

# SUPREME COURT OF QUEENSLAND

CITATION: *State of Queensland v Maryrorough Solar Pty Ltd* [2019] QCA 129

PARTIES: **STATE OF QUEENSLAND**  
(appellant)  
v  
**MARYROROUGH SOLAR PTY LTD**  
ACN 609 762 138  
(respondent)

FILE NO/S: Appeal No 5731 of 2019  
SC No 5299 of 2019

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2019] QSC 135 (Bradley J)

DELIVERED ON: 25 June 2019

DELIVERED AT: Brisbane

HEARING DATE: 7 June 2019

JUDGES: Fraser and McMurdo JJA and Boddice J

ORDER: **Appeal dismissed with costs.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DECLARATIONS – where the *Electrical Safety (Solar Farms) Amendment Regulation 2019* (Qld) amended the *Electrical Safety Regulation 2013* (Qld) by inserting s 73A – where s 73A *Electrical Safety Regulation* necessitated that the locating, mounting, fixing in or removing from a place of a photovoltaic module at a solar farm could only be performed by a person who held an “electrical work licence” pursuant to the *Electrical Safety Act 2002* (Qld) – where the primary judge concluded that s 73A *Electrical Safety Regulation* was inconsistent with the *Electrical Safety Act* and void as a result of being beyond the regulation-making power conferred by the Act – whether the primary judge erred in construing s 73A *Electrical Safety Regulation* as being beyond the regulation-making power conferred by the *Electrical Safety Act*

*Electrical Safety Act 2002* (Qld), s 4, s 5, s 210  
*Electricity Act 1994* (Qld), s 8  
*Electrical Safety Regulation 2013* (Qld), s 73A  
*Statutory Instruments Act 1992* (Qld), s 22, s 27

*Morton v Union Steamship Co of New Zealand Ltd* (1951)  
83 CLR 402; [1951] HCA 42, cited  
*Shanahan v Scott* (1957) 96 CLR 245; [1957] HCA 4, cited

COUNSEL: G A Thompson QC SG, with E J Longbottom, for the appellant  
P J Dunning QC, with B I McMillan, for the respondent

SOLICITORS: Crown Law for the appellant  
Herbert Smith Freehills for the respondent

[1] **FRASER JA:** The *Electrical Safety (Solar Farms) Amendment Regulation 2019* (Qld), which commenced on 13 May 2019, amended the *Electrical Safety Regulation 2013* (Qld) by inserting s 73A. Upon application by the respondent a judge in the Trial Division declared that s 73A of that Regulation is invalid. The State has appealed against that decision.

[2] Section 73A of the Regulation provides:

**“73A Work involving PV modules at solar farms**

- (1) A person must not perform work on a PV module at a solar farm unless—
- (a) the person is a licensed electrical worker; and
  - (b) the work performed is work that the person would be authorised to perform under the person’s electrical work licence if the PV module were electrical equipment, and the following were types of electrical work—
    - (i) locating, mounting or fixing the PV module in a place;
    - (ii) removing the PV module from a place; and
  - (c) the PV module at the solar farm, to the extent the PV module is affected by the work, complies with the wiring rules.

Maximum penalty—40 penalty units.

- (2) If a business or undertaking includes the performance of work on a PV module at a solar farm, a person conducting the business or undertaking must ensure that, in the conduct of the business or undertaking, a person does not perform work in contravention of subsection (1).

Maximum penalty—40 penalty units.

- (3) In this section—

***PV module*** means a solar panel—

- (a) comprised of an interconnected assembly of photovoltaic cells; and
- (b) used to generate electricity.

***solar farm*** means a system of PV modules and associated infrastructure—

- (a) used to generate electricity with a total rated capacity of at least 100kW; and
- (b) that is, or will be, operated by a person for the purpose of conducting a business or undertaking.

**work**, on a PV module—

- (a) means—
  - (i) work on the PV module that would be electrical work if the PV module were electrical equipment; or
  - (ii) locating, mounting or fixing the PV module in a place at a solar farm; or
  - (iii) removing the PV module from a place at a solar farm; and
- (b) does not include moving, packing or unpacking the PV module.”

