PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Chief Executive of the Department of Environment and Science v NuGrow Ipswich Pty Ltd (No. 2)* [2026] QPEC 37
PARTIES:	**CHIEF EXECUTIVE OF THE DEPARTMENT OF ENVIRONMENT AND SCIENCE** (Applicant/Respondent) **v** **NUGROW IPSWICH PTY LTD (ACN 124 571 875)** (Respondent/Applicant)
FILE NO/S:	3527 of 2023
DIVISION:	Planning and Environment
PROCEEDING:	Application to amend an existing restraint order
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	20 October 2026
DELIVERED AT:	Brisbane
HEARING DATE:	28 and 30 September 2026
JUDGE:	Williamson KC DCJ
ORDER:	**Order as per the amended draft dated 30 September 2026.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – where application by the Respondent to change an existing restraint order made under s 505 of the *Environmental Protection Act 1994* – where the application to change the order was opposed by the Applicant – where the parties disagreed about the source of the power to make the change – whether the order should be changed in the exercise of the discretion.
LEGISLATION:	*Environmental Protection Act 1994* ss 9, 440, 505 and 506 *Planning Act 2016*, s 181 *Planning and Environment Court Rules 2018,* r 4 *Sustainable Planning Act 2009,* s 606 *Uniform Civil Procedure Rules 1999,* rr 7 and 668
CASES:	*Bowman v Brisbane City Council* [2017] QCA 84 *Chavez v Moreton Bay Regional Council* [2009] QCA 348 *Chief Executive of the Department of Environment & Science v Nugrow Ipswich Pty Ltd* [2024] QPEC 8 *Crowther v State of Queensland* [2005] QCA 47 *Crowther v State of Queensland* [2009] QPELR 241

FAI General Insurance Co Ltd v Southern Cross Exploration NL (1988) 165 CLR 268
Knight v FP Special Assets Ltd (1992) 174 CLR 178

COUNSEL: Mr S Keim SC with Mr J Ware and Ms R Williams for the Applicant/Respondent
Mr S Holt KC for the Respondent/Applicant

SOLICITORS: Litigation Unit, Department of Environment and Science for the Applicant/Respondent
McCullough Robertson for the Respondent/Applicant

Introduction

[1] On 30 September 2026, an application to change an existing restraint order given under s 505 of the *Environmental Protection Act 1994* (**the EP Act**) was allowed. The orders made, which were opposed, are attached. They have the effect of changing, subject to conditions, the time for compliance with paragraph 2 of a restraint order dated 2 May 2025.

[2] The reasons for making the attached order are as follows.

Background

[3] NuGrow operates a large waste recycling and compost manufacturing facility at Swanbank, Ipswich (**the NuGrow facility**). To manufacture compost, odoriferous material is delivered to the NuGrow facility and then stored and mixed on site. It was well understood, and history confirms, that the presence of odoriferous material, in combination with known by-products of compost manufacturing, means there is a genuine risk of odour nuisance from the NuGrow facility. Odour nuisance can adversely impact on environmental values, including public health and amenity.[1] This is particularly so in the initial stages of the composting process.

[4] While the risk of odour nuisance reduces during the course of the composting process, it is a risk that needs to be managed. The risk is managed at the NuGrow facility through a number of regulatory approvals, including an environmental authority given by the Chief executive under the EP Act. That authority authorises NuGrow to receive specific categories of '*Listed waste*', subject to conditions.

[5] On 1 December 2023, the Chief executive commenced proceedings in this Court under s 505 of the EP Act to: (1) restrain NuGrow from causing unlawful odour nuisance, which is an offence under s 440(2); and (2) compel NuGrow to construct and utilise an approved in-vessel composting system. The Court's power to grant this relief was subject, in the first instance, to s 505(5) of the EP Act, which states:

> "(5) If the Court is satisfied—
>
> (a) an offence against this Act has been committed (whether or not it has been prosecuted); or

1 s 9(b), EP Act.

(b) an offence against this Act will be committed unless restrained;

the Court may make the orders it considers appropriate to remedy or restrain the offence."

[6] After an unsuccessful application[2] for interim orders under s 506(2) of the EP Act, the proceeding was listed for hearing.[3] The hearing did not proceed. It was adjourned by order of 12 April 2024. At this time, the following order was made (Court document No. 164):

"Upon the Court being satisfied that an offence of odour nuisance pursuant to section 440(2) of the Environmental Protection Act 1994 will be committed in the future unless restrained by orders being made which require the development of some form of enclosed ("in-vessel") and/or other engineered composting system at the Respondent's Swanbank facility:

…

2. The proceeding be adjourned to a date to be fixed for a hearing about the appropriate final orders to be made pursuant to section 505(5)(b) of the Environmental Protection Act 1994, including:

(a) the appropriate design of the enclosed ("in-vessel") and/or engineered composting system to be implemented;

(b) any necessary site layout changes to achieve the form of the enclosed ("in-vessel") and/or engineered composting determined to be appropriate; and

(c) any interim measures to be implemented while the appropriate enclosed ("in-vessel") and/or engineered composting system is developed.

3. The Respondent will continue to implement interim odour measures until final orders are made, which must include:

(a) utilisation of an aerated floor system; and

(b) dousing of the liquid deposition tank with ferric chloride and hydrated lime."

[7] By a subsequent order of 12 June 2024, the proceeding was listed for hearing, with two related proceedings, in September 2024.[4] The September hearing dates were not utilised because the Chief executive and NuGrow reached agreement on the terms of orders to be made under s 505(5)(b) of the EP Act. The Court made orders consistent with the agreed terms on 18 September 2024 (**the final order**).[5] The purpose of the final order was to achieve compliance with the EP Act by allowing the controlled transition from existing compost manufacturing methods to an in-vessel or

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2 *Chief Executive of the Department of Environment & Science v Nugrow Ipswich Pty Ltd* [2024] QPEC 8.

