

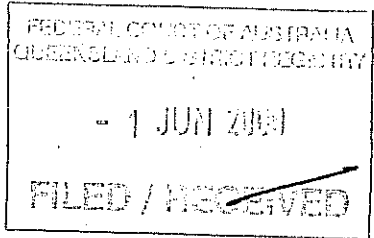
Rec'd
4:02 pm
JAB

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

No QUD 319 of 2008

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant



BURNETT WATER PTY LTD

Respondent

DEFENCE TO THE AMENDED STATEMENT OF CLAIM
(Order 11 rule 20)

1. The Respondent admits the allegations contained in paragraphs 1 and 2 of the Amended Statement of Claim.
2. As to paragraph 3 of the Amended Statement of Claim, the Respondent:
 - (a) admits:
 - (i) that it has been the holder of an approval pursuant to s.133 of the *Environment Protection and Biodiversity Act 1999 (EPBC Act)* since 25 January 2002 for the taking of the following action:

"to construct and operate the Burnett River Dam with a capacity of 300,000 megalitres on the lower Burnett River at 131.2km Average Middle Thread Distance (AMTD) and make controlled discharges of water for agricultural, commercial domestic and environmental uses (EPBC 2001/422)"
 - (ii) that the Burnett River Dam is now generally known as the Paradise Dam;
 - (b) otherwise does not admit the allegations contained therein.
3. The Respondent admits the allegations contained in paragraph 4 of the Amended Statement of Claim.
4. As to paragraphs 5 and 6 of the Amended Statement of Claim, the Respondent:

Filed on behalf of: the Respondent

Solicitor: William McCredie
Allens Arthur Robinson
Lawyers
Riverside Centre
123 Eagle Street
Brisbane QLD 4000
Tel (07) 3334 3000
Fax (07) 3334 3444
DX 210 Brisbane

- (a) admits the allegations contained therein;
- (b) says that the other conditions attached to the approval which were inserted by the variation to the approval on 8 August 2003, provide:
 - (i) the Respondent must adhere to the environmental flow requirements specified in the *Water Resource Plan (Burnett Basin) 2000* and the *Resource Operation Plan (Burnett Basin) 2003* and the Burnett River Dam Flow Strategy for Lungfish dated 22 May 2003;
 - (ii) prior to commencing operation of the dam, the Respondent must provide to the Minister a report detailing the results of baseline monitoring of the lungfish population in the vicinity of the dam wall;
 - (iii) the Respondent must undertake annual aquatic ecosystem monitoring at about AMTD 119 km, AMTD 201 km and at least two sites between these points and provide to the Minister five biennial summary reports. This 10 year monitoring program will include the measurement of the condition of lungfish and lungfish habitat/macrophytes. Monitoring will commence when the dam becomes operational;
 - (iv) the Respondent must conduct a review of the impacts of the dam on the lungfish at the conclusion of the 10 year monitoring program in consultation with the Commonwealth Environment portfolio, to determine whether future monitoring is required;
 - (v) the Respondent must make lungfish information and data from research and monitoring activities freely available for inclusion in State and Commonwealth lungfish recovery programs or programs relating to water quality in the Burnett River;
 - (vi) if aquatic ecosystem monitoring required under sub-paragraph (iii) or the review required under sub-paragraph (iv) indicates ongoing lungfish population decline at about AMTD 119 km that cannot be attributed to natural periodic fluctuations, then the Respondent will initiate appropriate recovery actions. The recovery actions cannot be inconsistent with an adopted Commonwealth Lungfish Recovery Plan.

