Stein J).

172 See McGrath, above n 110, 26–8. See also *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 74A, discussed above, n 146.

173 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 489.

174 [2003] FCA 410 (Unreported, Gray J, 23 April 2003).

provided to the Commonwealth Environment Minister for the purposes of the controlled action decision must be ‘truthful and complete so as not to mislead’.¹⁷⁵ Significantly, his Honour noted that the provision of appropriate information for decision-making promotes the environmental protection purpose of the *EPBC Act*, which otherwise ‘would be subverted if the Environment Minister were to be called upon to make determinations in relation to proposals without full information of the kinds required by the *EPBC Act* and the *EPBC Regulations*’.¹⁷⁶

The likelihood of continuing judicial scrutiny of the information made available by proponents for the purpose of decision-making under the *EPBC Act* seems assured by the Act’s broad third party provisions, which expose the operation of the EIA process to the watchful and critical eyes of environmental groups and the general public. Indeed, the breadth of the *Nathan Dam* rulings and the generous standing provisions of the *EPBC Act* could provide strong incentives for environmental groups to frame their objections to particular projects in terms of potential impacts on MNES, so as to bring claims within the scope of this legislation.

It is equally possible, however, that the currents of change generated by the *Nathan Dam* case will flow from a different direction – from the uptake of a *Nathan Dam*-style approach to ‘impacts’ by state planning and environmental tribunals. The Full Federal Court’s rulings in the *Nathan Dam* case are framed in very general terms, as the outcome of a consideration of the ‘ordinary meaning’ of the word ‘impact’ against a background of broad legislative objectives to protect the environment, conserve biodiversity and promote ESD. As a consequence of the ‘cooperative federalism’ approach to environmental matters that prevailed through the 1990s and the intergovernmental endorsement of environmental policy documents like the NSESD, much state environmental legislation is structured along broadly similar lines to the *EPBC Act*. In particular, many state EIA and natural resource management laws have objectives that reference the goals and principles of ESD and are framed in terms of ‘impacts’ or ‘effects’ on particular resources or the environment more generally.¹⁷⁷ Substantial scope thus exists for state courts and tribunals to transpose the reasoning approach of the Full Federal Court in the *Nathan Dam* case to the consideration of environmental provisions under local planning schemes, catchment water management plans or EIA legislation.

Indeed, there are already indications that this may be occurring, with a trickle of *Nathan Dam* inspired cases beginning to emerge from State-based tribunals. Recent decisions of the Victorian Civil and Administrative Tribunal in the cases of *Hazelwood Power Station*¹⁷⁸ and *Bates v Southern Rural Water* (‘*Bates*’)¹⁷⁹

175 Ibid 456.

176 Ibid.

177 See Stein, above n 65. See also Fisher, above n 86, 353–63.

178 *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 (Unreported, Morris P, 29 October 2004). For a review of this case see Merinda Logie, ‘Greenhouse Emissions and Indirect Impacts Brought within Scope of Environmental and Planning Assessment’ (2005) 10(3) *Local Government Law Journal* 117.

may suggest the shape of things to come. In the former case, the Tribunal relied on the *Nathan Dam* case decision to support its ruling that submissions raising the possibility of 'indirect' adverse environmental effects (climate change) were a relevant matter to be considered by a panel appointed under Victorian planning legislation to assess an amendment to a planning scheme designed to prolong the operation of the Hazelwood Power Station.¹⁸⁰ Reliance on the findings in *Nathan Dam* seemed to play an even greater role in the latter case of *Bates*,¹⁸¹ which concerned an application by a farmer for a water licence to extract a substantial volume of groundwater from an already seriously over-allocated system. The Tribunal upheld the water authority's decision to implement a more rigorous assessment process in licensing decisions in such circumstances. The Tribunal held that it was necessary to consider the farmer's application within the broader context of its possible environmental impacts on the use and protection of the whole aquifer.¹⁸² The 'key issue', according to the Tribunal, was to improve the quality of data feeding into EIA by 'ensur[ing] that the process is done effectively and in response to the most up-to-date information'.¹⁸³ The Tribunal saw this approach as 'entirely appropriate and reasonable,' having regard to the sustainable development objectives of the relevant regulatory framework.¹⁸⁴

Thus, rather than a wholesale refashioning of Commonwealth/state roles with respect to the environment, what we may expect to see as an outcome of the *Nathan Dam* case is a 'quiet sea change' in the way EIA is conducted in Australia. Through judicial emphasis on the breadth of notions of 'impact' encompassed by EIA legislation like the *EPBC Act*, the courts may facilitate more holistic and better-informed evaluations of the impacts of development activities on the environment. If the rulings of the *Nathan Dam* case continue to be developed by federal and state courts, the Full Federal Court decision has the potential to aid in addressing one of the most intractable problems of environmental law: the mismatch between a compartmentalised and discrete regulatory framework, and the regulated environment made up of a landscape of interconnected and inter-dependent ecosystems. Cast in this role, the rulings in *Nathan Dam* may, in time, come to be recognised as a true 'watershed' in the development of Australian environmental law.

179 *Bates* [2004] VCAT 2045 (Unreported, Martin P and Mainwaring M, 22 October 2004).

180 *Australian Conservation Foundation & Ors v Minister for Planning* [2004] VCAT 2029 (Unreported, Morris P, 29 October 2004) [42] (Morris P).

181 *Bates* [2004] VCAT 2045 (Unreported, Martin P and Mainwaring M, 22 October 2004) [27].

182 *Ibid* [4].

183 *Ibid* [31].

184 *Ibid*.