

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD (ACN 097 206 614)

Respondent

**COUNCIL'S SUBMISSIONS IN REPLY TO MOTION TO
STRIKE OUT DISCRETIONARY CONSIDERATIONS**

Introduction

1. Burnett Water applies to strike out paragraphs 35 to 44, 46 to 90 and 96 to 98 of the Amended Statement of Claim. It also complains about paragraph 45 in its outline of argument.¹ The motion and the outline do not state the provision of the Rules under which the application is made but the Council assumes it is made under O 11, r 16 of the Rules.
2. It is trite law that the Court's power to strike out pleadings under O 11, r 16 is exercised sparingly and only where there is a plainly untenable case.² It must be plain and obvious that the impugned portions of a statement of claim are unarguable.³

Issues in dispute

3. The issue in dispute is the limit (if any) of the matters the Court may consider in exercising its discretion under s 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Burnett Water argues that the facts raised in paragraphs 35 to 44, 46 to 90 and 96 to 98 of the Amended Statement of Claim are outside the scope of matters the Court may consider and, therefore, irrelevant to the exercise of the Court's discretion.
4. This is a significant issue because Australian courts have rarely stated limits to the scope of matters that may be considered in exercising similar discretions, preferring instead to leave the discretion flexible and open-ended. Despite the significance of the issue it raises, Burnett Water provides virtually no case law in support of its propositions and

¹ Outline of Argument on behalf of the Respondent, dated 11 May 2009, paras 19-22.

² *Leaney v Olmstead Pty Ltd* (1994) 51 FCR 240 at 240G per Branson J; *Morton v Vouris* (1996) 21 ACSR 497 at 513 per Sackville J.

³ *Murex Diagnostics Australia Pty Ltd v Chiron Corp* (1995) 55 FCR 194 at 203C per Burchett J.

COUNCIL'S SUBMISSIONS IN
REPLY TO MOTION TO STRIKE
OUT DISCRETIONARY FACTORS
Filed on behalf of the Applicant

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fails to acknowledge the body of law that is contrary to its arguments or previous decisions of the Court involving s 475 of the EPBC Act.

5. The issue of whether Burnett Water has contravened s 142 of the EPBC Act is a separate, though inter-related, issue to the exercise of discretion to grant the relief sought under s 475 of the Act. The former is a condition precedent to the latter but does not constrain the latter.

General principles for the exercise of the Court's discretion

6. The language of s 475 of the EPBC Act, "if a person has [contravened the Act] the Court may grant an injunction ...", indicates that the Court has a discretion to grant an injunction but is not compelled or obliged to do so should an offence or contravention of the Act be established.⁴ Section 475 does not state the matters to be taken into account in exercising the discretion and on its face the considerations that may be taken into account are wide and flexible.⁵ Section 479 states that certain considerations are not relevant for granting injunctions but these matters enlarge rather than constrain the Court's discretion. Section 479 was regarded by Black CJ and Finkelstein J as "an important and distinctive feature of Div 14 of Pt 17 of the EPBC Act [that along with other provisions such as widened standing to apply to the Court for an injunction] have the evident object of assisting in the enforcement, in the public interest, of the EPBC Act."⁶
7. A large body of law also establishes that the statutory power to grant an injunction under s 475 of the EPBC Act is at the Court's discretion in all of the relevant facts and circumstances of the case.⁷ The courts have traditionally refused to define limits to the matters that may be considered but have provided guidelines on how the discretion is to be exercised.⁸ The facts, matters and circumstances that courts have considered relevant

⁴ See *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 257 per Lockhart J, 267-268 per Gummow J, and 268 per French J.

⁵ Compare the matters specified to be taken into account in determining a pecuniary penalty under s 481(3) of the EPBC Act. Although the matters stated in s 481(3) are themselves very wide and flexible, it would seem incongruous to suggest that the matters the Court may take into account under s 475 are more limited than s 481(3) and cannot include each of the matters stated in s 481(3).

⁶ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 431 [20]-[21] per Black CJ and Finkelstein J.

