



**WIDE BAY BURNETT CONSERVATION COUNCIL INC**

Applicant

**BURNETT WATER PTY LTD (ACN 097 206 614)**

Respondent

**APPLICANT'S SUBMISSIONS IN REPLY  
TO MOTION FOR STAY**

**Material to be read**

The Applicant reads the following material:

1. Affidavit of Jo-Anne Bragg affirmed and filed on 6 November 2008;
2. Affidavit of Reginald Franklin Thornton affirmed on 24 November 2008 and filed on 2 December 2008;
3. Affidavit of Jean Joss affirmed on 2 December and filed on 3 December 2008; and
4. Affidavit of David Carl Kreutz sworn and filed on 2 December 2008.

**Introduction**

5. The Respondent's motion to stay the proceedings is based on a misunderstanding of the nature of the proceedings brought by the Applicant under s475 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the threat of potential criminal prosecution is used as a false stalking horse for the Respondent's real purpose: to delay or avoid needing to address the merits of the proceedings. The case law cited by the Respondent concerned materially different circumstances and does not support the stay of proceedings in this case.

**Nature of proceedings under s 475**

6. The Respondent's submission at [19] that it "is unjustly exposed to having defend civil proceedings in circumstances where the spectre of other proceedings

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IN REPLY TO MOTION FOR  
STAY

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(particularly criminal proceedings) looms over it”<sup>1</sup> misunderstands the nature of proceedings under s475 of the Act and the legitimate and separate role that interested persons have in enforcing the Act in the Court. The Legislature has deliberately chosen to create a power for interested persons to commence proceedings irrespective of the views of the Executive represented by the Environment Minister or the Attorney-General. The role of interested persons is to act as surrogate regulators<sup>2</sup> and they are entitled to litigate to enforce the Act irrespective of the views of the Executive.<sup>3</sup>

7. As Black CJ and Finkelstein J recognised in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 429-430 [9]-[10], the leading case for the nature of proceedings under s 475 of the EPBC Act but omitted in the submissions filed by the Respondent:

A prosecution for an offence against the EPBC Act must be instituted by the Commonwealth Director of Public Prosecutions [and] the decision to prosecute is made by the Director, independently of the views of the Executive. If a person has engaged or proposes to engage in conduct that would be an offence under the EPBC Act, s 475 provides that the responsible Minister, “an interested person” (other than an unincorporated organisation) or a person acting on behalf of an unincorporated organisation that is “an interested person” may apply to the Federal Court for an injunction restraining the person from engaging in that conduct. In the case of an organisation, “interested person” is defined in s 475(7). ... The Minister’s decision to bring or not to bring a *civil* proceeding for an injunction may be informed by policy considerations. So might a decision by an interested person to bring proceedings.

...

We take it to be settled law that provided the jurisdiction of the Federal Court is engaged by an action in respect of subject matter with which the Court can deal, and the action is instituted by an applicant who has standing, and the action is not oppressive, vexatious or otherwise an abuse of process and, finally, the Court can assume jurisdiction over the defendant (by service or submission), the Court cannot refuse to adjudicate the dispute. The reason is explained by Brennan J in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 (at 239):

Generally speaking, it is of the nature of a legal right that the person in whom it is vested is entitled to invoke the State’s power to enforce it. For that purpose the courts are at the service of litigants, and the rule of law rests on the courts’ duty to exercise their jurisdiction when litigants invoke it.

8. Black CJ and Finkelstein J reiterated and expanded upon the nature of applications under s 475 by interested persons at 431 [19]-[21]:

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<sup>1</sup> Submissions on Behalf of the Respondent, 2 December 2008, at [19].

<sup>2</sup> To use the term coined by Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998), Chs 3 and 6, pp 101-104, 408-413. Creation of wide standing to enforce public remedies such as environmental protection laws and for judicial review was supported by the Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) at [4.15] in these terms: “Political, bureaucratic and financial constraints mean the Attorney-General and other government plaintiffs cannot adequately represent the public interest in all matters. There is an important role to be played by private plaintiffs in the maintenance of the rule of law through the review of government decisions and the enforcement of statutory rights and obligations.”

<sup>3</sup> Indeed, in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, the Full Court held an interested person could litigate under s 475 in circumstances where the proceedings were actively *opposed* by the Attorney-General.

Parliament has determined that it is in the public interest that the enforcement provisions of the EPBC Act should be unusually comprehensive in scope. Section 475 of the EPBC Act and its related provisions form part of a much larger enforcement scheme contained in the 21 divisions of Pt 17. ...

