

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD (ACN 097 206 614)

Respondent

OUTLINE OF ARGUMENT ON BEHALF OF THE RESPONDENT

Summary

1. The Respondent has filed and served an Amended Statement of Claim which, like its predecessor, claims injunctive and declaratory relief in respect of alleged contraventions by the Respondent of a condition of an approval granted under the *Environment Protection and Biodiversity Conservation 1999* (“EPBC Act”). In doing so, the Applicant has confined itself to alleged contraventions of s.142 of the EPBC Act (a civil penalty provision with no fault element) and no longer alleges contraventions of s.142A or s.142B of the EPBC Act (an offence provision with fault elements).
2. The Respondent applies to strike out several parts of the Amended Statement of Claim. The parts in question do not plead material facts in relation to the alleged contraventions of s.142. They purport to plead matters in relation to the exercise of the Court’s discretion to grant relief in respect of those alleged contraventions. However:
 - (a) several of the matters pleaded have no logical bearing on the discretion the Court may be called on to exercise and suffer from a lack of pleading of material facts;
 - (b) several of the matters pleaded amount to an attempt to plead, as matters going to the exercise of a discretion, offences and other contraventions which are not the subject of the claim for relief.
3. In the circumstances, the offending parts of the Amended Statement of Claim ought to be struck out.

4. It is worth noting at the outset that the strike out application leaves entirely intact that part of the applicant's pleading which sets up its case and its claim for relief (paragraphs 1 to 34). What is at issue is the second part of the applicant's pleading, which comes after the heading "Facts relevant to Court's discretion", and which, for the reasons submitted below, is objectionable.

Relevant Facts

5. The relevant background to the proceedings is set out in the reasons for judgment of the Court cited as [2008] FCA 1900 and [2009] FCA 237.
6. The Amended Statement of Claim was filed by the Applicant on 14 April 2009 pursuant to directions given by the Court consequent upon the striking out of its predecessor on 18 March 2009.
7. The contents of the Amended Statement of Claim require some examination, in particular because it is necessary to identify the alleged past or likely future contraventions of the EPBC Act upon which the Applicant relies to claim relief. It is those contraventions which define and confine the matters with respect to which any discretion may arise.
8. Paragraphs 3 to 8 allege the approval and its conditions, including condition 3 as inserted by the variation of 8 August 2003. The action the subject of the approval is alleged to be the construction of the Paradise Dam, the operation of the dam and the making of controlled discharges from the dam.
9. Paragraphs 9 to 11 allege the construction of the dam, some characteristics of the construction of the dam (including the installation of the fish transfer device), the commencement of operation of the dam in November 2005 and its continued operation since then. In this respect the Applicant alleges the occurrence of two of the three approved actions.
10. Paragraphs 12 to 17 allege facts said to lead to conclusions about the suitability characteristics of the fish transfer device. According to paragraph 17, those requirements are as follows:
 - (a) that it is likely to allow any normal size lungfish to move upstream and downstream of the dam without injury irrespective of the water level in the dam;

- (b) that it operates continuously each day of the year both day and night, subject only to minor interruptions for repairs and maintenance;
 - (c) that it is actually operating to allow any normal size lungfish to move upstream and downstream of the dam.
- 11. Paragraphs 18 to 26 allege facts about the fish transfer device and its operation. These include the incorporation into the fish transfer device of a downstream fishway and an upstream fishway as well as allegedly relevant characteristics of the fishways. It is alleged that by reason of the location of its entrance the downstream fishway cannot operate when water levels in the dam reservoir are less than EL 62.0 m, which is said to be equivalent to 57% capacity, that it is not suitable for lungfish when water levels in the dam reservoir are less than EL 62.0 m and that it was not operated between November 2005 and January 2009 because water levels in the dam reservoir were below EL 62.0 m until 25 January 2009. It is alleged that the upstream fishway did not commence operation in November 2005 and has not been operated continuously since then.
- 12. Paragraphs 27 and 28 are pleaded under the heading "Contravention of section 142". Reduced to its essentials, the Applicant alleges that the Respondent has contravened s.142 of the EPBC Act by acts and omissions constituting contraventions of condition 3 of the approval, namely:
 - (a) installing the downstream fishway such that it does not operate when water levels in the dam reservoir are beneath EL 62.0 m and, for that reason, was not operated before January 2009;
 - (b) failing to commence operating the upstream fish transfer device when the dam became operational in November 2005 and continuously thereafter, subject only to minor interruptions for repairs and maintenance.
- 13. In the case of the downstream fishway, therefore, the Applicant's case that condition 3 of the approval has been contravened by the Respondent is confined to an allegation that it does not operate when water levels in the dam reservoir are below EL 62.0 m. There is no allegation of unsuitability when water levels in the dam reservoir are above EL 62.0 m. In the case of the upstream fishway, the only complaint is about lack of continuous operation. There is no allegation that the fish

