

NELR casenotes

HIGH COURT

***Queensland Construction Materials Pty Ltd v Kerrie Tapp & Ors* [2011] HCASL 131 (9 June 2011);
Queensland Construction Materials Pty Ltd v Don Baxter & Ors [2011] HCASL 131**

In June 2011 the High Court (Gummow and Kiefel JJ) refused with costs, special leave to appeal against a decision of the Queensland Court of Appeal (McMurdo P, Chesterman JA and Applegarth J) which had found that the applicant had not complied with the requirements of the *Integrated Planning Act 1997* (Qld) in relation to seeking Council approval for some matters affecting sand mining operations on Stradbroke Island.

The decision in *Queensland Construction Materials P/L v Redland City Council & Ors* [2010] QCA 248 (10 September 2010) stands. The Court of Appeal had overturned a decision of the Planning and Environment Court (Wilson DCJ) that had accepted the applicant's submission that statutory requirements had been met and that the development application had been properly made.

The High Court refused leave to appeal on the basis that no substantive question of statutory interpretation was in issue, and that matters of evidence only were raised on the facts. Thus the criteria for special leave had not been engaged.

FEDERAL COURT

***Wide Bay Burnett Conservation Council Inc v Burnett Water Pty Ltd (No 8)* [2011] FCA 175;
Wide Bay Burnett Conservation Council Inc v Burnett Water Pty Ltd (No 9) [2011] FCA 661**

This case involved an application by an 'interested person' under s 475(1) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to restrain an alleged contravention of ministerial approval of a controlled action, in particular, the approval of a dam incorporating a fishway. It was alleged that the respondent had contravened a condition of the approval which stated that '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.'

The application was dismissed with the Court commenting on the lack of persuasive expert evidence to demonstrate non compliance with the condition. The Court further noted that

even if, contrary to the conclusion which I have reached, the Conservation Council ought to be regarded as having proved the pleaded contravention, if only on the particularised basis that the upstream device did not commence when the dam became operational, I should not, as a matter of discretion grant any injunctive relief. That is because, on the evidence I have preferred and taking the long term view, such periods when that device did not operate after December 2005 were attributable to what may aptly be described as transitory commissioning events. The influence of these events has passed. The weight of the evidence is that, as presently operated, the upstream device is suitable for the lungfish.¹

On 10 June 2011, Justice Logan ordered Wide Bay Burnett Conservation Council to pay the costs of the proceedings of the respondent on an indemnity basis to the amount of \$1 040 031.50.²

1 *Wide Bay Burnett Conservation Council Inc v Burnett Water Pty Ltd (No 8)* [2011] FCA 175 at [167].

2 *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 9)* [2011] FCA 661.