

SUPREME COURT OF QUEENSLAND

CITATION: *Maryrorough Solar Pty Ltd v The State of Queensland* [2019] QSC 135

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

FILE NO: SC No 5299 of 2019

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 29 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2019

JUDGE: Bradley J

ORDER: **The parties are to make submissions on the form of declaratory relief.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWER OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DECLARATIONS – STATUTES – SUBORDINATE LEGISLATION – CONSTRUCTION – VALIDITY – where the applicant seeks a declaration that s 73A of the *Electrical Safety Regulation 2013* (Qld) is invalid – where s 73A was inserted by the *Electrical Safety (Solar Farms) Amendment Regulation 2019* (Qld) – where both regulations were made by the Governor in Council pursuant to a regulation-making power under s 210 of the *Electrical Safety Act 2002* (Qld) – where an effect of s 73A is to require work involving photovoltaic modules at solar farms to be undertaken by a licensed electrical worker – where the work in question does not fall within the scope of the definition of “electrical work” under the Act and is expressly excluded from the licensing provisions of the Act – where the applicant contends that s 73A is beyond the regulation-making power conferred by s 210 of the Act and further contends that s 73A is inconsistent with the Act – where the respondent contends that s 73A was enacted specifically pursuant to s 210(2)(b) of the Act, which authorises a regulation prescribing “ways of ensuring the electrical safety of persons or property” – where the respondent contends that

s 73A further carries into effect the object found in s 4(1) of the Act to eliminate “the human cost to individuals, families and the community of death, injury and destruction that can be caused by electricity”, and that it seeks to achieve that purpose in a way authorised by s 5 of the Act – whether s 73A is within the regulation-making power conferred by s 210 of the Act – whether s 73A imposed a duty on persons who may affect electrical safety, within the meaning of s 5(a) of the Act – whether s 73A established a benchmark for industry and the community generally as a regulation about achieving electrical safety, within the meaning of s 5(b)(i) of the Act – whether s 73A is inconsistent with the licensing provisions of the Act

Electrical Safety Act 2002 (Qld), s 4, s 5, s 210

Electrical Safety Regulation 2013 (Qld), s 73A

Judicial Review Act 1991 (Qld), s 43(2)

Statutory Instruments Act 1992 (Qld), s 22

Morton v The Union Steamship Company of New Zealand

Limited (1951) 83 CLR 402; [1951] HCA 42, cited

Shanahan v Scott (1957) 96 CLR 245; [1957] HCA 4, cited

COUNSEL: P Dunning QC, with B McMillan, for the applicant
J M Horton QC, with E J Longbottom, for the respondent

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

- [1] The applicant Maryrorough Solar Pty Ltd seeks a declaration that s 73A of the *Electrical Safety Regulation 2013 (Qld)* is invalid. The declaration is sought pursuant to s 43(2) of the *Judicial Review Act 1991 (Qld)* or in the inherent jurisdiction of the court.
- [2] The applicant owns the project rights to develop, build, connect and operate a solar project at Brigalow. The project involves the location, mounting, fixing and installation of 104,690 photovoltaic (PV) modules. If valid, s 73A would require the work of locating, mounting and fixing the PV modules in place to be undertaken by licensed electrical workers. Prior to the commencement of s 73A, the applicant had contracted for this work to be performed by a workforce without such licences. The applicant estimates the additional cost to it of complying with s 73A would be \$2,626,000.
- [3] It is accepted by the respondent, the State of Queensland, that the applicant has standing to seek this relief, as a person whose interests are, or would be, adversely affected in or by s 73A.
- [4] The challenged regulation is in these terms:
- “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.”

- [5] This provision was inserted by the *Electrical Safety (Solar Farms) Amendment Regulation 2019*, which commenced on 13 May 2019. The amendment regulation, like the regulation itself, was made by the Governor in Council pursuant to a regulation-making power enacted by s 210 of the *Electrical Safety Act 2002* (Qld) (the **Act**).
- [6] The applicant advances its challenge on the basis: that s 73A exceeds the regulation-making power conferred by s 210 of the Act; and that s 73A is inconsistent with the Act.

Is s 73A beyond the regulation-making power in the Act?

- [7] The validity of a regulation depends upon the statutory power in pursuance of which it was made.¹ A general regulation-making provision does not authorise a regulation that extends the scope or general operation of the enactment, but only a regulation strictly ancillary, that carries the enacted provisions into effect, and covers what is incidental to the execution of the specific enacted provisions.²
- [8] By the *Statutory Instruments Act 1992* (Qld), the Parliament has dealt with the topic of acts or statutory instruments that authorise or require the making of statutory instruments, such as the *Electrical Safety Regulation*. It includes the following provision:

“22 Power to make statutory instrument under Act etc.

