



**WIDE BAY BURNETT CONSERVATION COUNCIL INC**

Applicant

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

Respondent

**AMENDED STATEMENT OF CLAIM**

(O 4, r 6, O 11 and O 13, rr 2 and 9)

Amended on 14 April 2009 pursuant to leave granted by Logan J on 18 March 2009.

**PARTIES**

1. The applicant has standing to bring the proceedings in the Court as an interested person within the meaning of section 475 of the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act") because:
  - (a) the applicant has been incorporated in Australia under the *Associations Incorporation Act 1981* (Qld) since 24 September 1993;
  - (b) during the 2 years immediately before the conduct of the respondent to which the application relates and the making of the application, the applicant's objects or purposes included the protection or conservation of, or research into, the environment; and
  - (c) during the 2 years immediately before the conduct of the respondent to which the application relates and the making of the application, the applicant engaged in a series of activities related to the protection or conservation of, or research into, the environment.
2. The respondent has been a corporation incorporated in Australia and capable of being sued in the Court by the applicant at all material times.

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AMENDED STATEMENT OF CLAIM  
Filed on behalf of the applicant  
Form 7, O 4, r 6, O 11, O 13, rr 2 & 9

Environmental Defenders Office (Qld) Inc  
30 Hardgrave Road  
West End Qld 4101  
Tel: (07) 3211 4466  
Fax: (07) 3211 4655  
Email: [edoqld@edo.org.au](mailto:edoqld@edo.org.au)

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**ACTION APPROVED SUBJECT TO CONDITIONS**

3. The respondent has been the holder of an approval under Part 9 of the EPBC Act since 25 January 2002 for the taking of actions to:
  - (a) construct the Burnett River Dam (now generally known as the “Paradise Dam”) with a capacity of 300,000 megalitres, on the lower Burnett River at 131.2 km Average Middle Thread Distance (“the dam”);
  - (b) operate the dam; and
  - (c) make controlled discharges of water from the dam for agricultural, commercial, domestic and environmental uses,having a reference number EPBC 2001/422 (“the approval”).
4. The approval was originally granted subject to two conditions.
5. The approval was varied on 8 August 2003 to attach an additional seven conditions.
6. As material to these proceedings, condition 3 attached to the approval, as varied on 8 August 2003, provides:
  3. *Burnett Water Pty Ltd must install a fish transfer device on the Burnett River Dam suitable for the lungfish. The fishway will commence when the dam becomes operational.*
7. The reference to “lungfish” in condition 3 of the approval was a reference to the Australian or Queensland lungfish (*Neoceratodus forsteri*), an ancient species of fish endemic to the Burnett River and the Mary River in South-East Queensland (“lungfish”).
8. The approval, as varied on 8 August 2003, has effect until 1 January 2052.
9. The respondent constructed the dam between 2003 and 2005.
10. The dam constructed by the respondent pursuant to the approval:
  - (a) is located on the lower Burnett River at 131.2 km Average Middle Thread Distance approximately 80 km southwest of Bundaberg in the State of Queensland;
  - (b) has a total storage capacity of 300,000 megalitres and a full supply level of 67.60 m Australian Height Datum or Elevation (EL) above sea level;
  - (c) consists of a concrete dam wall up to 37.1 m high and spanning approximately 600 m;

(d) makes controlled discharges of water generally via a main water outlet and when water levels exceed the maximum storage capacity via a stepped spillway; and

(e) has a fish transfer device installed as particularised below.

11. The dam became operational in or about November 2005 and remains in operation.

### **CONTRAVENTION OF CONDITION 3**

#### **Suitable for lungfish**

12. The lungfish population in the Burnett River has low genetic diversity and, therefore, maintaining connectivity within the breeding population is important for the conservation of the population.

13. Lungfish have limited home ranges within the Burnett River but undertake movements upstream and downstream of varying lengths for foraging, breeding and dispersal purposes.

14. Lungfish may move within the Burnett River at any time of year and by day or night, although the species is largely nocturnal and movement beyond home ranges occurs particularly when adult lungfish are seeking suitable spawning habitat between July and December.

15. Prior to the construction of the dam, lungfish were historically able to move upstream and downstream along the reach of the Burnett River where the dam is now constructed with high connectivity and effectively continuously, subject to rare and limited times of zero river flow when no movement was possible between isolated reaches or pools along the river.

16. Lungfish in the Burnett River grow from larvae of a few millimetres in length to adults of 1.5 m in length (“normal sized lungfish”).

