

[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

Federal Court of Australia

You are here: [AustLII](#) >> [Databases](#) >> [Federal Court of Australia](#) >> [2008](#) >> [\[2008\]](#)
FCA 1900

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#)
[\[Download\]](#) [\[Help\]](#)

Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (corrigendum 15 December 2008) [2008] FCA 1900 (12 December 2008)

Last Updated: 15 December 2008

FEDERAL COURT OF AUSTRALIA

Wide Bay Conservation Council Inc v Burnett Water Pty Ltd [\[2008\]](#)
[FCA 1900](#)

CORRIGENDUM

WIDE BAY CONSERVATION COUNCIL INC v BURNETT
WATER PTY LTD; MINISTER FOR THE ENVIRONMENT,
HERITAGE AND THE ARTS QUD319 of 2008 LOGAN J12
DECEMBER 2008 (CORRIGENDUM 15 DECEMBER
2008) BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY

QUD319 of 2008

BETWEEN: **WIDE BAY CONSERVATION COUNCIL INC**
 Applicant
AND: **BURNETT WATER PTY LTD**
 Respondent

**MINISTER FOR THE ENVIRONMENT,
HERITAGE AND THE ARTS**
Intervener

JUDGE: **LOGAN J**
DATE OF ORDER: **12 DECEMBER 2008**
WHERE MADE: **BRISBANE**

CORRIGENDUM

1 On the coversheet and paragraph 5 of the Reasons for Judgment, delete "*Environmental Protection and Biodiversity Conservation Act 1999* (Cth)", and insert, "*Environment Protection and Biodiversity Conservation Act 1999* (Cth)".

2 At paragraphs 10, 15, 18 and 37 of the Reasons for Judgment, delete "Conversation", and insert, "Conservation".

3 At paragraphs 32 and 33 of the Reasons for Judgment, delete "Ross", and insert "Joss".

I certify that the preceding three (3) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment of the Honourable Justice Logan.

Associate:Dated: 15 December 2008

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

QUD319 of 2008

BETWEEN: **WIDE BAY CONSERVATION COUNCIL INC**
 Applicant

AND: **BURNETT WATER PTY LTD**
 Respondent

**MINISTER FOR THE ENVIRONMENT,
HERITAGE AND THE ARTS**
Intervener

JUDGE: **LOGAN J**
DATE: **12 DECEMBER 2008**
PLACE: **BRISBANE**

REASONS FOR JUDGMENT

1 The Paradise Dam is situated on the Burnett River in Queensland, upriver from and approximately 80km Southwest of Bundaberg. The dam incorporates an upstream fishway, an associated fish hopper and a downstream fishway.

2 The Respondent, Burnett Water Pty Ltd ("Burnett Water") constructed, operates and owns the Paradise Dam. Burnett Water is a wholly owned subsidiary of SunWater Limited. The dam became operational in or about November 2005. It remains operational.

3 The purpose of the fishways is to permit any normally sized Australian lungfish (*Neoceratodus fosteri*), also commonly known as the Queensland lungfish, to move upstream and downstream of the dam without injury. Absent such fishways, the dam prevents this movement.

4 Australian lungfish occur naturally in only a few coastal river systems in

Southeast Queensland. The Burnett River system is one of these. Lungfish can lay claim to be the oldest surviving vertebrate species. The lungfish has long been a protected species.

5 One contemporary reflection of Parliamentary recognition of the importance of affording protection to the lungfish is to be found in a requirement arising under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) for the construction and operation of the Paradise Dam, a "controlled action" for the purposes of that Act, to have Ministerial approval. Ministerial approval for the construction and operation until 1 January 2052 of the dam, subject to conditions, was initially given on 25 January 2002. On 8 August 2003 the conditions of approval were varied by the Minister so as to add a further condition, condition 3, that Burnett Water install a fish transfer device on the dam suitable for lungfish with a requirement that the fishway commence when the dam became operational. Ancillary conditions relating to the lungfish were also then added by variation.

6 The applicant, Wide Bay Burnett Conservation Council Inc. ("the Conservation Council") is a body corporate incorporated under the *Associations Incorporations Act 1981* (Qld) in 1993. Its objects include the protection or conservation of, or research into, the environment, particularly in the Wide Bay Burnett Region.

