SUPREME COURT OF QUEENSLAND

CITATION:	*Bond v Chief Executive, Department of Environment and Heritage Protection* [2017] QCA 180
PARTIES:	**PETER BOND** (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (respondent)
FILE NO/S:	Appeal No 10417 of 2016 P & E Appeal No 3070 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Queensland Planning and Environment Court – [2016] QPEC 40 (Everson DCJ)
DELIVERED ON:	22 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2017
JUDGES:	Morrison and Philippides JJA and Mullins J
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is dismissed.** **3. The appellant is to pay the respondent's costs of the application and appeal, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – where the respondent issued an Environmental Protection Order (EPO) to the applicant– where the applicant applied to the Planning and Environment Court to have the EPO declared unlawful and was unsuccessful – where the applicant seeks leave to appeal against that decision on the grounds that the learned primary judge erred in law when dismissing the application – where the case involves important questions of general application as to the proper interpretation of the *Environmental Protection Act* – where leave to appeal is granted – where an application for review of the decision to grant the EPO was made within the nominated 10 day period – where the application for review stated that the decision was unreasonable and should have allowed for a period longer than 10 days within which to apply for review – where the

application for review relied on there being special circumstances – where s 521 allows the administrating authority to extend the 10 day period in special circumstances – where the applicant alleges that an assessment of whether there are special circumstances must occur before an EPO is issued and failure to make such an assessment led to a breach of procedural fairness and makes the EPO invalid – where the *Environmental Protection Act* requires standard criteria to be considered before an EPO is issued – where the administering authority is required to balance the standard criteria and the affected party's interests – where the applicant's case relies on the brevity of s 521 and depends on the proper statutory construction of the *Environmental Protection Act* – where the proper course of construction is to read the words of a definition into the enactment and then construe the enactment – where the objects of the act surround environmental management – where there were no clear words that would constrain the rights of the affected party by an EPO after it was issued – where to prohibit the consideration of special circumstances after an EPO was issued would constrain the affected party's rights – whether proper construction of the *Environmental Protection Act* restricts the time in which to determine special circumstances – whether the issue of the EPO was valid

Acts Interpretation Act 1954 (Qld), s 32C, s 39
Environmental Protection Act 1994 (Qld), s 360, s 521, s 539
Judicial Review Act 1991 (Qld), s 4
Sustainable Planning Act 2009 (Qld), s 498

Bond v Chief Executive, Department of Environment and Heritage Protection [2016] QPELR 771; [2016] QPEC 40, related
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12, followed
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, followed
Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323, cited
Watson v Scott [2016] 2 Qd R 484; [2015] QCA 267, followed

COUNSEL: D Gore QC, with N Loos, for the applicant
J M Horton QC, with B G Rix, for the respondent

SOLICITORS: Thomson Geer for the applicant
Herbert Smith Freehills for the respondent

[1] **MORRISON JA:** Mr Bond was the Chief Executive Officer and Managing Director of Linc Energy Limited (**Linc Energy**). Linc Energy carried out an underground coal gasification plant on land at Chinchilla, which caused the land to suffer environmental harm and contamination. Linc Energy therefore had obligations to rehabilitate or restore the land.

[2] The Chief Executive, Department of Environment and Heritage Protection[1] issued an Environmental Protection Order (**EPO**) to Mr Bond, to ensure Linc Energy's obligations were performed. Mr Bond received the EPO because he was a related person of Linc Energy.

[3] Mr Bond appealed to the Planning and Environment Court against the decision to issue the EPO. In the course of that he sought the determination of a preliminary point, namely that the EPO was unlawful because it did not comply with s 360 of the *Environmental Protection Act* 1994 (Qld) (the ***EPA***) and that Mr Bond was denied procedural fairness. If those points succeeded, an order was sought pursuant to s 539 of the *EPA*, that the appeal be allowed.

[4] The learned primary judge dismissed the application.[2] Mr Bond seeks leave to appeal against that decision to this Court, pursuant to s 498 of the *Sustainable Planning Act* 2009 (Qld). The question of leave was argued at the same time as the merits of the proposed appeal.

[5] The grounds of the proposed appeal rely only on suggested errors of law in failing to conclude that the EPO was invalid:

(i) upon the proper interpretation of the *EPA*, for the purposes of s 521(2)(a)(ii), the Chief Executive was required to determine whether there were special circumstances prior to the issue of the EPO, and, if so, to state a longer period than 10 business days in the EPO; at all material times, the Chief Executive was of the view that special circumstances were involved, but the EPO did not state a longer period than 10 business days;

(ii) alternatively, the Chief Executive failed to make the determination whether there were special circumstances involved prior to the issue of the EPO, which accordingly failed to state a longer period than 10 business days for making an application for a review;

(iii) further, or alternatively, if (as the Chief Executive contended) it was possible to apply, after receipt of the EPO, for a longer period than 10 business days within which to apply for a review of the decision to issue the EPO, the EPO did not say so;

(iv) the learned primary judge did not determine the ground in subparagraph (ii) above, and therefore failed to provide adequate reasons for dismissing the application; and

(v) further, the primary judge erred in law in relying upon discretionary matters as a basis for dismissing the application, and in determining that it would be futile to grant the relief sought, because if the EPO was invalid for noncompliance with s 360 of the *EPA*, there was no discretion available to the Court.