5. The Respondent admits the allegations contained in paragraphs 7 and 8 of the Amended Statement of Claim.

6. As to paragraph 9 of the Amended Statement of Claim, the Respondent:
- (a) admits that:
 - (i) it caused the dam to be constructed;
 - (ii) construction of the dam commenced on or about 18 November 2003;
 - (iii) practical completion of the dam occurred on or about 28 November 2005;
 - (b) otherwise denies the allegations contained therein.
7. As to paragraph 10 of the Amended Statement of Claim, the Respondent:
- (a) as to sub-paragraph 10(a), admits that the dam is located on the lower Burnett River at approximately 131 km Average Middle Thread Distance approximately 80 km south west of Bundaberg;
 - (b) admits that the allegations contained in sub-paragraph 10(b);
 - (c) as to sub-paragraph 10(c), admits that the dam incorporates a dam concrete wall up to approximately 37 m high;
 - (d) as to sub-paragraph 10(d), admits that:
 - (i) the dam makes controlled discharges of water via the downstream fishway, the upstream fishway, irrigation outlets and environmental outlets;
 - (ii) when water levels exceed the maximum storage capacity of the dam reservoir, water is also discharged over a stepped spillway;
 - (e) as to sub-paragraph 10(e):
 - (i) admits that the dam has a fish transfer device installed;
 - (ii) repeats and relies on paragraphs 19 and 20 below;
 - (f) otherwise does not admit the allegations contained therein.
8. As to paragraph 11 of the Amended Statement of Claim, the Respondent:
- (a) admits that:
 - (i) practical completion of the dam occurred on or about 28 November 2005;
 - (ii) the dam became operational in about December 2005;

- (iii) the dam remains in operation;
 - (b) otherwise denies the allegations contained therein.
9. The Respondent does not admit the allegations contained in paragraphs 12, 13, 14, 15 and 16 of the Amended Statement of Claim.
10. The Respondent denies the allegations contained in paragraph 17 of the Amended Statement of Claim.
11. Further, on its proper construction, condition 3 of the approval:
- (a) required the Respondent to:
 - (i) install a fish transfer device at the dam which was suitable for lungfish having regard to information which was reasonably available at the time it was designed and which was reasonably relevant to the design;
 - (ii) commence that fish transfer device in accordance with its design at the time the dam became operational;
 - (b) did not require the Respondent to install a fish transfer device at the dam which would operate continuously;
 - (c) does not require the Respondent to operate a fish transfer device installed at the dam:
 - (i) continuously;
 - (ii) when it is not lawfully able to do so;
 - (iii) when it is not reasonably practicable to do so.
12. Further:
- (a) the minimum operating level of the downstream fishway of EL62.0 m was suitable for lungfish having regard to information which was reasonably available at the time it was designed and which was reasonably relevant to the design;

Particulars

- (i) the Respondent engaged numerous experts over the period 2001 to 2005 to advise it about potential environmental impacts of the dam, including on the lungfish, such experts including Sinclair Knight Merz, SunWater, WBM Oceanics Australia, and the Queensland Department of Primary Industries and Fisheries (*DPIF*);

- (ii) in 2001 the Respondent proposed in its Environmental Impact Statement for the Burnett River Dam, to install an effective fish transfer device to reduce any level of risk associated with the dam to lungfish;
- (iii) the Respondent commenced a concept design for the fish transfer device in 2002 and engaged DPIF to carry out surveys of lungfish population for use in the design of the fish transfer device;
- (iv) the Respondent liaised over the period 2001 to 2005 with numerous government departments about the potential environmental impacts of the dam (including on the lungfish) and the design of the fish transfer device, such departments including the State Government departments of DPIF, Department of Natural Resources and Mines (*DNRM*), the Environmental Protection Agency (*EPA*) and, in respect of the lungfish specifically, the Commonwealth Department of Environment (later called Department of Environment, Water, Heritage and the Arts (*DEWHA*));
- (v) the Respondent consulted various experts over the period 2001 to 2005 about lungfish and/or the design of the fish transfer device and/or its suitability for various fish including the lungfish;
- (vi) in 2003 the Respondent formed the Burnett Dam Alliance (*BDA*) consisting of it, Walter Construction Group, SMEC Australia Pty Ltd, Hydro Tasmania and McMahon Contractors Pty Ltd which alliance was responsible for the design and construction of the dam and fish transfer device;
- (vii) on 5 November 2003 the DPIF directed the Respondent to build the fish transfer device in general accordance with the Respondent's concept plan Drawing No Team1-303 and Drawing No Team 1-306 and to conduct more detailed design work in consultation with DPIF;
- (viii) the Respondent had numerous discussions, meetings, site inspections and workshops with representatives of the DPIF about the proposed design of the fish transfer device over the period 2002 to 2003 and from 2003 to 2005 the BDA continued such discussions and meetings with the DPIF;
- (ix) prior to final design of the fish transfer device the Respondent caused a hydraulic model of the proposed dam and fishway to be