7 Section 475 of the EPBC Act relevantly provides:

475 Injunctions for contravention of the Act

Applications for injunctions

(1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations:

(a) the Minister; or

(b) an interested person (other than an unincorporated organisation); or

(c) a person acting on behalf of an unincorporated organisation that is an interested person;

may apply to the Federal Court for an injunction.

Prohibitory injunctions

(2) If a person has engaged, is engaging or is proposing to engage in

conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.

Additional orders with prohibitory injunctions

(3) If the court grants an injunction restraining a person from engaging in conduct and in the Court's opinion it is desirable to do so, the Court may make an order requiring the person to do something (including repair or mitigate damage to the environment).

Mandatory injunctions

(4) If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail to do an act, and the refusal or failure did, does or would constitute an offence or other contravention of this Act or the regulations, the Court may grant an injunction requiring the person to do the act.

... Meaning of interested person--organisations

(7) For the purposes of an application for an injunction relating to conduct or proposed conduct, an organisation (whether incorporated or not) is an interested person if it is incorporated (or was otherwise established) in Australia or an external Territory and one or more of the following conditions are met:

(a) the organisation's interests have been, are or would be affected by the conduct or proposed conduct;

(b) if the application relates to conduct--at any time during the 2 years immediately before the conduct:

(i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and

(ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment;

(c) if the application relates to proposed conduct--at any time during the 2 years immediately before the making of the application:

(i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and

(ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment.

8 The Conservation Council asserts that it is an "interested person" for the purposes of s 475. The correctness of this assertion is not formally

conceded by Burnett Water although it has not as yet advanced any detailed submission as to why it should not be concluded that the Conservation Council has this status. There is evidence before me from the Conservation Council's President, Reginald Thornton, a retired CSIRO research scientist, which at least prima facie admits of a conclusion that it is an "interested person" for the purposes of the EPBC Act. For present purposes I shall assume that it is.

9 The Conservation Council has made the following allegations against Burnett Water in the statement of claim it has filed in this proceeding:

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 and 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.

10 Apart from declaratory relief concerning condition 3, the Conversation Council seeks a mandatory injunction that, within 6 months of the granting of the order, Burnett Water comply with condition 3 by installing and operating continuously until 1 January 2052 a fish transfer device that is

likely to allow any normal sized lungfish to move upstream and downstream of the Paradise Dam without injury irrespective of the water level in the dam.

11 For its part, Burnett Water:

(a) admits that the downstream fishway:

(i) does not transfer lungfish when water levels in the dam are beneath 62.0 metres (being a level estimated to be achieved approximately 80% of the time) because the designed minimum operating level of the downstream fishway is EL 62.0;

(ii) has not transferred lungfish because, due to drought conditions, water levels in the dam have not reached 62.0 metres;

(iii) otherwise denies the allegations in paragraph 6 of the statement of claim;

(b) denies the allegations made in paragraphs 7 and 8 of the statement of claim; and

(c) further or alternatively, alleges that it has acted honestly and reasonably at all times and not at any time acted recklessly.

12 Section 142 of the EPBC Act provides that a civil penalty of up to 10,000 penalty units may be imposed for a contravention of an approval condition. Section 142A of the EPBC Act separately provides for an offence constituted by a reckless contravention of an approval condition.

An individual who commits an offence against s 142A may be imprisoned for up to 2 years or fined up to 120 penalty units or both.

13 Section 142B of the EPBC Act makes separate provision for the commission of a strict liability offence by a person whose taking of an action has been approved under that Act if:

(a) the person takes an action or omits to take an action; and

(b) the action or omission contravenes a condition attached to the approval.

For individuals the penalty for a breach of s 142B is up to 60 penalty units.

14 Obviously enough, of these punishments only a fine is applicable in the case of a corporate offender. As to that, the effect of [s 4B\(3\)](#) of the [Crimes Act 1914](#) (Cth) is that a body corporate may be fined up to 5 times the maximum amount that an individual may be fined. I note in passing that executive officers of bodies corporate that contravene ss 142 or 142A or 142B are also amenable to a suit for a pecuniary penalty or, as the case may be, prosecution for an offence: ss 494 and 495 respectively.