transfer device is unsuitable, and hence no allegation that condition 3 of the approval has been or will be contravened, in any other respect.

14. This is reinforced by paragraphs 29 to 34. They allege the basis for the Court to grant injunctive and declaratory relief. The limited acts and omissions referred to above are relied upon as constituting contraventions of the EPBC, other than an offence. The Applicant only seeks relief based upon establishing non-offence contraventions of the EPBC Act.

Facts Alleged to be Relevant to the Court's Discretion

Paragraphs 35 to 44

15. These paragraphs are grouped under the heading "Lungfish are a listed threatened species". If the heading is intended to be a guide as to what follows, only paragraph 44 is relevant. Paragraphs 35 to 43 contain irrelevant statements of evidence.
16. Paragraphs 35 to 43 deal broadly with evidentiary matters relating to the following:
 - (a) the Burnett River basin is highly developed with 26 water storages, including other dams and weirs;
 - (b) lungfish are adversely impacted by dams and weirs in the Burnett River basin, including other dams and weirs;
 - (c) the Minister administering the EPBC Act included lungfish on the list of threatened species as a consequence of the above matters.
17. In the effect, the Applicant seeks to delve into the motivation of the Minister in including lungfish on the list of threatened species. This is irrelevant. That lungfish are so listed, and are thus afforded statutory recognition as a species requiring protection, is the relevant fact. The matters which motivated the Minister to take that step cannot have any logical bearing on any discretion which may arise in these proceedings.
18. Moreover, an inquiry into the impacts of other dams and weirs in the Burnett River basin has no logical connection with any issue of discretion which may arise in these proceedings. As stated above, the Applicant's case is confined to one of alleged contraventions of s.142 of the EPBC Act in limited respects. No part of

that case involves a broad ranging inquiry into the impacts of other construction within the Burnett River.

Paragraphs 45 to 46

19. These paragraphs are grouped under the heading “Significant impact to lungfish”. Once again, if the heading is intended to be a guide to what follows, only paragraph 45 would be relevant. But there are even problems with that paragraph.
20. Paragraphs 45 and 46 plead that the Respondent’s alleged contraventions of condition 3 of the approval and s.142 of the EPBC Act “has, will have, or is likely to have” a significant impact on lungfish. This rolled up plea is objectionable. It fails to distinguish between, and plead material facts with respect to, those impacts which are alleged already to have occurred, are alleged will occur and are alleged to be likely to occur. To take an example derived from paragraph 45(b), one cannot discern whether it is the Applicant’s case that there has already been a flood event or events which have caused lungfish to move over the dam’s stepped spillway resulting in death or injury or whether that is something that will occur or whether it is something that is likely to occur. In each case, were the allegation material, the facts would need to be pleaded.
21. But there are more basic problems with paragraphs 45 and 46. They adopt the language of s.142A even though the Applicant does not claim relief based upon any alleged offence committed under that section. They contain allegations which go towards the apparent pleading, as a discretionary consideration, of conduct constituting an offence. This topic is addressed in more detail below.
22. Paragraph 45(b) suffers from the absence of pleading of material facts. The allegation is confined to the downstream fishway, the only complaint about which is that it cannot operate when levels in the dam reservoir are below EL 62.0 m. This paragraph posits a flood event in which the dam reservoir is full and water flows over the spillway. It posits circumstances in which levels in the dam reservoir are necessarily above EL 62.0 m. The causal connection between the unavailability of the downstream fishway when capacity is below 57% with impacts on lungfish when capacity is at 100% is not logically apparent on the face of the pleading. The problem stems from the shorthand reference to “causing” rather the pleading of material facts which demonstrate the alleged causal connection.

