

WIDE BAY BURNETT CONSERVATION COUNCIL INC

Applicant

BURNETT WATER PTY LTD (ACN 097 206 614)

Respondent

**APPLICANT'S OUTLINE OF ARGUMENT FOR
MOTION FOR DISCOVERY**

Material to be read

The Applicant reads the following material:

1. The affidavit of Jo-Anne Bragg affirmed and filed on 6 November 2008;
2. The affidavit of Jean Joss affirmed on 2 December 2008 and filed on 3 December 2008; and
3. The affidavit of David Carl Kreutz sworn and filed on 2 December 2008.

Introduction

4. That the Applicant applies¹ for directions from the Court concerning the provision of particulars of the Defence filed by the Respondent, discovery of specified classes of documents, inspection of the dam by its experts, and a review of the matter in February 2008. These submissions concentrate on the motion for discovery, in response to the concerns raised by the Court in relation to this matter at the first directions hearing on 7 November 2008.

Discovery

5. The Applicant seeks discovery of the four classes of documents specified in the Notice of Motion concerning:

¹ Under O10, r5 (Directions), O12, r 5 (Particulars), O 15, r3 (Discovery), O17 (Inspection of property), and O 19 (Motion) of the Rules.

- (a) the design of the upstream and downstream fishways on the Paradise Dam, many of which have been raised by the Respondent in its Defence;
 - (b) the operation of the upstream and downstream fishways on the Paradise Dam and the main water outlet works from the dam;
 - (c) monitoring of lungfish populations in the Burnett River, including monitoring alleged to have occurred in paragraph 6(f) of the Defence and as required by conditions 4 and 6 of the approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) for the dam;
 - (d) the dealings alleged in paragraph 6(g) of the Defence to have been engaged in between the Respondent and the Department of the Environment, Water, Heritage and the Arts (DEWHA) to identify and address any further requirements of the Department for the fish transfer device.
6. The documents sought by the Applicant can fairly be described as within the four categories of documents required to be disclosed under O 15, r 2(3)(a)-(d). The Applicant requires, in particular, discovery² of the documents relied upon by the Respondent in defence of the Application to enable the Applicant to know the case it is to meet and avoid surprise at the trial.
 7. In accordance with O 15, rr 2 and 15 of the Rules and Practice Note No 14, the Court will seek to avoid unnecessary discovery. A party has only a qualified “right” to discovery. The Court must ensure that in all the circumstances, the litigation is conducted fairly in the interests of both parties, and care must be taken to make sure that there is no excessive or unnecessary discovery.³ The Court must balance cost and oppression versus importance and likely benefit in all of the circumstances of the case.⁴ The fundamental policy behind discovery is to ensure that litigation is decided upon the merits and that cases are not decided by ambush and surprise.⁵
 8. Beaumont J (Tamberlain & Carr JJ agreeing) noted in *Reading Entertainment Australia v Birch Carrol & Coyle* [2002] FCAFC 109 at [65], that discovery will not be ordered to enable a party to “fish” for witnesses or for a new case, ie. to enable the party to frame a new case. This is not such a case. In these proceedings, the pleadings raise issues for which the documents sought through discovery are relevant.⁶ In addition, evidence of the Applicant at this preliminary stage indicates that the downstream fishway has not operated, the upstream fishway operates only intermittently, and there are legitimate concerns regarding the possible impacts of the Respondent’s actions on the lungfish.⁷ Direct observations of the design and

² Alternatively, the Applicant is entitled to serve a Notice to Produce the documents referred to in the pleading for inspection: O 15, r 10.

³ *Index Group of Companies Pty Ltd v Nolan* [2002] FCA 608 at [6]–[7] per Kiefel J; *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2006] FCA 116 at [3] per Tamberlin J.

⁴ *Kyocera Mita Australia v Mitronics Corporation* [2005] FCA 242 at [6] per Stone J.

⁵ *Kyocera Mita Australia v Mitronics Corporation* [2005] FCA 242 at [5]–[7] per Stone J.

