

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD (ACN 097 206 614)

Respondent

**APPLICANT'S SUBMISSIONS IN REPLY TO MOTIONS FOR
PARTICULARS OF RECKLESSNESS AND THE FORM OF RELIEF**

Material to be read

The Applicant reads the following material:

1. The affidavit of Jo-Anne Bragg affirmed and filed on 6 November 2008;
2. The affidavit of Jo-Anne Bragg affirmed and filed 2 March 2009; and
3. The affidavit of Jo-Anne Bragg affirmed and filed on 6 March 2009.

Introduction

4. That Respondent has, in substance, applied for orders that the Applicant provide:
 - (a) Particulars of the action the Applicant alleges the Respondent has taken that recklessly contravenes condition 3 of the approval (as set out in a letter from the Respondent's solicitor dated 24 February 2009¹);
 - (b) Particulars of, or an amended application stating, the design of the fish transfer device which, by the grant of the injunction sought in paragraph 2 of the Application, the Respondent would be compelled to install and operate.
5. The Respondent has not filed an outline of argument explaining the basis of the orders it seeks and this reply is, therefore, provisional.

Request for particulars of recklessness

6. The Applicant objects to the Respondent's request for particulars of recklessness for six reasons:

¹ See the affidavit of Jo-Anne Bragg affirmed and filed on 2 March 2009, p 9.

- (a) the request is late and the pleadings have closed;
 - (b) the request is a second and new set of questions not limited to clarification of the earlier particulars given by the Applicant;
 - (c) there is little utility in particularising further the Applicant's allegations of recklessness due to the issues raised in the Respondent's Defence;
 - (d) many of the requests are for evidence rather than particulars;
 - (e) the request misunderstands the concept of "action" in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act);
 - (f) the particulars already provided by the Applicant are sufficient.
7. The Respondent's request for particulars of recklessness comes several months after the Respondent filed its Defence, on 28 November 2008, and the pleadings have closed. The Respondent has already made one request for particulars of the Statement of Claim, on 12 November 2008, and now asks a new and different set of questions in relation to the allegation of recklessness. In effect, the Respondent seeks to re-open the pleadings.
8. The Respondent's requests for particulars, delivered in two letters on 20 February 2008 and 24 February 2009, are a new set of questions and if the Respondent is allowed to re-open the pleadings, the questions should be limited to clarifying the particulars already provided.
9. There is little purpose to be served in further particularising the Applicant's allegations of recklessness because the Respondent's Defence is wider than responding to the issues raised in the Statement of Claim. The Respondent claims at paragraphs 6(a) and (b) of its Defence that it "has acted honestly and reasonably at all times" and "has not acted recklessly at any time". These allegations are not limited to the issues raised by the Applicant and the Respondent largely refused to provide particulars of these paragraphs of its Defence on the basis that the request for particulars of these matters was a request for evidence.² Due to the unparticularised nature of the claims in the Defence, these issues are very much at large in the proceedings and evidence will be relevant if it goes to prove or disprove the Respondent's honesty, reasonableness or reckless conduct in the design, construction and operation of the fishways generally.
10. Many of the requests now made by the Respondent are for evidence rather than particulars and the Applicant objects to them on this basis. For example, (b)(iii) of the Respondent's letter of 24 February 2009 requests the Applicant to, "in respect of each action and omission relied upon specify each fact relied upon to establish the causal link between the action or omission and the impact identified in the particulars of paragraph 8 of the statement of claim."³ Such facts will be the subject of expert opinion in reports tendered in the proceedings.

² See paragraphs 1 and 2 of the Respondent's Further and Better Particulars of the Defence filed on 6 February 2009.

³ See the affidavit of Jo-Anne Bragg affirmed and filed on 2 March 2009, p 9.