constructed and tested at SunWater's Rocklea laboratory over the period May 2003 to April 2004;

- (x) the Respondent conducted fish transfer device design workshops at SunWater's Rocklea laboratory over the period January 2003 to February 2004 which workshops were attended by representatives of the Respondent, BDA, SunWater, DPIF and, in respect of one such workshop, Professor Jean Joss;
 - (xi) the Respondent liaised with the DEWHA about the fish transfer device over the period 2002 to May 2004 including providing a copy of the proposed design of the fish transfer device to DEWHA in May 2004;
 - (xii) in December 2003 the BDA submitted its proposed dam and fish transfer device design to Peer Reviewers;
 - (xiii) in determining the operating ranges for the fish transfer device the BDA in consultation with the DPIF, identified inter alia, ecological priorities and upstream and downstream migration times, examined the hydrological data and considered the probability of achieving fish passage success at various flows;
 - (xiv) over the period 2001 to 2005 the Respondent caused hydrological modelling to be carried out during the fish transfer device design stage which modelling indicated that the dam would be above EL 62.0 approximately 80% of the time;
 - (xv) the BDA determined that the downstream fishway with a fish lock tower of 5.7m commencing at an EL of 62.0 m would operate for 80% of the time (based upon the hydrology data referred to in (xiv) and for 93% of the peak migration periods of major species of fish and this was considered by the BDA to offer the best cost benefit risk for all stakeholders that balanced ecology and accountability;
 - (xvi) the Respondent obtained DPIF's confirmation and acceptance of the Respondent's fish transfer device design in October 2004 including that the design took account of whole fish communities and size ranges of fish and that the proposed manipulation of water releases from the dam sought to minimise injury to fish;
- (b) the fish transfer device was installed in the dam before the dam became operational;

Particulars

The fish transfer device was installed in the dam between 2003 and 2005 before the dam became operational.

- (c) the fish transfer device commenced operating at the time the dam became operational;

Particulars

- (i) The downstream fishway was available for use in accordance with its design, namely when water levels in the dam reservoir were at EL62.0 m or greater, at the time the dam became operational. It did not in fact transfer fish at that time because water levels in the dam reservoir were then below EL62.0 m.
- (ii) The upstream fishway was operated in the course of being commissioned from about December 2005.

13. Further, the operation of the dam is and at all material times was regulated by:
- (a) the *Water Act 2000 (Qld)*;
 - (b) the *Water Resource (Burnett Basin) Plan 2000 (WRP)* promulgated under the *Water Act 2000 (Qld)*;
 - (c) the *Burnett Basin Resource Operations Plan (ROP)* promulgated under the *Water Act 2000 (Qld)* as in force from time to time;
 - (d) the *Resource Operations Licence* in respect of the dam (**ROL**) issued under the *Water Act 2000 (Qld)* as in force from time to time.
14. Pursuant to the ROL and the ROP, releases of water from the dam are and at all material times were only lawfully able to be made for the purposes of, in amounts determined in accordance with, and at the times specified in:
- (a) the ROL;
 - (b) attachment 4.1E of the ROP;
 - (c) the critical water supply arrangements for the Bundaberg Water Supply Scheme.