17. In the premises, a fish transfer device that is suitable for the lungfish is a fish transfer device that:

(a) is likely to allow any normal sized lungfish to move upstream and downstream of the dam without injury irrespective of the water level in the dam;

(b) operates continuously each day of the year both day and night, subject only to minor interruptions for repairs and maintenance; and/or

(c) is actually operating to allow any normal sized lungfish to move upstream and downstream of the dam.

**Installed fish transfer device**

18. The respondent installed a fish transfer device on the dam consisting of a downstream transfer device (“the downstream fishway”) and a separate upstream transfer device (“the upstream fishway”).
19. The downstream fishway (also known as the “downstream fishlock”) installed by the respondent is as follows:
  - (a) The downstream fishway consists of an inlet chamber on the upstream side of the dam wall in the dam reservoir and a pipe to the downstream side of the dam.
  - (b) Fish, including lungfish, are intended to be attracted into the inlet chamber of the downstream fishway by flowing water.
  - (c) A lock or vertical gate approximately 0.4 m wide at the front entrance of the inlet chamber of the downstream fishway is designed to be periodically closed and the chamber drained to cause the fish to be transported into a pipe and released into a pool on the downstream side of the dam wall connected to the downstream river.
  - (d) The entrance of the downstream fishway is installed between EL 62.0 m and EL 67.6 m and the downstream fishway cannot operate at water levels in the dam reservoir outside this range.
  - (e) The minimum water level in the dam reservoir at which the downstream fishway can operate, EL 62.0 m, is equivalent to 57% of the capacity of the dam.
  - (f) At times when the dam is full and the stepped spillway is overtopping, lungfish may enter the downstream fishway via a passage or “flume” installed from the side of the stepped spillway to the inlet chamber of the downstream fishway.
  - (g) The entrance to the passage or “flume” installed from the side of the stepped spillway to the inlet chamber of the downstream fishway is located at approximately EL 67.0 m – EL 67.6 m.
20. The upstream fishway (also known as the “upstream fishlift”) installed by the respondent is as follows:
  - (a) The upstream fishway consists of a 7,500 litre caged container (known as a “hopper”) into which fish, including lungfish, are intended to be attracted by flowing water at the downstream base of the dam.
  - (b) When operating the caged container used in the upstream fishway is periodically lifted over the dam wall to enable any fish, including lungfish, in the container to be released on the upstream side of the dam.

- (c) To reach the caged container lungfish must swim through either of two passages, one from the main water release channel beneath the dam wall or a second from the side of the dam spillway.
  - (d) The entrances to the two passages through which lungfish must swim to reach the caged container each consist of a vertical slot approximately 0.4 m wide in concrete walls.
  - (e) The passage from the side of the dam spillway is only used when the dam is full and the stepped spillway is overtopping.
21. The downstream fishway is not suitable for lungfish when water levels in the dam reservoir are less than EL 62.0 m because it cannot operate and lungfish cannot enter it.

### **Operation of the fish transfer device**

22. The respondent did not operate the downstream fishway from the commencement of operation of the dam in November 2005 until January 2009 because water levels in the dam reservoir were beneath the entrance at EL 62.0 m until 25 January 2009.
23. The upstream fishway did not commence operation when the dam commenced operation in or about November 2005.
24. During the first 26 months of operation of the dam, from November 2005 to December 2007, the upstream fishway operated for less than 5% of the total time available.
25. During the first 37 months of operation of the dam, from November 2005 to January 2009, the upstream fishway operated for approximately 20% of the total time available, with periods of complete lack of operation of up to 9 months.
26. Monthly figures of the percentage of total hourly time the upstream fishway operated from November 2005 to January 2009 were as follows:
- (a) November 2005 - 0.0 %
  - (b) December 2005 - 0.0 %
  - (c) January 2006 - 0.0 %
  - (d) February 2006 - 0.0 %
  - (e) March 2006 - 0.0 %
  - (f) April 2006 - 5.0 %
  - (g) May 2006 - 4.6 %
  - (h) June 2006 - 2.6 %
  - (i) July 2006 - 12.1 %
  - (j) August 2006 - 0.5 %
  - (k) September 2006 - 0.0 %
  - (l) October 2006 - 0.0 %
  - (m) November 2006 - 0.0 %
  - (n) December 2006 - 0.0 %