15 Burnett Water has sought a stay of these proceedings or that they be

stood out of the Court's list. It seeks that such an order continue in force until such time as the Minister for the Environment, Heritage and the Arts or a responsible officer in his Department either completes an investigation under ch 6 Pt 17 of the EPBC Act in respect of its compliance with condition 3 of its approval, advises it whether or not condition 3 will be varied or amended or confirms in writing to it that no criminal proceedings will be instituted against it or its officers in respect of conduct substantially the same as that relied upon by the Conversation Council in these proceedings.

16 At the time when Burnett Water's application was called on for hearing the Minister sought leave to intervene in the proceeding. It emerged in the course of submissions that the purpose of the Minister's application, which was made pursuant to O 6 r 17 of the *Federal Court Rules* in the absence of there being a statutory right of intervention conferred on the Minister by the EPBC Act, was:

(a) to provide full details of the compliance programme that is currently being undertaken by his department and allowing officers of his

Department to respond to questions about the programme as part of these proceedings;

(b) to allow for information or comments on proposals which the parties may present to the court where those proposals may impact upon the compliance procedures or steps the Minister may consider it appropriate to take; and

(c) providing any other information which may be requested by the Court.

17 If only to permit the Minister to make such submissions as he may be advised concerning the stay application I granted the Minister leave to intervene on the basis that this leave and whether to grant it only on the terms sought would be the subject of consideration after judgment had been given in respect of Burnett Water's stay application. I stood over the Minister's application accordingly. In the result, the Minister did not offer any substantive submissions in respect of the stay application.

18 It should also be recorded that the Conversation Council has made application for discovery in respect of particular categories of documents concerning the construction and operation of the fishways on the dam. That application also has been stood over pending the disposal of the stay application.

19 That the Court has a general power to control its proceedings and that this includes a power to grant a temporary stay of those proceedings in

various circumstances is not in doubt. The authority cited by Burnett Water for this proposition, *Sterling Pharmaceuticals Pty Ltd v The Boots Company (Australia) Pty Ltd* [1992] FCA 72; (1992) 34 FCR 287 at 290 certainly exemplifies this but in the different context of similar proceedings pending in a foreign jurisdiction. More pertinent is a line of authority with regard to this general power which may be traced to the judgement of Megaw LJ (Brandon LJ agreeing) in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 in which (at 904H-905B) his Lordship stated: I should be prepared to accept that the court which is competent to control the proceedings in the civil action ... would have a discretion, under s 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings if it appeared to the court that justice – the balancing of justice between the parties – so required, having regard to the concurrent criminal proceedings, and taking into account the principle, which applies in the criminal proceeding itself, of what is sometimes referred to as the ‘right of silence’ and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right. There is, I say again, in my judgement, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under Order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings. The protection which is at present given to one facing a criminal charge – the so-called ‘right of silence’ – does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings.

20 *Jefferson Ltd v Bhetcha*, its initial Australian reception and the relationship, if any, between the discretion described by Megaw LJ in the passage quoted and the "felonious tort rule" were considered by Wootten J in *McMahon v Gould* (1982) 7 ACLR 202 in what has proved to be an influential judgment. In that case Mr McMahon, in his capacity as the liquidator of The Dominion Insurance Company of Australia Limited commenced proceedings against the directors of that company, including Mr Gould, for the recovery of sums of money. He alleged that the sums of money in question had been withdrawn from the company’s account and

misapplied and as a result the directors were guilty of fraud and breach of duty owed to the company. Mr Gould was, at the time already facing criminal proceedings directly related to the sums in question. He applied to the Supreme Court for a general stay of the liquidator's proceedings pending the termination of those criminal proceedings.

21 Against this background, Wootten J (at 206-207) made the following observations:

I approach the decision of this matter with the following guidelines:

- (a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court (*Rochfort v John Fairfax & Sons Ltd* at 19);
- (b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds (*ibid*);
- (c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with (*Jefferson v Bhetcha* at 905);
- (d) Neither an accused (*ibid*) nor the Crown (*Rochfort v John Fairfax & Sons Ltd* at 21) are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;
- (e) The court's task is one of "the balancing of justice between the parties" (*Jefferson Ltd v Bhetcha* at 904), taking account of all relevant factors (*ibid* at 905);
- (f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors (*ibid* at 905);
- (g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding (*ibid* at 904). I return to this subject below;
- (h) However, the so-called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding (*ibid*

at 904–5);