- (1) If an Act or statutory instrument (the *authorising law*) authorises or requires the making of a statutory instrument under the authorising law or an Act or statutory instrument (the *other law*), the power enables a statutory instrument to be made with respect to any matter that—
 - (a) is required or permitted to be prescribed by the authorising law or other law; or
 - (b) is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law or other law.
 - (2) Subsection (1) applies to the authorising law even though the authorising law also authorises the making of a statutory instrument for a particular purpose.
 - (3) Power conferred by the authorising law to make a statutory instrument for a particular purpose is in addition to, and does not limit the effect of, power conferred by the authorising law to make a statutory instrument under the authorising law or other law unless the authorising law expressly provides otherwise.”
- [9] The respondent contends that s 73A was made, not under a general regulation-making power, but under s 210(2)(b) of the Act, which authorises a regulation prescribing “ways of ensuring the electrical safety of persons or property”. This is one of many differently enumerated bases for regulations in s 210(2).

¹ *Morton v The Union Steamship Company of New Zealand Limited* (1951) 83 CLR 402 at 409 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

² *Shanahan v Scott* (1957) 96 CLR 245 at 250 (Dixon CJ, Williams, Webb and Fullagar JJ).

- [10] The respondent submits that s 73A further carries into effect the object found in s 4(1) of the Act to “[eliminate] the human cost to individuals, families and the community of death, injury and destruction that can be caused by electricity.” The respondent contends that it seeks to achieve that purpose in a way authorised by s 5(a) and s 5(b)(i) of the Act.
- [11] It is convenient to set out s 4 and s 5 of the Act in full, which explain the purpose of the Act and how it is to be achieved.

“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 electrical 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.”

[12] The respondent submitted that s 73A imposed a duty on persons who may affect electrical safety, within the meaning of s 5(a), and established a benchmark for industry and the community generally as a regulation about achieving electrical safety, within the meaning of s 5(b)(i).

[13] These contentions require some consideration.

Does s 73A impose a duty?

[14] On its face, s 73A(1) is a prohibition on any person performing work on a PV module at a solar farm unless the requirements of its sub-paragraphs (a), (b) and (c) are all met. For the respondent, it was submitted that the prohibition of an activity imposes a duty on a person not to engage in the activity. This is not an obvious conclusion.

[15] The Act, in Part 2, Division 2, provides for certain persons to have duties. The focus of these duties is the obligation to ensure certain things and activities are “electrically safe”. That is a defined expression which relevantly means the electrical risk to a person or property has been eliminated, so far as reasonably practicable, or, if not reasonably practical to eliminate, then the risk has been minimised so far as is reasonably practicable.³ Each of the duties is expressed as a duty to ensure certain things or a duty to take reasonable care. None is expressed as a prohibition.

[16] Division 2A of Part 2 creates certain offences for breaches of the duties.

[17] In the context of the express provisions of the Act, and on the ordinary meaning of the words, I am unable to accept that s 73A(1) can properly be characterised as a provision that achieves the general purpose of the Act by imposing a duty on persons who may affect the electrical safety of others by their acts or omissions, within the scope of s 5(a) of the Act.

[18] By s 73A(2), the regulation does seek to impose a duty – on a person conducting the business or undertaking of a solar farm. The duty is to ensure that a person does not perform work in contravention of s 73A(1). If the prohibition in s 73A(1) is valid, there is no reason to conclude s 73A(2) is invalid. Its fate turns on the provision it supports or reinforces.

Does s 73A establish a benchmark?

[19] The respondent next contends that s 73A is a regulation that establishes a benchmark, as authorised by s 5(b)(i) of the Act.

[20] In the context of s 5(b)(i), the ordinary meaning of benchmark is a standard, point of reference or criterion against which other things can be measured or assessed. The

³ Act, s 10(2), (4).

provision states that such benchmarks are to be established for industry and the community through making regulations, ministerial notices and codes of practice.