(o)	January 2007	-	0.0 %
(p)	February 2007	-	0.0 %
(q)	March 2007	-	0.0 %
(r)	April 2007	-	0.0 %
(s)	May 2007	-	0.0 %
(t)	June 2007	-	5.3 %
(u)	July 2007	-	0.0 %
(v)	August 2007	-	3.5 %
(w)	September 2007	-	0.0 %
(x)	October 2007	-	14.8 %
(y)	November 2007	-	19.1 %
(z)	December 2007	-	15.5 %
(aa)	January 2008	-	12.8 %
(bb)	February 2008	-	1.0 %
(cc)	March 2008	-	67.7 %
(dd)	April 2008	-	86.6 %
(ee)	May 2008	-	67.7 %
(ff)	June 2008	-	46.2 %
(gg)	July 2008	-	79.7 %
(hh)	August 2008	-	22.3 %
(ii)	September 2008	-	18.1 %
(jj)	October 2008	-	47.8 %
(kk)	November 2008	-	16.6 %
(ll)	December 2008	-	93.1 %
(mm)	January 2009	-	100.0 %

### **Contravention of section 142**

27. In the premises, the respondent has contravened section 142 of the EPBC Act in the following manner:

- (a) the respondent is a person whose taking of an action has been approved under Part 9 of the EPBC Act at all material times;
- (b) condition 3 attached to the approval required the respondent at all material times to:
  - (i) install a fish transfer device on the dam suitable for the lungfish; and
  - (ii) commence the fishway when the dam became operational; and
- (c) the respondent has contravened condition 3 attached to the approval by:
  - (i) installing the downstream fishway with an operation range of water levels in the dam reservoir between EL 62.0 m and EL 67.6 m, such that it is not suitable for lungfish when water levels in the dam reservoir are beneath EL 62.0 m because it cannot be operated and lungfish are unable to enter it;

- (ii) failing to commence to operate the downstream fishway when the dam became operational in or about November 2005;
  - (iii) failing to operate the downstream fishway continuously, subject only to minor interruptions for repairs and maintenance, after the dam became operational in or about November 2005;
  - (iv) failing to operate the downstream fishway between November 2005 and January 2009;
  - (v) failing to commence to operate the upstream fishway when the dam became operational in or about November 2005;
  - (vi) failing to operate the upstream fishway continuously, subject only to minor interruptions for repairs and maintenance, after the dam became operational in or about November 2005; and/or
  - (vii) failing to operate the downstream fishway for the periods particularised in paragraph 26.
28. The respondent is proposing to contravene section 142 of the EPBC Act in the following manner:
- (a) the respondent is a person whose taking of an action has been approved under Part 9 of the EPBC Act during the period between 25 January 2002 and 1 January 2052;
  - (b) condition 3 attached to the approval requires the respondent to:
    - (i) install a fish transfer device on the dam suitable for the lungfish;
    - (ii) commence the fishway when the dam becomes operational and thereafter operate the fishway while the approval has effect until 1 January 2052; and
  - (c) the respondent proposes to contravene condition 3 attached to the approval in the future until 1 January 2052 by:
    - (i) failing to operate the downstream fishway whenever water levels in the dam reservoir fall beneath EL 62.0 m;
    - (ii) failing to operate the downstream fishway continuously, subject only to minor interruptions for repairs and maintenance; and/or
    - (iii) failing to operate the upstream fishway continuously, subject only to minor interruptions for repairs and maintenance.

**JURISDICTION TO GRANT INJUNCTION**

29. In the premises, the Court's discretion to grant an injunction under section 475 of the Act is enlivened because the respondent has engaged in conduct consisting of an act or omission that constitutes a contravention (other than an offence) of the EPBC Act, namely, in the circumstances set out in paragraphs 27(a) and (b):
- (a) the act described in paragraph 27(c)(i);
  - (b) the omission described in paragraph 27(c)(ii);
  - (c) the omission described in paragraph 27(c)(iii);
  - (d) the omission described in paragraph 27(c)(iv);
  - (e) the omission described in paragraph 27(c)(v);
  - (f) the omission described in paragraph 27(c)(vi); and/or
  - (g) the omission described in paragraph 27(c)(vii).
30. In the premises, the Court's discretion to grant an injunction under section 475 of the Act is enlivened because the respondent proposes to engage in conduct consisting of an omission that constitutes a contravention (other than an offence) of the EPBC Act, namely, in the circumstances set out in paragraphs 28(a) and (b):
- (a) the omission described in paragraph 28(c)(i);
  - (b) the omission described in paragraph 28(c)(ii); and/or
  - (c) the omission described in paragraph 28(c)(iii).
31. In the premises, the Court's discretion to grant a mandatory injunction under section 475(4) of the EPBC Act is enlivened because the respondent has failed to do an act and the failure did constitute a contravention (other than an offence) of the Act, namely, in the circumstances set out in paragraphs 27(a) and (b):
- (a) failing to install the downstream fishway in a manner that it could operate at any water level in the dam, rather than the limited range of operation described in paragraph 27(c)(i);
  - (b) the failure described in paragraph 27(c)(ii);
  - (c) the failure described in paragraph 27(c)(iii);
  - (d) the failure described in paragraph 27(c)(iv);
  - (e) the failure described in paragraph 27(c)(v);
  - (f) the failure described in paragraph 27(c)(vi); and/or

