

**WIDE BAY BURNETT CONSERVATION  
COUNCIL INC**

Applicant

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

Respondent

**RESPONDENT'S OUTLINE OF SUBMISSIONS  
ON ITS NOTICE OF MOTION**

**Introduction**

1. This outline addresses:
  - (a) The Respondent's application for further particulars of the allegation that it recklessly contravened a condition attached to the approval and so committed an offence against, or otherwise contravened, s142A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the "Act").
  - (b) The Respondent's application to require the Applicant to specify the design of the fish transfer device which, by the grant of the injunction sought, the Respondent would be compelled to install and operate.
2. Each of the applications is opposed.

**Further particulars of the alleged reckless contravention**

3. Paragraph 8 of the statement of claim is in the following terms:

The Respondent's contravention of condition 3 set out in paragraph 6 constitutes an offence or other contravention of section 142A of the EPBC Act.

**Particulars of offence against section 142A**

- (a) The Respondent has been reckless as to the contravention; and

- (b) The Respondent's conduct results, will result in, or is likely to have a significant impact on a matter protected by a provision of Part 3 of the EPBC Act, namely the lungfish, a listed threatened species, by:
- (i) stopping, hindering, or reducing upstream and downstream movement or migration of lungfish in the Burnett River for feeding or reproduction;
  - (ii) causing a greater number of lungfish to move downstream in flood events over the dam spillway and, thereby, increasing mortality in the lungfish population due to death or injury of lungfish on the spillway;
  - (iii) unless restrained by the Court the impacts in paragraphs 8(b)(i) and (ii) will continue during the operation of the dam for the indefinite future.
4. The allegation in the body of pleading comprises a bald assertion of an offence or other contravention, absent a statement of the material facts necessary to support that conclusion.
5. This alone would render the allegation liable to be struck out, it being well established that a statement of claim which simply repeats the language of a statutory provision and asserts a contravention of that provision, without more, will be struck out: see, e.g., *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 at 114-15; *H 1976 Nominees Pty Ltd v Galli* (1979) 30 ALR 181 at 186-187; *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at [23].
6. Further, on a strict application of the pleading rules, the absence of the necessary material facts could not be cured by the provision of particulars: see, e.g., *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 711-713; *H 1976 Nominees Pty Ltd v Galli* (1979) 30 ALR 181 at 186-187.
7. However, in recognition of the modern reality that the Court will not always insist on strict adherence to the pleading rules provided that a clear statement of the case emerges from the material facts alleged and the particulars given: see, e.g., the discussion in *Queensland v Pioneer Concrete (Qld) Pty Ltd* (1999) ATPR 41-691 at 42,827-9, the Respondent has refrained at this stage from applying to strike out paragraph 8 of the statement of claim, and instead has sought particulars.

8. The Respondent's first request was made on 12 November 2008.
9. The Applicant's response was provided on 19 November 2008.
10. That response is patently deficient in a number of respects.
11. *First*, it is expressed in inclusive terms, and so leaves the Applicant's case wholly unconfined. In this regard, it is in the following terms:

(b) The facts, matters and circumstances relied upon in support of the allegation that the respondent's alleged contravention of condition 3 has been reckless include:

(i) The allegation of recklessness relates primarily to paragraphs 6(d) and (e) of the statement of claim, the facts that the upstream fishway and the downstream fishway do not operate continuously and that the downstream fishway was designed to only operate above 62m EL.

[emphasis added]

12. The Applicant is thus seeking to hide behind the impermissible generality of the allegation in paragraph 8 of the statement of claim, and to reserve for itself the right to run any new case at all. This should not be permitted. Rather, the Applicant should be compelled to identify in a comprehensive way each aspect of the conduct of the Respondent which it seeks to characterise as reckless. The Respondent's objection to providing further particulars based on the statutory definition of "action" is misconceived because:

- (a) It is important to distinguish between the "action" which was approved, and the "action" or "omission" the subject of the allegation of recklessness.
- (b) The former may be taken to refer to the whole of a project, etc (s523 of the Act), whereas the latter directs attention to the component sought to be characterised as reckless.
- (c) Were it otherwise, an offence could only be committed against s142A if the whole of the project were carried out recklessly. That is obviously not the case.
- (d) And, indeed, that is not how the Applicant has framed its case. It has identified particular aspects of the overall project which it seeks to characterise as reckless.