[6] For reasons which follow I would grant leave to appeal, but dismiss the appeal.

Applicable legal principles

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1 Whom I will refer to as the Chief Executive.

2 *Bond v Chief Executive, Department of Environment and Heritage Protection* [2016] QPEC 40. (**Reasons**)

[7] The contentions on the appeal concern the proper construction of the provisions of the *EPA*. Therefore the principles as to the correct approach are applicable.

[8] As to the proper approach to construction of a statutory provision, the principles are made clear by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*:[3]

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.'
>
> …
>
> [78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the

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[3] (1998) 194 CLR 355; [1998] HCA 28, at [69]-[71]. Internal citations omitted.

purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. …".

[9] In *Red Hill Iron Ltd v API Management Pty Ltd*[4] Beech J referred to the proposition that definition clauses do not have operative effect:

> "[127] As mentioned earlier in section 2, both the Farm-in Agreement and Joint Venture Agreement make extensive use of defined terms. Definitions do not have substantive effect. They are not to be construed in isolation from the operative provision(s) in which a defined term is used. Rather, the operative provision is to be read by inserting the definition into the provision: *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 [84], [103]; *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228 [62], [150], [218]. Those cases dealt with statutory interpretation; the same principle applies in interpreting contracts: *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [25]."

[10] In *Watson v Scott*[5] this Court referred to *Red Hill* and set out the established principles that apply when construing clauses affected by definition clauses:

> "[50] The important part of that passage is the rule of construction that "the operative provision is to be read by inserting the definition into the provision". That was referred to by McHugh J in *Kelly v The Queen*:
>
> > "[84] However, a legislative definition is not or, at all events, should not be framed as a substantive enactment. In *Gibb v Federal Commissioner of Taxation*, Barwick CJ, McTiernan and Taylor JJ stated:
> >
> > The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. ... *[Definition] clauses are ... no more than an aid to the construction of the statute and do not operate in any other way*.
> >
> > (emphasis added)."
> >
> > ...
> >
> > "[103] As I earlier pointed out, the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat

4 [2012] WASC 323 at [127].

5 [2015] QCA 267 at [50]-[51]; internal citations omitted; emphasis in original text. See also *Farnham v Pruden* [2016] QCA 18 at [23].

the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – **I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose** and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment."

[51] McHugh J was referring to statutory construction but the same principles have been applied to construction of contracts."

[11] Thus this Court has adopted the principle in *Kelly v The Queen*[6] that the proper course of statutory construction is to read the words of a definition into the substantive enactment and then construe the substantive enactment. Further, a well-established line of authority was relied upon for the extension of that principle to private documents.[7]

Leave to appeal

[12] Mr Bond applies for leave to appeal under s 498 of the *Sustainable Planning Act* on the basis that the judgment of the learned primary judge involved errors or mistakes in law. The case involves important questions of general application as to the proper interpretation of the *EPA*, and for that reason leave to appeal should be granted.

The factual background

[13] The learned primary judge set out the relevant factual background. There is no challenge to those findings and it is, therefore, convenient to repeat them:[8]

"[8] The EPO relevantly stated:

"Generally, a request to have a decision reviewed must be made:

- within 10 business days of the decision being notified to the person;
- be supported by enough information to enable the department to decide the application for review; and

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6 [2004] HCA 12; (2004) 218 CLR 216, at [84] and [103].

7 *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [158] per McColl JA, Beazley P concurring; *Segelov v Ernst and Young Services Pty Ltd* [2015] NSWCA 156 at [88] per Gleeson JA, Meagher and Leeming JJA concurring; *Vincent Nominees v Western Australian Planning Commission* [2012] WASC 28 at [25] per Beech J.

8 Reasons [8]-[13]. Internal footnotes omitted.

- be made using the application for review of an original decision form (EM709).

Where an application has been made for a decision to be reviewed, the applicant may also apply to the relevant court for a stay of the decision to secure the effectiveness of the review."

[9] Within the nominated ten day period the appellant's solicitor Mr Marshall lodged an application for review of the original decision in the form approved pursuant to the EPA. Among the reasons stated as to why he believed the decision was unreasonable or inappropriate were the following passages:

> "The EPO is lengthy, contains multiple technical requirements and refers to and relies upon a range of technical reports and studies. On any fair and reasonable approach, this would constitute "*special circumstances*" within the meaning of section 521(2)(a)(ii) *Environmental Protection Act* 1994 (***EP ACT***). Accordingly, the administering authority should have determined that a period of 10 business days was not a sufficient period of time to enable Mr Bond to consider the contents of the EPO, take advice from his consultants and formulate grounds in support of this application for internal review.
>
> …
>
> The EPO refers to and relies upon a range of technical documents and reports of experts which Mr Bond does not have access to and which were not provided to Mr Bond at the time of issuing the EPO."

[10] The application for review which was sent under cover of a letter dated 8 June 2016 elicited a response on behalf of the respondent by letter dated 22 June 2016 in, inter alia the following terms:

> "The Application states that the Environmental Protection Order dated 25 May 2016 relied upon 'a range of technical documents and reports of experts' to which Mr Bond does not have access. We provide these documents to you now, on the enclosed USB stick that contains the following documents.
>
> …
>
> In light of the special circumstances, the Department is inclined to grant a longer period of time for your client to complete his application for internal review of the original decision.
>
> We are minded to allow your client 20 business days from the date of this letter to amend or add to his

> application for internal review. Please advise if your client wishes to accept this additional time to take the steps foreshadowed."