(g) the failure described in paragraph 27(c)(vii).

32. In the premises, the Court's discretion to grant a mandatory injunction under section 475(4) of the Act is enlivened because the respondent is proposing to fail to do an act and the failure would constitute a contravention (other than an offence) of the EPBC Act, namely, in the circumstances set out in paragraphs 28(a) and (b):

(a) the failure described in paragraph 28(c)(i);

(b) the failure described in paragraph 28(c)(ii); and/or

(c) the failure described in paragraph 28(c)(iii).

### **JURISDICTION TO GRANT DECLARATION**

33. In the premises, the Court has original jurisdiction to grant an injunction under s 475 of the EPBC Act in this matter.

34. In the premises, the Court has a discretion under s 21 of the *Federal Court of Australia Act 1976* to make a binding declaration of right as to the interpretation of condition 3 of the approval.

### **FACTS RELEVANT TO COURT'S DISCRETION**

#### **Lungfish are a listed threatened species**

35. The Burnett River basin is one of the most developed river catchments in Queensland containing 26 water storages, including seven on the main river channel of which the dam is one.

36. At a height of 37.1 m, the dam is much higher and a greater impediment to lungfish movement than other water infrastructure constructed in the lower Burnett River, which otherwise consists of weirs and a tidal barrage.

37. The dam is located approximately in the centre of the lungfish population in the Burnett River basin and effectively divides the population in two.

38. Inundation as a result of dams and weirs removes the breeding habitat of lungfish (shallow water containing dense macrophytes).

39. Dam walls block the movement of lungfish upstream and restrict movement downstream to passage over the dam's spillway unless an effective fish transfer device is operating.

40. Lungfish can be injured or killed when they pass over the top of dam walls or spillways during high water flows, particularly a stepped spillway of the height constructed on the dam.

41. Lungfish are a long-lived, slow growing species that depend on high adult survivorship to maintain a stable population size and increased adult mortality from anthropogenic factors such as deaths of adults on dam spillways may cause their populations to substantially decline over time.
42. As a result of breeding habitat reductions, restrictions on lungfish passage and increased adult mortality on the Burnett River due to the construction of dams and weirs the lungfish population on the Burnett River is likely to undergo a substantial decline within the next three generations.
43. As a result of threats to lungfish populations in the Burnett River and Mary River from dam and weir development the Minister administering the EPBC Act (“the Minister”) included lungfish on the list of threatened species, in the category of “vulnerable”, established under section 178 of the EPBC Act on 6 August 2003 and lungfish remain on the list in that category.
44. As a listed threatened species, lungfish are a matter of national environmental significance pursuant to sections 18 and 18A of Part 3 of the EPBC Act.

#### **Significant impact to lungfish**

45. The respondent’s conduct in contravening condition 3 of the approval and section 142 of the EPBC Act, specified above, has, will have, or is likely to have a significant impact on lungfish by:
  - (a) stopping, hindering, or reducing upstream and downstream movement or migration of lungfish in the Burnett River for feeding or reproduction;
  - (b) causing a greater number of lungfish to move downstream in flood events over the dam’s stepped spillway and, thereby, increasing mortality in the lungfish population due to death or injury of lungfish on the stepped spillway; and
  - (c) unless the respondent’s contravention of condition 3 is restrained by the Court, the impacts specified in paragraphs (a) and (b) will continue during the operation of the dam.
46. The respondent’s conduct in contravening condition 3 of the approval and section 142 of the EPBC Act, specified above, has, will have, or is likely to have the significant impact on lungfish specified in paragraph 45 having regard to the following contextual facts:
  - (a) the importance of maintaining connectivity in the lungfish population in the Burnett River for the conservation of the population specified in paragraphs 12 and 13 above;
  - (b) the threats and impacts faced by the lungfish population in the Burnett River due to the construction of dams and weirs specified in paragraphs 35 to 42 above;

- (c) the risk that water levels in the dam will fall beneath EL 62 m and the downstream fishway will not operate in the future for extended periods of time; and
- (d) the threats and impacts faced by the lungfish species outside the population in the Burnett River due to the proposed construction of the Traveston Crossing Dam on the Mary River using a fish transfer device modelled on the Paradise Dam.