Particulars

- (i) Pursuant to s.110 of the *Water Act 2000 (Qld)* it is and was a condition of the ROL that any operating arrangements and supply or distribution requirements of the ROP be complied with.

- (ii) For the period 1 December 2005 until 12 December 2005 the source of the operating rules was the ROP.
- (iii) For the period 12 December 2005 until 30 June 2007 the source of the operating rules was the ROL and, by reference, attachment 4.1E of the ROP.
- (iv) From 1 July 2007 to 22 February 2008 the source of the operating rules was the ROL and, by reference, attachment 4.1E of the ROP but subject to the critical water supply arrangements for the Bundaberg Water Supply Scheme.
- (v) From 23 February 2008 to 30 June 2008 the source of the operating rules was the ROL and, by reference, attachment 4.1E of the ROP.
- (vi) From 1 July 2008 to the present time the source was attachment 4.1E of the ROP.

15. By reason of the matters referred to in paragraphs 13 and 14 above:

- (a) there were various days between about December 2005 and the present time when:
 - (i) releases of water from the dam could not lawfully be made in accordance with the requirements of the ROL, the ROP and the critical water supply arrangements for the Bundaberg Water Supply Scheme;
 - (ii) releases of water from the dam could only lawfully be made in accordance with the requirements of the ROL, the ROP and the critical water supply arrangements for the Bundaberg Water Supply Scheme in amounts which were not sufficient to operate the fish transfer device;
 - (iii) the fish transfer device could not lawfully be operated for the reasons stated in sub-paragraphs (i) and (ii) above;
- (b) there were various days between about December 2005 and the present time when:
 - (i) releases of water from the dam could only lawfully be made in accordance with the requirements of the ROL, the ROP and the critical water supply arrangements for the Bundaberg Water Supply Scheme in amounts which were not sufficient to operate the fish transfer device for the whole day;

- (ii) the fish transfer device could not lawfully be operated continuously for the reasons stated in sub-paragraph (i) above.
- 16. Between about December 2005 and the present time, it has not been reasonably practicable for the Respondent to operate the fish transfer device continuously:
 - (a) for the reasons stated in paragraphs 13 to 15 above;
 - (b) because of:
 - (i) mechanical, hydraulic or electrical failure of the fish transfer device;
 - (ii) undertaking work, maintenance and repairs to the dam, including the fish transfer device;
 - (iii) low water levels in the area where the hopper of the upstream fishway enters the water upstream of the dam which creates a risk of damage to the hopper due to:
 - (A) submerged rocks and debris;
 - (B) horizontal movement in windy conditions;
 - (C) the location of an adjacent rock face and the risk of rock falling into the hopper;
 - (iv) monitoring of lungfish populations.
- 17. There will in the future be times when:
 - (a) the fish transfer device is not lawfully able to be operated;
 - (b) it is not reasonably practicable to operate the fish transfer device.
- 18. The Respondent admits the allegations contained in paragraph 18 of the Amended Statement of Claim.
- 19. As to paragraph 19 of the Amended Statement of Claim, the Respondent:
 - (a) admits the allegations contained in sub-paragraphs 19(a) and 19(b);
 - (b) as to sub-paragraph 19(c):
 - (i) says that the lock or vertical gate is approximately 0.5 metres at the front entrance of the inlet chamber and that the fish are transported into a pipe and released into the "standing water level" on the downstream side of the dam wall connected to the downstream river;
 - (ii) otherwise does not admit the allegations contained therein;