3 Court document No. 162, order of 26 March 2024, paragraph 2.

4 Court document No. 174.

5 Court document No. 201.

engineered system. The final order comprises two components to give effect to this intention.

[8] First, the final order seeks to achieve compliance with the EP Act by restraining NuGrow from receiving specific waste types (**Listed waste**) that are notorious for adverse odour emissions. The risk of odour nuisance was sought to be addressed at the source by restraining the receipt of odorous material at the front gate of the NuGrow facility. While having obvious appeal for securing compliance with the EP Act, the restraint is not a perfect solution. The risk of odour nuisance is not eliminated by such a restraint. It is not eliminated until all pre-existing batches of compost that contain Listed waste are removed from the NuGrow facility. The evidence suggests a period of 2 to 3 months is required to remove material of this kind. The final order did not make provision for pre-existing stockpiles of Listed waste, or compost containing Listed waste, to be removed from the NuGrow facility.

[9] Second, the final order provides that NuGrow may continue to receive Listed waste, provided the facility transitions, over time, to a new composting system. The transition was to be staged, commencing with the design, construction and commissioning of a Mobile Aerated Floor System (**MAF System**). The MAF System was envisaged to remain in place for a period of up to 2 years, by which time an Engineered Membrane System (**EMS**) was to be in place. The final part of the transition involved moving from the EMS, in whole or part, to an In-Vessel System (**IVS**). The IVS represents best practice composting. It is an enclosed system, enabling all waste to be mixed and odour contained within impervious tunnels. The final order provided that the IVS system was to be commissioned, either on its own or in conjunction with an EMS, by September 2028.

[10] NuGrow designed, installed and commissioned a MAF System. That system remains in place today. NuGrow has also pursued the transition from its existing composting operations to an EMS and/or IVS. The first part of the transition involved a design process. This process was the impetus for a change in approach to that envisaged by the final order. It led NuGrow to abandon an EMS and pursue only an IVS. NuGrow also elected to pursue this course on an expedited timetable; NuGrow elected to deliver the IVS within a two year time frame.

[11] On 23 April 2025, NuGrow filed an application to amend the final order to reflect its change in position.[6] Paragraph 8 of the grounds in support of the application confirms that the change was driven, in large measure, by two considerations:

> "Arising from the design process for the infrastructure improvements required by the…[final order], the Respondent [NuGrow] proposes to:
>
> (a) refine the layout of the In-Vessel System…to achieve operational efficiency; and
>
> (b) bring forward the current timeframe for the design, construction and commissioning and operation of the In-Vessel Composting System to 18 September 2026 rather than first commissioning the…[EMS]…by 18 September 2026 as currently required by the…[final order]."

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6 Court document No. 203.

[12] On 2 May 2025, the application to amend the final order was allowed with the consent of the parties. The terms of the amendment are reflected in Court document No. 205, which is titled '*Amended Final Order*' (**the AFO**).

[13] Paragraphs 1 to 5 of the AFO are in the following terms:

> "**Restraint of Listed Waste**
>
> 1. Subject to paragraphs 2 to 4 of this Order, from 18 October 2024, the Respondent is restrained from receiving, at its waste management facility located at Lot 3 Unnamed Road, Swanbank (Lot 3 on SP 289972) in the State of Queensland (**the facility**), the waste set out in Schedule 1 to this Order (**Listed Waste**).
>
> 2. If the Respondent designs, installs, commissions and utilises a Mobile Aerated Floor system (MAF system) generally in accordance with paragraphs 1(a) to (c) in Schedule 4 to this Order then the restraint in paragraph 1 is stayed from the date on which that occurs until 18 September 2026 (**In-Vessel System Date**).
>
> 3. If the Respondent installs, commissions and lawfully utilises for composting of all Listed Waste at its facility, an in-vessel system generally in accordance with Schedule 2 of this Order (**In-Vessel System**), by the In-Vessel System Date, then the restraint in paragraph 1 is further stayed from the date that occurs until the date (**Enclosed System Date**) which is the earlier of:
>
>   a. 21 months after the Respondent obtains the relevant development approvals for the enclosed system generally in accordance with Schedule 3 to this Order (**Enclosed System**); or
>
>   b. 18 September 2028.
>
> 4. If the Respondent installs, commissions and lawfully utilises for composting of all Listed Wasted (*sic*) at its facility, the **In-Vessel System** and the **Enclosed System** then the restraint in paragraph 1 is permanently stayed from the date on which this occurs.
>
> **Interim measures**
>
> 5. Between 18 October 2024 and the In-Vessel System Date, the Respondent must lawfully implement at the facility the interim measures set out in paragraphs 1(a) to (h) and 1(l) to (n) in Schedule 4 to this Order."

[14] Paragraphs 2, 3 and 5 of the AFO refer to attached schedules. Schedule 2 contains specifications for the IVS. Schedule 4 contains specifications for the MAF System.

[15] The '*In-Vessel System Date*' is identified in paragraph 2 of the AFO. This date is relevant to the interim measures required by paragraph 5. Those measures were to be implemented during the period starting 18 October 2024 and ending on the In-Vessel System Date, which is 18 September 2026. The interim measures comprised, primarily, the MAF System.

[16] The AFO required NuGrow to install and commission the IVS within a 16 month period ending no later than 18 September 2026. Mr Wilson, who is the Executive General Manager of the NuGrow Group, confirmed this timeframe to design, construct and commission an IVS, comprising 12 permanent concrete and steel tunnels, was '*achievable*', but '*tight*'. This opinion was based on information available in May 2025, which included knowledge gathered by NuGrow (and its consultants) during the design process. The design process had commenced on 20 January 2025.