### **Lungfish mortality on stepped spillway**

- 47. In addition, a failure to provide suitable downstream passage for lungfish through the downstream fishway is likely to have a significant impact on lungfish because lungfish attempting to move or migrate downstream by passing over the stepped spillway on the dam in non-skimming flows (where water is less than 0.3 m above the crest of the spillway) will be severely damaged with significant mortalities likely to result.
- 48. Lungfish mortality when water is released from the dam over the stepped spillway would be significantly reduced by construction of a smooth section of the spillway with a gate on the crest and a plunge-pool dedicated to fish passage as described in reports by:
  - (a) Martin Mallen-Cooper to the Burnett Dam Alliance, of which the respondent was a member, on or about 21 February 2004; and
  - (b) Andreas Neumaier to the Burnett Dam Alliance on 2 March 2004.
- 49. Construction of a smooth section of the spillway with a gate on the crest and a plunge-pool dedicated to fish passage, as particularised above, is international best practice for dams of a similar height to the dam.
- 50. The respondent did not install a spillway crest gate, smooth spillway section, and plunge pool when the dam was constructed or at all.
- 51. In circumstances where the dam has already been constructed, the installation of a spillway crest gate, smooth spillway section, and plunge pool dedicated to reducing lungfish mortality on the stepped spillway, particularised above, is no longer practicable.
- 52. As a consequence of the failure to install a spillway crest gate, smooth spillway section, and plunge pool, particularised above, lungfish are likely to be severely damaged with significant mortalities likely to result passing over the stepped spillway on the dam in non-skimming flows in the future.

### **Representations made to obtain approval**

- 53. In seeking to obtain the approval the respondent submitted an environmental impact statement (“the EIS”) to the Minister in September 2001 that, *inter alia*, proposed to install a fish transfer device to mitigate impacts on passage of fish

movement caused by the construction of the dam at an estimated construction cost of \$1,492,000 within an overall project cost then estimated at \$180,864,000.

54. The fish transfer device was proposed by the respondent in the EIS to mitigate the impacts of the dam on a number of fish species, including lungfish.
55. On 4 November 2002, Mike Montefiore, then Director of the respondent, wrote to the department then administering the EPBC Act, Environment Australia, regarding actions the respondent proposed to take focussed on the lungfish and giving commitments to implement a range of initiatives “to ensure the ongoing health of the species.”
56. In his correspondence of 4 November 2002 Mr Montefiore stated that the project specific actions to protect lungfish to be undertaken by the respondent were, *inter alia*:

*incorporation of a fishway into the Burnett River Dam ... to allow downstream and upstream passage of fish, including lungfish. The fishway has been designed to accommodate the lungfish.*

57. Based, *inter alia*, on the respondent’s commitments to incorporate a fish transfer device into the dam, between or about 3 April 2003 and 29 July 2003 Environment Australia and the respondent negotiated and agreed to additional conditions to be attached to the approval focused on the lungfish.
58. The respondent represented to Environment Australia on or about 26 June 2003 that the additional conditions were:

*... specifically relevant to the lungfish that would, in the opinion of Burnett Water Pty Ltd and its expert advisers, be appropriate to protect the lungfish and mitigate damage to the lungfish from the construction and operation of the Burnett River Dam.*

59. The additional conditions attached to the approval of the dam by the Minister on 8 August 2003 adopted the respondent’s commitments to “a suite of initiatives to address the long-term survival of the Australian lungfish.”

### **Compliance audit and internal audit**

60. In early June 2007 the department administering the EPBC Act, then the Department of Environment and Water Resources (“DEWR”), informed the respondent that it proposed to conduct a random compliance inspection of the dam to assess compliance with the conditions of approval (“the compliance audit”).
61. Prior to the compliance audit occurring in June 2007 the upstream fishway had not been operated for a period of 8 consecutive months as particularised in paragraph 26 above.
62. At the time of the compliance audit and subsequently a company trading as “SunWater” operated the dam as agent of the respondent.