- (c) as to sub-paragraph 19(d):
 - (i) says the entrance of the downstream fishway is installed between EL62.0 m and EL67.9 m;
 - (ii) admits the downstream fishway cannot operate when water levels in the dam reservoir are below EL62.0 m;
 - (iii) otherwise does not admit the allegations contained therein;
 - (d) admits the allegations contained in sub-paragraph 19(e);
 - (e) as to sub-paragraph 19(f):
 - (i) says that when the dam is near full to overtopping and the stepped spillway is overtopping, lungfish may enter the downstream fishway in the manner alleged therein;
 - (ii) otherwise does not admit the allegations contained therein;
 - (f) as to sub-paragraph 19(g):
 - (i) says that 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 EL66.6 m to EL67.9 m;
 - (ii) otherwise does not admit the allegations contained therein.
20. As to paragraph 20 of the Amended Statement of Claim, the Respondent:
- (a) as to sub-paragraph 20(a):
 - (i) admits that the upstream fishway incorporates a 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;
 - (ii) otherwise does not admit the allegations contained therein;
 - (b) admits the allegations contained in sub-paragraphs 20(b) and 20(c);
 - (c) as to sub-paragraph 20(d):
 - (i) says that the vertical slots are approximately 0.5m wide;
 - (ii) otherwise admits the allegations contained therein;
 - (d) as to sub-paragraph (e):
 - (i) says that the passage from the side of the dam spillway can also be used in high tail water levels;

- (ii) otherwise admits the allegations contained therein.
21. As to paragraph 21 of the Amended Statement of Claim, the Respondent:
- (a) admits that the downstream fishway cannot operate when water levels in the dam reservoir are below EL62.0 m;
 - (b) otherwise denies the allegations contained therein.
22. As to paragraph 22 of the Amended Statement of Claim, the Respondent:
- (a) admits that the downstream fishway did not transfer fish from the time the dam became operational in about December 2005 until about 25 January 2009 because during that period water levels in the dam reservoir were beneath the minimum operating level of the downstream fishway of EL62.0m;
 - (b) otherwise denies the allegations contained therein.
23. The Respondent denies the allegations contained in paragraph 23 of the Amended Statement of Claim.
24. The Respondent does not admit the allegations contained in paragraph 24 of the Amended Statement of Claim.
25. As to paragraph 25 of the Amended Statement of Claim, the Respondent:
- (a) says that the dam became operational in about December 2005;
 - (b) otherwise does not admit the allegations contained therein.
26. As to paragraph 26 of the Amended Statement of Claim, the Respondent:
- (a) denies the allegations contained in sub-paragraphs 26(i), 26(t), 26(bb), 26(cc), 26(dd), 26(ee), 26(ff), 26(gg), 26(ii), 26(jj), 26(kk), 26(ll) and 26(mm);
 - (b) otherwise does not admit the allegations contained therein.
27. As to paragraph 27 of the Amended Statement of Claim, the Respondent:
- (a) admits the facts alleged in sub-paragraph 27(a);
 - (b) as to sub-paragraph 27(b), says that condition 3 of the approval provided:

"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";

- (c) repeats and relies upon the allegations contained in paragraphs 11 to 16 inclusive (above);
 - (d) in the premises, denies that it has contravened condition 3 in the respects identified in sub-paragraph 27(c), or at all;
 - (e) otherwise denies the allegations contained therein.
28. As to paragraph 28 of the Amended Statement of Claim, the Respondent:
- (a) admits the facts alleged in sub-paragraph 28(a);
 - (b) otherwise denies the allegations contained therein.
29. The Respondent denies the allegations contained in paragraphs 29, 30, 31, 32, 33 and 34 of the Amended Statement of Claim.
30. The Respondent admits the allegations contained in paragraph 44 of the Amended Statement of Claim.
31. The Respondent denies the allegations contained in paragraph 91 of the Amended Statement of Claim.
32. The Respondent does not admit the allegations contained in paragraph 92 of the Amended Statement of Claim.
33. The Respondent denies the allegations contained in paragraphs 93 and 94 of the Amended Statement of Claim.
34. As to paragraph 95 of the Amended Statement of Claim, the Respondent:
- (a) denies that the cost of constructing Concept No.1 to extend the operating range of the downstream fishway is small;
 - (b) otherwise does not admit the allegations contained therein.
35. Further and in the alternative, if (which is denied) the conduct of the Respondent has contravened and is likely to contravene s.142 of the EPBC Act, the Court ought not grant the relief claimed by the Applicant:
- (a) by reason of the facts and matters pleaded in paragraphs 4, 12, 13, 14, 15, 16, 17, 33 and 34 above;
 - (b) because the Applicant has unreasonably delayed in commencing these proceedings;