⁶ *Bailey v Beagle Management Pty Ltd* (2001) 105 FCR 136 at 143; *Dorajay PL v Aristocrat Leisure Ltd* [2005] FCA 588 at [34] (Stone J).

⁷ See the affidavit of Jean Joss affirmed on 2 December 2008 and filed on 3 December 2008 and the affidavit of David Carl Kreutz sworn and filed on 2 December 2008.

operation of the fishways and documents already in evidence, such as the Department of Environment, Heritage, Water and the Art's compliance inspection in 2007, indicate that there is substance to the Applicant's case alleging non-compliances with condition 3.⁸ This is not a fishing expedition. In this case the documents sought by the Applicant fairly meet the categories of O15, r2(3). Discovery is sought here to flesh-out a case already apparent by direct observation. The Applicant has a good case proof of which is likely to be aided by discovery.⁹ The specified classes of documents sought by the Applicant are fairly sought and the documents sought are not excessive or unnecessary.

9. If discovery is not granted, for instance of monitoring results of lungfish, the Applicant's experts can assess the dam themselves through direct observation but they will be at a distinct disadvantage to the experts retained by the Respondent who will have access to a range of monitoring results and background information on the design and operation of the dam and its fishways. In such circumstances the Applicant's experts, who of course owe their paramount duty to the Court, are likely to be taken by surprise by information readily available to the Respondent's expert witnesses.
10. The documents sought by the Applicant relating to the design, operation, and monitoring of the fishways were created by or on behalf of the Respondent to, at least in part, obtain approval under the EPBC Act and to comply with conditions of approval under that Act. Disclosure of the documents, particularly the monitoring results of lungfish and the operation of the fishways required to be carried out under the approval granted under the Act, will promote the objects of the EPBC Act to protect the environment, particularly matters of national environmental significance such as the lungfish, a listed threatened species.¹⁰ Proceedings such as these have a strong public interest nature and serve the objects of the EPBC Act to protect the environment and conserve biodiversity.¹¹
11. It is submitted that the balance of cost and oppression versus importance and likely benefit in all of the circumstances of the case favours the Court ordering discovery of the specified documents sought.

Discovery involving possibly criminal conduct

12. At the first directions hearing on 7 November 2008 the Court raised particular concerns over discovery in civil proceedings such as these that are based upon or may give rise to criminal liability.

⁸ See annexure JAB-3, p 14, to the affidavit of Jo-Anne Bragg, affirmed and filed 6 November 2008.

⁹ *Nestle Australia Ltd v FCT* (1986) 10 FCR 78 at 83 (Wilcox J), noting the substantial rethinking of these issues in recent years: *Bailey v Beagle Management Pty Ltd* (2001) 105 FCR 136 at 143; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 at [34] (Stone J).

¹⁰ Section 3(1)(a) (Objects) of the EPBC Act.

¹¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 at 431 [19]-[21] (Black CJ and Finkelstein J).

13. The Respondent, a corporation, has no right to refuse to provide discovery on the basis that the documents might incriminate it.¹²
14. Subject to the Court's general discretion noted above, discovery will ordinarily be ordered in civil proceedings such as here where the action is not for a penalty (but where the result of the proceeding might be used to establish a party's liability to a penalty in another proceeding), rather than an action for a civil or criminal penalty.¹³ The current proceedings concern an application for a declaration and an injunction rather than a penalty.
15. It is submitted that the application for the specified classes of documents in the Notice of Motion is consistent with the principles of discovery established in the Court.

Dr Chris McGrath
Counsel for the Applicant
2 December 2008

¹² Section 187 of the *Evidence Act 1995* (Cth); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Trade Practices Commission v Abcco Iceworks Pty Ltd* (1994) 52 FCR 96; *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 554 [13]; *ASIC v Mining Projects Group Ltd* (2007) 164 FCR 32 at 35 [5] (Finkelstein J).

¹³ *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corp* (1979) 42 FLR 204 at 207-208 (Deane J); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Microsoft v CX Computer Pty Ltd* (2002) 116 FCR 372 at 388 (Lindgren J).