It is an important and distinctive feature of Div 14 of Pt 17 of the EPBC Act that, like s 80(4) of the TP Act, the Federal Court is expressly empowered to grant an injunction restraining a person from engaging in conduct whether or not it appears to the Court that the person intends to engage again in conduct of that kind and, even, whether or not there is a significant risk of injury or damage to the environment if the person engages or continues to engage in conduct of that kind: see s 479(1)(a) and (c).

The public interest character of the injunction that may be granted under s 475 of the EPBC Act is also emphasised by other elements in Div 14 of Pt 17. Thus, as we have noted, standing is conferred upon “an interested person” to apply to the Court for an injunction. ...

9. The link made by Black CJ and Finkelstein J to the *Trade Practices Act 1974* (TP Act) when considering the enforcement mechanisms created under the EPBC Act was apt. The EPBC Act has had the same object and reforming effect for environmental protection as the TP Act had for consumer protection. It created a new layer of Commonwealth laws that widened the common law rights<sup>4</sup> and supplemented State environmental laws.
10. To achieve the objects of the EPBC Act,<sup>5</sup> the Legislature created a wide jurisdiction with as its centre-piece the assessment and approval system in Chapters 2-4, Parts 3-9, of the Act administered primarily by the Minister<sup>6</sup> and a series of overlapping and complimentary enforcement mechanisms. Table 1 states the five main enforcement options under the Act, including negotiation backed by the threat of litigation.

**Table 1: Enforcement options in the EPBC Act in decreasing order of gravity**

<b>Enforcement option</b>	<b>Able to be sought by:</b>	<b>Court</b>
1. Criminal prosecution	Cth DPP	State courts
2. Civil penalty provision	Minister	Federal Court
3. Section 475 injunction	Minister or interested person	Federal Court
4. Administrative order	Minister	N/A
5. Negotiation / threat of litigation	Minister or interested person	N/A

<sup>4</sup> A pertinent example is the widened standing in s 475 to bring proceedings in a court to restrain an offence against the EPBC Act.

<sup>5</sup> Stated in s 3 of the EPBC Act.

<sup>6</sup> Many decisions of the Court have considered the objects and structure of the EPBC Act in the context of judicial review of the Minister’s decisions under the Act. A leading decision is *Minister for the Environment and Heritage v Queensland Conservation Council Inc & Anor* (2004) 139 FCR 24 (the Nathan Dam Case) in which the Full Court (Black CJ, Finkelstein and Finn JJ) found the Minister erred in failing to consider the downstream impacts of farmers using water from a dam when assessing the impacts of the dam under s 75 of the Act.

11. A full list of civil cases decided under the EPBC Act is included as an Appendix for the Court's reference. In practice, over the first eight years of the Act's operation:
- (a) There have been no large criminal prosecutions under the EPBC Act, but approximately 30 prosecutions have occurred involving relatively minor Ch 5 (Biodiversity conservation) offences<sup>7</sup> decided summarily at the magistrates or local court level.
  - (b) There have been few proceedings brought by the Minister for civil penalties or injunctions but an important example was the Greentree Case in which Sackville J granted an injunction, rehabilitation order and \$450,000 pecuniary penalty in proceedings brought by the Minister against wheat farmers in NSW for clearing a Ramsar wetland and preparing to plant a crop in it.<sup>8</sup>
  - (c) Injunctions have been granted by the Court under s 475 of the Act to interested persons in several cases, one of which was overturned on appeal.<sup>9</sup> In *Booth v Bosworth* (2001) 114 FCR 39 (Flying Fox Case), Branson J granted an injunction restraining the operation of electric grids to kill flying-foxes on land adjacent to the Wet Tropics World Heritage Area. In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, Allsop J granted a declaration and injunction restraining Japanese whaling in the Australian Whale Sanctuary adjacent to Antarctica.
12. The Respondent's submission at [19] that it "is unjustly exposed to having defend civil proceedings in circumstances where the spectre of other proceedings (particularly criminal proceedings) looms over it" misunderstands that in any civil proceeding under the EPBC Act there is always the potential for later criminal proceedings. This is because the structure of civil and criminal provisions mirrors each other virtually throughout the Act.<sup>10</sup> If civil proceedings were not allowed where criminal prosecution might follow, then virtually any civil proceeding would be liable to be stayed. Such an outcome would frustrate the legislative intention of creating a range of flexible enforcement options and surrogate regulators with a right to seek to enforce the Act irrespective of the views of the Executive.
13. The Respondent's complaint at [21] that the Applicant has "chosen in this proceeding to allege and set out to prove that the Respondent has engaged in criminal conduct"<sup>11</sup> is correct but it would be artificial for the Applicant to

<sup>7</sup> Such as Indonesian fishermen prosecuted for killing dolphins for shark bait in the Australian Whale Sanctuary.