⁷ See *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341 per Kirby P; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 255-258 per Lockhart J, 267-268 per Gummow J, and 268 per French J; *NRMCA (Qld) Ltd v Andrew* [1993] 2 Qd R 706 at 711-713 per Macrossan CJ, Pincus JA and Davies JA; *Tynan v Meharg & Anor* (1998) 101 LGERA 255 at 259 (NSWCA) per Stein JA with whom Priestley and Handley JJA agreed; *Booth v Bosworth* (2001) 114 FCR 39 at 66-68 [108]-[117] per Branson J; *Mudie v Grainriver Pty Ltd* [2002] 2 Qd R 53 at 58-59 per Davies and Thomas JJA, White J; *Caloundra City Council v Taper Pty Ltd & Anor* [2003] QPELR 558; [2003] QPEC 019 at [91]-[96] per Robertson DCJ; *Mees v Roads Corporation & Ors* (2003) 128 FCR 418 at 457 [122] per Gray J; *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 250 [220] per Sackville J; *Minister for the Environment and Heritage v Greentree (No 3)* (2004) 136 LGERA 89; [2004] FCA 1317 at [2] per Sackville J; *Woolworths Ltd v Caboolture Shire Council & Anor* [2004] QPELR 634; [2004] QPEC 026 at [7] per Wilson SC DCJ; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 per Black CJ and Finkelstein J; *Great Lakes Council v Lani* [2007] NSWLEC 681; 158 LGERA 1 at [12] per Preston CJ; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 at 522-525 [45]-[53] per Allsop J.

⁸ A rare exception to this is *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, where Black CJ and Finkelstein J held political considerations are irrelevant to the exercise of discretion to grant leave to serve originating process outside the jurisdiction. Allsop J held that this reasoning applied to

to the exercise of similar discretions in other cases have been extremely wide. The cases show the matters that may be taken into account in the exercise of the discretion are not limited to what is necessary to prove the offence alleged to be the basis for the injunction sought. For example, in cases such as the present where it has been unnecessary to prove harm to the environment or fault to establish an offence has occurred, courts have considered the effect on the environment⁹ and whether the offence was the fault of the person against whom the injunction is to be granted.¹⁰

8. The leading case for the exercise of the discretion under s 475 of the EPBC Act is *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 (*HSI case*). In that case Black CJ and Finkelstein J emphasised the public interest character of injunctions under the EPBC Act in achieving the objects of the Act¹¹ and stated principles for the grant of such injunctions.¹² Black CJ and Finkelstein J stated:

... the grant of a statutory public interest injunction to mark the disapproval of the Court of conduct which the Parliament has proscribed, or to discourage others from acting in a similar way, can be seen as also having an educative element. ... a public interest injunction may have a purpose that is entirely educative.¹³

9. Allsop J followed the majority's approach in granting an injunction under s 475 of the EPBC Act in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 at 522-525 [45]-[53]. Other decisions of this Court show a diverse range of factors may be relevant to the exercise of discretion under s 475 of the EPBC Act but these are not referred to in the submissions of Burnett Water.¹⁴
10. Burnett Water's submissions appear to misunderstand the role of injunctions under the EPBC Act stated by the Full Court in the *HSI case*. While an injunction is directed at restraining or mandating particular conduct, the educative role of the injunction allows a particularly wide approach to the facts, matters and circumstances relevant to the exercise of the Court's discretion.

Burnett Water's complaints

11. Burnett Water argues that the facts raised in paragraphs 35 to 44, 46 to 90 and 96 to 98 of the Amended Statement of Claim are outside the scope of matters the Court may

the exercise of discretion for the grant of an injunction as final relief in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 165 FCR 510 at 522 [45].

⁹ *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339G per Kirby P.

¹⁰ *Tynan v Meharg & Anor* (1998) 101 LGERA 255 at 259 (NSWCA) per Stein JA with whom Priestley and Handley JJA agreed; *Caloundra City Council v Taper Pty Ltd & Anor* [2003] QPELR 558 at [96] per Robertson DCJ.

¹¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 432 [18]-[21].

¹² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 432 [22]-[27].

¹³ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 432 [22].