- [3] The validity of s 73A depends upon whether it is within the power to make regulations conferred upon the Governor in Council. Section 210(1) of *Electrical Safety Act 2002* (Qld) (“the Act”) empowers the Governor in Council to make regulations “under” that Act. Section 210(2) authorises regulations prescribing any of the matters set out in paragraphs (a) to (u) of that subsection. The State contends that s 73A is authorised by each of s 210(1) and two paragraphs of s 210(2) which empower regulations prescribing “(b) ways of ensuring the electrical safety of persons or property” and “(f) safety and technical requirements for electrical installations, works of electricity entities, electrical lines and electricity supply”. In addition, s 22 of the *Statutory Instruments Act 1992* (Qld) authorises regulations that are “required or permitted to be prescribed by” or “necessary or convenient to be prescribed for carrying out or giving effect to” the Act.
- [4] The purpose of the *Electrical Safety Act* and the ways by which it achieves that purpose are described in sections 4 and 5. The State particularly relies upon the protective nature of the purpose of the Act expressed in s 4 and those parts of s 5 which I have emphasised:

#### **“4 Purpose**

- (1) This Act is directed at eliminating the human cost to individuals, families and the community of death, injury and destruction that can be caused by electricity.
- (2) Accordingly, the purpose of this Act is to establish a legislative framework for—
  - (a) preventing persons from being killed or injured by electricity; and
  - (b) preventing property from being destroyed or damaged by electricity.

#### **5 How purpose of Act is to be achieved**

The purpose of this Act is to be achieved in the following ways—

- (a) **imposing duties on persons who may affect the electrical safety of others by their acts or omissions;**
- (b) **establishing benchmarks for industry and the community generally through—**
  - (i) **making regulations,** ministerial notices and codes of practice **about achieving electricity safety;** and
  - (ii) introducing safety management systems for particular electricity entities;
- (c) providing for the safety of all persons through licensing and discipline of persons who perform electrical work;
- (d) providing for protection for consumers against failures of persons who perform electrical work to properly perform and complete the work;
- (e) providing for the appointment of a commissioner for electrical safety to advise the Minister on electrical safety matters and to manage the activities of the Electrical Safety Board and its committees;
- (f) establishing the Electrical Safety Board and its committees to—
  - (i) allow industry and the community to participate in developing strategies for improving electrical safety; and
  - (ii) participate in developing requirements for the licensing and discipline of persons who perform electrical work; and
  - (iii) promote community awareness about electrical safety; and
  - (iv) participate in developing requirements for the electrical safety of electrical equipment.”

[5] The evident purpose of s 73A, other than paragraph (c) of s 73A(1), is to ensure that work described in subparagraphs (i) and (ii) of s 73A(1)(b) (locating, mounting, fixing in or removing from a place, a PV module at a solar farm) is performed only by a person who holds an “electrical work licence”.

[6] The primary judge concluded that the regulation’s prohibition of persons from doing that work without an electrical work licence is inconsistent with the licensing provisions of the Act. An “electrical work licence” is one of two kinds of “electrical licence” created by the Act. The term “electrical work licence” is defined by s 20(1) of the Act as “a licence authorising an individual to perform electrical work” and the term “electrical contractor licence” is defined by s 20(2) as “a licence authorising a person to perform electrical work as part of a business or undertaking.” Consistently with s 5(c), the Act contains numerous provisions about electrical licences and the discipline of electrical licence holders. Most of those provisions are in Part 4 (“Licences”) and Part 9 (“Disciplinary action and immediate suspension

notices”). In Part 4, s 55(1) provides that a person must not perform or supervise “electrical work” unless the person holds an electrical work licence that authorises the person to perform the work and s 57AA(2)(a) provides that a person conducting a business or undertaking that includes the performance of electrical work “must ensure ... the electrical work is performed by the holder of an electrical work licence that authorises the performance of the work”. In Part 9, the grounds for taking disciplinary action against the holder of an electrical licence in relation to work are restricted to matters concerning “electrical work”: s 106(a) – (c) and s 107(1)(a) – (e), (m) and (n). In the case of each of the two kinds of electrical licence, one of the grounds for discipline is that the “electrical work” is not electrically safe or the person who performs the “electrical work” is negligent or incompetent in the performance of the work: s 106(a) and s 107(1)(a).