## PARTICULARS OF AGENT AND AGENCY

- (a) On or about 16 December 2005 the respondent became a wholly-owned subsidiary of SunWater Pty Ltd (ACN 059 666 625), trading as “SunWater”.
  - (b) On 16 January 2006 SunWater Pty Ltd changed its company name to ACN 059 666 625 Pty Ltd, trading as “SunWater”.
  - (c) On 12 May 2008 ACN 059 666 625 Pty Ltd was de-registered and its assets transferred to a newly incorporated company, SunWater Ltd (ACN 131 034 985), trading as “SunWater”.
  - (d) The agency between the respondent (as principal) and SunWater (as agent) commenced in or about November 2005 when the dam commenced operation and continued thereafter.
  - (e) The scope of the agency was at all material times for SunWater to operate the dam on the respondent’s behalf, including compliance with the approval and negotiations with the department administering the EPBC Act.
63. Prior to the site visit to the dam by a four person audit team from DEWR for the purposes of performing the compliance audit, an employee of SunWater and agent of the respondent, Andrew Maughan, worked to ensure that the upstream fishway operation would be demonstrated to the auditors.
64. When the DEWR audit team conducted a site inspection of the dam on 26 June 2007, SunWater staff acting as agents for the respondent operated the upstream fishway to represent to the auditors that the upstream fishway was in fact operational.
65. Further, on 10 August 2007 Peter Sampson, General Manager Water Services, SunWater, and an agent of the respondent, wrote to DEWR and requested that the audit report find, *inter alia*, that “The upstream fish lift is operational.”
66. In so doing Mr Sampson represented to DEWR that the upstream fishway was operational.
67. On 8-10 October 2007 an internal auditor employed by SunWater, Danny Green, acting also as an agent for the respondent, conducted an internal audit of the environmental management system of the dam.
68. Mr Green found in his report, dated 10 October 2007 (“the internal audit report”), *inter alia*:

*It is noted that SunWater may be breaching the conditions outlined within its Federal licence to operate and maintain Paradise Dam. The wording of the condition may work in the favour of SunWater however SunWater is exposed to negative publicity and undue political scrutiny even if a court does find that the organisation has not breached the conditions.*

69. Further, Mr Green found in the internal audit report:

*There is a possible non-conformance with the operation of the upstream fish lift at Paradise Dam as it has only been operated 13 days in the year up to 30 June 2007.*

70. The operation of the upstream fishway at the Paradise Dam for 13 days in the year up to 30 June 2007 represented operation for 3.5% of total daily time.

71. The findings of the internal audit report were not conveyed to DEWR.

72. DEWR and representatives of SunWater, acting as agents for the respondent, arranged a meeting in Brisbane on 22 November 2007 to discuss a draft compliance audit report provided by DEWR to SunWater concerning the findings of the compliance audit of the dam conducted by DEWR in June 2007.

73. On 14 November 2007 Mike Smith, Director of the DEWR Monitoring and Audit Section sent an email to Briony Pomplun, Environmental Services Manager, SunWater, setting out the issues that DEWR wished to address at the meeting. One of the issues raised by Mr Smith was:

*Can SunWater provide advice as to whether the fishlift has been operating as intended i.e. with optimal operating times and if not, what are SunWater's plans to address any shortfall in operational performance?*

74. The proposed meeting on 22 November 2007 to discuss the draft DEWR compliance audit report was cancelled by DEWR and in lieu of the meeting SunWater prepared a letter to answer the questions raised by Mr Smith.

75. Ms Pomplun prepared a draft response to Mr Smith's questions on 22 November 2007 that responded to his question regarding "whether the fishlift has been operating as intended ..." by stating in reply that the upstream fishway had been "plagued with mechanical failure."

76. On 22 November 2007 Mr Danny Green, acting as an employee of SunWater and agent of the respondent, stated in an email in relation to the draft response prepared by Ms Pomplun, *inter alia*, that:

*I suggest that the words responding to whether the fishlift has been operating as intended should be modified. The audit did not come down too hard on this aspect so I dont [sic] think we should include comments like "plagued with mechanical failure".*

77. Mr Green's email on 22 November 2007 in relation to Ms Pomplun's draft response was copied, *inter alia*, to Peter Boettcher, Chief Executive Officer of SunWater and Chief Operating Officer of the respondent.