[11] This in turned resulted in a response from Mr Marshall who stated in a letter dated 24 June 2016:

> "We note that the Department has now provided us with a USB containing all of the documents referred to in the Environmental Protection Order (**EPO**) issued to our client.
>
> Your letter also acknowledges our submissions that there are "*special circumstances*" present that warrant the granting of a longer period of time for our client to apply for a review of the decision to issue the EPO. The Department has proposed to allow our client 20 business days from 22 June 2016 in which to "*amend or add*" to his application for internal review.
>
> …
>
> We acknowledge that your letter is an attempt by the Department to rectify matters. However, we have serval [*sic*] concerns with the proposal you have advanced.
>
> Firstly, we are unware of any provision in the *Environmental Protection Act* (***EP Act***) that would authorise the changing or extending of an internal review period that has already commenced.
>
> ...
>
> The proposed extension of the internal review period by 20 business days is likely, in our view, to be *ultra vires* or otherwise unlawful under the *EP Act*.
>
> …
>
> Having regard to the above matters our client does not agree to the proposal advanced by the Department, on the grounds that it will in fact compound the failure to afford our client natural justice, is likely to be *ultra vires* and carries an unacceptable risk to our client that he may lose his right of appeal to the Planning and Environment Court."

[12] A letter from the solicitors acting on behalf of the respondent dated 12 July 2016 thereafter stated:

> "You may be aware that on 30 June 2016 liquidators from Linc Energy Limited disclaimed some of Linc's property, including land, mining and petroleum tenures, environmental authorities and some other property at the Chinchilla site.
>
> In light of this development, the Department is considering its position in relation to the rehabilitation

> of the site and other issues raised in your application for internal review of the Environmental Protection Order issued to Mr Peter Bond.
>
> I am instructed that no decision has been made in relation to that EPO or your client's challenge to it. I expect to be in a position to make known to you the course the Department intends to pursue by the end of the week."

[13] Eventually the chain of correspondence concluded with a further letter from the solicitors acting on behalf of the respondent dated 15 July 2016 in the following terms:

> "We agree that any proposed extension of the internal review period may be ultra-vires and as such, pursuant to Section 521(10) of EP Act, the Department is taken to have made a decision confirming the decision to issue the EPO.
>
> If your client intends to challenge that decision, on our calculations your client must file any appeal to the Planning and Environment Court by 5 August 2016.""

Discussion

[14] It is convenient to commence with a consideration of what is required under s 521, and what can be done by the Chief Executive in relation to the time allowed for an application to review an original decision. Senior Counsel for Mr Bond submitted that on the proper construction of s 521 the Chief Executive had to determine whether there were special circumstances prior to the issue of the EPO, and, if so, to state a period longer than 10 business days in the EPO.

Proper construction of s 521

[15] Section 521 provides as follows:

> "**521 Procedure for review**
>
> (1) A dissatisfied person may apply for a review of an original decision.
>
> (2) The application must—
>
> (a) be made in the approved form to the administering authority within—
>
> (i) 10 business days after the day on which the person receives notice of the original decision or the administering authority is taken to have made the decision (the ***review date***); or
>
> (ii) the longer period the authority in special circumstances allows; and
>
> (b) be supported by enough information to enable the authority to decide the application.

(3) On or before making the application, the applicant must send the following documents to the other persons who were given notice of the original decision—

(a) notice of the application (the ***review notice***);

(b) a copy of the application and supporting documents.

(4) The review notice must inform the recipient that submissions on the application may be made to the administering authority within 5 business days (the ***submission period***) after the application is made to the authority.

(5) If the administering authority is satisfied the applicant has complied with subsections (2) and (3), the authority must, within the decision period—

(a) review the original decision; and

(b) consider any submissions properly made by a recipient of the review notice; and

(c) make a decision (the ***review decision***) to—

(i) confirm or revoke the original decision; or

(ii) vary the original decision in a way the administering authority considers appropriate.

(6) The application does not stay the original decision.

(7) The application must not be dealt with by—

(a) the person who made the original decision; or

(b) a person in a less senior office than the person who made the original decision.

(8) Within 10 business days after making the review decision, the administering authority must give written notice of the decision to the applicant and persons who were given notice of the original decision.

(9) The notice must—

(a) include the reasons for the review decision; and

(b) inform the persons of their right of appeal against the decision.

(10) If the administering authority does not comply with subsection (5) or (8), the authority is taken to have made a decision confirming the original decision.

(11) Subsection (7) applies despite the *Acts Interpretation Act 1954*, section 27A.

(12) This section does not apply to an original decision made by—

(a) for a matter, the administration and enforcement of which has been devolved to a local government—the

local government itself or the chief executive officer of the local government personally; or

(b) for another matter—the chief executive personally.

(13) Also, this section does not apply to an original decision to issue a clean-up notice.

(14) In this section—

decision period means—

(a) if a submission is received within the submission period—15 business days after the administering authority receives the application; or

(b) if no submissions are received within the submission period—10 business days after the administering authority receives the application."