Particulars

- (i) Since at least late 2002, the Applicant has monitored and made submissions in respect of the approval of the dam.
 - (ii) Between about November 2003 and November 2005, the Applicant monitored the construction of the dam, including the installation of the fish transfer device, and thereby became (or ought to have become) aware that the downstream fishway cannot operate when water levels in the dam reservoir are below EL62.0 m.
 - (iii) From about December 2005 to the present time, the Applicant monitored the operation of the fish transfer device and thereby became (or ought to have become) aware that the downstream fishway and the upstream fishway did not operate continuously, subject only to minor interruptions for repairs and maintenance.
 - (iv) Despite the matters referred to in sub-paragraphs (i) to (iii) above, the Applicant did not commence this proceeding until 7 October 2008.
- (c) because there is in place a system of monitoring of lungfish populations in the Burnett River;

Particulars

- (i) The Respondent engaged the DPIF to conduct lungfish surveys during August 2004 (Winter), December 2004 and January 2005 (Summer) and lungfish spawning surveys in September 2004 to November 2004 as a result of which in May 2005 the Respondent caused a report entitled Baseline Lungfish Monitoring Report to be prepared by the DPIF recording results of baseline monitoring of lungfish in the vicinity of the dam wall to be compiled.
- (ii) In June 2005 the Respondent engaged the DPIF to commence fish transfer device monitoring programs which will continue for 5 years.
- (iii) In 2006 the Respondent engaged the DPIF to commence lungfish monitoring program at AMTD 119 km and AMTD 201 km and at AMTD 64, 122, 135, 158, 183, 242 km for a period of 10 years. This monitoring program includes the

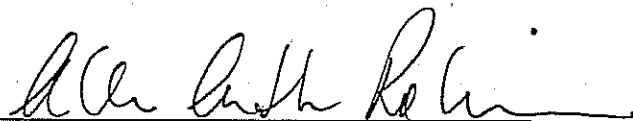
measurement of the condition of lungfish and lungfish habitat/macrophytes. The program includes sampling of the 8 sites, twice a year and monthly spawning surveys during the lungfish spawning season of August to November.

- (iv) The Respondent will conduct a review of the impacts of the dam on the lungfish at the conclusion of the 10 year monitoring program in consultation with the DEWHA to determine whether any future monitoring is required.
- (v) If the lungfish monitoring referred to in sub-paragraph (iii) or the review referred to in sub-paragraph (iv) indicates ongoing lungfish population decline at about AMTD 119 km that cannot be attributed to natural periodic fluctuations then the Respondent will initiate appropriate recovery actions consistent with any Commonwealth lungfish recovery plan.

(d) because since about mid 2007, the Respondent has engaged in dealings with the DEWHA to identify and, if reasonably practicable, address any further requirements of the Department for the fish transfer device, and those dealings have not been concluded.

36. Save as aforesaid, the Respondent does not admit the allegations contained in the Statement of Claim.

Dated 1 June 2009



Allens Arthur Robinson
Solicitor for the Respondent

This pleading was prepared by Mr D.R. Gore QC and Mr Damian Clothier of Counsel.

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD

Respondent

CERTIFICATE OF LEGAL REPRESENTATIVE
(Order 11 rule 1B)

We, Daniel Richard Gore and Damian Clothier, certify to the Court that, in relation to the pleading dated 1 June 2009 filed on behalf of the Respondent, 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.

Dated 1 June 2009



Daniel Richard Gore



Damian Clothier

Legal representatives for the
Respondent