- (e) The point is that it must identify all such aspects in a comprehensive way, and with the precision demanded by the serious nature of the allegations.
13. **Secondly**, the Applicant's response makes a number of assertions as to what the Respondent knew (subparagraphs (b)(iv)-(viii)) or intended (subparagraphs (b)(ii) and (iii)), but nowhere does the Respondent:
- (a) say who on behalf of the Respondent had the relevant knowledge or intention;
  - (b) identify the facts from which the alleged knowledge or intention is to be inferred.
14. Particulars of these matters should be provided: see, e.g., *Lyons v Kern Konstructions (Townsville) Pty Ltd* (1983) 47 ALR 114 at 124-126.
15. **Thirdly**, a related problem emerges from the Applicant's stance as articulated in subparagraph (b)(ix):
- The allegation of recklessness relates to the respondent's conduct and no individual person within the respondent is alleged to have been reckless on behalf of the respondent.
16. The Respondent is a corporation which can only act through human agents. Yet the Applicant refuses to identify the human agents responsible for the conduct about which it complains.
17. This approach cannot be justified in light of the provisions of s498B of the Act, which provides:
- (1) Any conduct engaged in on behalf of a body corporate:
    - (a) by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or
    - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is to be taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

- (2) If, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
- (a) that the conduct was engaged in by a person as mentioned in paragraph (1)(a) or (b); and
  - (b) that the person had that state of mind.

18. This provision raises a large number of questions about the Applicant's case which the Applicant's pleading and particulars fail to answer. For example, is the Respondent alleged to have been reckless by reason of the conduct of, or conduct at the direction or with the consent or agreement of, a director, an employee or an agent? If so, whom? And what are the details of any necessary direction, consent or agreement? The Applicant cannot avoid confronting these and other important questions, which are necessarily at the heart of its case under s142A.
19. *Fourthly*, the Applicant's case is that the (inadequately particularised) reckless conduct of the Respondent has caused, or is likely to cause, a significant impact on the lungfish.
20. This requires the identification of the material facts relied upon to establish the causal link between the Respondent's conduct and the impact relied upon: compare, e.g., *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210, where Lord Watson said at 221:
- There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and injuries complained of stood to each other in the relation of cause and effect.
21. See also *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215 at 221-222.

22. However, the Applicant's particulars are deficient in this area: first, given that the Applicant has refused to identify in a comprehensive way all of the conduct of the Respondent upon which it relies, it follows that its particulars necessarily fail to address the causal significance of all of the salient conduct of the Respondent; secondly, the particulars that have been given are again inclusive rather than comprehensive (subparagraph (d)(i)(A)); and, thirdly, many of the particulars given are expressed in terms of meaningless generality, and do not appear to suggest the necessary causal link (see, e.g., subparagraphs (d)(i)(D) and (E)).
23. In light of these deficiencies, the Respondent sought further particulars by its solicitors' letter of 24 February 2009. However, the Applicant objects to providing them.
24. Thus the Respondent seeks to have the Court compel the Applicant to provide these essential particulars.
25. The Applicant has seen fit to level charges of serious misconduct, and such charges must be formulated with precision: compare, e.g., *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559 at [164]-[165].

#### **What will the injunction require?**

26. In *Morris v Redland Bricks Ltd* [1970] AC 653 at 666, Lord Upjohn (with whom the other members of the House of Lords agreed) held:

If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.
27. In the present case, the Court could not, conformably with this principle, grant an injunction in terms of paragraph 2 of the Application.
28. That paragraph requires the installation and continuous operation of something that "is likely to allow any normal sized Australian lungfish ... to move upstream and downstream without injury irrespective of the water level in the dam".
29. This falls squarely within the principle stated in *Morris v Redland Bricks Ltd* [1970] AC 653 at 666. And, in this context, the critical question remains unanswered: what,

as matter of fact, would the Respondent have to do in carrying out the order? What instructions would it have to give its contractors?

30. The Applicant obviously has a view that the current device will not suffice to meet the condition of the approval. What does it say will meet that condition? What is it asking the Court to require of the Respondent?
31. This question will not only be of significance at the end of the case. It has real significance in terms of trial preparation as well. How is the Respondent to prepare a hardship defence until it knows what it is being asked to do? How can the costs be estimated? How can the inconvenience to the Respondent and third parties be assessed?
32. For these reasons, the Applicant should be compelled to specify now the design of the device which it seeks to have the Respondent install and operate.
33. This may be done pursuant to Order 12, r5(1)(b). Or it may be done by striking out paragraph 2 of the Application (upon the footing that such relief could not be granted conformably with the principle stated in *Morris v Redland Bricks Ltd* [1970] AC 653 at 666) and giving leave to file and serve an amended application including a claim for injunctive relief on condition that the amended application include or incorporate a statement of the design.

Dated: 9 March 2009

**D. Gore QC**

**A.M. Pomeranke**