<sup>8</sup> *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198; [2004] FCA 741; and *(No 3)* [2004] FCA 1317; (2004) 136 LGERA 89. The decision was upheld on appeal: *Greentree v Minister for the Environment and Heritage* (2005) 144 FCR 388; [2005] FCAFC 128 (Kiefel, Weinberg and Edmonds JJ).

<sup>9</sup> *Brown v Forestry Tasmania* [2005] FCA 1210; [2006] FCA 468; [2006] FCA 469; [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCA 604; [2007] FCAFC 186; [2008] HCATrans 202.

<sup>10</sup> Consider, for example, the civil penalty provisions and criminal offences provisions of Part 3, of which ss 12 and 15A are an example. These provisions mirror each other with relatively minor differences in relation to fault elements in criminal provisions.

<sup>11</sup> Submissions on Behalf of the Respondent, 2 December 2008, at [21].

proceed in any other way in the circumstances where the provisions of ss 142, 142A and 142B are almost identical and open on the facts of this case. Had the applicant not pleaded the criminal provisions, or if the Applicant were to seek leave to remove reference to them in the Statement of Claim, the Court would still need to be mindful of them.

14. While proceedings under s475 of the EPBC Act are civil proceedings to which the civil standard of proof applies,<sup>12</sup> the Applicant accepts that due to the seriousness of the matters involved in the proceedings, the fact that the cause of action involves alleged breaches of criminal laws, and the gravity of the consequences flowing from a finding that the respondent has contravened the Act, the civil standard of proof is at the high end of the balance of probabilities.<sup>13</sup>
15. The Respondent's submission at [22] that ss 486A-486C "evidence an intention that persons not be prejudiced by civil proceedings and subsequent criminal proceedings" is mistaken. It is significant that s486C expressly provides that criminal proceedings *may* be started after a pecuniary penalty has been imposed. Sections 486A-486C do not refer to civil injunctions under s 475 and they have no application to the present proceedings brought by an interested person. The Applicant is not the Minister and the proceedings do not seek a civil penalty, nor could the Applicant seek such a penalty.<sup>14</sup>

#### **Authorities relied upon by the Respondent**

16. In addition to misunderstanding the nature of proceedings under s475 of the EPBC Act, the Respondent's motion for a stay is not well supported by the case law relied upon by it.<sup>15</sup> In particular, *Sterling Pharmaceuticals Pty Ltd v The Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287, which the Respondent relies upon heavily, was a very different case. In that case Lockhart J stayed proceedings between subsidiaries of two multinational corporations because proceedings on substantially the same issues were pending in proceedings brought by subsidiaries of the corporations in the New Zealand High Court. That case is very different to these proceedings, where there are no other proceedings pending.
17. The case law referred to involving the Australian Securities and Investments Commission (ASIC), a statutory authority with strong regulatory powers, is also very different in nature to the current proceedings. Those cases are clearly distinguishable from the present proceedings.

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<sup>12</sup> Section 140 of the *Evidence Act 1995*.

<sup>13</sup> *Employment Advocate v Williamson* (2001) 111 FCR 20 at [65]-[69] (Branson J, Kenny J agreeing); *Hadgkiss v Sunland Constructions Pty Ltd* [2007] FCA 346 at [11] (Kiefel J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (Allsop J).

<sup>14</sup> Section 481 provides that only the Minister may apply for a civil penalty.

<sup>15</sup> *Sterling Pharmaceuticals Pty Ltd v. The Boots Company (Australia) Pty Ltd* (1992) 34 FCR 287 at [15]-[16]; *L & W Investments Pty Ltd v. Della* [2003] NSWCA 140 at [36]-[58]; *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.

## Harm to lungfish

18. The Respondent's submission at [24] that "a stay is not likely to cause any real prejudice or inconvenience to ... the lungfish" is contradicted by the evidence of Professor Jean Joss.<sup>16</sup> There are legitimate and real concerns that recruitment of juvenile lungfish will be adversely affected by lack of fish passage over Paradise Dam and that the loss of connectivity in the population will have serious long-term effects on lungfish in the Burnett River. The grant of an indefinite stay in such circumstances would not advance the objects of the Act stated in s 3.

