

**WIDE BAY BURNETT CONSERVATION COUNCIL INC**

Applicant

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

Respondent

**FURTHER AMENDED REPLY**

(Form 17, O 11, r 22)

Filed pursuant to leave granted by Logan J on 20 November 2009.

1. The applicant admits that the other conditions inserted by the variations to the approval on 8 August 2003 and 30 March 2009 were, in substance, as stated in paragraph 4(b) and (c) of the Defence to the Further Amended Statement of Claim.
2. As to paragraphs 16-20 of the Defence to the Further Amended Statement of Claim, the applicant denies that the respondent could not since the dam became operational, or will not in the future be able to, lawfully install and operate a fish transfer device on the Paradise Dam as required by condition 3 because:
  - (a) condition 3 of the approval is not to be interpreted by reference to extrinsic documents or other approvals except to the extent that such documents or approvals are expressly or impliedly incorporated into condition 3 on its proper construction;
  - (b) the State laws, plans and licence referred to in paragraph 16 of the Defence to the Further Amended Statement of Claim are not expressly or impliedly incorporated into condition 3 on its proper construction, except to the extent necessary to achieve consistency with condition 4 of the approval; and
  - (c) any requirement under a State law that is inconsistent with the requirements imposed on the respondent by condition 3 and condition 4 of the approval is invalid to the extent of the inconsistency due to section 109 of the *Constitution of the Commonwealth of Australia*.

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**FURTHER AMENDED REPLY**  
Filed on behalf of the applicant  
Form 17, O 11, r 22

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3. As to paragraph 35(b) of the Defence to the Further Amended Statement of Claim, the applicant denies that it has unreasonably delayed in commencing these proceedings.
4. As to paragraph 35(c) and (d) of the Defence to the Further Amended Statement of Claim, the applicant denies that the monitoring of lungfish populations in the Burnett River is a reason for not granting the relief sought because:
  - (a) The monitoring conducted by the DPIF does not include lungfish less than 300 mm in length and, therefore, it will not provide evidence of impacts on recruitment in the lungfish population in the Burnett River for many years.
  - (b) Prior to the monitoring conducted by the DPIF providing evidence of impacts on recruitment in the lungfish population in the Burnett River, the contraventions of condition 3 alleged in the Further Amended Statement of Claim will cause harm to lungfish by:
    - (i) stopping, hindering, or reducing upstream and downstream movement or migration of lungfish in the Burnett River for feeding, dispersal or reproduction; and
    - (ii) 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.
5. As to paragraph 35(e) of the Defence to the Further Amended Statement of Claim, the applicant denies that respondent's dealings with DEWHA to identify and address any further requirements for the fish transfer device is a reason for not granting the relief sought.
- ~~6. Further, during the respondent's dealings with DEWHA the respondent has attempted to mislead DEWHA in relation to its conduct in operating the upstream fishway.~~

#### PARTICULARS

- ~~(a) DEWHA, then Department of Environment and Water Resources, conducted an audit of compliance with the conditions of the approval on 25-28 June 2007 ("the compliance audit").~~
- ~~(b) At the time that the compliance audit was conducted, agents of the respondent operated the upstream fishway to represent to the DEWHA officers conducting the audit that the upstream fishway was operational.~~
- ~~(c) At the time that the compliance audit was conducted, agents of the respondent knew but failed to inform the DEWHA staff conducting the audit that the upstream fishway had virtually not been operated for the preceding 10 consecutive months.~~

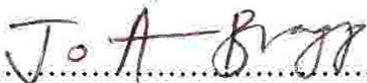
- ~~(d) At the time that the compliance audit was conducted, agents of the respondent knew but failed to inform the DEWHA staff conducting the audit that the upstream fishway was plagued with mechanical failure.~~
- ~~(e) In response to a request by DEWHA on 14 November 2007 to provide advice as to whether the upstream fishway had been operating as intended, the respondent:~~
- ~~(i) knew but failed to inform DEWHA that the upstream fishway was plagued with mechanical failure;~~
  - ~~(ii) knew but failed to inform DEWHA of almost total lack of operation of the upstream fishway to that point; and~~
  - ~~(iii) falsely represented to DEWHA that continuous operation of the fishway had been achieved at some time since its commencement.~~
- ~~(f) To avoid DEWHA becoming aware of the almost total lack of operation of the upstream fishway, in or about February 2008 an employee or agent of the respondent instructed DPIF staff preparing an interim report on the operation of the upstream fishway to modify the report by:~~
- ~~(i) deleting a statement that the downstream fishway “has operated for five percent of the total time”; and~~
  - ~~(ii) deleting a statement that the “downtime of the fishway operation is of major concern.”~~
7. The applicant denies that the grounds alleged in paragraph 35 of the Defence to the Further Amended Statement of Claim provide a basis for the Court declining to grant the relief sought and says the Court ought to grant the relief sought by the applicant having regard to the following facts:
- (a) The harm caused by the contraventions to lungfish by:
    - (i) stopping, hindering, or reducing upstream and downstream movement or migration of lungfish in the Burnett River for feeding, dispersal or reproduction; and
    - (ii) 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.
  - (b) In order to obtain the approval, the respondent represented that it would install and operate a fish transfer device suitable or effective for lungfish and condition 3 was imposed pursuant to that representation.

## PARTICULARS

- (i) The respondent submitted, either directly or through the Queensland Coordinator-General, an environmental impact statement to the Minister in September 2001 when seeking to obtain the approval that, *inter alia*, proposed to install a fish transfer device to mitigate the impacts of the dam on a number of fish species, including lungfish.
  - (ii) On 4 November 2002 the respondent represented to then department administering the EPBC Act that the fishway proposed to be installed on the dam had been designed to accommodate the lungfish.
  - (iii) From late 2002 to mid-2003 that the respondent negotiated the terms of conditions 3 with the then department administering the EPBC Act and represented that the fishway proposed to be installed by the respondent would be appropriate to protect the lungfish and mitigate damage to the lungfish from the construction and operation of the dam.
- (c) The respondent ~~knowingly~~ contravened condition 3 as ~~particularised in paragraph 6 of this Reply~~.
  - (d) The relief will not cause economic hardship to the respondent.
  - (e) The relief sought is reasonable and practicable to prevent or alleviate the contravention continuing in the future in consideration of the facts specified above and the Further Amended Statement of Claim.
8. The applicant otherwise joins issue with the respondent.

This pleading was prepared by Ken Fleming QC, Penny Hay and Dr Chris McGrath of counsel.

Date: 23 November 2009

  
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Jo-Anne Bragg (Principal Solicitor)

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

We, Ken Fleming QC, Penny Hay, and Chris McGrath, counsel, certify to the Court that, in relation to the pleading dated 23 November 2009 filed on behalf of the applicant, the factual and legal material available to us 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: 23 November 2009

  
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Ken Fleming QC

  
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Penny Hay

  
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Chris McGrath