(i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (*ibid* at 905);

(j) In this regard factors which may be relevant include:

(i) the possibility of publicity that might reach and influence jurors in the civil proceedings (*ibid* at 905);

(ii) the proximity of the criminal hearing (*ibid* at 905);

(iii) the possibility of miscarriage of justice eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses (*ibid* at 905);

(iv) the burden on the defendant of preparing for both sets of proceedings concurrently (*Beecee Group v Barton*);

(v) whether the defendant has already disclosed his defence to the allegations (*Caesar v Somner* at 932; *Re Saltergate Insurance Co Ltd* at 736);

(vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him (cf *Re Saltergate Insurance Co Ltd* at 735–6);

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant's obligation to the plaintiff;

(1) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed (*Beecee Group v Barton*).

(Citations of authorities mentioned omitted).

22 The first reported consideration in Queensland of the discretion described by Megaw LJ in *Jefferson Ltd v Bhetcha* is the judgment of Connolly J in *Black & White Cab Co Limited v Kelk* [1984] 2 Qd R 484. That case was a civil proceeding in which Mr Kelk was a defendant to a claim for an injunction to restrain the use of allegedly confidential knowledge and damages for an alleged breach of his duty of trust and confidence. Though he had entered an appearance, he had filed no defence. In the meantime an indictment had been presented against him alleging an offence of making improper use as an employee of corporate information to gain an advantage for himself or another person. His Honour (at 485) described the passage which I have quoted above from the judgment of

Megaw LJ in *Jefferson Ltd v Bhetcha* as "highly persuasive" and decided (at 487) to follow it. *McMahon v Gould* does not appear to have been drawn to his Honour's attention although two earlier New South Wales decisions in which *Jefferson Ltd v Bhetcha* had been considered and which were in turn considered by Wootten J were. In the result, Connolly J dismissed the stay application, fixed a time for the filing of a defence and counterclaim and permitted the entry of interlocutory judgement for damages to be assessed in default of the delivery of the same. His Honour allowed (at 488) that, if the criminal trial were imminent, it may well be the proper course to postpone the trial of the civil action until after verdict observing that this was a matter which could be resolved when the civil action was closer to trial.

23 Later factual exemplars of the application of the discretion described by Megaw LJ in *Jefferson Ltd v Bhetcha* and of the guidelines set out by Wootten J in *McMahon v Gould* abound. The most recent of these appears to be a judgment delivered last month by Robson J of the Victorian Supreme Court in *Australian Securities and Investments Commission v Flugge* [2008] VSC 473. That case is noteworthy for a number of reasons. Firstly, it exemplifies that an exercise of the discretion in question in a civil proceeding may be sought even where related criminal proceedings have not been instituted but are instead "on the cards", i.e. a "reasonable possibility". Secondly, it contains a reflective discussion of whether the guidelines stated in *McMahon v Gould* should continue to be applied in light of later High Court authority. Thirdly, there is to be found in it consideration of observations made by Finkelstein J of this Court concerning the danger of a civil court's making declaratory judgments or granting injunctive relief if a matter is likely to end up before a criminal court.

24 As to the second of these noteworthy features, the following passage from the reasons for judgment of Robson J (at [30] to [32]) should be set out:

Authority of *McMahon v Gould*

[30] ASIC submits the principles set out above are well established and have been applied in numerous other cases. It submits they should be followed in the present case. There are, however, indications that the principles may require review by an appellate court. In *Yuill v Spedley Securities Ltd* Kirby P referred to *McMahon v Gould* as "the existing law." His Honour indicated, however, that one day it may be appropriate for the

guidelines referred to by Wooten J in *McMahon v Gould* to be reconsidered. Kirby P said that the guidelines do not take specifically into account the primacy of the administration of criminal justice in our legal system. In *Niven v SS Beazley* JA of the New South Wales Court of Appeal said there was force in Kirby's opinion although the case before him was not the case to reconsider *McMahon v Gould*. In *Baker v The Commissioner of Federal Police* Gyles J said that in view of *Reid v Howard* there was some merit in the view that there should be reconsideration of the manner in which the *McMahon v Gould* line of authorities is now applied so as to decide whether too little weight is given to the practical as well as legal prejudice to the accused and to the primacy of criminal proceedings in our justice system. Gyles J said: The applicants rely upon the decision of the High Court in *Reid v Howard* to suggest that the line of authority commencing with *McMahon v Gould* has given insufficient weight to, and has not fully appreciated the extent of, the privilege against self-incrimination. There is no doubt that *Reid v Howard* does re-affirm the importance of the privilege against self-incrimination, and does not give any encouragement to think that any devaluation of the principle which may apply in the United Kingdom will be applied in Australia.