- [7] Section 210(2)(m) authorises regulations prescribing “all matters about electrical licences”, including matters specifically described in eight subparagraphs. The specified matters include “classes of electrical licences” and “eligibility requirements for the issue, renewal or reinstatement of electrical licences, including requirements as to suitability, requirements for particular qualifications and requirements for the successful completion of examinations or courses stated in the regulation or chosen by the regulator”.
- [8] As the primary judge concluded, because the work described in subparagraphs (i) and (ii) of s 73A(1)(b) is not “electrical work” s 210(2)(m) does not authorise s 73A(1)(a) and (b) or s 73A(2) and those provisions are not a way described in s 5(c) of achieving the Act’s purpose.
- [9] The term “electrical work” is defined in s 18(1) as meaning connecting or disconnecting electricity supply wiring to or from “electrical equipment” or manufacturing or engaging in other specified activities concerning “electrical equipment or an electrical installation”. Section 18(2) specifies many different activities that are not “electrical work”, including:
- “(f) locating or mounting electrical equipment, or fixing electrical equipment in place, if this task is not performed in relation to the connection of electrical equipment to an electricity supply;
  - ...
  - (n) locating, mounting or fixing in place electrical equipment, other than—
    - (i) making or terminating electrical connections to the equipment; or
    - (ii) installing supply conductors that will connect the equipment to a supply of electricity”.
- [10] So far as is presently relevant, “electrical equipment” is defined in s 14(1)(a) to mean “any apparatus, appliance, cable, conductor, fitting, insulator, material, meter or wire that ... is used for controlling, generating, supplying, transforming or transmitting electricity at a voltage greater than extra low voltage”. “Extra low voltage” is defined to mean “voltage of 50V or less AC RMS, or 120V or less ripple-free DC.” Uncontroversial evidence adduced at the hearing before the primary judge established that the PV modules at the respondent’s solar farm will generate electricity as direct current at a voltage lower than 120V ripple-free DC. For that reason, work of the

kind described in subparagraphs (i) and (ii) of s 73A(1)(b) performed on a PV module at the respondent's solar farm is not "electrical work" as defined in s 18(1) because such a PV module is not "electrical equipment". More generally, if any PV module to which s 73A applies is "electrical equipment" the work described in subparagraphs (i) and (ii) of s 73A(1)(b) of locating, mounting and fixing in place such a PV module would not be "electrical work" because of the express exclusions in s 18(2)(f) and (n) of the Act.

- [11] The State submits that s 73A of the Regulation is designed to fill a "gap" in the Act, in that a "solar farm" is "a system of PV modules" used to generate electricity with a total rated capacity of 100kW, and such a "system of PV modules" therefore amounts to "electrical equipment" as defined in s 14 as "apparatus" or "material" used for "generating" and "supplying" electricity "at a voltage greater than extra low voltage". Whether or not that submission is correct is not significant for the resolution of this appeal. Section 73A(1) is directed only to work on "a" PV module "at" a solar farm and paragraph (b) of s 73A(1) makes plain the regulatory purpose of imposing a requirement for a licence which is not required by the Act because the work for which the licence is required is not "electrical work" and that work is on a PV module which is not "electrical equipment".
- [12] The State did not rely upon s 210(2)(f) of the Act in the Trial Division. The primary judge rejected the State's contention that s 73A prescribes a way of "ensuring the electrical safety of persons or property" within the meaning of s 210(2)(b) upon the ground that s 73A does not prescribe any way; instead, s 73A(1) prohibits persons from performing certain work and s 73A(2) obliges other persons to ensure that prohibited persons do not do such work. For the same reason, the primary judge considered that s 73A could not properly be characterised under s 5(a) of the Act as a provision that achieves the general purpose of the Act by imposing "duties on persons who may affect the electrical safety of others by their acts or omissions". The primary judge rejected the State's contention that s 73A establishes a "benchmark" in terms of s 5(b)(i) upon the ground that the ordinary meaning of benchmark is "a standard, point of reference or criterion against which other things can be measured or assessed." The primary judge concluded that s 73A could not be regarded as giving effect to the object in s 4(1) of the Act of "eliminating the human cost to individuals, families and the community of death, injury and destruction that can be caused by electricity" by either of the ways described in s 5(a) and (b)(i). The primary judge also held that s 73A(1)(a) and (b) are invalid for inconsistency with the licensing provisions in the Act and that s 73A(2) is necessarily also invalid for inconsistency with the Act.
- [13] It being common ground that the whole of s 73A stands or falls according to the validity of s 73A(1)(a) and (b), the primary judge held that s 73A(1)(c) is also invalid. The appeal was argued upon the same premise that the whole of s 73A stands or falls according to the validity of s 73A(1)(a) and (b).
- [14] The State argues that the primary judge focussed unduly upon s 5, rather than the language of the provisions conferring regulation-making power, the express terms of the Act are not intended to deal completely and exclusively with the purpose of the Act expressed in s 4, and the Act's purpose weighs against a narrow construction of the powers given by the Act to deal with electrical safety. It is submitted that the primary judge adopted unduly narrow constructions of the terms by which delegated authority is conferred by s 210(2)(b) and of the terms in s 5(a) (particularly "duties") and (b) (particularly "benchmarks"). The State submits that the primary judge erred

