

**WIDE BAY BURNETT CONSERVATION COUNCIL INC v. BURNETT WATER
PTY LTD**

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Summary

1. The Respondent applies for a temporary stay of the proceedings. There is a parallel compliance investigation being undertaken by the Department for the Environment, Heritage and the Arts ("the Department") which is likely to be completed in the near term. The Department has indicated that there are a number of possible outcomes of that investigation, including criminal proceedings or the variation of the condition upon which the Applicant relies.
2. The interests of justice favour a stay. The Applicant alleges that the Respondent has engaged in criminal conduct and the Minister has sought to intervene at a time when the Department is actively considering what (if any) action is an appropriate response to the Respondent's alleged non-compliance. Moreover, the same consideration may result in a variation of the condition which will render the proceeding otiose.

Background Facts

3. The Respondent owns and operates the Paradise Dam. In January 2002 it obtained an approval from the then Minister under the *Environment Protection and Biodiversity Conservation Act 1999* ("the EPBC Act"). Subsequently, the lungfish was listed as a threatened species under the EPBC Act and on 8 August 2003 the Minister varied the conditions of the approval, including by inserting condition 3 on which the Applicant relies. It provides:

"3. *Burnett Water Pty Ltd must install a fish transfer device on the Burnett River suitable for the lungfish. The fishway will commence when the dam becomes operational.*"

4. A fishway was designed and installed with the involvement of numerous persons, including the Queensland Department of Primary Industries and Fisheries, which approved the design. The dam became operational in November 2005.
5. The design of the fishway is such that the downstream fishway is only functional when water levels exceed EL 62.0 meters. That has not occurred to date.
6. In 2007, the Paradise Dam was randomly selected for a compliance audit under the EPBC Act. The final compliance audit, which issued on 25 January 2008, found that the Respondent had installed a fish transfer device which was suitable for lungfish. However, the Respondent was given a “partial compliance” rating in relation to whether it had commenced because of the position with the downstream fishway.
7. By letter dated 24 January 2008, the Department informed the Respondent that the allegation of non-compliance would be managed through its Compliance and Enforcement Policy. On that occasion and subsequently the Department has indicated that there are a range of responses by the Department to contraventions of the EPBC Act, including administrative action, civil action and criminal action.
8. By letter dated 17 April 2008, the Department informed the Respondent that the alleged non-compliance had been referred to its compliance section for action. The letter again referred to the “range of potential courses” which the Department could take in relation to any non-compliance and to the fact that it desired to ensure that “all options to resolve this matter are on the table”. It proposed that the Respondent provide information on the feasibility, design and costing of retrofitting the fishway so that lungfish transfer could occur during all or a greater range of dam operating conditions. It proposed a review of the science that relates to the biological requirements of lungfish and the collation of information about world’s best practice in relation to fishways.

9. A meeting was held between the Department and the Respondent on 9 July 2008. At that meeting, the Department informed the Respondent to the effect that an option for consideration was a change to condition 3.
10. The Department again wrote to the Respondent on 13 October 2008. It repeated its view that there had been partial non-compliance with condition 3. It referred specifically to the fact that ss.142 and 142A of the EPBC Act provided for civil and criminal offences in relation to non-compliance.
11. The Department then set out what it required to progress the matter. This included a revision of the original modeling used to set the parameters of the fishway, a review of the fishway monitoring program and provision of advice in relation to a retrofit.
12. By letter dated 31 October 2008, the Department informed the Respondent that it expected to receive reports within 2 months.
13. These proceedings were commenced by the Applicant on 7 October 2008. Although the Applicant complains about a wider range of matters than the allegation of partial non-compliance by the Department, it relies heavily on the fact that the downstream fishway is not in use.
14. The Applicant specifically alleges in the proceedings that the Respondent has contravened ss.142, 142A and 142B of the EPBC Act. Section 142 is a civil penalty provision. Sections 142A and 142B provide for criminal offences. Section 142A is concerned with reckless conduct. Sections 142A and 142B are both strict liability provisions. The relief claimed by the Applicant is a declaration and an injunction under s.475 requiring the Respondent to carry out work to the fishway.
15. The Minister has recently indicated that he intends to intervene in the proceedings. The extent of his proposed involvement is not clear.