¹⁴ *Booth v Bosworth* (2001) 114 FCR 39 at 66-68 per Branson J (economic impacts of relief); *Mees v Roads Corporation & Ors* (2003) 128 FCR 418 at 457 [122] per Gray J (other referrals of link roads and utility of relief); *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 250 [220] per Sackville J; *Minister for the Environment and Heritage v Greentree (No 3)* (2004) 136 LGERA 89; [2004] FCA 1317 at 92 [2] and 97 [22] (practical difficulties of relief sought) per Sackville J; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 at 522-525 [45]-[53] per Allsop J (educative purpose of injunction and futility). Note: one decision of the Court, later reversed on appeal, granted an injunction under s 475 of the EPBC Act but did not consider as a separate issue the question of discretion: *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 per Marshall J, reversed in *Forestry Tasmania v Brown* (2007) 167 FCR 34 per Sundberg, Finkelstein and Dowsett JJ.

consider and, therefore, irrelevant to the exercise of the Court's discretion. It alleges that several of these matters "have no logical bearing on the discretion the Court may be called to exercise" and others "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."¹⁵

12. Burnett Water submits that "the alleged past or likely future contraventions of the EPBC Act upon which the [Council] relies to claim relief ... define and confine the matters with respect to which any discretion may arise."¹⁶
13. Burnett Water does not cite in its written outline any authority for the limitations it seeks to impose on the exercise of the Court's discretion but its list of authorities refers to *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215 at 221-222 per French J. That case involved an application for damages under s 82 of the *Trade Practices Act 1974* (Cth) (TPA). A causal nexus between the contravention and the loss or damage suffered is central to establishing liability under s 82 and this explains the concerns raised by French J at 221-222 about the lack of a "logical relationship" in the pleadings between the misleading and deceptive conduct and the loss and damage said to have been suffered. That is a very different situation to the exercise of discretion under s 475 of the EPBC Act which arises once an offence or contravention of the Act is established. The decision in *Bond* does not support the complaints made by Burnett Water.
14. Burnett Water refers repeatedly to "there is no allegation that the downstream fishway is unsuitable when water levels are above EL 62.0 m".¹⁷ This is not correct. Paragraphs 27 and 28 of the Amended Statement of Claim allege that the downstream fishway is no suitable for lungfish whenever it does not operate. This includes both time when water is beneath EL 62.0 m and times when water is above this level but Burnett Water fails to operate the downstream fishway continuously, subject only to minor interruptions for repairs and maintenance.

Paragraphs 35 to 44

15. Burnett Water suggests that paragraphs 35 to 44 of the Amended Statement of Claim contain "irrelevant statements of evidence" and seek "to delve into the motivation of the Minister in including lungfish on the list of threatened species."¹⁸ It suggests "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."
16. The Council does not fully understand Burnett Water's complaint that "paragraphs 35 to 43 contain ... statements of evidence." The Council understands each of these paragraphs to be a statement of a material fact rather than the evidence to prove material facts. The evidence of these material facts will be contained in expert reports tendered at the trial but this, the Council believes rightly, is not set out in paragraphs 35 to 43.
17. The Council does not rely upon the facts raise in paragraphs 35 to 44 for the purpose alleged by Burnett Water, viz to "delve into the motivation of the Minister". Rather,

¹⁵ Outline of Argument on behalf of the Respondent, dated 11 May 2009, para 2.

¹⁶ Outline of Argument on behalf of the Respondent, dated 11 May 2009, para 7.

¹⁷ Outline of Argument on behalf of the Respondent, dated 11 May 2009, paras 13,22, and 32.

¹⁸ Outline of Argument on behalf of the Respondent, dated 11 May 2009, paras 15 and 17.

these paragraphs simply raise the factual context relevant to the listing of the lungfish as a threatened species under the EPBC Act and current threats to the lungfish. These facts are relevant in at least two ways to the exercise of the Court's discretion, namely:

- (a) for the Court to understand how the relief sought may contribute to achieving the objects of the EPBC Act, stated in s 3, by establishing that the lungfish is a listed threatened species and, therefore, a matter of national environmental significance, and the reasons for the species listing; and
 - (b) for the Court to understand the consequences of the contraventions by Burnett Water by understanding the known threats to lungfish and the context of the impacts.
18. The purpose of injunctions granted under s 475 of the EPBC Act is to support the public interest in achieving the objects of the Act through effective enforcement of the Act.¹⁹ Protecting the environment, especially those aspects of the environment that are matters of national environmental significance is the first stated object of the Act.²⁰ Consequently, the fact that lungfish are a listed threatened species and, therefore, a matter of national environmental significance under Part 3 of the Act, together with the reasons for their listing, are clearly relevant to the exercise of the Court's discretion.
19. In exercising its discretion under s 475 of the EPBC Act in previous cases, the Court has considered the context of impacts and why species were listed as threatened under the Act:
- (a) Branson J held it was necessary to consider the context and intensity of impacts when assessing their significance in granting an injunction under s 475 of the EPBC Act in *Booth v Bosworth* (2001) 114 FCR 39 at 65 [99]-[100]. Her Honour considered as part of the context of the killing of Spectacled Flying Foxes by electric grids on a lychee farm: the total number of the species; the species life history and rate of reproduction; other threats to the species from habitat destruction, natural stochastic events and direct exploitation by humans; deaths on electric grids on other farm; and other sources of mortality.²¹
 - (b) Sackville J held it was necessary to consider the context of impacts and to have a "baseline" in order to assess the significance of those impacts in granting an injunction under s 475 of the EPBC Act in *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244-246 [191], [192] and [197]. Kiefel J held on appeal in that case that whether there is or has been a significant impact does not depend upon the environment in question being "natural" or "pristine" prior to the activities.²²
 - (c) Marshall J expressly considered why an eagle, beetle and parrot species were listed as threatened under the EPBC Act in granting an injunction against forestry operations impacting on those species under s 475 in *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 13 [84], 16 [105] and 21 [138]. His Honour also considered the context of the impacts in assessing their significance.²³ That decision

¹⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 432 [18]-[21].

²⁰ See s 3(1)(a) of the EPBC Act.

²¹ *Booth v Bosworth* (2001) 114 FCR 39 at 58-59 [74], 60 [81], 61 [86], 62 [87], and 63 [90]-[95].

²² *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388 at 399 [48] per Kiefel J with whom Wienberg and Edmonds JJ agreed.

²³ *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 14-15 [91]-[97].

was overturned on appeal due to an exemption from liability for the forestry operations.²⁴

20. The threats to lungfish other than from the contravention by Burnett Water and the highly regulated nature of the Burnett River are relevant to the Court understanding the context of the impacts of the contravention. This makes these matters relevant to the exercise of the Court's discretion. The facts alleged in paragraphs 35 to 43 of the Amended Statement of Claim are, therefore, relevant to the exercise of the Court's discretion.

Paragraphs 45 to 46

21. The complaints made²⁵ by Burnett Water against paragraph 45 of the Amended Statement of Claim were not raised in its correspondence of 27 April 2009, which preceded the strike out application.²⁶
22. Paragraph 45 and 46 are not intended to adopt the language of 142A or to plead a separate offence. Rather, they are intended to reflect the concepts in Part 3 of the EPBC Act, such as s 18 (Listed threatened species), which are the mainstay of liability and the triggers for assessment under the Act. While s 142 does not require the Council to prove any impact on the environment to establish an offence, the Council considers the concepts in Part 3 of the Act, particularly the threshold of "significant impact", provides a useful reference for the Court in exercising its discretion under s 475. This is the reason for the choice of language in paragraph 45. The reference to the context of impacts in paragraph 46 reflects the approach taken by the Court in assessing the significance of impacts in previous cases, as noted above.²⁷
23. Paragraph 45 did not separate out past, present and future impacts because many of the impacts on lungfish are expected to overlap in time (e.g. if the failure to operate the fishways in 2006 restricted breeding in that year, the impacts will be felt in the past, present and future). As a consequence, the Council considers that it will not be particularly useful or meaningful to attempt to separate the impacts into past, present and future. The Council considers that paragraph 45 adequately alerts Burnett Water to the case it is to meet in relation to the alleged impacts on lungfish. The impacts of any contravention of condition 3 will be addressed in expert reports.
24. In relation to paragraph 22 of Burnett Water's outline, the Council notes that this paragraph contains a misunderstanding of the complaint about the downstream fishway. Paragraphs 27 and 28 of the Amended Statement of Claim allege that the downstream fishway is not suitable for lungfish whenever it does not operate. This includes both time when water is beneath EL 62.0 m and times when water is above this level but Burnett Water fails to operate the downstream fishway continuously, subject only to minor interruptions for repairs and maintenance.
25. The Council had assumed it was common ground that water levels in the dam have not yet reached the spillway during the operation of the dam and, therefore, no water has yet

²⁴ *Forestry Tasmania v Brown* (2007) 167 FCR 34 per Sundberg, Finkelstein and Dowsett JJ.