by construing s 73A(1) as falling outside s 5(a) of the Act on the basis that it imposes a prohibition rather than a duty. The difference between subsections (1) and (2) of s 73A is submitted to be merely syntactical; s 73A is properly construed as “imposing duties on persons who may affect the electrical safety of others by their acts or omissions”, as provided for in s 5(a) of the Act. The State also argues that even if s 73A(1) is characterised as imposing a prohibition it is authorised by the provision in s 27 of the *Statutory Instruments Act* that, “[i]f an Act ... authorises ... a matter to be regulated by a statutory instrument, the power may be exercised by prohibiting by statutory instrument the matter or any aspect of the matter.” A prohibition upon a person performing work on a PV module at a solar farm unless the requirements of s 73A(1) are met is submitted to be an aspect of the authority given by s 210(2)(b) of ensuring the electrical safety of persons or property because it prescribes a way in which the electrical safety of persons or property with respect to such work may be achieved. The submissions for the respondent substantially endorse the primary judge’s reasons.

- [15] Section 210(2)(b) describes as an authorised prescription by regulation “ways of ensuring the electrical safety of persons or property”. The expression “electrical safety” is defined in s 10(3) to mean, “for a person or property ... the person or property is electrically safe”. So far as is presently relevant, “electrically safe” is defined to mean, “for a person or property, that the person or property is free from electrical risk”: s 10(2)(a). The effect of the definition in s 10(4) of “free from electrical risk” is that “for a person or property ... electrical risk ... has been eliminated, so far as is reasonably practicable ... or ... if it is not reasonably practicable to eliminate electrical risk ... the risk has been minimised so far as is reasonably practicable.” The definition of “electrical risk” in s 10(1) comprehends the risk to a person of death, shock or injury and the risk to property of loss or damage, whether caused directly by or originating from electricity. It follows that “electrical safety” comprehends but is not limited to safety relating to work for which an electrical licence is required by the Act.
- [16] In light of the protective nature of the purpose expressed in s 4(1) of the Act, the provisions giving effect to that purpose should be given a “fair, large and liberal” interpretation, albeit not one that is unreasonable or unnatural.<sup>1</sup> Applying that principle of statutory construction, but putting the statutory context aside for the moment, I respectfully consider that the licensing requirement imposed by s 73A may properly be described as a way of ensuring “electrical safety” in terms of s 210(2)(b), the imposition of a duty in terms of s 5(a), and a “benchmark” in terms of s 5(b)(i).
- [17] Relevant statutory context must be taken into account in the construction of the regulation-making power conferred by s 210(2)(b).<sup>2</sup> That context includes the description in s 5(c) of a way of achieving the Act’s purpose, the extensive and detailed provisions about electrical licences and discipline of electrical licence holders to which that paragraph adverts (including those mentioned in [6], [9] and [10] of these reasons), and the express grant in s 210(2)(m) of broad and detailed regulation-making power about electrical licences. The Act defines in very considerable detail the work for which an electrical licence is required.<sup>3</sup> That presumably reflects policy choices about the appropriate scope of the licensing scheme, which is an important

<sup>1</sup> *IW v The City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J, quoting from *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333).

<sup>2</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>3</sup> Cf *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

part of the statutory scheme as a whole. In terms of s 5(c), the extent to which the expressed purpose of the Act is to be achieved by licensing and discipline of persons is relevantly confined by the Act to the licensing and discipline of persons who perform “electrical work”. To the extent that the general words of s 210(2)(b) are capable of being construed as authorising regulations that are inconsistent with the detailed provisions in the Act defining the scope of the licensing scheme, the former provision must be regarded as subordinate to the latter provisions.<sup>4</sup> The Act comprehensively defines the work for which an electrical licence is required such as to leave no room for modification by delegated legislation. Section 73A would involve “a new step in policy”<sup>5</sup> which cuts across that aspect of the Act by requiring a licence for work that is not “electrical work”. Indeed, in so far as the effect of s 73A is that a person is not authorised to perform the work described in paragraphs (i) and (ii) of s 73A(1)(b) without holding an “electrical work licence”, that regulation is practically irreconcilable with the effect of s 20(1) that such a licence authorises only the performance of “electrical work”.