[17] Paragraphs 1 to 3 of the AFO are mirrored in NuGrow's existing environmental authority, which is dated 27 April 2026 (**the EA**). Condition 1–G1 of the EA states, in part:

> "Activities conducted under this environmental authority must not be conducted contrary to any of the following limitations:
> …
> 2. Listed waste must not be accepted by the activity unless:
>
> (a) liquid listed waste is received and stored within an enclosed system which is under negative pressure at all times when in use; and
>
> (b) non-liquid listed waste is mixed with a bulking agent or high carbon material as soon as practicable but at least within 6 hours of receipt; and
>
> (c) from 18 October 2024 until condition 1–G1-2(d) takes effect:
>
> (i) all listed waste is processed on a mobile aerated floor system for a minimum of 21 days or until pasteurisation is achieved; and
>
> (d) from 18 September 2026:
>
> (i) all listed waste is processed within an in-vessel system for a minimum of 21 days or until pasteurisation is achieved; and
>
> (ii) with the in-vessel system, biofilter and scrubber/dehumidifier located in the designated areas identified in the plan in Appendix B; and…"

[18] The conditions of the EA do not represent the full suite of obligations that must be complied with under the EP Act. This is confirmed by the following note appearing at the beginning of the EA, which states, in part:

> **"Obligations under the *Environmental Protection Act 1994***
>
> In addition to the requirements found in the conditions of this EA, the holder must also meet their obligations under the EP Act, and the regulations made under the EP Act. For example, the holder must comply with the following provisions of the Act:

…
• offence of causing environmental nuisance (section 440)…"

[19] The undertaking to design, construct and commission an IVS is complex and involves substantial capital investment. So much is confirmed by the evidence, which suggests the project cost for NuGrow is in the order of $29 million. Multiple construction programmes, when examined with the benefit of aerial photography, demonstrate that by the start of September 2026, substantial steps had been undertaken to deliver the IVS in accordance with the AFO. As at 2 September 2026, foundations and earthworks were complete; aeration pipework had been installed; concrete ground slabs had been constructed; concrete walls had been constructed for 9 of the 12 tunnels; roofs had been constructed for three tunnels; and the slabs and walls for biofilters had been constructed. The steps completed were summarised by Mr Wilson in these terms:

> "In particular, NuGrow Ipswich has:
>
> (a) progressed the development applications for changes to the land use approval and operational works necessary for the In-Vessel System and associated infrastructure;
>
> (b) designed, installed, commissioned and utilised the MAF System in accordance with paragraph 2 of the Amended Final Order;
>
> (c) progressed the design, procurement and construction of the In-Vessel System; and
>
> (d) implemented and maintained the interim measures required by Schedule 4 to the Amended Final Order."

[20] I accept Mr Wilson's evidence. His evidence confirms NuGrow is committed to completing the IVS to manage, inter alia, the risk of odour nuisance. The project is to be completed in two stages.

[21] The AFO restrains NuGrow from receiving Listed waste unless specified systems, and interim controls, are implemented. NuGrow has implemented the required interim measures. There is no suggestion the interim measures have been unsuccessful or have failed to comply with the AFO. The evidence comfortably establishes that the MAF System, which is the primary interim measure, has performed well and has successfully reduced the risk of odour nuisance beyond the boundaries of the NuGrow facility.

[22] Mr Zambelli is a consultant who has been retained by NuGrow to, inter alia, monitor the implementation and effectiveness of the MAF System. He has attended the site on 51 occasions during the period December 2024 and September 2026. He also prepared eight performance reports, which have been provided to officers of the Department of Environment, Tourism, Science and Innovation (**the Department**). With the benefit of this involvement, Mr Zambelli was of the opinion that the MAF System, save for one exception, has performed as intended. The exception has been a drainage issue, which was detected in June 2025 and quickly rectified. Mr Zambelli opined that the performance of the MAF System was such that the ongoing risk of offensive odour beyond the boundary of the NuGrow facility is, and will remain, low.

This assumes the system is operated and monitored consistently as has occurred since its implementation. There is no reason to suggest the system will not be operated and monitored appropriately into the future.

[23] While the construction of the IVS has been substantially advanced, and NuGrow is committed to completing the required works, it was uncontroversial that the project was not completed before the end of September 2026. The reason for the delay was explained by Mr Wilson. The delay is the product of four issues that coalesce, namely: (1) there was a significant delay in the completion of issued-for-construction information – this information was not completed until 31 July 2026; (2) the principal contractor identified deficiencies in the design (missing, incomplete or inconsistent design information) that needed to be cured before particular works commenced (to avoid disruption); (3) there were delays beyond the control of NuGrow due to the procurement of project materials, some of which have long lead times; and (4) the stage 2 earthworks, which represent activities on the critical path to completion, were delayed. Items (2) and (4) led the contractor for the project to issue six delay notices during the period 25 May 2026 to 11 June 2026. When reading each notice, it is hard not to be struck by the following phrase that suggests the time/cost impact associated with each delay is elusive:

> "The Contractor is yet to understand the full implications the Delay will cause/ has caused but will update the Superintendent as and when the detail is known. The Contractor hereby reserves their right to be compensated for time and cost the Delay causes once it becomes known."

[24] The delay to the project was the subject of a meeting between NuGrow and the Department on 25 June 2026. The evidence establishes the Department was told during the meeting that the IVS would not be completed by the end of September 2026. NuGrow offered to adopt an alternative construction approach to complete the project; the alternative involved a staged delivery of the IVS. This was not accepted by the Department.