²⁵ Outline of Argument on behalf of the Respondent, dated 11 May 2009, paras 19-30.

²⁶ See annexure RLM-2 to the affidavit of Robyn Lesleigh Morrison, affirmed 28 April 2009, pp 25-27.

²⁷ *Booth v Bosworth* (2001) 114 FCR 39 at 65 [99]-[100] per Branson J; *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244-246 [191], [192] and [197] per Sackville J; *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 14-15 [91]-[97] per Marshall J.

flowed over the spillway. However, from the absence of allegations about actual lungfish mortality from overtopping events on the stepped spillway it may be concluded that no such events are alleged to have occurred by the Council. For this reason, the Council submits that Burnett Water is sufficient alerted to the case it is to meet to fulfil the purpose of pleadings.

26. In relation to paragraph 24 of Burnett Water’s outline, the Council submits it is not oppressive and unhelpful to consider the impact of other dams and weirs on the Burnett River and the impacts on lungfish in the Mary River. The consideration of the context of impacts from the contravention of condition 3 reflects the approach taken by the Court in assessing the significance of impacts in previous cases, as noted above.²⁸
27. In relation to Burnett Water’s suggestion in paragraph 24 of its outline that “paragraph 42 appears to be inconsistent with the allegations in paragraph 15” the Council submits there is no inconsistency. Paragraph 15 refers to “the reach of the Burnett River where the dam is now constructed” whereas paragraph 42 refers to the whole of the Burnett River.
28. In relation to paragraphs 26-30 of Burnett Water’s outline, the connection between impacts on the lungfish population on the Burnett River and the Mary River is pleaded in paragraph 7 of the Amended Statement of Claim, namely the lungfish species is endemic to only two rivers – the Burnett River and the Mary River. Consequently, expected impacts on the species in either of the river systems is relevant to understanding the context of impacts from contraventions of condition 3. Again, the consideration of the context of impacts from the contravention of condition 3 reflects the approach taken by the Court in assessing the significance of impacts in previous cases, as noted above.²⁹
29. The brief reference to the Traveston Dam in paragraph 46(d) of the Amended Statement of Claim reflects the fact that the Council raises this matter only as a small part of the context of the impacts in this case and the Council does not intend to make this more than a small part of its case. It also reflects the Council’s concern to avoid the Court’s previous criticisms of prolixity. The Council has attempted to give considerable detail in the Amended Statement of Claim to facts it considered would be controversial and to provide less detail for facts it considered would be relatively uncontroversial. The Council is willing to provide further particulars upon request.

Paragraphs 47 to 52

30. The likely high mortality of lungfish on the stepped spillway raised in paragraphs 47 to 52 are relevant to the impacts of the contravention of condition 3. Burnett Water’s decision not to install a spillway crest gate, smooth spillway section and plunge pool are relevant to understanding its role in causing those increased impacts on lungfish, which is relevant to the exercise of the Court’s discretion.

²⁸ *Booth v Bosworth* (2001) 114 FCR 39 at 65 [99]-[100] per Branson J; *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244-246 [191], [192] and [197] per Sackville J; *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 14-15 [91]-[97] per Marshall J.

²⁹ *Booth v Bosworth* (2001) 114 FCR 39 at 65 [99]-[100] per Branson J; *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244-246 [191], [192] and [197] per Sackville J; *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 14-15 [91]-[97] per Marshall J.

