PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Abbot Point Bulkcoal Pty Ltd v Chief Executive, Administering the Environmental Protection Act 1994* [2018] QPEC 18
PARTIES:	**ABBOT POINT BULKCOAL PTY LTD (ACN 010 183 534)** (appellant) v **CHIEF EXECUTIVE, ADMINISTERING THE *ENVIRONMENTAL PROTECTION ACT 1994*** (respondent)
FILE NO/S:	4671 of 2017
DIVISION:	Planning and Environment
PROCEEDING:	Application in Pending Proceeding
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	29 March 2018 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2018
JUDGE:	Kefford DCJ
ORDER:	**The respondent's application for excusal of the noncompliance is refused**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – application by the Chief Executive for excusatory relief for noncompliance following a failure to comply with legislation it administers – where failure was the late service of an environmental evaluation notice - where noncompliance arose by reason of a mistake and resulted in a deemed decision – whether the court should exercise its discretionary power of excusal
LEGISLATION:	*Environmental Protection Act 1994* (Qld), s 521 *Planning and Environment Court Act 2016* (Qld), s 37 *Sustainable Planning Act 2009* (Qld), s 440
CASES:	*Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Anor; Sunshine Coast Regional Council v Beerwah Land Pty Ltd* [2016] QPEC 055; [2016] QPELR 963, approved

COUNSEL:	J Lyons for the appellant
	D O'Brien QC and R Quirk for the respondent
SOLICITORS:	Ashurst Australia for the appellant
	Department of Environment and Science for the respondent

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Introduction

[1] This is an application where the respondent, Chief Executive administering the *Environmental Protection Act 1994* (Qld), seeks excusatory relief pursuant to s 37 of the *Planning and Environment Court Act 2016* (Qld) for its failure to comply with legislation that it administers. The respondent's failure relates to the provision of an environmental evaluation notice.

[2] The respondent gave the appellant, Abbot Point Bulkcoal Pty Ltd, an environmental evaluation notice on 18 September 2017. That notice required the appellant to undertake an environmental investigation pursuant to s 326B(2) of the *Environmental Protection Act 1994*.

[3] The appellant applied for an internal review of respondent's decision under s 521 of the *Environmental Protection Act 1994*.

[4] Following an internal review, a decision was made by a different delegate, Ms Kate Harbert, on 17 October 2017. Ms Harbert determined to vary the notice and produced a document dated 31 October 2017. That document was not given to the appellant until 1 November 2017.

[5] Under s 521(8) of the *Environmental Protection Act*, 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. If the administering authority does not give written notice in the prescribed timeframe, s 521(10) provides that the authority is taken to have made a decision confirming the original decision.

[6] Here, the respondent failed to give written notice within the requisite 10 business days and, as such, it was deemed to have made a decision confirming the original decision.

[7] The respondent seeks excusal under s 37 of the *Planning and Environment Court Act 2016* with respect to its failure to provide written notice in the requisite time. It also seeks consequential orders removing the effect of the deemed decision under the *Environmental Protection Act 1994* and giving effect to the October 2017 notice.

Background

[8] The relevant noncompliance involved provision of written notice less than 12 hours after the end of the legislated timeframe.

[9] The noncompliance arose because of a mistake by Mr Cagney. Mr Cagney had been provided with a copy of the notice by Ms Harbert at approximately 12.34 pm on 31 October 2017, which was the last day by which service was required. At 4.55 pm, just before he was about to board a flight, Mr Cagney realised he should have sent the written notice of the decision to the appellant. He landed at approximately 6.10 pm and arrived at his accommodation at approximately 7.00 pm. He subsequently decided not to send written notice of the decision out of professional courtesy and because he believed that the documents needed to be given within business hours to be given in accordance with the *Environmental Protection Act 1994*.

[10] On the morning of 1 November 2017, Mr Cagney arranged for a Mr Baker to send written notice of the decision. It was sent by Mr Baker at 11.59 am, some 12 hours late.

[11] The appellant filed a notice of appeal on 30 November 2017. It also filed an application for a stay on 1 December 2017. The court made an interim stay order on the 6 December 2017 and an interlocutory stay on 12 December 2017.