[25] Pausing the background at this point, it can be observed that the submissions made on behalf of the Chief executive contended it was the Department who '*raised the alarm*' that the IVS would not be completed by the end of September 2026. It was also suggested that NuGrow was '*sitting on its hands*' in response to the delay and provided limited information to keep the Department informed as to the progress of construction. This characterisation, in my view, is overstated. It is also difficult to reconcile with the meeting held on 25 June 2026. The Department was put on notice at the meeting of 25 June 2026 that the IVS system was not going to be completed by the end of September 2026.

[26] In the period July to August 2026, the Department sought information from NuGrow as to the progress of the IVS. I accept that NuGrow did not respond in a timely way to these requests despite the looming deadline of September 2026. The slow response time was explained by Mr Wilson. At the time, his attention was directed to a request from the Department for disclosure. The evidence establishes that this process was time and resource consumptive. While the request for disclosure diverted Mr Wilson's primary focus from the IVS construction project, it was not explained how it was beyond staff or consultants employed by NuGrow to fill the breach. This lack of explanation, coupled with the slow response times to the Department's requests

for information about the progress of construction, is relevant to the exercise of the discretion.

[27] Upon completing the disclosure process, Mr Wilson turned his attention to the Department's requests for information. This included giving instructions to NuGrow's solicitors to file an application to change paragraph 2 of the AFO to insert '*21 January 2027*' in lieu of '*18 September 2026*'.[7] The application was filed on 4 September 2026.

[28] The updated completion date is supported by the evidence of Mr Reid, who was not required for cross-examination. He is the project manager retained by NuGrow. Based on detailed construction programming, it is his opinion that the IVS can be installed, commissioned and operational by 20 January 2027. This date is said to be the '*worst case scenario*'. If known risks do not eventuate, the IVS could be operational as early as 6 January 2027. I accept Mr Reid's evidence.

[29] The change sought to the AFO by NuGrow, if granted, has two consequences. First, it would alter the '*In-Vessel System Date*' to 21 January 2027. Second, the change would extend the time interim measures are to be in place under paragraph 5. These measures would remain until the In-Vessel System Date, which would be 21 January 2027 in lieu of 18 September 2026.

[30] The second of the above two consequences is not unacceptable. The MAF System will continue to manage the risk of odour nuisance until the transition to the IVS is complete. That it will do so is supported by past performance, which complies with Schedule 4 of the AFO. It is further supported by the evidence of Mr Zambelli. His evidence establishes that the MAF System can continue to operate successfully, provided existing controls, monitoring and rectification measures remain in place. The risk of odour nuisance beyond the boundary of the site during the period September 2026 to January 2027 would be low. The continued operation of the system will not materially increase the risk of offensive odour, or odour nuisance, during an extended period of operation, equating to 4 months.

[31] On 8 September 2026, NuGrow received written notice from the Department about its position with respect to the application to change the AFO and the impact of that application on the EA. The notice was given by Ms Ventura. She is the Director of the Swanbank Project within the Department and has engaged with NuGrow over an extended period about the management of its facility and the management of odour nuisance. Ms Ventura's letter states, in part:

> "Should the Planning and Environment Court order amendments to the Amended Final Order, the Department is prepared to work constructively with NuGrow to expedite any consequential amendment, by agreement where appropriate, to Environmental Authority EPPR00696713, so that the authority reflects the Court's determination."

[32] On 11 September 2026, Ms Ventura attended the NuGrow facility with officers from the Department. The purpose was to inspect the progress of the works related to the IVS and to inspect on-site odour mitigation controls. Mr Zambelli was present during the inspection. He confirmed that the Department's officers were shown, inter alia,

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7 Court document No. 206.

the MAF System and the in-vessel tunnels under construction. He personally observed on 11 September 2026 that: (1) the MAF System was operating to the required standard; (2) compost rows were appropriately covered and aerated; and (3) no offensive odour was present.

[33] On 17 September 2026, the Department, through its litigation unit, changed the position notified by Ms Ventura on 8 September 2026. The change was notified by way of letter, which made clear that the Chief executive would not amend the EA by agreement, like had occurred on earlier occasions. Further, NuGrow was invited to withdraw the application to change the AFO, and each party would bear its own costs. The change in position appears to have been founded on an assumption that the public would be worse off in the event the AFO and EA were amended as proposed by NuGrow. For reasons that are set out below, I do not accept this assumption is correct.

[34] The application to change the AFO was opposed by the Chief Executive. It was listed for a contested hearing on 28 September 2026.

The power to amend

[35] The AFO is a restraint order made under s 505 of the EP Act. The purpose of this provision of the EP Act is evident from its heading, which reads: '*Restraint of contraventions of Act etc.*'

[36] The Court's power to make a restraint order is subject to s 505(5), which is extracted at paragraph [5]. The provision requires the Court to be satisfied about one of two alternatives before an order can be made. Here, the order of 12 April 2024 records the Court was satisfied that '*an offence against this Act will be committed unless restrained*'. Satisfaction in this regard was reached for reasons given in *Chief Executive of the Department of Environment & Science v Nugrow Ipswich Pty Ltd* [2024] QPEC 8.

[37] When either ss 505(5)(a) or (b) are engaged, the Court's power to make a restraint order is not expressly fettered. Rather, it is broadly stated: '*the Court may make the orders it considers appropriate to remedy or restrain the offence*'. Sections 505(6) to (11) confirm that the power conferred on the Court is broad and intended to: (1) restrain contraventions of the EP Act; and (2) secure compliance with the EP Act. This is further reinforced by ss 505(6)(a), (6)(b) and (11), which state:

> "(6) An order—
>
> (a) may direct the defendant—
>
> (i) to stop an activity that is or will be a contravention of this Act; or
>
> (ii) to do anything required to comply with, or to cease a contravention of, this Act; and
>
> (b) may be in the terms the Court considers appropriate to secure compliance with this Act; and"

And:

> (11) The Court's power under this section is in addition to its other powers."