- [18] For those reasons I would confirm the primary judge’s conclusion that s 210(2)(b) of the Act does not authorise s 73A(1)(a) or (b), or s 73A(2).
- [19] The respondent submits that s 73A departs from the scheme of the Act in another respect. Under the Act, every holder of an electrical licence is amenable to discipline for deficiencies in the performance of “electrical work” done under the authority of such a licence, but a licence holder would not be amenable to such discipline for any deficiency in the performance of work described in s 73A(1)(b) because it is not “electrical work”. There is substance in that submission. This aspect of the statutory scheme of the Act supplies additional support for the conclusion that s 73A (other than paragraph (c) of s 73A(1)) is not authorised by s 210(2)(b) of the Act.
- [20] It is necessary next to consider the general regulation-making powers in s 22 of the *Statutory Instruments Act* and s 210(1) of the Act. In relation to s 210(1), it should be noted that s 210(2) commences with the words, “[w]ithout limiting subsection (1)”. It is not necessary in this appeal to decide whether those words preclude s 210(2)(m) from having any limiting effect upon the scope of the regulation-making power in s 210(1).<sup>6</sup> My following reasons proceed upon the assumption that s 210(2)(m) has no such effect.
- [21] There is no issue in this appeal about the principles the primary judge considered to be applicable in a determination of the scope of a general grant of delegated legislative authority. The primary judge referred to *Morton v Union Steamship Co of New Zealand Ltd*<sup>7</sup> and *Shanahan v Scott*,<sup>8</sup> which concerned the validity of regulations made under statutory powers in terms similar to s 22 of the *Statutory Instruments Act*. In *Morton*, the High Court described the power as one “to make regulations incidental to the administration of the Act” and held that it does not authorise “regulations which vary or depart from the positive provisions made by the Act or regulations which go

<sup>4</sup> See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 – 382 [70] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>5</sup> *R v Commissioner of Patents; Ex Parte Martin* (1953) 89 CLR 381 at 407 (Fullagar J, Webb, Kitto and Taylor JJ agreeing; Williams ACJ contra).

<sup>6</sup> See *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 – 680 (Mason J, Barwick CJ agreeing) and at 680 – 681 (Aickin J).

<sup>7</sup> (1951) 83 CLR 402 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

<sup>8</sup> (1957) 96 CLR 245 (Dixon CJ, Williams, Webb and Fullagar JJ; Kitto J dissenting).



outside the field of operation which the Act marks out for itself”; “[t]he ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains” and “the degree to which the legislature has disclosed an intention of dealing with the subject” is an important consideration.<sup>9</sup> In *Shanahan*, the High Court similarly concluded that “such a power does not enable the authority by regulations to extend the scope or general operation of the enactment” or to “widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.”<sup>10</sup> For the reasons already given, s 73A(1)(a) and (b) and s 73A(2) depart from the licensing scheme the Act enacted in pursuit of the statutory purpose. It follows that s 73A(1)(a) and (b) and s 73A(2) are not authorised by s 22 of the *Statutory Instruments Act* or by the general power in s 210(1) of the Act.

- [22] The State contends for the first time in this appeal that s 73A falls within the delegated legislative power in s 210(2)(f) as a prescription of safety and technical requirements for electricity supply. I accept the respondent’s argument that s 73A concerns electricity generation rather than electricity supply. The respondent referred to the definition in s 8 of the *Electricity Act* 1994 (Qld) of “supply network” as “a system, or part of a system, of electric lines, substations and associated equipment, other than a transmission grid, for distributing electricity to customers, whether or not [a] generating plant is connected to it.” That definition does not apply to the construction of s 73A, but it is an illustration in a relevant context of the distinction between generation and supply. A solar farm may be designed to supply electricity that has been generated by a system of PV modules, but s 73A concerns only work on a PV module at that solar farm. The operative parts of s 73A and the definitions of “PV module” and “work” in s 73A(3) make it clear both that the topic of regulation is “work on a PV module at a solar farm” and that a PV module generates electricity. The State did not argue that a PV module also supplies electricity. For this reason, and for the reasons already given, s 210(2)(f) is not a source of power for s 73A.
- [23] The appeal should be dismissed with costs.
- [24] **McMURDO JA:** I agree with Fraser JA.
- [25] **BODDICE J:** I agree with Fraser JA.

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<sup>9</sup> (1951) 83 CLR 402 at 410 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

<sup>10</sup> (1957) 96 CLR 245 at 250 (Dixon CJ, Williams, Webb and Fullagar JJ).