[31] Gyles J said, however, that any such reconsideration would need to be undertaken either by the Full Court of the Federal Court of Australia or the High Court. This approach to *McMahon v Gould* was also adopted by Gray J in *Elliot v APRA*. Gray J did hold that the line of authority in *McMahon v Gould* was not constructed by way of any exception to the privilege against self-incrimination or self-exposure to a penalty. He said:

Rather, it represents a means which the courts have developed to deal with the possible conflict between actual pending criminal proceedings and civil proceedings or administrative processes.

The approach taken by Gyles J was also adopted by Mansfield J in *Guglielmin v Trescowthick* (No 3).

[32] Nevertheless, in *Trade World Enterprises Pty Ltd v DCT* Nettle JA (with whom Redlich JA agreed) said the relevant principles applicable to

the exercise of discretion on an application for adjournment or stay were conveniently set out by Young CJ in *Philippine Airlines v Goldair (Aust) Pty Ltd* where Young CJ cited with approval the guidelines in *McMahon v Gould*. There was no examination of the reservations referred to by Kirby P.

(Internal footnote references omitted)

25 In the result, Robson J (at [58]) felt that he was bound to follow what he described as the "*McMahon v Gould* line of authorities". So do I. Locally in Queensland, Daubney J reached a like conclusion last year in *Osric Investments v Probst* [\[2007\] QSC 293](#) at [12].

26 In *Australian Securities and Investments Commission v Flugge*, Robson J felt constrained, as had others before him, to suggest that an appellate court may wish to reconsider *McMahon v Gould*. Insofar as *McMahon v Gould* recognises the existence of a power which a court has to control proceedings in a civil action by the granting of a stay of those proceedings where the interests of justice so require, I respectfully doubt whether there is any general need for a reconsideration of that case. It is important not to elevate particular factual circumstances calling or not calling for the exercise of that power into statements of principle. It seems to me that Wooten J was not endeavouring to do anything other than to set out guidelines. I do not approach this matter on the basis that the occasions for the exercise of the power are closed. What is required is a balancing of the interests of the applicant and respondent in a civil proceeding having regard to any statutory context relevant to that civil proceeding and to any impending or prospective criminal proceeding. A separate but not unrelated consideration is whether the civil proceeding or at least its then prosecution might be regarded as an abuse of the process of the court. Such considerations will especially loom where the applicant in a civil proceeding is an emanation of the Crown and seeks declaratory relief and the imposition of pecuniary penalties in circumstances where a respondent is or is in jeopardy of facing criminal proceedings in respect of substantially the same conduct. I note that such a prospect particularly influenced Robson J in his suggestion that *McMahon v Gould* may need to be reconsidered by an appellate court.

27 The judgment of Finkelstein J considered by Robson J was that given by his Honour in *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd* [\(2007\) 164 FCR 487](#). As Robson J (at [63]) noted, the following passage (164 FCR 487 at [58]) summarises the conclusion reached by Finkelstein J in relation to the making of a declaratory judgment by a civil court with respect to criminal conduct:

The English and Australian authorities that warn of the dangers of a civil court becoming involved in criminal conduct continue to apply in an appropriate company case. The general rule in a company case is that a civil court will usually be the appropriate court to deal with a contravention of the Corporations Act. But the court should be wary of granting relief, including the grant of a declaration or an injunction, if the case is likely to end up before a criminal court. Ordinarily, a civil court should not intervene in those circumstances unless its failure to do so will result in irreparable injury. That strict rule need not be applied if the case involves undisputed facts and the issue raised gives rise to a question of pure law. Then a declaration can be a very useful remedy. As Barwick CJ said in *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* that is the kind of case "which contributes enormously to the utility of the jurisdiction. (Internal footnote references omitted.)