[38] Section 505 does not[8] expressly provide for the right to make an application to change or cancel a restraint order. Nor does the provision expressly confer a power on the Court to change or cancel a restraint order. It is the absence of the latter that gave rise to a point of disagreement between the parties. The Chief executive submitted that s 505 does not include a power to change a '*final order*' such as the AFO. Rather, it was contended the head of power to change was to be found in either r 7 or r 668 of the *Uniform Civil Procedure Rules 1999* (**UCPR**).

[39] The Chief executive's position starts on a sound footing. Rules 7 and 668 of the UCPR apply where the *Planning and Environment Court Rules 2018* (**PECR**) do not provide for the same matters to which they are directed: r 4, PECR. There are no such provisions in the PECR.

[40] Turning to r 7(1) of the UCPR, it states:

> "**7 Extending and shortening time**
>
> (1) The court may, at any time, extend a time set under these rules or by order.

[41] Counsel for the Chief executive submitted that r 7 was the correct source of power because the change sought by NuGrow involved an extension of time set by the AFO. It was further submitted that the power conferred by r 7 included an implied power to extend time subject to conditions. While I was not referred to any authority in support of this further submission, it has considerable attraction given: (1) the absence of an express rule to the contrary; and (2) the application of the authorities referred to in paragraph [50] about the proper construction of a power conferred on a Court, which is to be exercised judicially.

[42] Rule 668(1)(b), (2) and (3)(b) of the UCPR state:

> "**668 Matters arising after order**
>
> (1) This rule applies if—
> …
> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.
>
> (2) On application by the person mentioned in subrule (1), the court may…or give other appropriate relief.
>
> (3) Without limiting subrule (2), the court may do one or more of the following—
> …

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[8] Unlike s 181(4) of the *Planning Act 2016,* which permits a person to apply to the Court to cancel or change an enforcement order or interim enforcement order.

(b) set aside or vary the order;"

[43] Counsel for the Chief executive submitted that support for its contention in relation to r 668 was found in *Crowther v State of Queensland* [2005] QCA 47 at paragraph [19]. This decision involved an application for leave to appeal against a decision of the Planning and Environment Court to vary an order made pursuant to s 505 of the EP Act: see paragraph [4] of the reasons for judgment. The applicant for leave contended there was a lack of jurisdiction to make such an order. At paragraph [19] of the reasons for judgment, Mackenzie J, with whom McMurdo P and Jerrard JA agreed, said:

> "The decision by Senior Judge Skoien was essentially an exercise of a discretionary power to vary an order previously made. The present applicant's submissions included reliance on alleged disregard of the objects of the *Environmental Protection Act* in s 3 to s 6 and the provisions of s 505 of it to found an argument that there was a lack of jurisdiction to vary the order of Judge Robin. A fundamental difficulty with the argument is that it was accepted by Senior Judge Skoien that the preconditions for relief remained in existence. All he did was extend time for doing what had already been ordered. He did so in a case where the making of the order in the terms of paragraph three was acknowledged by Judge Robin to be of uncertain feasibility, liberty to apply was given, and it had at least been foreseen as a possibility that circumstances arising after it was made might make it necessary to revisit its terms. It was in this sense that Senior Judge Skoien referred to paragraph three as being a "guesstimate", which may have been a little hyperbolic, but, in context, was not an erroneous description. **I am satisfied that UCPR r 668(1)(b) gave Senior Judge Skoien jurisdiction to make the order that had the effect of giving a longer period in which to remedy the nuisance**." (emphasis added)

[44] Against the background of the above, I accept there is considerable force in the Chief executive's submissions about rr 7 and 668 of the UCPR; however, it is premature, in my view, to look to the UCPR for the head of power before considering whether the power, in fact, arises in the EP Act in the first instance. In particular, attention should be given to s 505 of the EP Act to determine whether that provision, which confers a power on the Court, ought be construed subject to a constraint or limitation that does not appear in the text. In my view, s 505 is not so constrained or limited. This is so for the following reasons, taken in combination.

[45] First, s 505(5) confers a broad and unfettered discretion on the Court to make restraint orders that secure compliance with the EP Act.

[46] Second, the discretion to make a restraint order is inherently flexible. This is clear from s 505(6)(b), which provides that an order, if made, may be in the terms the Court considers appropriate. This conveys that a restraint order may be unconditional. It may also be granted subject to conditions. Here, the conditions imposed by the Court are complex and ongoing, potentially requiring judicial supervision to ensure compliance with the EP Act is, in fact, secured.

[47] Third, while the order is titled '*final order*', the AFO is not spent. It operates in the future, with the consequence that the Court's supervisory function is incomplete. In

circumstances such as this, the Court retains power over the AFO to continue its supervisory role, save where there is a contrary indicator in the EP Act: *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268, per Gaudron J at 289–290. There is no such indicator in s 505.

[48] Fourth, s 505 does not contain an express conferral of power to change or cancel a restraint order. Silence does not however equate to a prohibition or limitation. Rather, when considered in the context of a provision that confers power on a Court, silence may be construed as admitting of any incidental power necessary for the proper exercise of the power which is expressly conferred. The power expressly conferred, and any implied incidental power, are of course exercisable in the same way, and subject to the same preconditions. Here, the relevant precondition is stated in s 505(5). The evidence establishes that the precondition for relief remains.

