



Education, Employment and Small Business Committee

Report No. 19, 56th Parliament

Subordinate legislation tabled between 3 and 30 April 2019

1 Background and aim of this report

The committee's role in examination of subordinate legislation is to consider the policy to be given effect, consistency of the legislation with fundamental legislative principles (FLPs), compliance of the explanatory notes with the requirements of the *Legislative Standards Act 1992* (Legislative Standards Act), and the lawfulness of the subordinate legislation.

This report provides a summary of the committee's examination of subordinate legislation tabled from 3 April to the 30 April 2019. It also summarises the effect of the matters listed below. The Electrical Safety (Solar Farms) Amendment Regulation 2019, which is the main focus of this report, inserted a new section 73A in the Electrical Safety Regulation 2013.

The report provides background to:

- notice of a motion given by on 14 May 2019, that the Electrical Safety (Solar Farms) Amendment Regulation 2019 be disallowed
- a Supreme Court of Queensland decision on 29 May 2019 that found that section 73A of the Electrical Safety Regulation 2013 is invalid
- a *Speaker's Ruling – Notice of Motion of Disallowance, Subordinate Legislation Held Invalid by Court* tabled on 6 June 2019
- a Court of Appeal decision on 25 June 2019 which confirmed the Supreme Court decision
- the impact of a subsequent amendment regulation, the Electrical Safety Amendment Regulation (No. 1, 2019).

In light of the Court of Appeal decision and subsequent repeal of the amendment to the Electrical Safety Regulation 2013, originally made by the Solar Farms Amendment Regulation, this report focusses primarily on the lawfulness or validity of the regulation rather than on the policy or other issues of fundamental legislative principle.

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
46	Electrical Safety (Solar Farms) Amendment Regulation 2019	30 April 2019	4 September 2019
47	Electrical Safety (Codes of Practice) and Other Legislation (Solar Farms) Amendment Notice 2019	30 April 2019	4 September 2019

3 Electrical Safety (Solar Farms) Amendment Regulation 2019 – SL No. 46

3.1 Policy proposed to be given effect

The Electrical Safety (Solar Farms) Amendment Regulation 2019 (the Solar Farms Amendment Regulation) was tabled on 30 April 2019, and commenced on 13 May 2019. It has a disallowance date of 4 September 2019.

The policy objective of the Solar Farms Amendment Regulation was to:

... establish a clear framework and direction in relation to the mounting, fixing, locating of photovoltaic (PV) modules to ensure this work is undertaken in a manner that is electrically safe and minimises risks to health and safety.¹

The Solar Farms Amendment Regulation applied to solar farms with a total rated capacity of at least 100kw and operated by a person conducting a business or undertaking.² It inserted a new section 73A into the Electrical Safety Regulation 2013 (Electrical Safety Regulation) to provide:

- only a licensed electrical worker can mount, locate, fix or remove PV modules on solar farms
- a person conducting a business or undertaking which includes the performance of work on a PV module at a solar farm must ensure that mounting, locating, fixing or removal of PV modules is undertaken only by a licensed electrical worker.

3.2 Notice of disallowance motion

Section 50 of the *Statutory Instruments Act 1992* provides that the Legislative Assembly may pass a resolution disallowing subordinate legislation if notice of a disallowance motion is given by a member within 14 sitting days after the legislation is tabled in the Legislative Assembly.

On 14 May 2019 the Member for Burleigh gave notice of a motion to disallow the Solar Farms Regulation in accordance with section 50 of the *Statutory Instruments Act 1992* and Standing Order 59.

Under Standing Order 59 a motion to disallow a regulation shall be considered within seven sitting days after notice has been given, during the time set aside for debate of Private Member's Bills or other General Business. A disallowance motion takes precedence during that time until disposed of. When a motion is called on it is moved, debated and decided, and if not moved, lapses.

