



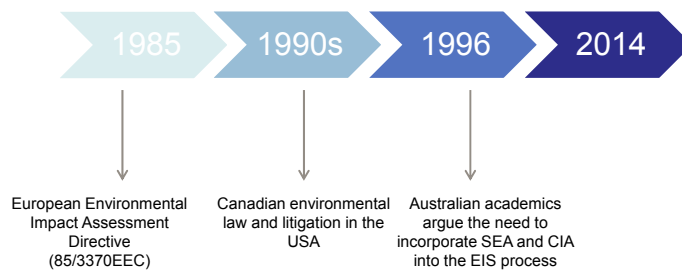
Cumulative Impact Assessment – the Lawyer’s Perspective

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OLIVIA WILLIAMSON, ASSOCIATE



Historic Observations



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► Commonwealth

- *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*
- No specific mention of “cumulative impacts”
- Requires consideration of “relevant impacts”
- “Impact” is defined to include direct, indirect and reasonably foreseeable consequences of actions
- “Significant Impact” is not defined, however the Commonwealth Government has published “Significant Impact Guidelines 1.1 – Matters of National Environmental Significance”
- The EPBC Act necessitates consideration of all direct and indirect impacts which are:
 - Facilitated, to a major extent, by the action; and
 - Within the contemplation of the person taking the action; and
 - Reasonably foreseeable.



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▶ Queensland

- *State Development and Public Works Organisation Act 1971 (Public Works Act)*
- *Environmental Protection Act 1994 (EP Act)*
- No specific mention of “cumulative impacts” in either Act
- No definition of “impact” or “significant impact” in either Act
- Queensland case law confirms that an action has a “significant impact” if the impact is “*important, notable or of consequence having regard to its context or intensity.*”
- The Queensland Government generic draft terms of reference for an environmental impact statement defines “cumulative impact” as “*the combined impacts for all relevant sources (development and other activities in the area)*”



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▶ Part 3.2 of the generic Terms of Reference

“To the extent of the information available, the assessment should endeavour to predict the cumulative impact of the project on environmental values over time and in combination with impacts created by the activities of other adjacent and upstream and downstream developments and landholders- as detected by baseline monitoring. The absence of comprehensive cumulative impact analysis need not be fatal to the project. The EIS should also outline ways in which the cumulative impact assessment and management could subsequently be progressed further on a collective basis.”



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▶ Local Government

- Local Government planning schemes
- Consideration of cumulative impacts often arise in the context of hydrology/flood studies
- Land use planning
- Establishment of Development Areas and special development schemes



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▶ Nathan Dam Case

- *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190; 134 LGERA 272
- Issue: the scope of the impacts that must be considered when deciding whether a proposed action requires approval under the EPBC Act.
- The Federal Environment Minister determined that the proposed construction and operation of the Nathan Dam was a controlled action on the basis of impacts on threatened species.
- The Federal Environmental Minister declined to consider impacts caused by persons ultimately using water from the dam when assessing the impacts of the dam.
- The Qld Conservation Council and the World Wide Fund for Nature applied for judicial review of the Minister's decision to refuse to consider those impacts.



JudICIAL

- The Federal Court Trial Judge held:
 - When assessing the impacts of a proposal under s75 of the EPBC Act, the enquiry of the Minister is a wide one and might extend properly to the whole, cumulated and continuing effect of the activity, including the impacts of activities of third parties.
 - When assessing the impacts of a proposal under s75 of the EPBC Act, the Minister is first to consider “all adverse impacts” the action is likely to have. The widest possible consideration is to be given in the first place, limited only by considerations of the likelihood of it happening.
 - A narrow approach should not be taken to the interpretation of the EPBC Act because of the high public policy apparent in the objects of the EPBC Act.
- The Federal Court Trial Judge remitted the decision back to the Minister for reconsideration.



JudICIAL

- The Minister appealed against the decision of the Federal Court Trial Judge contending that consideration of “all adverse impacts” must be limited to impacts that are “inherently or inextricably involved” in the action.
- The Minister’s appeal was dismissed by the Full Federal Court (upholding the principles applied by the Trial Judge) but the Full Federal Court applied a slightly different approach.



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- On appeal, the Full Court held:
 - “impact” means the influence or effect of an action and, given its ordinary meaning, can readily include the indirect consequences of an action and the results of acts done by persons other than the principal actor.
 - “impact” is not confined to direct physical effects of the action, it can include the effects which are sufficiently close to the action to allow it to be said that they are, or would be, the consequences of the action on the protected matter.
 - “all adverse impacts” includes each consequence, which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not.
 - The width of the enquiry in each case will depend on its facts and on what may be inferred from the description of the ‘activity’ which the Minister is required to consider.



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- ▶ **Reasonably Foreseeable?**
 - A critical question for cumulative impact assessment is ‘what future actions are reasonably foreseeable?’
 - Can future actions be excluded because they are speculative? Far-fetched or fanciful?
- ▶ **Insufficient treatment of cumulative impacts**
 - Target for litigation
 - A perfect analysis of cumulative impacts is not required in order to survive a legal challenge – *Prineas v Forestry Commission of NSW*
 - The need to demonstrate that genuine consideration has been given to the assessment of cumulative impacts.