[49] An interpretation of s 505 that admits of the implied power is, as I have said, subject to any contrary indication in the EP Act. Statutory context does not suggest a contrary view ought be adopted to that set out in paragraph [48]. Indeed, a contrary view is difficult to reconcile with: (1) the text of ss 505(5), (6)(b) and (11); and (2) the inherent flexibility of s 505, which admits of orders akin to those made here, namely orders that are complex, ongoing and in need of judicial supervision to secure compliance with the EP Act.

[50] Fifth, s 505 does not expressly limit or constrain the Court's power to amend, replace or cancel a restraint order. To impose a limitation of this kind can therefore only arise as a matter of implication. Quite apart from inhibiting the inherent flexibility of s 505, there is no statutory context that favours reading such a limitation into the provision. In the absence of supporting statutory context, reading such a limitation into s 505 would be contrary to a principle of construction involving the interpretation of a power granted to a Court: see *FAI General Insurance Co Ltd* (Supra), per Gaudron J at 290. An often-cited statement of the principle is that of Gaudron J in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205:

> "It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant. Save for a qualification which I shall later mention, a grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse." (footnote omitted)

[51] Sixth, this Court, and the Court of Appeal, have accepted that the power to amend a restraint order to extend time for compliance is to be found in r 668 of the UCPR: see *Crowther v State of Queensland* [2009] QPELR 241; *Crowther v State of Queensland* [2005] QCA 47 at [19]. Reference to these decisions reveals that the matters traversed

in paragraphs [45] to [50] were not drawn to the attention of either Court. In particular, it does not appear from the reasons for judgment that either Court was referred to the principle stated by Gaudron J in *Knight* (Supra), which is extracted at paragraph [50].

[52] While the power conferred on the Court under s 505 includes a power to change, or cancel a restraint order, it does not follow that a change or cancellation is automatic, or simply there for the asking. The Court will need to be satisfied that any change or cancellation is appropriate in the exercise of the discretion. Ultimately, this will involve weighing up factors that are particular to each case, cognisant of: (1) the purpose of orders made under s 505 (to secure compliance with the EP Act); and (2) the purpose of the EP Act more generally. The factors to be weighed will be directed to, inter alia, whether there are, on balance, reasons that demonstrate the proposed change or cancellation is justified. Where the orders sought to be changed or cancelled were made by consent, a party who seeks the change or cancellation will ordinarily need to demonstrate there is good reason to deprive the other party of the benefit/s of the order sought to be changed or cancelled.

Should the AFO be changed?

[53] A large volume of affidavit material was filed by both parties for the application. After reviewing the material, in conjunction with the written and oral submissions, I was satisfied NuGrow demonstrated each of the following matters relevant to the exercise of the Court's discretion.

[54] First, the delay, and consequential need, to change the AFO were explained by NuGrow. The delay is due to a range of design, procurement and construction issues: see paragraph [23]. To expect the evidence to '*unscramble the egg*' to attribute delay to a single factor is however unrealistic; no single factor is to blame. The delay is the product of a number of issues, some, but not all, of which were beyond NuGrow's control.

[55] Second, NuGrow has gone to considerable effort to comply with the AFO. That effort is evident in: (1) the value of works completed in September 2026 (in excess of $5 million); (2) the work recorded as '*completed*' in the construction programmes in evidence before the Court; and (3) a number of aerial photographs that permit the sequence of construction work to be followed over the course of the past few months.

[56] Third, NuGrow is committed to completing the IVS. There is no suggestion the work undertaken to date will be demolished.

[57] Fourth, the change sought to the AFO will not appreciably increase the risk of odour nuisance beyond the boundaries of the NuGrow facility. This is because the change will alter paragraph 5 of the AFO which, in turn, will require the interim measures to be maintained until the transition to the IVS is complete. Those measures have been successful in reducing the risk of odour nuisance. There is no reason to presume this will cease to be the case by reason of a change to the AFO. Past performance, taken together with Mr Zambelli's evidence, gives the Court considerable confidence that the risk of odour nuisance beyond the boundary of the NuGrow facility (and associated impacts on environmental values as defined in the EP Act) will remain at an acceptably low level.

[58] If the reasons are paused at this point, I wish to observe that the matters identified at paragraphs [54] to [56] are deserving of weight in the exercise of the discretion to change the AFO. They are not, however, sufficient to persuade me that the discretion should be exercised in NuGrow's favour. More was required.

[59] The short point is that the matters traversed in paragraphs [54] to [56] were foreseeable; they are a product of construction and design risk. NuGrow was aware at the time the AFO was made that compliance with its terms was attended with construction and design risk. As Mr Wilson said in his affidavit, the time for compliance was '*tight*', but '*achievable*'. In consenting to the order, NuGrow assumed that risk. In particular, it assumed the foreseeable risk that the works required to comply with the AFO may be substantially progressed, but not complete, by the end of September 2026. For NuGrow to rely upon the crystallisation of that assumed risk, and the associated consequences, as a reason to change the AFO, is not sufficient to justify the change it now seeks: *cf Bowman v Brisbane City Council* [2017] QCA 84 at p.5, in the context of an application to change an enforcement order under s 606(3) of the *Sustainable Planning Act 2009*. This is so even assuming the change to the AFO would not appreciably increase the risk of odour nuisance for the public (see paragraph [57]).

[60] It can also be observed that the Chief executive derives a benefit from the AFO. The benefit can be stated this way: the risk of future odour nuisance (i.e. an offence against the EP Act) is minimised while the NuGrow facility undergoes a controlled transition to a permanent IVS by the end of September 2026. The change to the AFO, if granted, would result in the Chief executive losing the benefit of the September 2026 date, which was obtained by consent of the parties. I was not satisfied the matters identified at paragraphs [54] to [56], even allowing for the absence of ongoing odour nuisance as discussed at [57], provide a good reason to deprive the Chief executive of that benefit: *cf Chavez v Moreton Bay Regional Council* [2009] QCA 348 at [39], in the context of r 7 of the UCPR.