28 I approach this matter conscious of the warning to which Finkelstein J refers.

29 In the present matter Burnett Water has in the end brought its stay application after filing its defence rather than at the first directions hearing. No criminal or even civil penalty proceedings instituted by or on behalf of the Commonwealth are presently pending against it or any "executive officer" in respect of any of the matters alleged in the statement of claim. Prosecution or civil penalty proceedings are two of the options open to the Minister to consider under the EPBC Act, as his Department's policy and correspondence with Burnett Water recognise. So, too, is the seeking of injunctive relief under s 475 of the EPBC Act by the Minister himself. None of these options has yet been abandoned by the Minister or his Department. Yet other options theoretically open to the Minister to consider are the variation of the conditions of the approval, the suspension of the approval or its revocation: ss 143, 144 and 145 respectively.

30 Even though it is settled now that the privilege against self incrimination does not apply to corporations: *Environmental Protection*

Authority v Caltex Refining Co Pty Ltd [1993] HCA 74; (1992-1993) 178 CLR 477, note also s 187 of the Evidence Act 1995 (Cth), it does not follow that Burnett Water is for that reason not entitled to seek a stay of the present proceedings. A prior civil proceeding may still in theory have a potential to embarrass a respondent corporation in relation to its defence of a later civil penalty or criminal proceeding. It is though for that corporation to demonstrate that this is more than an abstract concern.

31 A compliance audit of the dam having regard to the EPBC Act was completed by the Department in January 2008. That identified a "partial non-compliance" with, materially, condition 3 of the Ministerial approval. By October 2008 a revision in respect of the original modelling used to set the parameters of the fishways, a review of the monitoring program in respect of the fishways and the seeking of advice in respect of the possibility of an ameliorating "retrofit" to the fishways were occurring. A report on these subjects was expected to be received within 2 months. It is not yet to hand. After its receipt the Department will give further consideration to the course of action it should take. The prospect of either criminal or civil penalty proceedings is but a bare contingency at the moment.

32 In the meantime, according to preliminary report of 2 December 2008 provided by Professor Jean Ross of Macquarie University who has a research interest in the Australian lungfish, a concern remains about the impact of the dam and the present state of the fishways in relation to the future of that species in the Burnett River. She opines:

My principal concern in relation to the possible passage for lungfish over the Paradise Dam is that lungfish are faithful to their spawning sites and need to be able to return to their spawning sites following movement away from those sites, primarily for feeding, following each spawning season. Moreover, due to habitat loss associated with the construction of the Paradise Dam and upstream and downstream water infrastructure, there is a potential for overcrowding at the remaining spawning sites.

33 The objects of the EPBC Act (s 3) include the protection of the environment and the promotion of biodiversity. Having regard to the very occasion for the imposition of condition 3 in the Ministerial approval, the evidence of Professor Ross and the objects of the EPBC Act, there are public interests at large in the present proceeding other than a potential embarrassment of Burnett Water and the administration of justice in relation to any civil penalty or criminal proceedings. There is a public

interest character in the injunctive relief which may be granted by the Court pursuant to s 475 of the EPBC Act. This was recognised by Black CJ and Finkelstein J in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116; (2006) 154 FCR 425 at 431-432, [19] to [21]:

19 Parliament has determined that it is in the public interest that the enforcement provisions of the EPBC Act should be unusually comprehensive in scope. Section 475 of the EPBC Act and its related provisions form part of a much larger enforcement scheme contained in the 21 divisions of Pt 17. The provisions include the conferral of powers of seizure and forfeiture, powers to board and detain vessels and authority to continue a pursuit on the high seas.

20 It is an important and distinctive feature of Div 14 of Pt 17 of the EPBC Act that, like s 80(4) of the TP Act, the Federal Court is expressly empowered to grant an injunction restraining a person from engaging in conduct whether or not it appears to the Court that the person intends to engage again in conduct of that kind and, even, whether or not there is a significant risk of injury or damage to the environment if the person engages or continues to engage in conduct of that kind: see s 479(1)(a) and (c).

21 The public interest character of the injunction that may be granted under s 475 of the EPBC Act is also emphasised by other elements in Div 14 of Pt 17. Thus, as we have noted, standing is conferred upon ‘an interested person’ to apply to the Court for an injunction. Likewise, the traditional requirement that an applicant for an interim injunction give an undertaking as to damages as a condition of the grant is negated. Indeed, s 478 provides, expressly, that the Federal Court is not to require such an undertaking. These modifications to the traditional requirements for the grant of injunctions have the evident object of assisting in the enforcement, in the public interest, of the EPBC Act. This does not of course mean that the traditional requirements are irrelevant: see *ICI Australia Operations Pty Ltd v TPC* at 256-257.

