

QUD - 3 19 / 08

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

No. QUD / 2008

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD (ACN 097 206 614)

Respondent



STATEMENT OF CLAIM
(Order 4, rule 6, and Order 11)

1. The applicant is an incorporated organisation, capable of suing, and an interested person within the meaning of section 475 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Particulars of interested person

- (a) The applicant is incorporated in Australia.
 - (b) During the 2 years immediately before the conduct of the respondent to which the application relates and the making of the application, the applicants' objects or purposes included the protection or conservation of, or research into, the environment.
 - (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 is a corporation incorporated in Australia and capable of being sued in the Court by the applicant.

STATEMENT OF CLAIM
Filed on behalf of the applicant
Form 7, O 4, r 6, and O 11.

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3. The respondent constructed, operates, and owns the Paradise Dam (the dam).

Particulars of the dam

- (a) The dam is located on the lower Burnett River approximately 80 km southwest of Bundaberg in the State of Queensland.
 - (b) The dam was previously referred to as the “Burnett River Dam” but is now generally known as the “Paradise Dam”.
 - (c) The purpose of the dam is to store water and make controlled discharges of water downstream which the respondent sells for commercial gain to agricultural, commercial, domestic and other users.
 - (d) In addition to releases of water for human uses, environmental flows are released downstream from the dam.
 - (e) The dam 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.
 - (f) The dam became operational in or about November 2005 and remains in operation.
4. At all times relevant to this application the respondent has held and been subject to an approval granted under section 133 of the EPBC Act for the construction and operation of the dam (the approval).

Particulars of the approval

- (a) The reference number for the approval is EPBC 2001/422.
- (b) The original approval was granted to the respondent by the Minister for the Environment and Heritage (the Minister) on 25 January 2002 and remains in effect until 1 January 2052.
- (c) The Minister varied the conditions of approval of the dam on 8 August 2003 to mitigate the impacts of the dam on the Australian lungfish, also known as the Queensland lungfish (*Neoceratodus forsteri*) (lungfish).
- (d) The approval of the dam, as varied on 8 August 2003, is subject to nine conditions, including condition 3, which 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.

5. In purported compliance with condition 3 of the approval the respondent has constructed a fish transfer device on the dam consisting of an upstream transfer device (the upstream fishway) and a separate downstream transfer device (the downstream fishway).

Particulars of the fish transfer device

- (a) The upstream fishway (also known as the “upstream fishlift”) consists of a 7,500 litre caged container (known as a “hopper”) into which fish are intended to be attracted by flowing water at the downstream base of the dam. The caged container is designed to be periodically lifted over the dam wall and for any fish in the container to be released on the upstream side of the dam.
- (b) The downstream fishway (also known as the “downstream fishlock”) 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. Fish are intended to be attracted into the inlet chamber by flowing water. A lock or vertical gate at the entrance of the inlet chamber 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.
6. The respondent has engaged, engages and, unless restrained by the Court, proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the EPBC Act by failing since the dam became operational to install and operate a fish transfer device suitable for lungfish in contravention of condition 3 of the approval for the dam.

Particulars of conduct constituting an offence or other contravention

The respondent has installed and operated, is operating, and intends to continue to operate the upstream fishway and downstream fishway in a manner whereby:

- (a) The entrances to the upstream fishway and the downstream fishway are not likely to be found by lungfish attempting to move or migrate upstream or downstream of the dam wall.
- (b) The entrances to the upstream fishway and downstream fishway are too small for fully grown lungfish to enter.
- (c) The caged container in the upstream fishway is too small for fully grown lungfish.
- (d) The upstream fishway and downstream fishway do not operate continuously.
- (e) The downstream fishway is not suitable for lungfish to move or migrate downstream of the dam when water levels in the dam are beneath EL 62.0 m (57% of the full storage capacity of the dam) because the inlet to the downstream fishway is constructed above this height.

- (f) Lungfish are likely to be injured by the speed at which they are transported through the downstream fishway and the small dimensions of the pipes and downstream release pool.
 - (g) Lungfish, particularly juveniles, are susceptible to predation while moving through the upstream fishway and the downstream fishway.
 - (h) Lungfish exiting the upstream fishway or the downstream fishway are susceptible to predation at the release point.
 - (i) Due to the matters raised in paragraphs 6(a)-(h), the upstream fishway and the downstream fishway are not likely (more than 50% probable) to allow any normal sized lungfish to move upstream or downstream of the dam without injury irrespective of the water level in the dam.
7. The respondent's contravention of condition 3 set out in paragraph 6 constitutes an offence or other contravention of sections 142 and 142B of the EPBC Act.
8. The respondent's contravention of condition 3 set out in paragraph 6 constitutes an offence or other contravention of section 142A of the EPBC Act.

Particulars of offence against section 142A

- (a) The respondent has been reckless as to the contravention; and
- (b) The respondent's conduct results, will result in, or is likely to have a significant impact on a matter protected by a provision of Part 3 of the EPBC Act, namely the lungfish, a listed threatened species, by:
 - (i) Stopping, hindering, or reducing upstream and downstream movement or migration of lungfish in the Burnett River for feeding or reproduction.
 - (ii) Causing a greater number of lungfish to move downstream in flood events over the dam spillway and, thereby, increasing mortality in the lungfish population due to death or injury of lungfish on the spillway.
 - (iii) Unless restrained by the Court the impacts in paragraphs 8 (b) (i) and (ii) will continue during the operation of the dam for the indefinite future.

The applicant claims the relief specified in the application.

This pleading was prepared by Dr Chris McGrath of counsel.

Date: 7 October 2008


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Larissa Waters (Acting Principal Solicitor)