[61] As I observed above, something more was required to change the AFO. Such a factor was present here. It is to be found in an examination of the consequences that flow in the event the application to change the AFO is dismissed, as was contended for by the Chief executive. For reasons that are now developed, dismissing the application has a significant and adverse consequence. By not extending the In-Vessel System Date in paragraph 2, the AFO will no longer control the transition to the IVS, which is at odds with the order of 12 April 2024.

[62] Dismissing the application has three consequences for NuGrow. First, the restraint on the receipt of Listed waste (paragraph 1 of the AFO) takes effect. Second, the requirement to lawfully implement and operate the interim measures, including the MAF System, ceases to have effect. Third, any requirement to complete the design, construction and commissioning of an IVS by a specific date no longer has application. Such an outcome is difficult to reconcile with the order of 12 April 2024, which identifies what was required to secure compliance with s 440 of the EP Act.

[63] The order of 12 April 2024 contains the following finding, which bears repeating (with emphasis):

> "Upon the Court being satisfied that **an offence of odour nuisance** pursuant to section 440(2) of the Environmental Protection Act 1994

> **will be committed** in the future **unless restrained by orders** being made **which require the development of** some form of enclosed **("in-vessel") and/or other engineered composting system** at the Respondent's Swanbank facility" (emphasis added)

[64] On 12 April 2024, the Court was satisfied that s 505(5)(b) of the EP Act was engaged because an offence against s 440(2) of the EP Act will be committed unless restrained by particular orders. The restraint orders envisaged were specific, requiring the development of an IVS or engineered composting system. It is orders of this kind, coupled with interim measures, that were intended to secure compliance with the EP Act.

[65] The finding recorded in the order of 12 April 2024 does not suggest compliance with the EP Act will be secured, in and of itself, by restraining NuGrow from receiving Listed waste. This is unsurprising. It was uncontroversial that a restraint order would not eliminate odour nuisance. The supplementary submissions filed on behalf of the Chief executive correctly put the position in these terms:

> "89. …Receiving the waste is not, itself, the offence of causing odour nuisance. It is one step along the path which was accepted by the parties as leading to the causing of odour nuisance…
>
> 90. It can be seen that complying with the requirement not to receive listed wastes does not guarantee that neither the causing of odour nuisance nor a breach of an EP will occur. If, for example, NuGrow already has a large stockpile of listed wastes on site and it proceeds to process them by composting, it may cause odour nuisance and may, thereby, breach both the EP Act and a condition in the EA prohibiting the causing of odour nuisance."

[66] This submission exposes that the risk of odour nuisance is not immediately eliminated by an order restraining the receipt of Listed waste at the front gate of the NuGrow facility. The risk will subsist until all Listed waste present on the site has been removed, composted or transitioned to an IVS. The AFO, if left unchanged, does not address this risk: the order does not require NuGrow to remove the Listed waste, or maintain the interim measures until this waste has worked its way out of the composting process. The odour nuisance risk posed by this Listed waste is not trivial. The evidence suggests it could take in the order of 2 to 3 months for this Listed waste to work its way through the composting process. This would occur in circumstances where there is no requirement for NuGrow to maintain the interim measures required by the AFO. Circumstances of this kind, which arise because the application to change the AFO is dismissed, serve to increase rather than minimise the risk of odour nuisance to the public.

[67] That the risk of odour nuisance increases because the AFO is left unchanged is a matter to which significant weight should be ascribed. In simple terms, the increase in risk does not represent a good outcome in the public interest. Mr Keim SC, who appeared for the Chief executive, did not persuade the Court otherwise. In my view, this increase in risk, coupled with the matters traversed in paragraphs [54] to [57], provide sufficient justification to change the AFO. They also demonstrate there is a good reason to deprive the Chief executive of the benefits of the AFO.

[68] For completeness, the Chief executive advanced a number of matters that were said to militate against the exercise of the discretion to change the AFO. In summary terms, the matters were as follows:

(a) NuGrow should not be permitted to resile from its free and voluntary commitment to completing an IVS by September 2026;

(b) the delay in meeting the terms of the AFO is not satisfactorily explained;

(c) NuGrow's proposed new date for compliance is not reliable;

(d) the public interest lies in maintaining the current restraint agreed to by NuGrow;

(e) the order sought would be inconsistent with the EA and of no practical effect until an amendment has been assessed on its merits.

[69] I do not accept the points summarised in subparagraphs (a) to (d) have been established or require the application to be dismissed.

[70] As to subparagraph (e), it is correct to say that an order changing the AFO will mean it is inconsistent with part of the EA, namely condition 1–G1. I do not however accept that it follows the AFO will be of no practical effect until the inconsistency is cured. The order, despite the inconsistency, will be operative. As an operative order, it will require (by paragraph 5) NuGrow to maintain the interim measures prescribed in Schedule 4 of the AFO. This includes the MAF System. Paragraph 5 of the AFO has in mind that such measures must be lawfully implemented until the '*In-Vessel System Date*'. This date, in the changed AFO, would be 21 January 2027. Given paragraphs [8], [15] and [61] to [67], it is difficult to accept how the maintenance of these measures, even assuming no further Listed waste was received, is of no practical effect.

