

FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

- 3 AUG 2009

FILED / RECEIVED

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD (ACN 097 206 614)

Respondent

FURTHER AMENDED STATEMENT OF CLAIM

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

Amended on 3 August 2009 pursuant to leave granted by Logan J on 31 July 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.

FURTHER 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

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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, such times of zero river flow being on average less than 5% of total time per annum.

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 attempting to move upstream and downstream of the dam wall to do so without injury or death 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 environmental flows, such interruptions being on average less than 5% of total time per annum; and/or

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

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~~ 0.5 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~~ 67.9 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~~ 66.6 m – EL ~~67.6~~ 67.9 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~~ 0.5 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 30 January 2009 because water levels in the dam reservoir were beneath the entrance at EL 62.0 m until 25 January 2009.

22A. Monthly figures of the percentage of total hourly time the downstream fishway operated from January 2009 to 24 May 2009 were as follows:

(a)	<u>January 2009</u>	-	<u>0.0 %</u>
(b)	<u>February 2009</u>	-	<u>85.3 %</u>
(c)	<u>March 2009</u>	-	<u>89.8 %</u>
(d)	<u>April 2009</u>	-	<u>49.0 %</u>
(e)	<u>May 2009</u>	-	<u>99.6 %</u>

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 6 months.
26. Monthly figures of the percentage of total hourly time the upstream fishway operated from 1 November 2005 to January 24 May 2009 were as follows:

(a)	November 2005	-	0.0 %
(b)	December 2005	-	0.0 %
(c)	January 2006	-	0.0 %
(d)	February 2006	-	<u>20.8 %</u> 0.0 %
(e)	March 2006	-	<u>25.7 %</u> 0.0 %

(f)	April 2006	-	<u>6.1 %</u>	5.0 %
(g)	May 2006	-	<u>3.5 %</u>	4.6 %
(h)	June 2006	-	<u>3.0 %</u>	2.6 %
(i)	July 2006	-	<u>11.7 %</u>	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	-	<u>3.2 %</u>	0.0 %
(r)	April 2007	-	0.0 %	
(s)	May 2007	-	0.0 %	
(t)	June 2007	-	<u>3.9 %</u>	5.3 %
(u)	July 2007	-	0.0 %	
(v)	August 2007	-	3.5 %	
(w)	September 2007	-	0.0 %	
(x)	October 2007	-	<u>11.6 %</u>	14.8 %
(y)	November 2007	-	<u>12.2 %</u>	19.1 %
(z)	December 2007	-	<u>5.4 %</u>	15.5 %
(aa)	January 2008	-	<u>6.3 %</u>	12.8 %
(bb)	February 2008	-	<u>0.7 %</u>	1.0 %
(cc)	March 2008	-	<u>66.7 %</u>	67.7 %
(dd)	April 2008	-	<u>89.0 %</u>	86.6 %
(ee)	May 2008	-	<u>73.2 %</u>	67.7 %
(ff)	June 2008	-	<u>49.9 %</u>	46.2 %
(gg)	July 2008	-	<u>78.5 %</u>	79.7 %
(hh)	August 2008	-	<u>21.7 %</u>	22.3 %
(ii)	September 2008	-	<u>20.0 %</u>	18.1 %
(jj)	October 2008	-	<u>47.2 %</u>	47.8 %
(kk)	November 2008	-	<u>79.2 %</u>	16.6 %
(ll)	December 2008	-	<u>93.2 %</u>	93.1 %
(mm)	January 2009	-	<u>71.4 %</u>	100.0 %
(nn)	February 2009	-	<u>97.1 %</u>	
(oo)	March 2009	-	<u>86.9 %</u>	
(pp)	April 2009	-	<u>93.1 %</u>	
(qq)	May 2009	-	<u>95.7 %</u>	

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~~ 67.9 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 and environmental flows, 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 and environmental flows, 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 environmental flows; and/or
- (iii) failing to operate the upstream fishway continuously, subject only to minor interruptions for repairs and maintenance and environmental flows.

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

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.

~~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.~~

RELIEF

99. The applicant claims the relief claimed in the Amended Application :

- (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~~

~~(e) such other relief as the Court deems necessary; and~~

~~(d) costs.~~

This pleading was prepared by Dr Chris McGrath of counsel.

Date: 31 July 2009

.....*Jo-Anne Bragg*.....
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 31 July 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: 31 July 2009

.....*Chris McGrath*.....
Counsel representing the applicant