- [21] The provisions in Part 2, Division 3 of the Act deal with ministerial notices that prescribe ways of discharging a person's electrical safety duty and with codes of practice that state ways of discharging such a duty.
- [22] A ministerial notice prevails over any inconsistent regulation or code of practice to the extent of the inconsistency. It may expire after a year, but its operation may be extended by a regulation. The contravention of a ministerial notice constitutes a failure to discharge a relevant electrical safety duty.
- [23] A code of practice is an instrument that states a way of discharging a person's electrical safety duty. A notice making a code of practice is subordinate legislation, but if it is inconsistent with a regulation, then the regulation prevails to the extent of the inconsistency. A person may prove that they have complied with a relevant electrical safety duty by evidence that shows compliance with the Act in a way that is different from a code of practice and that provides a standard of electrical safety that is equivalent to or higher than the standard required in the code.
- [24] The challenged provision s 73A is a regulation and not a ministerial notice or a code of practice. However, in the context of safety legislation, some similarity to those different instruments might be expected for a regulation contended to prescribe "ways of discharging a person's electrical safety duty" or prescribe "ways of ensuring the electrical safety of persons or property".
- [25] It is not the case that s 73A prescribes a way of ensuring electrical safety. It does not prescribe any way at all. In s 73A(1) it prohibits persons from performing certain work and in s 73A(2) it obliges other persons to ensure the prohibited persons do not do such work. It follows that the regulation does not find support in s 5(b)(i) of the Act.
- [26] In form, s 73A is a prohibition accompanied by a duty to ensure others do not breach the prohibition. In that form, it is not specifically authorised by the Act.

Does s 73A achieve the general purpose in another way?

- [27] Within the Act, one of the ways the general purpose is to be achieved, according to s 5(c), is by providing for safety of all persons through licensing and discipline of persons who perform electrical work. By s 55 and s 56 of the Act, general prohibitions are imposed on persons who do not hold electrical work licences that authorise them to perform relevant electrical work.
- [28] By s 210(2)(m), the Parliament has authorised the making of regulations prescribing "all matters" about electrical licences issued under the Act. A regulation prohibiting persons who are not licensed from undertaking certain work would likely be within the scope of that authority and be a means of achieving the Act's general purpose by providing for the safety of all persons through licensing and discipline of persons who perform electrical work, as expressed in s 5(c) of the Act.
- [29] The respondent expressly disclaims any reliance on s 5(c) as a source of power to make s 73A. This is because that way of achieving the general purpose is confined to licensing and disciplining persons who perform electrical work. The expression "electrical work" is extensively defined in s 18 of the Act. There, it is expressly

confined to work on “electrical equipment” and 15 types of work are expressly not included in “electrical work”. Among the work not within the scope of “electrical work” is

“(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;”

- [30] It follows that, if PV modules were electrical equipment, the work the applicant has contracted to have performed would be excluded from the scope of “electrical work” for the purposes of the Act.
- [31] As it transpires, the PV modules are not electrical equipment because they are extra low voltage devices. The definition of electrical equipment, in s 14 of the Act, excludes anything used for or operated by voltage that is not greater than extra low voltage.
- [32] Leaving aside the form of s 73A, in substance it is a provision that seeks to require compliance with the regulatory measures in the Act that apply to electrical equipment by persons working with extra low voltage PV modules on solar farms, which the Act provides are not electrical equipment. It also seeks to require persons to comply with the measures in the Act applying to electrical work by persons doing work on such PV modules that is not electrical work (and would not be electrical work even if the PV modules were electrical equipment).
- [33] These considerations lead to the conclusion that a regulation to prohibit persons from doing such work, if they are not licensed under the Act, is inconsistent with the licensing provisions of the Act which, by express provision, do not require a person to be licensed in order to perform that work. Such a regulation is not authorised by s 210(2)(m), which sets out the matters about electrical licences that may be the subject of regulations, or by s 210(2)(t), which authorises regulations for the discipline of electrical licence holders.
- [34] I do not accept the submission of the respondent, however persuasively put, that s 73A should be construed as an entirely different and separate means of achieving the Act’s general safety purpose that could operate alongside the licensing provisions in the Act.
- [35] As the prohibition in s 73A(1) is inconsistent with provisions of the Act about licensing persons to do electrical work, it follows that the duty to ensure a person does not breach the invalid prohibition in s 73A(2) is also invalid, as another provision similarly inconsistent with the Act.
- [36] The respondent’s explanation for s 73A is that it was intended to fill a “gap” in the legislation and apply measures to a technology that was not in existence or anticipated when the Act was enacted. This explanation contains within it the insight that the Act does not apply and was not intended to apply in the way the amended regulation would seek to apply it.
- [37] The parties informed the court that, were it to be found that s 73A(1)(a) and (b) were invalid, then no purpose would be served by allowing s 73A(1)(c) to survive. They were agreed, in other words, that the whole of s 73A would stand or fall according to the validity of s 73A(1)(a) and (b). As I have concluded that those parts of the regulation are beyond power, the appropriate relief may be in terms of a declaration that the whole of s 73A is invalid. However, I will hear the parties on the exact form of declaratory relief that ought to be granted.