23. Paragraph 46 purports to plead contextual facts which point to the effects alleged in paragraph 45. To this extent it is an adjunct to paragraph 45 and must go with it.
24. Additionally, paragraph 46(b) cross-refers to paragraphs 35 to 42 and, specifically, “the threats and impacts faced by the lungfish population in the Burnett River due to the construction of dams and weirs specified” in those paragraphs. This paragraph suffers from the same vice referred to above, namely the suggestion that the discretion is to be exercised with respect to the imprecisely pleaded alleged effects of structures other than the dam. It is oppressive and / or unhelpful to require the respondent and the Court to investigate the impact of other dams and weirs (paragraph 46(b)) and the impact on lungfish in a different river system, the Mary River (paragraph 46(a)). Additionally, paragraph 42 appears to be inconsistent with the allegations in paragraph 15.
25. Paragraph 46(d) is even more remote. It refers to the threats and impacts 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 modeled on the dam.
26. There are several problems with this allegation. The preamble to paragraph 46 states that the facts pleaded in it set the factual context for the impacts alleged in paragraph 45. Those are impacts relating to the movement of lungfish in reference to the dam. There is no logically pleaded connection between those movements and the mere possibility of the use of a fish transfer device on another dam on a different river.
27. Reading between the lines, the Applicant’s concern may be that a fish transfer device modeled on the fish transfer device on the dam will be used elsewhere. But this proceeding is concerned with the suitability of the fish transfer device in the circumstances of a particular dam, not the suitability of the fish transfer device in the (unidentified) circumstances of other dams. Moreover, the allegations of unsuitability are confined to the operational levels and periods of operation. Apart from in respect of the operational level of the downstream fish transfer device in the context of this particular dam, there is no allegation about the unsuitability of the design of it.

28. As the Court observed in its decision which led to the filing of the Amended Statement of Claim:

“[56] Attention needs to be given to the language of s.475 when considering both the nature of the power conferred and the remedy which may appropriately be granted pursuant to that power. In context, if a failure to do an act, namely, the construction of a dam incorporating an installed fish transfer device suitable for lungfish constitutes an offence or other contravention of the EPBC Act because the dam as constructed does not have installed such a fish transfer device, thereby breaching a condition of the approval for the taking of that act, the Court may grant an injunction requiring the person to do the act, ie incorporate in the dam a fish transfer device suitable for lungfish.”

29. As this passage indicates, the discretion to be exercised in a proceeding such as this is a discretion to require compliance with condition 3. That discretion cannot sensibly be informed by mere possibility that the design of the fish transfer device for the dam might be modified in some unidentified respect and applied to some other dam with unidentified characteristics.
30. Even if, contrary to the above, such a broad proposition could remotely be argued, the material facts which demonstrate the connection between the matters alleged and the discretion are not pleaded. There are no facts pleaded about the proposed dam, its characteristics, the proposed fish transfer device for the proposed dam, its characteristics or the facts which demonstrate the alleged threats and impacts. These matters are asserted without any reference to material facts.

Paragraphs 47 to 52

31. Paragraphs 47 to 52 are grouped under the heading “Lungfish mortality on stepped spillway”. As mentioned above, they seem to posit a circumstance of harm to lungfish seeking downstream passage when the dam is full and water flows over the spillway. Paragraph 47 refers to “a failure to provide suitable downstream passage through the downstream fishway”.
32. The relevance of these allegations is not apparent on the face of the pleading. As mentioned, there is no allegation that the downstream fishway is unsuitable when water levels are above EL 62.0 m. The only allegation is that the downstream

fishway is unsuitable when water levels are below EL 62.0 m. The pleading of facts about impacts which may arise when water levels are above EL 62.0 m is irrelevant to the context of the exercise of any discretion.

33. Moreover, in substance, the Applicant seeks to plead a separate and additional aspect of unsuitability and therefore a separate and additional contravention of s.142. However, it is not a contravention which the Applicant relies on to obtain relief. It is merely pleaded as a discretionary matter. As a matter of logic, the pleading of a separate and additional contravention which is not relied on as a basis for relief is not a relevant discretionary matter in relation to other contraventions which are so relied upon.