78. On 23 November 2007 Mr Boettcher wrote, as Chief Operating Officer of the respondent, to DEWR in lieu of the meeting planned for 22 November 2007 and

responded to the question from DEWR particularised in paragraph 73 above by stating:

*The upstream fishway operating range is EL 44.44m to EL66.66m. The fishway became operational when the dam commenced in December 2005. The fishway has not been operated as intended due to:*

- *December 2005 to March 2006 represented the commissioning phase of the fishway;*
- *Initial mechanical problems were experienced during March 2006 to June 2006;*
- *During the period June 2006 – December 2006, the fishway operation was interrupted by the construction of the mini-hydro facility at the Dam;*
- *Advice was received in August 2006, from the Burnett Dam Alliance (BDA), to cease operating the fishway at the then current level of EL 49.09m, due to concerns by BDA that the fish hopper might hit a submerged rock pimple (Evidence Doc No. 14). The storage continued below this level from August 2006 to October 2007.*
- *Investigations during July to September 2007 by [Burnett Water Pty Ltd (BWPL)], found that the fishway could in fact be operated to the full lower operating level of EL44.44m, without damaging the hopper.*
- *On 10 October 2007, a correction was received from BDA that the fishway could operate to the EL 44.44m (Evidence Doc No. 15) and operation of the fishway recommenced with on-site supervision.*

*The current operation will be monitored to assess any further operational issues, whilst the operator is on-site. Once reliable operation is confirmed, continuous operation of the fishway will recommence.*

79. The statements by Mr Boettcher in his letter to DEWR of 23 November 2007, particularised in paragraph 78, acknowledged that:

- (a) condition 3 of the approval required continuous operation; and
- (b) the respondent knew it had failed to operate the upstream fishway for long periods.

80. The conduct engaged in by Mr Boettcher, set out in the preceding paragraphs, was engaged in on behalf of the respondent by Mr Boettcher as an employee of the respondent within the scope of his actual or apparent authority.

81. In the premises, the state of mind of Mr Boettcher in engaging in the conduct set out in the preceding paragraphs was the state of mind of the respondent pursuant to section 498B(2) of the EPBC Act.

82. In the premises, the respondent, through its employees and agents, knew that the upstream fishway had not operated for long periods during 2006 and 2007 and the respondent knew that this contravened or may contravene condition 3 of the approval.

### **Modification of DPI interim report**

83. In February 2008 officers of Queensland Department of Primary Industries & Fisheries (“DPI”) prepared interim reports for the respondent on the monitoring program for the upstream fishway (“the upstream fishway interim report”) and the downstream fishway (“the downstream fishway interim report”).

84. An early draft of the upstream fishway interim report (the early draft) stated at section 3.1, *inter alia*:

*Since the completion of the Paradise Dam and the upstream fishway a number of issues have led to the fishway being inoperable for long periods of time. After the initial setup and commissioning of the fishway in March 2006 the fishway has operated for five percent of the total time. Most faults were due to mechanical failures to the fish hopper in the early stages of operation.*

85. The early draft concluded at section 5, *inter alia*:

*The downtime of the fishway operation is of major concern. Even before [Burnett Dam Alliance] ceased the operation of the fishway, it had only operated for five percent of the total time in use. The fishway needs to be operated for long periods of time to address design and maintenance failures. Large numbers of fish are migrating even under reduced inflows to the Burnett River system. For this reason investigation into the operation of the fishway during low impoundment levels needs to be seriously addressed.*

86. In or about February 2008 an unknown employee or agent of the respondent reviewed the early draft and instructed the DPI orally and/or in writing to modify it by, *inter alia*:

- (a) deleting the statement that the downstream fishway “has operated for five percent of the total time”; and
- (b) deleting the statement that the “downtime of the fishway operation is of major concern.”

87. The modifications of the early draft instructed by the respondent’s employee or agent, specified above, were incorporated by DPI into the final version of the upstream fishway interim report.

88. In the premises, the respondent had knowledge of the problems identified with the operation of the upstream fishway in the early draft of the upstream fishway interim report.

89. The respondent failed to inform DEWR of the problems identified with the operation of the upstream fishway in the early draft of the upstream fishway interim report, specified above.

90. The respondent provided the downstream fishway interim report to DEWR but did not supply the upstream fishway interim report to DEWR.