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▶ Hancock Coal

- *Hancock Coal Pty Ltd v Kelly & Ors* [2014] QLC 12
- The Alpha Coal Project was a declared “significant project” under the Public Works Act and deemed a “controlled action” under the EPBC Act.
- Objectors raised issue with the failure to model the cumulative impacts of the Project having regard to other proposed projects in the area.
- Ultimately the Land Court recommended approval of the Project, but only if certain conditions were implemented.
- Member Smith concluded that the data and level of knowledge of the groundwater impacts outside the mining lease area was insufficient.
- The Member also admitted lacking confidence in the groundwater evidence should the modelling not be correct.
- The case acknowledges that uncertainty about potential impacts, including cumulative impacts, are cause for taking a precautionary approach.
- Judicial review proceedings have been filed in the Supreme Court. These are yet to be determined.



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▶ LandCorp

- *Western Australia Land Authority (LandCorp) v the Minister for Sustainability, Environment, Water, Population and Communities* [2012] FCA 226
- LandCorp applied for reconsideration of the Federal Minister’s positive “controlled action” decision on the grounds that new information was available which would help to more clearly define the potential impacts on matters of NES.
- After reconsideration, the delegate confirmed the original controlled action decision.
- LandCorp applied to the Federal Court to have the reconsideration decision reviewed. A ground of review was that the delegate did not make LandCorp aware that it would take into account the cumulative impacts of 9 other proposed developments in the region.



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- The Federal Court did not accept the argument advanced on behalf of the Minister that it was reasonable to assume that LandCorp were aware of other developments in the region. The Federal Court held that when assessing a proposal the matters for consideration by the delegate should not be a “guessing game”.
- Fairness requires a decision maker to disclose specifically what matters would be taken into account when deciding an application so that an applicant can be afforded the opportunity to address those matters and respond appropriately.



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▶ Tarkine

- *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694; *Tarkine National Coalition v West Coast Council* [2013] TASRMPAT 103; *Tarkine National Coalition Incorporated v Minister for the Environment* [2014] FCA 468
- Proposal by Venture Minerals to develop and operate a hematite mine in the Tarkine area.
- On 24 July 2012, the proposal was declared a “controlled action” to be determined having regard to the assessment documentation
- In August 2012, it was confirmed that the proposed action would be assessed pursuant to the bilateral agreement between the Commonwealth and Tasmania.
- Considered at first instance by West Coast Council, referred to the Tasmanian Environment Protection Authority Board.
- The Board recommended that certain conditions be attached to any approval.



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- The West Coast Council approved the proposal subject to the conditions recommended by the Board.
- The Tarkine National Coalition (**TNC**) lodged an appeal against the Council's decision with the Tasmanian Resource Management and Planning Appeal Tribunal. A ground of challenge was the failure to consider the cumulative impact of mines in the area.
- Notwithstanding the appeal lodged, the Federal Minister decided to approve the proposal, subject to conditions.
- The TNC applied to the Federal Court for judicial review of the Federal Minister's decision.



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- The Federal Court dismissed TNC's application for judicial review.
- TNC's complaint about the failure to take into account the mine's cumulative environmental impacts failed for the following reasons:
 - The relevant Tasmanian environmental legislation did not require or prevent the Board from having regard to cumulative impacts.
 - The Board had guidelines which required Venture Minerals to provide a plan relating to the cumulative impact of the mine.
 - The Board was conscious that the Federal Minister would consider, in due course, under the EPBC Act, the cumulative impact of the proposed development.



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- Ultimately the Federal Court held that the Board could have regard to cumulative impacts if it wished, but the fact that it did not, did not mean that the assessment was not carried out in accordance with law.
- Turning then to whether the Minister failed to consider cumulative impacts, the Federal Court held that because the Minister did address matters under the heading 'cumulative impacts' and considered the cumulative impact of habitat loss, the Minister did deal with the subject matter to which section 136 of the EPBC Act directed his attention.



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- The Federal Court rejected the assumption that the EPBC Act requires the Minister, in all cases, to have regard to the cumulative impact of a proposed development. What the EPBC Act requires is regard to the "relevant impacts".
- The case confirms that any failure on the part of the Minister to take into account cumulative impacts of a project may not give rise to a jurisdictional error.
- Important notes:
 - TNC has commenced an appeal to the Full Federal Court –this was heard on 13 November 2014 and judgment is pending
 - There was some consideration of cumulative impacts relevant to the proposed development
 - As far as Queensland State legislation is concerned, the Queensland generic draft terms of reference confirm that the absence of cumulative impact assessment is not fatal



Conclusions

- ▶ Assessment and management of cumulative impacts is a regulatory requirement not specifically enshrined in the Federal and Queensland legislation.
- ▶ Recent case law reveals:
 - The complete failure to address cumulative impacts, while not necessarily fatal, will likely be the subject of challenge if there are third parties;
 - A token assessment of cumulative impacts may still be subject to challenge;
 - A rigorous assessment of cumulative impacts may still be challenged, but provided that enough information is given to make an informed decision and there is evidence that the decision maker turned its mind to such impacts, it will be difficult to challenge an approval on the basis of a failure to have regard to cumulative impacts



Conclusions continued...

- Where an assessment decision has regard to other existing, approved or future developments, those matters should be disclosed to the proponent.
- The Tarkine National case (as it currently stands) suggests that from the point of view of judicially reviewing a decision by the Minister there is no express requirement in the EPBC Act for the Minister to take into account cumulative impacts. This case law is unsettled and may be overturned or revised as a result of the appeal heard by the full Federal Court of Australia.





Thank you

OLIVIA WILLIAMSON, ASSOCIATE
Phone +61 7 3024 0422
Email o.williamson@hopgoodganim.com.au
www.hopgoodganim.com.au