31. As noted earlier, Branson J, Sackville J and Marshall J have held it was necessary to consider the context and intensity of impacts when assessing their significance in granting an injunction under s 475 of the EPBC Act.³⁰ Kiefel J, with whom Wienberg and Edmonds JJ agreed, also considered the context of impacts in assessing their significance under the EPBC Act.³¹
32. The threats to lungfish other than from the contravention by Burnett Water and the highly regulated nature of the Burnett River are relevant to the Court understanding the context of the impacts of the contravention. This makes these matters relevant to the exercise of the Court's discretion.
33. In addition, the design features of the dam that Burnett Water was aware would be likely to increase mortality of lungfish and chose to install anyway, and that are now compounded by its failure to operate the downstream fishway, are matters that weigh in favour of the grant of an injunction.³²

Paragraphs 53 to 59

34. Paragraphs 53 to 59 attempt to identify with sufficient particularity the material facts alleged to be relevant to the representations Burnett Water to obtain approval under the EPBC Act. While prior negotiations and representations made by Burnett Water are not relevant to interpreting condition 3 for the purposes of deciding whether a contravention has occurred,³³ these matters may be relevant to the exercise of the Court's discretion where they bear on the equity and reasonableness of the injunction.
35. In granting an injunction restraining the use of premises as a restaurant but declining to restrain use of the premises as a guest-house, Else-Mitchell J considered the conduct of the planning authority and the landholder in obtaining specific approvals in *Woollahra Municipal Council v Morris* [1966] 1 NSW 136 at 144-145 and found from the representations made and actions taken by the parties:

There seems to me to arise, on the facts and correspondence between the parties, a situation in which it would be inequitable to order the defendants to cease using the premises as a guest-house ...³⁴

36. The representations made by Burnett Water to obtain approval and the negotiations it conducted in relation to the wording of condition 3 are relevant to whether it is fair, reasonable and just to order it to re-build a section of the fishways and increase the operation of the fishways substantially. These representations are also relevant to

³⁰ *Booth v Bosworth* (2001) 114 FCR 39 at 65 [99]-[100] per Branson J; *Minister for the Environment and Heritage v Greentree (No 2)* (2004) 138 FCR 198 at 244-246 [191], [192] and [197] per Sackville J; *Brown v Forestry Tasmania (No 4)* (2006) 157 FCR 1 at 14-15 [91]-[97] per Marshall J.

³¹ *Greentree v Minister for Environment and Heritage* (2005) 144 FCR 388 at 399 [48].

³² *Visa International Services Association v Beiser Corporation Pty Ltd* (1983) 77 FLR 234 at 243 per Beaumont J in the context of weighing the balance of convenience to grant an interim injunction. See also the circumstances in *Woollahra Municipal Council v Morris* [1966] 1 NSW 136 at 144-145 per Else-Mitchell J and

³³ It is submitted that approvals under the EPBC Act should be interpreted in a similar manner to planning approvals and, therefore, they should primarily be interpreted as a stand-alone document and not by reference to application documents or other (extrinsic) documents unless they are expressly or by necessary implication incorporated into the approval: *Hubertus Schuetzenverein Liverpool Rifle Club Ltd v Commonwealth of Australia* (1994) 51 FCR 213 at 222 per Wilcox J.

³⁴ This decision was approved on appeal: *Morris v Woollahra Municipal Council* (1966) 116 CLR 23 and, at 31, Taylor, Menzies and Owen JJ referred to correspondence between the parties as part of the relevant facts.

avoiding any question that Burnett Water is “surprised” by the requirements imposed upon it by condition 3. For example, as pleaded in paragraph 55 of the Amended Statement of Claim, to obtain approval under the EPBC Act Burnett Water represented it would “ensure the ongoing health” of the lungfish and agreed to the wording of condition 3. In the light of this representation it can hardly now say that being required to comply with its representations or previous position is unfair, unreasonable, or unjust.

Paragraphs 60 to 82

37. Paragraphs 60 to 82 attempt to identify with sufficient particularity the material facts alleged to be relevant to Burnett Water’s knowledge of that the operation of the fishways contravened or may contravene condition 3 of the approval.
38. Burnett Water’s knowledge of the contravention and failure to rectify it is relevant to the exercise of the Court’s discretion whether to grant the relief sought under the normal principles for the grant of injunctive relief.³⁵ In granting a mandatory injunction Jessel MR stated in *Smith v Smith* (1875) L.R. 20 Eq. 500 at 505 that “all the circumstances of the case must be taken into consideration” and:

Without laying down any absolute rule, in the first place it is of great importance to see if the Defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it.