### **Practicable modifications to fish transfer device**

91. It is practicable for the respondent to operate the upstream fishway and the downstream fishway continuously or with only minor interruptions for maintenance and repairs at all times the water levels in the dam reservoir are within the existing operating ranges of the fishways.
92. It is practicable for the respondent to modify the downstream fishway to extend its operating range in the manner identified as “Concept No 1” by Daryl Brigden, Engineering Design Manager South, SunWater, in a briefing note to SunWater dated 24 April 2008, namely, installation of a suspended steel entrance chamber located on a rail system beside the existing entrance chamber and capable of level adjustment to match the prevailing reservoir level and able to operate over the full operational range of the dam between EL 42 m and EL 67.6 m (“Concept No 1”).
93. The approximate cost of constructing Concept No 1 to extend the operating range of the downstream fishway is between \$5 million and \$10 million.
94. The approximate time required to construct Concept No 1 to extend the operating range of the downstream fishway is in the order of 12 months.
95. The total capital cost of constructing the dam was approximately \$240 million and the cost of constructing Concept No 1 to extend the operating range of the downstream fishway is small by comparison.

### **Utility of alternative relief sought**

96. Even when operating continuously over the full operational range of the dam, the downstream fishway may contravene condition 3 of the approval because it may not be suitable for the lungfish, however, further monitoring of the downstream fishway in operation is required to determine this issue.
97. Even when operating continuously, the upstream fishway may contravene condition 3 of the approval because it may not be suitable for the lungfish, however, further monitoring of the upstream fishway in operation is required to determine this issue.
98. Despite the facts alleged in paragraph 96 and 97, the alternative relief sought by the respondent, specified below, has utility because:
  - (a) even if the benefit of the alternative relief is limited and does not achieve full compliance with condition 3, the alternative relief sought is likely to reduce the impacts to lungfish of the respondent’s contravention of condition 3; and
  - (b) continuous operation will assist the respondent to improve the design and operation of the downstream fishway and the upstream fishway that can in time be implemented.

**RELIEF**

99. The applicant claims:

- (a) the declaration and injunction specified in the application (“the primary relief sought”); or
- (b) the declaration specified in the application and, in the alternative to the injunction specified in the application, a mandatory injunction that:
  - (i) the respondent operate the upstream fishway continuously, or with only minor interruptions for repairs and maintenance, at all times water levels are above EL 44.44 m;
  - (ii) the respondent operate the downstream fishway continuously, or with only minor interruptions for repairs and maintenance, at all times water levels are above EL 62.0 m;
  - (iii) within 12 months of the date of this order, the respondent install Concept No 1 specified in the briefing note prepared by Daryl Brigden, Engineering Design Manager South, SunWater, on 24 April 2008, to extend the operating range of the downstream fishway to the full operational range of the dam between EL 42 m and EL 67.6 m;
  - (iv) following the modification of the downstream fishway ordered in the preceding paragraph, the respondent operate the downstream fishway continuously, or with only minor interruptions for repairs and maintenance, at all times water levels are between EL 42 m and EL 67.6 m;
  - (v) for the purposes of interpreting these orders, “minor interruptions” means stoppages not greater than 5% of total available time, calculated monthly; and
  - (vi) the respondent publish or cause to be published on a publicly accessible internet site a continuous log, updated daily or monthly, stating the daily operating hours of the upstream fishway and the downstream fishway; or
- (c) such other relief as the Court deems necessary; and
- (d) costs.

This pleading was prepared by Dr Chris McGrath of counsel.

Date: 14 April 2009

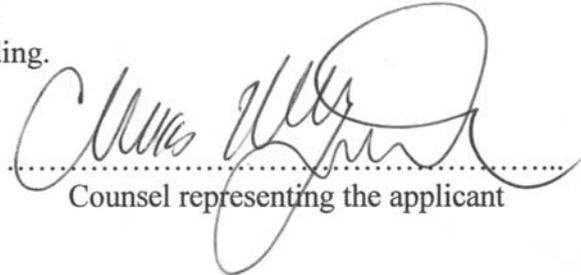
  
 .....  
 Jo-Anne Bragg (Principal Solicitor)

**CERTIFICATE OF LEGAL PRACTITIONER**  
(Order 11, rule 1B)

I, Christopher James McGrath, counsel, certify to the Court that, in relation to the pleading dated 14 April 2009 filed on behalf of the applicant, 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.

Date: 14 April 2009

  
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Counsel representing the applicant