[16] A person who is dissatisfied with a review decision may appeal the decision to the Planning and Environment Court: s 531 of the *EPA*. Section 532 provides for the period within which a notice of appeal must be filed, although the court may extend the period for filing a notice of appeal. Section 536 sets out the procedure for an appeal in the following terms:

"(1) The procedure for an appeal is to be in accordance with the rules of court applicable to the appeal or, if the rules make no provision or insufficient provision, in accordance with directions of the judge.

(2) An appeal is by way of rehearing, unaffected by the administering authority's decision."

[17] Pursuant to s 539, in deciding an appeal, the Court may:-

"(a) confirm the decision appealed against; or

(b) vary the decision appealed against; or

(c) set aside the decision appealed against and make a decision in substitution for the decision set aside."

[18] There are a number of matters to note from the terms of s 521, and the *EPA* generally.

[19] First, the review which is permitted is of an "original decision". Schedule 2 of the *EPA* defines a decision to issue an EPO as an original decision. Once the review is carried out the resultant decision can be appealed to the Planning and Environment Court: s 531(1).

[20] Secondly, s 521 occurs in a part of the *EPA* which gives powers to the administering authority to enforce obligations under the *EPA*. Both the obligations and the power to enforce them are designed to further the objects of the *EPA*, namely to "protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends": s 3. The objects are achieved by, in part, implementing environmental strategies and integrating them into efficient resource

management, and then ensuring accountability of environmental strategies: s 4. The EPA provides for various steps that must be undertaken to ensure the environment is protected, such as obtaining an environmental impact study,[9] environmental risk management plans,[10] and environmental authorities.[11] In all stages the administering authority is given a variety of powers to gather information, investigate and then impose conditions that are designed to protect the environment, balanced against the need for development. And the power to enforce conditions is accompanied by various penal provisions, making it an offence to fail to comply.

[21] In that context the administering authority can issue an EPO to secure compliance with such matters as environmental duties, environmental protection policies, conditions of authorities and approvals, and rehabilitation directions: s 360. In deciding to issue an EPO the administering authority must consider the "standard criteria" and do so before it issues: s 359. The standard criteria include various matters such as (i) any government plans, standards, agreements or requirements about environmental protection or ecologically sustainable development, (ii) any relevant environmental impact study, assessment or report, and (iii) principles of environmental policy as set out in the Intergovernmental Agreement on the Environment.[12] But they also include all submissions made by the applicant and submitters, the financial implications of the EPO and the public interest.

[22] Thus the administering authority must carry out a balancing exercise in its consideration to issue an EPO, part of which is the interests of the person affected by the EPO. The importance of that process is shown by s 361 which makes it an offence to not comply.

[23] In that context one would expect to see clear words in the statute if the process after the EPO issue was intended to constrain or cut off the rights of those whose interests are to be considered before the EPO issue. Further, in that context it is likely that the legislature intended that the administering authority have all the flexibility it needs to achieve the objects of the EPA. Is it likely, then that the legislature intended that the administering authority would be constrained to determine special circumstances only before the EPO issues, when it did not say so? As will be seen shortly there are many factual scenarios, common in the human experience that would deny rights to the recipient of an EPO, through no fault of their own, if that were the case. Thus, if it were intended that the determination of special circumstances could only be made before the EPO issue, one would expect to see clear words to that effect, rather than mere implication. There are no such words.

[24] Thirdly, a period longer than 10 business days can be "allowed" by the authority[13] as the time within which to apply for a review of a decision to issue an EPO, but that can only be done if the authority considers that there are "special circumstances": s 521(2)(a)(ii). Therefore, two things must exist for an applicant to have more than 10 business days to file the application: (i) the Chief Executive's holding the view that there are "special circumstances"; and (ii) the Chief Executive then "allowing" extra time.

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9 Chapter 3.
10 Chapter 4A, Part 3.
11 Chapter 5.
12 See the definition of "standard criteria" in schedule 3.
13 The "authority" in this case is the Chief Executive: schedule 4, *EPA*.

[25] Fourthly, the requirement for "special circumstances" is not restricted to the recipient's circumstances. They may also be circumstances that affect the administering authority. For example, if the administering authority knew that whilst its offices would be open during the 10 business days following the service of the EPO, its offices were blocked by a picket line as part of an industrial dispute, thus affecting receipt of an application to review or appeal, that could constitute special circumstances warranting the grant of a longer time to apply. Unlike an EPO which is required to be "served", thus attracting specific provisions affecting when service may be taken to have occurred,[14] an application must be "made" and no particular process is prescribed as to how it is "made" other than the approved form must be used. The approved form requests that the complete application, in the case of non-agricultural Environmentally Relevant Activities,[15] be submitted by post or courier or by hand.[16]

[26] Fifthly, there is nothing to suggest that the determination that there are special circumstances requires the recipient to raise them. If the Chief Executive knows that there are special circumstances, there is no reason why that determination cannot be made on the Chief Executive's own motion. That follows from the fact that "special circumstances" may be those that affect the administering authority rather than the recipient. If the determination on one alternative can be on the Chief Executive's own motion, there is no logical reason why it would not be so on the other.