## Declaration

19. The Respondent's submission at [26] that "there is no statutory provision which gives it special standing to seek a declaration" overlooks s 21 of the *Federal Court of Australia Act 1976*,<sup>17</sup> which permits the Court to make binding declarations of right in relation to a matter in which it has original jurisdiction.<sup>18</sup>
20. The declaration sought in this case is not to clarify the reasons for judgment<sup>19</sup> or declare findings of fact, both of which are impermissible.<sup>20</sup> As the Full Court said in *Warramunda Village Inc v Pryde* (2001) 105 FCR 437 at [8]:

The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment. This is even more strongly the case when the conclusion is not one from which any right or liability necessarily flows.

21. The declaration sought in this case is to clarify with precision and in a binding way the meaning of condition 3. It is not intended to declare findings of fact, nor does it seek to declare that the Respondent has contravened either a civil or criminal offence provision of the EPBC Act (that is a separate matter for the Court to determine on the evidence, whereas the construction of condition 3 is a question of law).

## Costs

22. Whichever side is successful in their motion, the appropriate order for costs is that costs be reserved or costs in the cause.

**Dr Chris McGrath**  
**Counsel for the Applicant**  
**4 December 2008**

<sup>16</sup> Affidavit of Jean Joss affirmed on 2 December and filed on 3 December 2008.

<sup>17</sup> Although this section is stated in the Application filed on 7 October 2008.

<sup>18</sup> Allsop J granted a declaration in proceedings brought under s 475 in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; however, note *Mees v Roads Corp* [2003] FCA 306; [2003] FCA 410.

<sup>19</sup> See *Mees v Roads Corporation* [2003] FCA 410 (Gray J).

<sup>20</sup> *Great Lakes Council v Lani* [2007] NSWLEC 681; (2007) 158 LGERA 1 (Preston CJ)

## APPENDIX – LIST OF EPBC ACT CASES<sup>21</sup>

Cases decided under the EPBC Act (as at 1 December 2008) in rough chronological order and divided into four groups:

- A. Cases for injunctive relief and civil penalties;
- B. Judicial review cases;
- C. Merits review cases in the AAT; and
- D. Criminal prosecutions.

To avoid confusion, while many of these cases have been reported in the FCR, ALR or LGERA, only media neutral citations of different decisions in the history of each case are listed. Cases that have settled, been discontinued, or remain pending without any judicial decision at this stage are not included.

### A. Cases for injunctions and civil penalties

1. *Booth v Bosworth* [2000] FCA 1878; [2001] FCA 1278; [2001] FCA 1453; [2001] FCA 1718; *Bosworth v Booth* [2004] FCA 1623 (*Flying Fox case*).
2. *Schneiders v Queensland* [2001] FCA 553; *Jones v Queensland* [2001] FCA 756 (*Fraser Island Dingo case*).
3. *Mees v Roads Corp* [2003] FCA 306; [2003] FCA 410 (*Scoresby Freeway case*).
4. *Minister for the Environment & Heritage v Wilson* [2004] FCA 6 (Civil penalty of \$12,500 for shark netting in the Great Australian Bight Marine Park).
5. *Minister for Environment & Heritage v Greentree* [2003] FCA 857; [2004] FCA 741; [2004] FCA 1317; *Greentree v Minister for the Environment & Heritage* [2005] FCAFC 128 (*Greentree case*).
6. *Save the Ridge Inc v National Capital Authority* [2004] FCA 996; [2004] FCAFC 209 (*Canberra Gungahlin Drive Extension case* – injunction to restrain clearing).
7. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; [2005] FCA 664; [2006] FCAFC 116; [2007] FCA 124; [2008] FCA 3; [2008] FCA 36 (*Japanese Whaling case*).
8. *Brown v Forestry Tasmania* [2005] FCA 1210; [2006] FCA 468; [2006] FCA 469; [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCA 604; [2007] FCAFC 186; [2008] HCATrans 202 (*Bob Brown's Wielangta Forest case*).
9. *Minister for Environment and Heritage v Warne* [2007] FCA 599 (Civil penalty of \$25,000 for trawling in Mermaid Reef National Marine Park Nature Reserve, WA).

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<sup>21</sup> Updated from McGrath C, "Flying-foxes, dams and whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324.