(Internal footnote reference omitted; emphasis in original).

34 An "interested person" may initiate proceedings for injunctive relief in circumstances where, for one reason or another, the Minister may be unable or unwilling so to do. Further, a condition precedent to the granting

of that relief is the proof of a contravention of the EPBC Act. That formal declarations to this effect have not been sought in the application may therefore in substance be a distinction without a difference. However, the present proceeding is of a quite different type to that which provoked the observation made by Finkelstein J in the passage which I have quoted from *Australian Securities and Investments Commission v HLP Financial Planning (Aust) Pty Ltd*.

35 The EPBC Act is not unique in providing for the granting of injunctive relief in circumstances which may attract either a civil penalty or a criminal prosecution. [Section 80](#) of the [Trade Practices Act 1974](#) (Cth) has, from the very commencement of that Act well over 30 years ago, permitted either an emanation of the Commonwealth in the form of what is now called the Australian Competition and Consumer Commission (ACCC) or any other person to institute proceedings for injunctive relief grounded in a finding of a contravention of Pt IV or Pt V of that Act. That there exists a theoretical contingency that a respondent's conduct may at the behest of the ACCC attract a civil penalty proceeding or a prosecution has not in the past proved to be a fertile source of precedent in relation to the staying of proceedings for injunctive relief under the [Trade Practices Act](#) initiated by a private person. An analogous conclusion is open in respect of the proceedings by private persons for injunctions grounded upon a breach of State fair trading statutes.

36 The EPBC Act does, by Subdivision B of Div 15 of Pt 17 of ch 6 (ss 486A to 486D) make some provision with respect to the relationship between criminal and civil penalty proceedings under that Act. I do not though discern in that Subdivision any implication that a proceeding for an injunction initiated by an "interested person" ought to be stayed even temporarily pending the making of a decision by the Minister as to whether civil penalty or criminal proceedings ought to be initiated in respect of the same conduct. Indeed, the absence of any reference in this Subdivision to a proceeding under s 475 of the EPBC Act is noteworthy.

37 There has been no submission on the part of Burnett Water that there has been any collusion between the Conservation Council and the Minister or officers of his Department such that one might regard the Conservation Council as a stalking horse for the Commonwealth. The Conservation Council appears on the evidence to have made its own investigations and taken its own counsel with respect to the initiation of the present proceeding. Nonetheless, that the Minister has sought to intervene in the

proceeding introduces a dynamic which was not present when they were instituted. The avowed basis upon which leave to intervene is sought is superficially limited with there being no avowed interest in separately seeking a role in the proof of any contravention of the EPBC Act. Even if the Minister had not sought to intervene, the present proceeding is a public one. Either the Minister or one of his officers would be entitled to observe and take notes of the evidence given in the proceeding.

38 The present case is nothing like *Australian Securities and Investments Commission v Flugge* where a conclusion that criminal proceedings against the defendants was a reasonable possibility was readily open having regard to recommendations made in a the report of a recently completed Royal Commission. The audit report does not recommend that a criminal proceeding or even a civil penalty proceeding be instituted.

39 Taking into account all of the considerations which I have mentioned, and balancing all of the public interests at large, it seems to me that, as matters presently stand, the case for even a temporary stay of the proceeding is neither compelling nor even persuasive. That is not to say that the granting of a stay is a remedy forever foreclosed to Burnett Water. Circumstances may change in which case it is at liberty again to bring an application.

40 The application should be dismissed. In the event of that occurrence, the Conservation Council did not seek any order as to costs other than that they be costs in the proceedings.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:Dated: 12 December 2008

Counsel for the Applicant: Mr McGrath

Solicitor for the Applicant: Environmental Defenders Office

Counsel for the Respondent: Mr Clothier

Solicitor for the Respondent: Allens Arthur Robinson

Solicitor for the Intervener: Australian Government Solicitor

Date of Hearing: 5 December 2008

Date of Judgment: 12 December 2008

•

AustLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)URL:
<http://www.austlii.edu.au/au/cases/cth/FCA/2008/1900.html>