[27] Sixthly, there is nothing in s 521, nor the EPA generally, to suggest that the Chief Executive cannot enter into a dialogue with the recipient of an EPO, either before the EPO issues or after it does, as to whether there may be suggested "special circumstances" for the purposes of s 521(2)(a)(ii).

[28] Seventhly, nothing in the EPA suggests that there is any statutorily regulated procedure, such as a mandated application procedure, for a putative recipient of an EPO, or an actual recipient, to ask for the longer period possible under s 521(2)(a)(ii). The Chief Executive has power to grant a longer period than 10 business days, and it is consistent with other provisions of the EPA that the Chief Executive not be bound to a particular process in coming to the view that a longer period should be granted. For example there are many areas where the Chief Executive can, without constraint except as to the time with which things must be done, seek information, consult widely, and receive representations or submissions.[17]

[29] Eighthly, s 521 does not put a limit on the extra time that might be allowed, nor does it suggest that only one period of extra time can be allowed. Section 32C of the *Acts Interpretation Act* 1954 (Qld) provides that in an Act words in the singular include the plural. Therefore where s 521(2)(a)(ii) refers to "the longer period" that might be allowed, that also includes "longer periods". Thus the Chief Executive might allow a longer period, and within that period allow another period.

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14 *EPA* s 552 and s 39A(1) of the *Acts Interpretation Act* 1954 (Qld).

15 The agricultural ERA's are described as ERA 2, ERA 3 and ERA 4: AB 141. The *Environmental Protection Regulation* 2008 (Qld) shows these to relate to cattle, pigs and poultry.

16 AB 141.

17 For example: during the process of developing an Environmental Impact Study (ss 62, 64, 137, 140, 160, 161); as to a proposed Environmental Risk Management Plan (ss 98, 99); when considering authorising a proposed environmentally relevant activity (133, 134); as to amending an environmental authority (s 218); as to transferring an environmental authority (s 265); and when considering cancelling an environmental authority (s 281).

[30] Mr Bond contends that the decision by the Chief Executive to grant a longer period than 10 business days can only be made before the EPO issues. It was said that the two possible time periods were mutually exclusive. Senior Counsel for Mr Bond pointed to six matters which, if considered together, were said to compel that construction:

1. there is no express provision to the effect that the decision can be made later than when the EPO issues;

2. there is no express provision dealing with the consequences of a request for longer time; the EPA is silent about any suspension of the 10 day period;

3. there is no provision giving a right to review a decision to refuse a longer period, or give a period longer than 10 business days but still shorter than requested;

4. the review or appeal details say nothing about the right to request an extension of the time;

5. the review and appeal details are expressed in way that suggests the notice must be capable of identifying the relevant details at the time the EPO issues; and

6. the penal and financial consequences of non-compliance with an EPO tell against an indeterminate temporal regime.

[31] As to points 1, 2 and 5, for reasons which follow I do not consider that the matters raised compel the construction for which Mr Bond contends.

[32] The fact that there is no express provision, to the effect that the decision can be made later than when the EPO issues, does not tell one way or another; for one thing, there is equally no express provision to the effect that the decision cannot be made later than when the EPO issue.

[33] In general terms the sequence of steps under the EPA, when concerned with a review of a decision to issue an EPO is, relevantly:

(a) an EPO issues and is served: s 358, s 360(1)(e)(f);

(b) it makes a statement about the time within which an application for review can be made: s 360(1)(d);

(c) any application must be made within 10 business days after receiving notice of the EPO, or such longer period as the Chief Executive allows in special circumstances: s 521(2)(a);

(d) if an application is made it must be supported by enough information to enable the Chief Executive to decide the application: s 521(2)(b);

(e) by the time the application is made, the applicant must give any others who were given the EPO two things: (i) notice of the application itself (called a "review notice"); and (ii) a copy of it and supporting documents: s 521(3);

(f) the review notice must tell the recipient that submissions can be made to the Chief Executive within 5 business days of the application: s 521(4);

(g) if the Chief Executive is satisfied that the applicant has complied with s 521(2) and (3), the Chief Executive must review the original decision, and consider any submissions made by anyone who received a review notice, and

make a decision to confirm or revoke the original decision, or vary it: s 521(5);[18]

(h) the Chief Executive must do so with the decision period, which is: (i) if submissions are received, 15 business days after the application is received; or (ii) if no submissions are received, 10 business days after the application is received: s 521(5) and s 521(14);

(i) within 10 business days of making the decision the applicant and others who received a review notice must be given written notice of the decision: s 521(8); that notice must include the reasons for the decision, and tell the recipient of their rights of appeal: s 521(9); and

(j) if the Chief Executive does not comply with subsections (5) and (8), the Chief Executive "is taken to have made a decision confirming the original decision": s 521(10).

[34] The period within which to apply for a review of an EPO is a minimum of 10 business days from when the recipient "receives notice of the [EPO] or the administering authority is taken to have made the decision".[19] Section 360(1)(e) requires that an EPO be served on the recipient. Service can be achieved by one of the ways specified in s 39 of the *Acts Interpretation Act* 1954 (Qld), that is by delivering the document to the recipient personally, or by "leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document": s 39A(1). However, if served by post, s 552(1) has the qualification that it may only be done by "properly addressing, prepaying and posting the document as a letter", in which case service is taken to have been effected "at the time at which the letter is posted": s 552.[20]

[35] For the purposes of s 521(2)(a), it is proper service that is the receipt of notice, thus triggering the commencement of the period within which to apply for a review. Informal notice would not trigger the time period, nor would non-compliant service, such as using the post but not prepaying.