39. Stein JA, with whom Priestley and Handley JJA agreed, held that whether the party against which injunctive relief was sought was “deliberately flouting the law” was a relevant consideration for the exercise of the discretion to grant an injunction for unlawful development in *Tynan v Meharg* (1998) 101 LGERA 255 at 259 (NSWCA).
40. Robertson DCJ considered whether respondents to enforcement orders for constructing a building higher than allowed under the conditions of approval had acted deliberately or in contumelious disregard of the approvals in *Caloundra City Council v Taper Pty Ltd & Anor* [2003] QPELR 558; [2003] QPEC 019 at 576-580 [72]-[84], 582 [96] and 558 [111]-[113]. This was in spite of the fact that the offences in question did not have a mental element.³⁶ His Honour held that the acts and omissions of the respondents were not deliberate or reckless, rather they were incompetent, and this was a significant factor weighing against the grant of costly enforcement orders to rectify the contravention.³⁷
41. Beaumont J considered the respondent’s knowledge in weighing the balance of convenience to grant an interlocutory injunction in *Visa International Services Association v Beiser Corporation Pty Ltd* (1983) 77 FLR 234 at 243. His Honour held that the fact that a respondent was well aware of potential infringements and acted in spite of this potential such that the problems confronting the respondent may be attributed to its own actions is a factor weighing in favour of the grant of an injunction.³⁸

³⁵ See generally Spry ICF, *The Principles of Equitable Relief – Specific Performance, Injunctions, Rectification and Equitable Damages* (7th ed, Lawbook Co, Sydney, 2007), p 402.

³⁶ *Caloundra City Council v Taper Pty Ltd & Anor* [2003] QPELR 558 at 576 [69]-[71].

³⁷ *Caloundra City Council v Taper Pty Ltd & Anor* [2003] QPELR 558 at 582 [96] and 558 [111]. Cf *Woolworths Ltd v Caboolture Shire Council* [2004] QPELR 634 at 640 [21] per Wilson SC DCJ.

³⁸ *Visa International Services Assoc v Beiser Corporation Pty Ltd* (1983) 77 FLR 234 at 243 per Beaumont J. See also the circumstances in *Woollahra MC v Morris* [1966] 1 NSWLR 136 at 144-145 per Else-Mitchell J

42. The material facts alleged in paragraphs 60 to 79 are not, as Burnett Water suggests, an attempt to allege that it has contravened s 142A of the EPBC Act. That offence is not pleaded or relied upon by the Council. Neither are the facts alleged in these paragraphs an attempt to allege a contravention of s 491 of the EPBC Act, which makes it an offence to provide false or misleading information to an authorised office under the Act.³⁹ While not relying on ss 142A or 491, the Council is not barred in addressing the exercise of the Court's discretion from referring to facts that could be used in proceedings for breach of ss 142A or 491. Burnett Water's knowledge of the contravention is relevant to the exercise of the Court's discretion under s 475 of the EPBC Act to grant an injunction for a contravention of s 142, irrespective of any allegations concerning ss 142A or 491.

Paragraphs 83 to 90

43. Paragraphs 83 to 90 do not plead evidence but attempt to identify with sufficient particularity the material facts alleged to be relevant to Burnett Water's knowledge of that the operation of the fishways and the problems identified by DPI. Burnett Water's knowledge of these problems and failure to rectify or acknowledge them is relevant to the exercise of the Court's discretion whether to grant the relief sought under the normal principles for the grant of injunctive relief.⁴⁰ The fact that a respondent was well aware of potential infringements and acted in spite of this potential such that the problems confronting the respondent may be attributed to its own actions is a factor weighing in favour of the grant of an injunction.⁴¹

Paragraphs 96 to 98

44. Paragraphs 96 to 98 reflect the Court's judgment in *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2009] FCA 237 at [58] that the Council is not required to prove that any particular fish transfer device is suitable, as opposed to proving, *inter alia*, that the device which has been installed does not meet condition 3, properly construed. The Council does not allege that compliance with the orders sought by it will achieve compliance with condition 3 or mean that the fish transfer device is "suitable for lungfish". Despite this, the Council alleges that the relief sought still has utility for the reasons specified in paragraphs 96 to 98.