11. The Respondent's request for particulars of the action whereby the Respondent is alleged to have recklessly contravened condition 3 mistakenly attempts to take an atomistic approach to the concept of "action" in s 142A of the EPBC Act. This misunderstands the concept of "action" as used in the EPBC Act. "Action" is defined broadly in ss 523-524A of the EPBC Act to include a project, a development, an activity or series of activities, or an alteration [of these things]. The concept of "action" should be given a commonsense meaning in the EPBC Act and it is incorrect to attempt to break it down into infinitely smaller parts of an overall action (particularly where the purpose is to avoid an action triggering the approval requirements).⁴ Practice under the EPBC Act normally reflects this commonsense and wide approach to defining actions.⁵ For example, the "action" that the Respondent received the approval to which condition 3 was attached was:⁶

to construct and operate the [Paradise] Dam with a capacity of 300,000 megalitres, on the lower Burnett River at 131.2km Average Middle Thread Distance, and make controlled discharges of water for agricultural, commercial, domestic and environmental uses (EPBC 2001/422).

12. The "action" that the Respondent received approval for the Paradise Dam was not broken into the innumerable acts and omissions undertaken by the many people who worked on the design, construction and operation of the dam. Yet this is what the Respondent effectively seeks to have the Applicant identify in relation to the reckless "action" said to have contravened condition 3.
13. The "action" alleged to have contravened condition 3 is identified in paragraph 6 of the Statement of Claim as "failing since the dam became operational to install and operate a fish transfer device suitable for lungfish". However, as particularised in paragraph 12 of the Applicant's Further and Better Particulars of the Statement of Claim, the Respondent's conduct in designing and installing the fishways prior the dam becoming operational (in November 2005) are relevant to whether the contravention was reckless. The relevant action, therefore, is the design, installation and operation of the fish transfer device on the Paradise Dam. That is the logical and commonsense approach to defining the "action" alleged to have contravened condition 3.
14. The Applicant notes that s 142A(1)(b) refers to "action or omission", which suggests a distinction between a positive act and a failure to act. However, read in context of the preceding reference to "takes an action or omits to take an action", in s 142A(1)(a), the reference to "omission" is a reference to omitting to take an action. In the facts of this case, the design, installation and operation of the fish transfer device on the Paradise Dam come within a single "action" as that term is defined in the EPBC Act. On this approach, for example, a failure to operate the

⁴ No case law has considered the concept of action in detail in this context but see the discussion in McGrath C, "Key concepts of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)" (2005) 22 EPLJ 20 at 24-28. There was some discussion of the extent to which government decisions are actions under ss 523 and 524 of the EPBC Act in *Save the Ridge Inc v Commonwealth of Australia* [2005] FCA 17 (Whitlam J); [2005] FCAFC 203 (Black CJ, Emmett and Moore JJ).

⁵ As shown in the many judicial review cases against the Minister's decisions under the Act. See, for example, the leading decision on the impacts of an action in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24 (the Nathan Dam Case). Note: following that decision, s 527E was inserted into the EPBC Act. The definition broadly reflects the Full Court's approach, though in a more complicated and lengthy formula.

⁶ See the affidavit of Jo-Anne Bragg affirmed and filed on 6 November 2008, p 25.

fishways continuously is part of the action of designing, installing and operating the fishways.

15. The particulars already provided are sufficient for the Respondent to know the case it is to meet.⁷ Paragraph 12 of the Applicant's Further and Better Particulars filed on 19 November 2009 identifies the aspects of the design, installation and operation of the fishways said to constitute the Respondent's reckless conduct and the time periods when that conduct occurred. This conduct has been taken by the Respondent through its agents and employees collectively. Section 498B of the EPBC Act deals with liability of corporations for the conduct of directors, employees and agents.⁸

Particulars of the relief sought

16. The Respondent seeks particulars of the design of the fish transfer device which, by the grant of the injunction sought in paragraph 2 of the Application, the Respondent would be compelled to install and operate. While the Respondent only seeks particulars of paragraph 2 of the Application, the declaration and injunction sought by the Applicant are inter-related and need to be considered together. Paragraphs 1 and 2 of the Application state that the Applicant claims:

1. A declaration that condition 3 of the approval for the Paradise Dam granted under the *Environment Protection and Biodiversity Conservation Act 1999* requires Burnett Water Pty Ltd to install and operate continuously until 1 January 2052 a fish transfer device that is likely to allow any normal sized Australian lungfish (*Neoceratodus forsteri*) to move upstream and downstream of the dam without injury irrespective of the water level in the dam.
2. A mandatory injunction that, within 6 months of the date of this order, Burnett Water Pty Ltd comply with condition 3 of the approval for the Paradise Dam granted under the *Environment Protection and Biodiversity Conservation Act 1999* by installing and operating continuously until 1 January 2052 a fish transfer device that is likely to allow any normal sized Australian lungfish (*Neoceratodus forsteri*) to move upstream and downstream of the dam without injury irrespective of the water level in the dam.