[36] What follows from the foregoing is that service and actual receipt of the document are not necessarily the same thing. Thus, the EPO might be posted, properly addressed, prepaid and posted as a letter, but not actually received until nine business days after it was posted. Alternatively, it might not be actually received until outside 10 business days from when it was posted; for example if adverse weather conditions prevented delivery of the post. Nonetheless under s 552(1) service is taken to have been effected at the time when the letter was posted. In such a circumstance the subject of the EPO would not know that service in accordance with the EPA had been effected, or that time was running, or had already run.

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[18] I am conscious of the requirement under s 521(7) that the application need not be dealt with by the person who made the original decision, nor anyone in a less senior office than the original decision maker. In a practical sense that will mean that the Chief Executive will not make the original decision. However, for ease of analysis it is convenient to refer to the Chief Executive in both roles.

[19] The latter phrase deals with a number of instances where the authority does not make a decision within statutory timeframes, e.g. under ss 177, 178, 179, 329, 343, 398 and 616P.

[20] Service on a body corporate is by "leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate".

[37] The fact that the recipient of an EPO might find themselves in the position that their right to apply for a review was compromised because time was running even though they had not actually received the document until well into the 10 business day period, would, in my view, be a special circumstances where the Chief Executive would grant a period longer than 10 business days. If the Chief Executive knew prior to issuing the EPO that such a result would follow, it is difficult to see why a longer period of time would not be allowed.

[38] If the Chief Executive discovered that fact during the 10 business day period, it is difficult to see why s 521 should be construed as preventing the Chief Executive from then deciding that special circumstances existed, warranting the grant of a longer period.

[39] Further, the fact that the recipient of an EPO might find themselves in the position that their right to apply for a review was extinguished because the 10 business day period expired before they had not actually received the document, would, in my view, be a special circumstance where the Chief Executive would grant a period longer than 10 business days. If the Chief Executive knew prior to issuing the EPO that such a result would follow, it is very difficult to see why a longer period of time would not be allowed, before the EPO issued.

[40] Further, one can easily envisage a variety of factual scenarios which would impact upon the rights of a recipient of a duly served EPO. Thus:

(a) the recipient might actually be absent from their home or office at the time of service, and remain away for longer than 10 business days; such a scenario is easily comprehended by the recipient being on holiday when the document is served; in such a case they might not even know of the service;

(b) the recipient might fall ill, or suffer injuries in an accident, such that they are unable to make an application themselves, and unable to give instructions to someone to do it or them; in such a case they may know of service but then be unable to do anything about it, or they might not even know of service; and

(c) the recipient may become stranded in a remote location without adequate means of communication and therefore unable to instruct the steps to lodge an application; breakdown whilst in the outback or the impact of a cyclone are easily comprehended events that could have such an outcome; in such a case the recipient may know of service but then be unable to do anything about it, or they might not even know of service.

[41] In all of those scenarios the recipient would lose the right to apply for a review (or at the least have that right compromised) unless the time period to make that application was extended beyond the 10 business days. In each case if the Chief Executive knew of the likelihood of that occurrence before issuing the EPO, one cannot see why a longer period would not be given under the special circumstances provision.

[42] In my view, these considerations are powerful indicators that the proper construction of s 521(2) is that the decision as to whether special circumstances exist, and therefore warrant a longer period, is not confined to being made before the EPO issues.

[43] Indeed, the same considerations point to a construction of s 521 whereby the Chief Executive's power to grant a longer time is available even after the 10 business day period has run. However, there is no need in the present circumstances to resolve this issue. Within 10 business days of the EPO being served on Mr Bond an application to review the decision was lodged. Thus his application was within the time set by s 521(2)(a)(i). Section 521(3) was not engaged, and therefore a review decision had to be made by 23 June 2016 (10 business days from 8 June 2016),[21] failing which s 521(10) provided that a decision would be taken to have been made, confirming the original decision. No review decision was made by 23 June 2016, and s 521(10) deemed a confirmatory decision to have been made that day.

[44] In my view, the fact that s 521 provides strict times for responses under s 521(4) and for the review decision under s 521(5) does not materially impact on these considerations. The other recipients' rights only arise once an applicant has given the review notice and the other documents required by s 521(3). That requires that there be an application duly made under s 521(2), i.e. within the 10 business days, or the longer time period allowed by the Chief Executive. Similarly, the review decision can only be made once an application has been duly made. In that sense the time limits under s 521(3) and (5) depend on what happens under s 521(2). In neither case is there any provision suggesting that the Chief Executive can extend the relevant time, unlike s 521(2).

[45] As to point 3, it is true that there is no provision giving a right to review a decision to refuse a longer period, or give a period longer than 10 business days but still shorter than requested. Such a decision is not an "original decision": schedule 3. However, such a decision would be a discretionary decision of an administrative character made or proposed to be made under an enactment, and thus within s 4 of the *Judicial Review Act* 1991 (Qld). As such the decision would be amenable to judicial review: ss 19, 20 and 22 of the *Judicial Review Act*. Further, since the judicial review proceedings would be related to the review proceedings under the EPA, a stay could be granted to preserve the efficacy of the review proceedings, under s 522(1) of the EPA or s 29 of the *Judicial Review Act*.