[12] The department's failure to comply with the *Environmental Protection Act 1994* was pleaded in the notice of appeal. The appellant also pleaded a case in relation to both decisions and both notices. The application in pending proceeding also contained reference to both decisions and both notices, with the stay being sought in respect of each.

[13] Under the respondent's original notice of September 2017, the appellant was required to provide its first report to the respondent by 8 December 2017. That date was extended in the October 2017 notice to 22 December 2017. Notwithstanding the respondent's intention to extend the timeframe, at the time the appellant filed the appeal, by operation of the law, the timeframe within which the first report was required was 8 December 2017. As the respondent had not made an application to excuse its noncompliance prior to the hearing of the appellant's application for a stay, it was necessary for the appellant to seek a stay by no later than 8 December 2017, if it was to avoid committing an offence.

[14] At the hearing on 6 December 2017 his Honour Judge Jones made an order staying both decisions and both notices until further order. On 12 December 2017, his Honour Judge Jones made a further order that, amongst other things, stayed both decisions and both notices and set the matter down for a directions hearing on 9 February 2018.

[15] On 2 February 2018, in advance of the directions hearing, the solicitors for the appellant wrote to the respondent. The appellant asked, in effect, whether the respondent admitted that it had failed to comply with the *Environmental Protection Act 1994* and what the respondent though should be done about the matter.

[16] On 9 February 2018, his Honour Judge Jones made an order that included orders giving the respondent until 28 February 2018 to file any application for excusatory relief. That order also provided a timetable for progression of the appeal that would apply in the event that the respondent did not make an application for excusatory relief.

[17] The timetable included steps such as the filing of a statement of facts, matters and contentions by the appellant. There was also an opportunity for the respondent to file and serve a statement of facts, matter and contentions in response to the

appellant's statement of facts, matters and contentions. That was to be done by 30 March 2018.

[18] The issues in dispute in the appeal were defined by reference to the matters set out in those two statements of facts, matters and contentions. Provision was also made for disclosure and identification of experts that would be relied on by each party to give evidence in the proceeding, and for a mediation before the ADR registrar.

[19] On 22 February 2018, the respondent wrote to the solicitors for the appellant seeking its attitude in relation to excusal of the respondent's failure to comply with the *Environmental Protection Act 1994*. This was the first time the respondent accepted that it had not complied with the requirements of the *Environmental Protection Act 1994*.

[20] Until the 22 February 2018 admission, the appellant had to proceed on the basis that there were live issues in the appeal with respect to the non-compliance and which of the notices issued by the respondent was the relevant notice. This meant the appellant had to deal with both decisions and both notices in the notice of appeal, affidavit material, submissions when seeking a stay, provisions of the orders granting a stay, orders made to progress the appeal and various correspondence.

The respondent's application for excusatory relief

[21] On 28 February 2018, the respondent filed its application for excusatory relief. The application was supported by a solicitor's affidavit. On 2 March 2018, his Honour Judge Jones made an order that required the appellant to advise the respondent 2018 of its position in relation to the application for excusatory relief by 12.00 pm on 8 March. In compliance with that order, the solicitors for the appellant advised the department of its position, namely, that it opposed the granting of excusatory relief.

[22] In that correspondence the appellant also gave the respondent reasons for taking that position. Those reasons included that:

(a) there had not been an adequate explanation for the delay;

(b) there was not an adequate explanation or justification as to why the discretion should be exercised favourably to the respondent given the nature

of the proceeding and that the *Environmental Protection Act 1994* clearly and expressly specifies the consequence of the respondent's non-compliance;

(c) the appellant did not accept the respondent's allegation that the appellant suffered no prejudice as a result of the delay. The appellant noted that the respondent had only accepted there had been non-compliance for the first time on 22 February 2018, some three months after the appeal was filed. Until that time, the appellant had to proceed on the basis that whether there had been compliance was a live issue.

[23] In that same letter, the solicitors for the appellant asked whether the respondent was willing to pay on the standard basis the costs incurred by the appellant as a result of the respondent's failure to comply with the Act. The respondent has never responded to that question.