## B. Judicial review cases

1. *Humane Society International v Minister for the Environment & Heritage* [2003] FCA 64 (*HSI Flying Fox Administrative Guidelines case*).
2. *Queensland Conservation Council Inc v Minister for Environment & Heritage* [2003] FCA 1463; *Minister for the Environment & Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (*Nathan Dam case*).
3. *Mees v Kemp* [2004] FCA 366; [2004] FCA 549; [2005] FCAFC 5 (*Scoresby Freeway case (No 2)*).
4. *Tasmanian Conservation Trust v Minister for Environment & Heritage* [2004] FCA 883 (*Meander Dam case*).
5. *Save the Ridge Inc v Commonwealth of Australia* [2004] FCA 1167; [2004] FCA 1289; [2005] FCA 17; [2005] FCA 157; [2005] FCA 355; [2005] FCAFC 203; [2006] FCAFC 51 (*Canberra Gungahlin Drive Extension case – judicial review*).
6. *Paterson v Minister for the Environment & Heritage* [2004] FMCA 924 (*Powerlink transmission line case – lack of standing*).
7. *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736 (*Wildlife Whitsunday case*).
8. *Bald Hills Wind Farm Pty Ltd v Campbell, Minister for Environment & Heritage* [2006] FCA 848 (*Bald Hills Wind Farm case*).
9. *The Wilderness Society Inc v Turnbull, Minister for the Environment & Water Resources* [2007] FCA 1178; [2007] FCA 1863; [2007] FCAFC 175; [2008] FCAFC 19 (*Gunns Pulp Mill case*).
10. *Investors for the Future of Tasmania Inc v Minister for the Environment & Water Resources* [2007] FCA 1179; [2007] FCA 1864 (*Second Gunns Pulp Mill case*).
11. *Anvil Hill Project Watch Assn Inc v Minister for the Environment & Water Resources* [2007] FCA 1480; [2008] FCAFC 3 (*Anvil Hill Coal Mine case*).
12. *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8; [2008] FCA 399; [2008] FCA 1106 (*Port Phillip Bay dredging case*).
13. *Phosphate Resources Ltd v Minister for the Environment, Heritage & the Arts* [2008] FCA 385; [2008] FCA 1521 (*Christmas Island Phosphate Mining case*).
14. *Lawyers for Forests Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 588 (*Third Gunns Pulp Mill case*).
15. *Your Water Your Say Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 670; [2008] FCA 900 (*Gippsland Desalination Plant case*).
16. *Lansen v Minister for Environment & Heritage* [2008] FCA 903; [2008] FCA 909; [2008] FCA 1367 (*McArthur River Mine case*).

### C. Merits review cases in the AAT

1. *Wildlife Protection Assn of Australia Inc and Minister for the Environment & Heritage, Re* [2003] AATA 236 (NSW kangaroo management program).
2. *Wildlife Protection Assn of Australia Inc and Minister for Environment & Heritage* [2004] AATA 1383 (Qld, SA and WA kangaroo harvesting plans).
3. *International Fund for Animal Welfare (Aus) Pty Ltd and Minister for Environment & Heritage, Re* [2005] AATA 1210; [2006] AATA 94 (*Asian Elephants case*).
4. *Humane Society International and Minister for the Environment & Heritage, Re* [2006] AATA 298 (*Southern Bluefin Tuna case*).
5. *Wildlife Protection Assn of Australia Inc and Minister for Environment and Heritage, Re* [2006] AATA 29; [2006] AATA 953 (Flinders and King Island, Tasmania, wallaby harvesting plans).
6. *Nature Conservation Council of NSW Inc and Minister for Environment & Water Resources, Re* [2007] AATA 1876 (*Grey Nurse Shark case*).

### D. Criminal prosecutions

1. *Morgan v The Queen* [2007] NSWCCA 8 (appeal against sentence of imprisonment for smuggling bird eggs).

In addition to *Morgan v The Queen*, there have been approximately 30 prosecutions involving Ch5 (Biodiversity conservation) offences decided summarily at the magistrates or local court level, according to annual reports on the operation of the Act.<sup>22</sup> For example the 2005-06 annual report on the operation of the EPBC Act notes:

Parks Australia successfully prosecuted five residents of the Cocos (Keeling) Islands for possession of 216 dead booby birds and 14 dead frigate birds, both listed migratory species. All of the defendants pleaded guilty in the Cocos (Keeling) Islands Magistrate's Court on 7 December 2005 and were convicted under section 211C of the EPBC Act and released on two-year (\$5,000) good behaviour bonds. Each was ordered to pay legal costs of \$2,173.9.

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<sup>22</sup> Available at <http://www.environment.gov.au/about/publications/annual-report/index.html> viewed 10 June 2008.