Stay

16. The Court has power to temporarily stay a proceeding, or stand the proceeding out of its list, if it is in the interests of justice to make such an order¹. This power stands apart from the power to stay proceedings as an abuse of the Court's processes and involves broader considerations².
17. It is in the interests of justice to make such an order in the present case. The considerations which lead to that conclusion are as follows.
18. Subject to proof that it is an interested person under s.475(7) of the EPBC Act, the Applicant has standing to apply for an injunction in respect of any non-compliance with condition 3. However, the Minister remains the primary defender of the public interest. The Minister (or the Commonwealth which he represents) has complete power to seek redress in respect of any non-compliance, whether by administrative action, civil proceedings, civil penalty proceedings or criminal proceedings.
19. Particularly now that the Minister has decided to intervene in the proceeding, the Respondent is unjustly exposed to having to defend civil proceedings in circumstances where the specter of other proceedings (particularly criminal proceedings) looms over it. This is more than a theoretical prospect. In its dealings with the Respondent the Department has been at pains to point out that it retains a number of options in relation to any non-compliance, including the option of instigating criminal proceedings, and that all options are "on the table".
20. The injustice to the Respondent in this situation is manifest³. It is proposed to progress the civil proceedings at a time when there is no assurance that criminal proceedings will not follow it. There is the unacceptable risk that the criminal proceedings may become a dress rehearsal for criminal proceedings or, at least, the

¹ *Sterling Pharmaceuticals Pty Ltd v. The Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 at [15]-[16]; *The Environmental Group Ltd v. Croudace* (unreported, SC(NSW), Santow J, 07.08.98).

² *L & W Investments Pty Ltd v. Della* [2003] NSWCA 140 at [36]-[58].

³ See, generally, *ASIC v. Intertax Holdings Pty Ltd* [2006] QSC 276; *ASIC v. HLP Financial Planning(Aust) Pty Ltd* (2007) 164 FCR 487; *ASIC v. Flugge* [2008] VSC 473.

stalking horse for a decision to be made about whether criminal proceedings should be instigated.

21. The significance of that risk is heightened by two further factors. The first is that the Applicant has chosen not to confine its case to one of civil contravention of condition 3. The Applicant has deliberately chosen in this proceeding to allege and set out to prove that the Respondent has engaged in criminal conduct. In that sense, the manner in which the Applicant has framed its case directly invites attention to the significance of the prospect of subsequent criminal proceedings. It invites the Court to make findings that the Respondent has in fact engaged in criminal conduct at a time when a decision about whether criminal proceedings are to be instigated against the Respondent is under active consideration by the Department.
22. The second is that because this proceeding takes the form of civil proceedings commenced by an environmental organisation against a company, there are no safeguards as to the use in subsequent criminal proceedings of material gathered in the course of this proceeding. For example, had the Minister chose to commence civil penalty proceedings against the Respondent, the Respondent would be afforded the protection of knowing that such proceedings would be automatically stayed if criminal proceedings were subsequently commenced: see ss.486A-486C. These provisions evidence an intention that persons not be prejudiced by civil proceedings and subsequent criminal proceedings. A stay in the present case is consistent with this evident intention.
23. For these reasons, and particularly in light of the intervention of the Minister, it is appropriate to stay the proceeding until such time as it is determined that criminal proceedings will not be commenced against the Respondent.
24. Such a stay is not likely to cause any real prejudice or inconvenience to the Applicant nor the lungfish⁴. Although it is no doubt genuine in its desire to prosecute the proceeding, that must be balanced against the unacceptable risks to the Respondent given the current state of affairs and the nature of the allegations

⁴ Second Affidavit of Philip Murray para 24

which the Applicant has chosen to make. Moreover, it appears from the evidence that the Department is currently investigating matters and should be in a position to make a relevant decision within a few months. In those circumstances a stay of the kind sought will remedy the real risk of injustice to the Respondent and cause no corresponding prejudice to the Applicant.

25. The existence of parallel enforcement investigations is significant in another respect. The Department has foreshadowed that it will make a decision as to enforcement at the conclusion of those investigations and that one matter to be considered is the variation of condition 3. There is the very real prospect that the result of that process will have a material bearing on these proceedings.
26. The Applicant claims a declaration and an injunction about the condition 3 in its current form. There is no statutory provision which gives it special standing to seek a declaration and it does not otherwise allege that it has standing sufficient to seek that remedy. Its only claim to standing is under s.475 in respect of an injunction for future compliance. In terms of remedy, therefore, the real issue in the proceeding is whether the Applicant will obtain an injunction requiring any alleged non-compliance with condition 3 to be remedied for the future.
27. Of course, should condition 3 be varied in a material respect that relief will become otiose. It will also mean that substantial work and costs will be wasted on both sides. That is particularly significant in the context of the Applicant which, it is to be expected, does not have significant capacity to pay a costs order.
28. For these reason also, the justice of the case favours a temporary stay of the proceedings. Such a stay does not involve subordinating the judicial power of the Court to the executive power of the Commonwealth. The Court will always retain control over its processes and the power to reactivate the proceeding at any time⁵. Such a stay merely involves recognition of the realities of the situation. There is the real prospect, in the relatively near term, of an event which may render the proceeding otiose or substantially alter the course of them. From the perspective of

⁵ *Sterling Pharmaceuticals* at [25].

the Court's and the parties' time and resources it is better to wait a relatively short period to enable that process to take its course rather than to risk a significant waste of time and money. As mentioned, such a course will not cause prejudice to the Applicant. Indeed it is likely to be beneficial to the proceeding in that it will provide desirable certainty and the results of the investigation are likely to be of material assistance even if the proceeding progresses.

Damian Clothier

2 December 2008