[24] On 9 March 2018, his Honour Judge Rackemann made orders that, amongst other things, gave the respondent until 4.00 pm on 15 March 2018 to file and serve any further material in support of its application, and set the application down for hearing on 29 March 2018. After the appellant wrote to the respondent on the evening of 15 March 2018, confirming that no further material had been received, the respondent filed one further affidavit in support of its application on 16 March 2018 with no explanation as to why it had not complied with the court order.

The court's excusatory power

[25] The respondent contends that the court's power to excuse the non-compliance should be exercised. Section 37 of the *Planning and Environment Court Act 2016* provides that:

> "(1) If the P&E Court finds there has been noncompliance with a provision of this Act or an enabling Act, the court may deal with the matter in the way it considers appropriate.
>
> (2) Without limiting subsection (1) and to remove any doubt, it is declared that subsection (1)—
>
> (a) applies for a development approval that has lapsed, or a development application that has lapsed or has not been properly made under the Planning Act; and
>
> (b) is not limited to—
>
> (i) circumstances in relation to a current P&E Court proceeding; or

(ii) provisions under which there is a positive obligation to take particular action.

(3) In this section—

noncompliance, with a provision, includes—

(a) non-fulfilment of part or all of the terms of the provision; and

(b) a partial noncompliance with the provision.

provision includes a definition."

[26] *The Environmental Protection Act 1994* is an enabling Act, as defined by section 7 of the *Planning and Environment Court Act 2016*.

[27] There has been a non-compliance with a provision in an enabling Act in that the October 2017 notice was not served in compliance with s 521(8) of the *Environmental Protection Act 1994*.

[28] In *Beerwah Land Proprietary Limited v Sunshine Coast Regional Council*; *Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd & Another and; Sunshine Coast Regional Council v Beerwah Land Pty Ltd* [2016] QPEC 055; [2016] QPELR 963, His Honour Judge Rackemann observed at 974:

> "[50] It was submitted, in the alternative, that the court ought not, as a matter of discretion, make orders under s 440. It was pointed out that the legislature has provided for a particular consequence which should not be readily avoided by the use of s 440, particularly given that the effect would be to take from the applicant the benefit of an approval which it otherwise enjoys by reason of the deemed approval provisions. There is, I accept, some force in that submission and, accordingly, the court should exercise a degree of caution about using s 440 in that way. Certainly it should not be seen as a remedy to be applied whenever a deemed approval arises by reason of an assessment manager's honest mistake, but equally it should not be approached on the basis that the discretion should never be exercised in a way which interferes with a deemed approval. Nor do I consider that some disentitling conduct on the part of the holder of the deemed approval is required, before the exercise of the discretion under s 440 could be justified. Ultimately, the proper exercise of the discretion depends upon a consideration and weighing of all relevant matters."

[29] While His Honour's observations related to s 440 of the *Sustainable Planning Act 2009* (Qld), I consider them to be equally apt with respect to s 37 of the *Planning and Environment Court Act 2016*.

Should the non-compliance be excused?

[30] This is a case where the noncompliance arose by reason of a mistake. While the respondent has not provided an explanation as to why the decision was not prepared

sooner, it is entitled to take the full 10 business days to prepare its decision and deliver its decision. The noncompliance arose by its failure to do so within that timeframe. An explanation has been given as to why it was delivered 12 hours late.

[31] I accept the decision was in a form ready to be delivered within the 10 business days, and that the reason this was not achieved was as a consequence of those matters explained by Mr Cagney.

[32] The respondent submits there are four reasons that this is an appropriate case for the excusal power to be exercised.

[33] The first is that the noncompliance was minimal, involving delivery of the notice less than 12 hours after the expiry of the relevant timeframe. I accept the noncompliance involved a delay of less than 12 hours, however to say it is minimal fails to appropriately recognise that legal rights and legal obligations flow from the issuing of a notice of this nature.

[34] The rights and obligations of the appellant were affected by the noncompliance. The late delivery left the appellant exposed to potential commission of offences from 8 December 2017 rather than from 22 December 2017. Consequently, the appellant had a more condensed timeframe within which to obtain a stay, or comply with the notice obligations, to avoid committing an offence.