Paragraphs 53 to 59

34. Paragraphs 53 to 59 are grouped under the heading “Representations made to obtain approval”.
35. The matters pleaded under this heading have no logical bearing on the exercise of any discretion with respect to the relief which the Applicant seeks. They are not alleged to and cannot bear upon the meaning of condition 3. It is not alleged that any representation was made which was false and which induced the Minister to impose condition 3 in a particular form but, in any event, it is no part of the applicant’s case that condition 3 should have been worded any differently. In short, the matters pleaded have no apparent relevance to the exercise of any relevant discretion and none can be discerned from the face of the pleading.

Paragraphs 60 to 82

36. Paragraphs 60 to 82 are grouped under the heading “Compliance audit and internal audit”.
37. These paragraphs principally plead evidence rather than material facts. Moreover, the evidence seems to be designed only to lead to the conclusions pleaded in paragraphs 79 to 82 that after the dam was constructed and became operational:
 - (a) the Respondent acknowledged that condition 3 of the approval required continuous operation;
 - (b) the Respondent knowingly contravened condition 3.

38. These allegations of subsequent conduct are irrelevant. They cannot bear upon the proper interpretation of condition 3.
39. Further, in these paragraphs, the Applicant has sought to plead, as matters going to the exercise of a discretion, facts which constitute an offence under s.142A of the EPBC Act. The elements of that offence are elsewhere pleaded. It is alleged that the Respondent has taken two of the three approved actions, that in so doing it has contravened a condition of its approval and that the contravention results in or will result in a significant impact on lungfish which are a matter of national environmental significance. The final element of recklessness is supplied by the allegations in these paragraphs that the Respondent knowingly contravened in condition 3. As the Court observed in earlier reasons for decision, recklessness is a fault element under the *Criminal Code* which can be established by proof of knowledge. That is precisely what the Applicant pleads. The reference in paragraph 81 to s.498B(2) of the EPBC Act reinforces that the Applicant has attempted to plead in this way. That provision deals with the attribution of the state of mind of agents "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 not necessary to do that in the case of a contravention of s.142. It would be necessary to do that in the case of a contravention of s.142A.
40. It is impermissible for the Applicant to plead, as fact going to the exercise of a discretion with respect to a non-offence contravention of the EPBC Act, facts which amount to an offence under the EPBC Act. Injunctive relief under s.475 can be based on an act or omission which constitutes an offence or other contravention of the EPBC Act. In the present case, the Applicant rests its claim for relief solely on conduct which it alleges constitutes an "other contravention". It does not rest its claim for relief on conduct which constitutes an offence. It is therefore irrelevant and embarrassing to plead facts which demonstrate an offence which is not relied upon as a basis for relief.

Paragraphs 83 to 90

41. Paragraphs 83 to 90 are grouped under the heading "Modification of DPI interim report".

42. In substance these allegations are in the same category as paragraphs 60 to 82. The Applicant seeks to plead evidence with a view to alleging some form of knowledge by the Respondent of contraventions of condition 3 and in relation to dealings with the DEWR. For the reasons given above, these allegations are irrelevant to any discretion which the Court may have to exercise.

Paragraphs 96 to 98

43. Paragraphs 96 to 98 are grouped under the heading "Utility of alternative relief sought".
44. This is in substance a pleading that the relief sought by the Applicant may not render the fish transfer device suitable for lungfish in compliance with condition 3 of the approval.
45. The allegations are embarrassing and ought to be struck out. For the reasons given above, the orders which the Court may make are directed towards requiring such compliance. It is embarrassing for the Applicant to seek orders which it positively pleads may not have that result. This is an apparent attempt by the Applicant to reserve for itself the later ability to allege that there are additional respects in which the fish transfer device does not comply with condition 3. However, the Applicant has identified and confined its case as to alleged lack of suitability. It cannot on the one hand do that and on the other hand suggest that there may be additional aspects of lack of suitability which it does not identify and rely on.

D.R. Gore QC

D.G. Clothier

Counsel for the Respondent

11 May 2009