[46] As to point 4, I do not accept the contention that the proper construction of s 521 is affected by the fact that the review and appeal details say nothing about the right to request an extension of the time.

[47] Section 360 of the EPA is headed "Form and content of order" and provides:

> "(1) An environmental protection order—
>
> (a) must be in the form of a written notice; and
>
> (b) must specify the person to whom it is issued; and
>
> (c) may impose a reasonable requirement relevant to a matter or thing mentioned in section 358; and
>
> (d) must state the review or appeal details; and
>
> (e) must be served on the recipient.

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21 Applying s 38 of the *Acts Interpretation Act* 1954 (Qld).

(2) Without limiting subsection (1)(c), an environmental protection order may—

(a) require the recipient to not start, or stop, a stated activity indefinitely, for a stated period or until further notice from the administering authority; or

(b) require the recipient to carry out a stated activity only during stated times or subject to stated conditions; or

(c) require the recipient to take stated action within a stated period."

[48] Schedule 4 of the EPA defines the term "review or appeal details":

"***review or appeal details***, for a notice or order, means a statement in the notice or order as follows—

(a) that a person as follows may apply for a review of, or appeal against, the decision to which the notice or order relates—

(i) the person given the notice or order;

(ii) another dissatisfied person for the original decision to which the notice or order relates;

(b) about whether the person may apply for a review or may appeal against the decision;

(c) about the period or time allowed for making the application for a review or for starting an appeal;

(d) if the person may apply for a review—about how to apply for a review;

(e) if the person may appeal—about how to start an appeal."

[49] The submissions centred on s 360(1)(c) which requires that an EPO "must state the review or appeal details". Reading the definition of "review and appeal details" into that part of s 360(1), it reads that an EPO "must [contain] a statement in the … order … about the period or time allowed for making the application for a review or for starting an appeal".

[50] Several matters can be noted from the terms of s 360, s 521 and the definition clause.

[51] First, the provision does not require that the time requirements be set out verbatim from s 521 (2), but rather that the EPO contain a statement "about" the period or time allowed. In context the word "about" at the commencement of s 360(1)(c) means "in connection with", "on the subject of", or "in relation to".

[52] Thirdly, the definition of what the EPO must contain does not include any statement about the right to apply for an extension of the time, either from 10 business days or from whatever time is set under s 521(1)(a)(ii).

[53] The review or appeal details require a statement about: (i) whether the person may apply for a review or appeal; and (ii) the "period or time allowed" for applying for a review or starting an appeal. A statement about (meaning in connection with, on

the subject of, or in relation to) the period or time allowed would comprehend the fact that the authority can, in special circumstances, allow a longer period than 10 business days. Thus the "review or appeal details" tells a recipient that they can apply, and that may be allowed to be done in a time frame determined by special circumstances. In my view, that is enough to tell a recipient that they can raise special circumstances and request an extension of the 10 business days.

[54] As to point 6, I do not consider the penal or financial consequences that might flow from disobedience of an EPO compel the construction for which Mr Bond contends.

[55] The Chief Executive is required to make a decision under s 521(5), which uses the term "must" to qualify the obligation to review the original decision, consider submissions and to make a review decision.[22] However, that may only be done if the Chief Executive "is satisfied the applicant has complied with subsections (2) and (3)". The conjunctive "and" means that compliance with both subsection (2) and (3) are necessary. That means that there must be an application duly made within time, and that other recipients of the EPO have been notified under ss (3).

[56] If an application is lodged under s 521(2), that does not operate as a stay of the EPO: s 521(6). However, s 522(1) provides that a stay can be granted by the court "to secure the effectiveness of the review and any later appeal to the Land Court or the Court": s 522(2). The stay can be sought immediately upon an application for review being made.

[57] It is true to say that there are penal consequences of non-compliance with an EPO in that s 361 makes it an offence to contravene an EPO. That is a summary offence which is dealt with under the *Justices Act* 1886 (Qld): s 484, 497. There are potential defences under Chapter 8 and s 493A(3). However, more importantly for present purposes, an applicant for review under s 521(2) can obtain a stay to ensure the effectiveness of that application, and any appeal from the review decision. Therefore the offence of non-compliance under s 361 is avoided for so long as a stay is in place. If the applicant succeeds on the review decision or appeal, no offence is committed. If that review and appeal process results in the EPO being confirmed or varied, then the applicant is only then faced with the necessity to comply with it. Of course if there is no stay then compliance is required.

[58] However, the availability of a stay reduces the impact of this aspect of the contentions. I therefore do not accept the submission that penal and financial consequences of non-compliance with an EPO tell against an indeterminate temporal regime.

[59] I do not consider that the text of s 521, in context, or the six matters, individually or in combination, compel the construction that the only time the administering authority can determine that there are special circumstances is before the original decision is made.

[60] For these reasons I consider that the proper construction of s 521 is that:

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[22] For ease of analysis it is convenient to refer to the Chief Executive in the roles of original decision maker and review decision maker, notwithstanding the requirements in s 521(7).