[35] Criticism is made by the respondent of the appellant's submissions that the noncompliance meant it needed to bring a stay application urgently. The respondent says that the appellant would have had to bring an urgent stay application in any event. However, until 31 October 2017, it was still possible the appellant would be wholly successful on its application for an internal review. The need to obtain a stay in order to avoid committing an offence only crystallised on 31 October 2017. Due to the respondent's noncompliance, the appellant needed to obtain the stay by 8 December 2017, rather than by 22 December 2017.

[36] The second reason advanced by the respondent is that there is an explanation for the noncompliance: it arose because of a mistake; it was not deliberate. I accept that to be the case.

[37] The third reason given by the respondent is that while this appeal involves a rehearing unaffected by the original decision, the hearing of the appeal will involve

a consideration of the reasons identified by the respondent for issuing the investigation notice and specific conditions on which it should be issued. The respondent submits that the October 2017 notice, and not the September 2017 notice, represents its current position. It submits that it is artificial for this appeal to focus on a s 326B(2) notice, which the appellant knows, and the respondent accepts, does not reflect the respondent's current positon.

[38] The respondent also submits that if the appeal is discontinued by the appellant or is simply dismissed, the October 2017 decision should stand or be affirmed.

[39] The respondent's submissions on this issue create an impression that the correction of this matter is material to the way the dispute in this appeal will proceed. The respondent's submissions make no reference to the fact that, had it not applied to have its noncompliance excused, the issues to be agitated in this appeal would not be defined by reference to the September 2017 notice. Rather, it is apparent from the order of his Honour Judge Jones made on 9 February 2018 that the issues to be agitated in this appeal would have been defined by reference to a statement of facts, matters and contentions prepared by the appellant and a statement of facts, matters and contentions filed by the respondent.

[40] Further, the issues would not include a dispute about which of the two notices was the effective notice. Had the respondent not made the subject application, pursuant to paragraph 3(a) of the 9 February 2018 order, the respondent would be deemed to admit its noncompliance.

[41] There has been no suggestion that it is not open to the respondent to make clear in its statement of facts, matters and contentions that its current position is reflected in the October 2017 notice.

[42] In the unlikely event that appellant seeks to discontinue the appeal, the respondent could, at that point in time, make its application for the excusal. As already noted, the respondent is otherwise at liberty to take the position that the appeal should not be dismissed and should be allowed on the limited basis that the September 2017 notice ought be replaced with the October 2017 notice.

[43] As such, the third reason advanced by the respondent to exercise the court's power under s 37 of the *Planning and Environment Court Act 2016* is a hollow one.

[44] The fourth reason advanced by the respondent is that it says no prejudice has been identified by the appellant that would warrant refusal of the excusatory power.

[45] I have insufficient material before me to determine the extent of the financial prejudice suffered by the appellant. It may well be that the financial burden in having to deal with both decisions and both notices in the notice of appeal, affidavit material, submissions when seeking a stay, provisions of the order granting a stay, the orders made to progress the appeal and the correspondence were, in the scheme of things, minimal.

[46] The legislature has, in the *Planning and Environment Court Act 2016,* altered the position with respect to costs that existed, at least for a significant period of time, under the *Sustainable Planning Act 2009*. There is no longer a broad discretion to award costs. Nevertheless, as was accepted by counsel for the respondent, costs and prejudice in the nature of costs are not an irrelevant consideration.

[47] I do not consider costs to be a determinative factor in this case. However, it cannot be said that there is no prejudice to the appellant.

[48] The effect of s 521(10) of the *Environmental Protection Act 1994* is to deem the decision to be that contained in the September 2017 notice. It is clear from the appellant's position in this case that it wishes to maintain whatever benefit it potentially receives from that being the decision the subject of the review. Although the October 2017 notice contains some changes that are potentially beneficial to the appellant, such as an extension of some timeframes for preparation of reports, it also contains changes that may be considered damaging, such as more significant allegations with respect to environmental harm.

[49] Given the appellant's position, and the fact that the legislature has provided for a particular consequence that should not be readily avoided by the use of s 37 of the *Planning and Environment Court Act 2016*, I am not satisfied that the respondent should receive the relief it seeks.

[50] The respondent's insistence that its true position should be placed on the record can, as I have already noted, be achieved without granting the respondent's application.

Conclusion

[51] The respondent's application for excusal of the noncompliance is dismissed.