

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

No QUD 319 of 2008

FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD

Respondent

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**DEFENCE
(Order 11 rule 20)**

1. As to paragraph 1 of the Statement of Claim, the Respondent:
 - (a) admits that the Applicant is an incorporated organisation, capable of suing;
 - (b) otherwise does not admit the allegations contained therein.
2. The Respondent admits the allegations contained in paragraphs 2, 3 and 4 of the Statement of Claim.
3. As to paragraph 5 of the Statement of Claim, the Respondent:
 - (a) admits that the Respondent has constructed the fish transfer device referred to therein in compliance with condition 3 of the approval;
 - (b) denies that the construction of the fish transfer device is in purported, but not actual, compliance with condition 3 of the approval.
4. As to paragraph 6 of the Statement of Claim, the Respondent:
 - (a) admits that the downstream fishway:

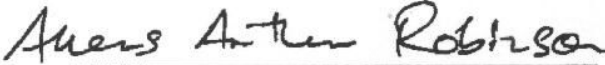
Filed on behalf of: the Respondent

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- (i) does not transfer lungfish when water levels in the dam are beneath EL 62.0 metres (being a level estimated to be achieved approximately 80% of the time) because the designed minimum operating level of the downstream fishway is EL 62.0;
 - (ii) has not transferred lungfish because, due to drought conditions, water levels in the dam have not reached EL 62.0 metres;
- (b) otherwise denies the allegations contained therein.
5. The Respondent denies the allegations contained in paragraphs 7 and 8 of the Statement of Claim.
6. Further and in the alternative, if (which is denied) the fish transfer device does not comply with condition 3 of the approval:
- (a) the Respondent has acted honestly and reasonably at all times;
 - (b) the Respondent has not acted recklessly at any time;
 - (c) the Queensland Department of Primary Industries and Fisheries (*DPI*) directed the Respondent to construct the fish transfer device in accordance with the Objectives and Conditions for Specified Fishways for the Burnett River Dam issued by the DPI to the Respondent under s116 of the Fisheries Act 1994 on 5 November 2003 (*the Directive*) with the final design of the fish transfer device requiring continued input from the DPI;
 - (d) the design of the fish transfer device was developed by the Respondent in consultation with numerous experts and the DPI over a period from July 2002 until October 2004 including in compliance with the Directive;
 - (e) the fish transfer device has not had, and is not likely to have, any or any significant adverse impact on lungfish populations in the Burnett River;
 - (f) there is in place a system of monitoring of lungfish populations in the Burnett River which is designed to detect any or any significant adverse impact on lungfish populations;
 - (g) since about mid 2007, the Respondent has engaged in dealings with the Department of the Environment Water Heritage and the Arts (*the Department*) to identify and, if reasonably possible address, any further requirements of the Department for the fish transfer device;

- (h) the dealings referred to in sub-paragraph (f) above have not been concluded;
- (i) if an injunction is ordered in the terms claimed by the Applicant, it will be uncertain, it will not identify precisely what the Respondent is required to do and it will be likely to lead to further disputes between the Applicant and the Respondent;
- (j) for the reasons stated in paragraphs (a) to (i) above, the Court ought refuse the relief sought by the Applicant in the exercise of its discretion.

Dated 28 November 2008



Allens Arthur Robinson
Solicitor for the Respondent

This pleading was prepared by Mr Damian Clothier of Counsel.

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Applicant

BURNETT WATER PTY LTD

Respondent

**CERTIFICATE OF LEGAL REPRESENTATIVE
(Order 11 rule 1B)**

I, Damian Clothier, certify to the Court that, in relation to the pleading dated 28 November 2008 filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non-admission in the pleading.

Dated 28 November 2008



Damian Clothier

Legal representative for the Respondent