(a) prior to an EPO issuing, the administering authority is not obliged to enquire of the recipient if there are "special circumstances" for the purposes of s 521(2)(a), but it may do so; and

(b) the determination that there are "special circumstances" for the purposes of s 521(2)(a) does not have to be made prior to issuing an EPO, but it can be, and may also be made in the period of 10 business days referred to in s 521(2)(a)(i); and

(c) once a longer period has been allowed under s 521(2)(a)(ii), further periods may be allowed if there are "special circumstances" which warrant that.

The review or appeal details in the EPO

[61] The EPO contained section E, which referred to matters concerning the review of decisions and appeals:[23]

> "The provisions regarding review of decisions and appeals may be found in sections 519 to 539 of the Act.
>
> A person who is dissatisfied with certain decisions of the department, may be able to apply to have the department review that original decision.
>
> Generally, a request to have a decision reviewed must be made:
>
> - within 10 business days of the decision being notified to the person;
> - be supported by enough information to enable the department to decide the application for review; and
> - be made using the application for review of an original decision form (EM709).
>
> Where an application has been made for a decision to be reviewed, the applicant may also apply to the relevant court for a stay of the decision to secure the effectiveness of the review.
>
> Once the original decision has been reviewed, a person who is dissatisfied with the review decision may be able appeal against that decision to the relevant court within 22 business days after receiving notice of the review decision.
>
> A person whose interests are or would be adversely affected by a decision of the department may also be able to request a statement of reasons for a decision or a statutory order review under the *Judicial Review Act 1991*.
>
> You may have other legal rights or obligations and should seek your own legal advice."

[62] In so far as the time or period allowed to apply is concerned that part of the EPO said: (i) that the provisions as to review and appeal are to be found in sections 519 to 539 of the EPA; plainly that includes s 521; (ii) **generally**, a request to have a

23 AB 43; internal footnotes omitted.

decision reviewed must be made within 10 business days of the decision being notified to the person; and (iii) the recipient may have other legal rights and should seek legal advice.

[63] However the EPO contained an Information Sheet as part of it.[24] That sheet gave a "summary of the process for review and appeal" to the Land Court and the Planning and Environment Court under the EPA, and set out the relevant sections, including s 521, in full.[25]

[64] In my view, neither of the statements set out in paragraphs [62] or [63] above qualified as a statement "about" the period of time allowed to apply for a review or start an appeal. In combination they clearly did, as the full terms of the relevant provisions were included.

Determination of special circumstances prior to the EPO

[65] In so far as the appeal contends that the Chief Executive was of the view, prior to the EPO being isued, that special circumstances were involved, the contention must be rejected.

[66] In the course of dealing with the issue whether special circumstances had to be determined before the EPO was issued, the learned primary judge referred to the submission made by Mr Bond, that the Chief Executive's letter of 22 June 2016 revealed that the Chief Executive was, in fact, of the view that there were special circumstances before the EPO issued. His Honour said:[26]

> "[15] I do not accept this argument. The letter dated 22 June 2016 was sent in response to the application for review of the original decision, which listed in great detail the grounds on which the appellant contended that there were special circumstances. There is no evidence before me that the EPO was defective at the time it was issued because the respondent apprehended these special circumstances at that stage as compared to later when it received the application to review. The nomination of the 10 day period together with the surrounding information quoted above in the EPO suggests that the respondent, at that stage, was not of the view that special circumstances, of the kind identified subsequently by the respondent in its application for review, were present. I am of the view that the EPO complied with s 360 of the EPA and was not invalid because it failed to acknowledge special circumstances in stating the review or appeal details."

[67] In my view, that passage reveals a finding of fact by the learned primary judge, namely that the Chief Executive did not apprehend that there were special circumstances at the time the EPO was issued. It is true that the passage might have been expressed more directly but it is clear that his Honour found that there was no evidence that the Chief Executive held the view, at the time the EPO issued, that

24 Affidavits of Marshall, AB 24, paragraph 2A; and AB 154 paragraph 2; AB 127.
25 Section 521 is at AB 127 and 131.
26 Reasons [15].

there were special circumstances. And it is plain that his Honour did not infer so, as the nomination of the 10 day period suggested the contrary.

[68] The contrary finding was made, namely that there was evidence that the Chief Executive did apprehend that there were special circumstances when the letter of 22 June 2016 was received, "which listed in great detail the grounds on which [Mr Bond] contended that there were special circumstances".

[69] No challenge was made to those findings. It is not now open to contend that this Court should proceed on the basis that the Chief Executive did apprehend that there were special circumstances prior to the EPO issuing, or before receipt of the letter of 22 June 2016.

Ground 5 – discretionary matters

[70] The reasons above mean that the grounds attacking the validity of the EPO must fail. In the circumstances, as that ground was dependent upon success on other grounds, there is no need to deal with the remaining ground, based on alleged errors in law in relying upon discretionary matters as a basis for dismissing the application.

Disposition of the appeal

[71] For the reasons above I propose the following orders:

1. Leave to appeal is granted.

2. The appeal is dismissed.

3. The appellant is to pay the respondent's costs of the application and appeal, to be assessed on the standard basis.

[72] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and with the orders proposed by his Honour.

[73] **MULLINS J:** I agree with Morrison JA.