45. The utility of the relief sought is a matter relevant to the exercise of the Court's discretion⁴² and is the converse of futility, which is well-known as a factor relevant to the exercise of the Court's discretion.⁴³

46. By narrowing the alleged contraventions to those stated in paragraphs 27 and 28, the Council is legitimately attempting to narrow the issues in dispute and to simplify the

³⁹ A contravention of s 491 of the EPBC Act could be the basis of an application for an injunction under s 475 (see *Mees v Roads Corporation & Ors* (2003) 128 FCR 418) but the Council considers this a peripheral issue that unnecessarily complicates the matters the Court needs to resolve here.

⁴⁰ *Smith v Smith* (1875) L.R. 20 Eq. 500 at 505 per Jessel MR; Spry, n 35, p 402; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at 576-580 [72]-[84], 582 [96] and 558 [111]-[113] per Robertson DCJ.

⁴¹ *Visa International Services Assoc v Beiser Corporation Pty Ltd* (1983) 77 FLR 234 at 243 per Beaumont J. See also the circumstances in *Woollahra MC v Morris* [1966] 1 NSW 136 at 144-145 per Else-Mitchell J

⁴² Gray J discussed utility as a discretionary factor against granting a declaration instead of an injunction under s 475 of the EPBC Act in *Mees v Roads Corporation* [2003] FCA 410 at [4]-[6] per Gray J.

⁴³ See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 at 522-525 [45]-[53] per Allsop J; and Spry, n 35, pp 405-407.

factual issues that the Court must resolve in this case. The Council is not, through paragraphs 96 to 98, attempting to preserve its position for later proceedings. To remove any doubt, the Council accepts an Anshun estoppel would apply against it in relation to these matters to prevent further litigation.

Particulars

47. The Council is willing to provide whatever further particulars are requested by Burnett Water. It made that offer in its letter of 28 April 2009⁴⁴ and remains willing to provide whatever particulars are requested of it.

Costs

48. In general, the appropriate order is that costs of the application be the successful party's costs in the cause, however:

- (a) If Burnett Water succeeds only in relation to the issues it now raises regarding paragraphs 45 and 46,⁴⁵ it is relevant to the issue of costs that these matters were not raised in Burnett Water's correspondence of 27 April 2009, which preceded the strike out application.⁴⁶
- (b) If Burnett Water succeeds only in relation to further particulars being ordered, it is relevant to the issue of costs that the Council was always willing to provide further particulars but no specific request was made of it by Burnett Water prior to the strike out application.

Postscript

49. In previous hearings a question has been raised about the currency of Reprint No 3 of the EPBC Act used by the Court. This is the most recent reprint of the EPBC Act available and incorporates major amendments in 2007.⁴⁷ There have been some very minor amendments to the Act since Reprint No 3⁴⁸ but none to the provisions relevant in these proceedings, particularly ss 142 and 475. The Court should be able to refer to Reprint No 3 for the purposes of these proceedings as reflecting the materially current version of the Act.

50. The Council notes that in the Court's two previous judgments it has been referred to as "Wide Bay Conservation Council Inc" in the title of the judgment and in the first reference to it.⁴⁹ The Council draws to the Court's attention that its incorporated name is "Wide Bay Burnett Conservation Council Inc".

Dr Chris McGrath
Counsel for the Council/Applicant
14 May 2009

⁴⁴ See annexure RLM-2 to the affidavit of Robyn Lesleigh Morrison, affirmed 28 April 2009, p 27

⁴⁵ Outline of Argument on behalf of the Respondent, dated 11 May 2009, paras 19-30.

⁴⁶ See annexure RLM-2 to the affidavit of Robyn Lesleigh Morrison, affirmed 28 April 2009, pp 25-27.

⁴⁷ Pursuant to the *Environment and Heritage Legislation Amendment Act (No. 1) 2006* (Cth).

⁴⁸ Pursuant to the *Migration Legislation Amendment (Information and Other Measures) Act 2007*; *Statute Law Revision Act 2008*; *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*; and *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008*.

⁴⁹ *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2008] FCA 1900 and *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* [2009] FCA 237.