[71] In the past, amendments have been made to the EA to respond to the terms of the Court's orders. This has occurred with the Chief executive's agreement. It has been made clear on this occasion that there is no such agreement. NuGrow is therefore required to make an application under the EP Act to obtain the amendment it requires to achieve consistency with the changed version of the AFO. That such an application is required is relevant to the exercise of the discretion. It is not however determinative one way or another. The application, if made, will take its ordinary course and be assessed on its merits by the Chief executive. The changed AFO will be operative and have effect during this process.

[72] While I was persuaded NuGrow's application should succeed, it was my view that the change to the AFO ought be granted subject to conditions. This is due to some of the Chief executive's criticisms of NuGrow's conduct.

[73] As I have already observed, submissions were made on behalf of the Chief executive that NuGrow knew it could not comply with the AFO but '*sat on its hands*'; provided limited information to the Department as to construction progress; and made a last minute application to this Court to address non-compliance with the AFO. I accept the submission made by Mr Holt KC that this aspect of the Chief executive's case created a false impression; the points were overstated. That said, the evidence does however reveal that the progress updates provided to the Department were not timely. This was unfortunate given the urgency the circumstances necessarily required. The

urgency for information was obvious given the extent of work NuGrow knew it was required to complete before the end of September 2026 to comply with the AFO. This shortcoming is not a reason to dismiss the application to change the AFO. Rather, it is a reason that supports the imposition of conditions attaching to the change to the AFO. The conditions are intended to ensure NuGrow provides the Department with information in a timely way to monitor future compliance with the AFO.

Conclusion

[74] The application to change the AFO was allowed.

[75] Paragraph 2 of the AFO was amended to insert 21 January 2027.

[76] The amendment to paragraph 2 was granted subject to compliance with the conditions set out in the attached draft order.

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IN THE PLANNING AND ENVIRONMENT COURT
HELD AT: BRISBANE

PLANNING AND ENVIRONMENT COURT
QUEENSLAND
30 SEP 2026
FILED
BRISBANE

No 3527 of 2023

Between: CHIEF EXECUTIVE OF THE DEPARTMENT OF ENVIRONMENT AND SCIENCE

Applicant

And: NUGROW IPSWICH PTY LTD (ACN 124 571 875)

Respondent

ORDER

Before:	His Honour Judge Williamson KC
Date of Hearing:	30 September 2026
Date of Order:	30 September 2026

IT IS ORDERED THAT:

1 The date in paragraph 2 of the Amended Final Order made on 2 May 2025 (Court Document 205), as extended by paragraph 4 of the Order made on 4 September 2026 (Court Document 209), by paragraph 2 of the Order made on 24 September 2026 (Court Document 221) and by paragraph 1 of the Order made on 29 September 2026 (Court Document 226) be further extended to 21 January 2027.

2 The Amended Final Order be further amended by inserting, after paragraph 12, the following:

"Reporting on the construction of the In-Vessel System

13 From the date of this Order until the date on which the Respondent fully commissions the In-Vessel System, the Respondent must, at intervals of not more than 14 days, give the Applicant a written progress report in respect of the construction of the In-Vessel System.

14 Each report given under paragraph 13 must:

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(a) be prepared by, or under the supervision of, the person engaged by the Respondent as project manager for the construction of the In-Vessel System;

(b) include a copy of the current programme for the construction of the In-Vessel System, as exported from the project scheduling software used for that construction, identifying:

(i) the data date of the programme;

(ii) for each activity commenced or completed during the reporting period, the actual start date and actual finish date recorded for that activity;

(iii) the forecast date, for the completion and commissioning of the In-Vessel System; and

(iv) the total float recorded against each activity.

(c) include a critical path pdf summary;

(d) include a written summary which identifies:

(i) any activity or logic updated in the programme;

(ii) for what reason the change/s was made;

(iii) any impacts (both positive and negative) on forecast date for the completion; and

(iv) any steps identified or taken to mitigate any adverse impact.

15 From the date of this Order until the date on which the Respondent commissions the In-Vessel System, the Respondent must, within 17 business days of the start of the given month, give the Applicant a monthly report.

16 Each report given under paragraph 15 will include:

(a) Progress for [the given month];

(b) Cost summary;

(c) Cost to Complete Assessment:

(i) Changes; and

(ii) Risks/Opportunities.

(d) Payment/Drawdowns;

(e) Progress:

(i) Design Completeness;

(ii) Filed Progress;

(iii) Procurement Progress;

(f) Programme;

(g) Authority Approvals;

(h) Quality Assurance; and

(i) Project Insurances.

17 If at any time the Respondent becomes aware of any matter which, in the reasonable opinion of the person referred to in paragraph 14(a), is likely to prevent the In-Vessel System being commissioned by the In-Vessel System Date, the Respondent must, as soon as practicable and in any event within 2 business days after becoming so aware, give the Applicant written notice which identifies:

(a) the matter;

(b) its likely effect on the date for the completion and commissioning of the In-Vessel System; and

(c) the steps taken or proposed to be taken to address it."

3 Paragraph 1(m) of Schedule 4 to the Amended Final Order be amended by omitting the words "**every three months**" and inserting in their place the words "**every month**".

4 A report or notice required by paragraph 13, 15 or 17 of the Amended Final Order is given to the Applicant if it is sent by email to the Applicant's address for service, or to such other email address as the Applicant notifies to the Respondent in writing.

5. The proceeding be reviewed on 3 December 2026 at 9:30am before Judge Williamson KC.

Filed on:	30 September 2026
Filed by:	McCullough Robertson Lawyers Sarah Hausler
Service address:	Level 11, Central Plaza Two 66 Eagle Street BRISBANE QLD 4000 GPO Box 1855 BRISBANE QLD 4001
Phone:	07 3233 8888
Fax:	07 3229 9949
Email:	shausler@mccullough.com.au

Registrar