17. In this case the alleged contravention of the EPBC Act is a breach of a condition imposed under the Act. The first task for the Court in resolving the case is to determine what the condition requires the Respondent to do – that is the purpose of seeking the declaration in paragraph 1 of the Application. The second task for the Court is to determine whether the Respondent has contravened condition 3. The third task for the Court is to decide whether, as an exercise of the Court's discretion, the injunctive relief sought by the Applicant or whether some other form of relief should be granted.

18. The matters to be taken into account in the exercise of the Court's discretion are wide⁹ but two competing factors are relevant for present purposes. First, the

⁷ Applying the normal principles for particularization stated in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740-741 and *Dare v Pulham* (1982) 148 CLR 658 at 664. While applying these principles, ultimately, the degree of particularity depends on common sense and the circumstances of each case: *American Flange & Manufacturing Co Inc v Rheem Australia Pty Ltd* (1963) 80 WN (NSW) 1294 at 1298.

⁸ Note: Part 2.5 (Corporate criminal responsibility) of the *Criminal Code* does not apply to the EPBC Act pursuant to s 498B(9).

⁹ See generally: *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 335 at 339-341 (Kirby P); *Booth v Bosworth* (2001) 114 FCR 39 at 66-68 (Branson J); *Mudie v Grainriver Pty Ltd* [2002] 2 Qd R

injunction should be sufficiently certain that the Respondent can know whether it is complying but not so precisely expressed as to encourage evasion of the spirit but not the letter of the injunction.¹⁰ Second, and balancing the first consideration, the Court will be conscious that its role should be limited to ensuring compliance with the condition imposed by the Minister and not re-writing that condition. The relevant condition imposed by the Minister set an objective for the Respondent to comply with but did not state the precise means by which the Respondent should achieve that objective. The Court should be wary of attempting to do what the Minister has avoided by specifying the means by which the Respondent should comply with condition 3.

19. If the Court ultimately determines that in the interests of certainty it should state precisely the means by which the Respondent is to comply with condition 3, it is premature to attempt to formulate the form of the injunction at this stage given the highly technical nature of the design and operation of the dam and the fishways. While it is premature to attempt to do this, it is apparent at this stage from the documents disclosed by the Respondent that the design and operation of the dam and the fishways by the Respondent is highly technical and attempting to specify the precise means by which the fishways must be re-designed or operated is fraught with difficulty for the Court.¹¹
20. In limiting the relief sought to clarifying and requiring compliance with the objective imposed by condition 3 the Applicant seeks to confine the Court's role to ensuring that the Respondent complies with condition 3 of the approval. In approving the dam subject to conditions and later modifying the approval to protect lungfish, the Minister chose to set an objective or standard that the Respondent was required to meet, not the means by which the Respondent was to achieve that objective. The Minister took a different approach in condition 4 the approval for the dam by requiring the Respondent to adhere to a detailed management plan and strategy.¹² The Applicant submits that the Court should be wary of trying to re-write condition 3 and impose the specific means by which (in the Court's opinion) the Respondent is to comply with condition 3.

Costs

21. Whichever party is successful in its motion, the appropriate order is that costs be costs in the cause.

Dr Chris McGrath
Counsel for the Applicant
6 March 2009

53 at 58-59 (Davies and Thomas JJA, White J); *Minister for the Environment & Heritage v Greentree (No 3)* [2004] FCA 1317; (2004) 136 LGERA 89 (Sackville J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 431-433 (Black CJ and Finkelstein JJ).

¹⁰ See generally, *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 259 (Lockhart J).

¹¹ See the manuals and logbooks explaining the operation of the fishways annexed to the affidavit of Jo-Anne Bragg affirmed and filed 6 March 2009.

¹² See the affidavit of Jo-Anne Bragg affirmed and filed on 6 November 2008, p 27.