3.3 Lawfulness or validity of Electrical Safety (Solar Farms) Amendment Regulation

Supreme Court decision - Maryrorough Solar Pty Ltd v The State of Queensland [2019] QSC 135

Maryrorough Solar Pty Ltd owns the project rights to develop, build, connect and operate a solar project at Brigalow. Maryrorough Solar sought a declaration from the Supreme Court that new section 73A of the Electrical Safety Regulation (as amended by the Solar Farm Amendment Regulation) was invalid on the basis that new section 73A:

- exceeded the regulation making power conferred by section 210 of the *Electrical Safety Act 2002*, and
- is inconsistent with the *Electrical Safety Act 2002*.

On 29 May 2019 Justice Bradley ruled that section 73A(1)(a) and (b) of the Electrical Safety Regulation were invalid because the provisions were beyond the regulation-making power conferred by the Act. The judgement noted the parties agreed that, were it found that sections 73A(1)(a) and (b) were

¹ Electrical Safety (Solar Farms) Amendment Regulation 2019, explanatory notes, p 1.

² Electrical Safety (Solar Farms) Amendment Regulation 2019, explanatory notes, p 1.

invalid, 'then no purpose would be served by allowing s 73A(1)(c) to survive'. The judgement foreshadowed that the appropriate relief may be in terms of a declaration that the whole of section 73A is invalid.³

Court of Appeal– State of Queensland v Maryrorough Solar Pty Ltd [2019] QCA 129

The State of Queensland appealed the Supreme Court decision; the appeal was heard on 7 June and the appeal decision was delivered on 25 June 2019.

The Court of Appeal judgement considered whether there were sufficient powers in the *Electrical Safety Act 2002*, or in section 22 of the *Statutory Instruments Act 1992* to authorise the making of the Solar Farms Amendment Regulation (which added section 73A to the Electrical Safety Regulation).

In relation to powers under the *Electrical Safety Act 2002*, the Court of Appeal judgement considered the general regulation-making power in section 201(1), and the more specific regulation-making powers in subsections 201(2)(b), (f) and (m). It found there was no source of power for section 73A of the Electrical Safety Regulation from those provisions.

Section 22 of the *Statutory Instruments Act 1992* provides a power to make regulations described as 'incidental to the administration of the Act'.⁴ The Court of Appeal found that section 22 of the *Statutory Instruments Act* did not authorise the making of section 73A.

The Court of Appeal dismissed the application by the State of Queensland and confirmed the primary judge's conclusion that the regulation-making powers in section 210 of the *Electrical Safety Act 2002*, and in section 22 of the *Statutory Instruments Act 1992* did not authorise section 73A of the Electrical Safety Regulation.⁵

3.4 Effect of court ruling on the notice of a disallowance motion - *Speaker's Ruling – Notice of motion of disallowance, subordinate legislation held invalid by court*

On the 6 June 2019 the Speaker of the Legislative Assembly ruled on the effect of the Supreme Court decision that section 73A of the Electrical Safety Regulation (inserted by the Solar Farms Amendment Regulation) was invalid on the notice of motion to disallow the Solar Farms Amendment Regulation. At that time the Court of Appeal had not heard the appeal of the Supreme Court decision, nor had the Electrical Safety Amendment Regulation (No. 1, 2019).

The Speaker's ruling concluded:

The Parliament and the courts have different, although slightly overlapping roles.

The courts are concerned with the legality of subordinate legislation. As can be seen from the [Legislative Standards Act] and the [Parliament of Queensland Act] the role of Parliament is much wider, Parliament can be concerned with legality but it can also be concerned with underlying policy.

I rule that the decision by the court does not affect the notice of motion for disallowance before the House and its consideration will take precedence the next Tuesday sitting evening when disallowance motions are considered and it can be moved.

The considerations that led to the Speaker's ruling of 6 June 2019, which are discussed in detail in the ruling, were:

- the judicial decision does not remove the provisions from the regulation in the same way as a disallowance motion. Section 51 of the *Statutory Instruments Act 1992* provides that if subordinate legislation is not tabled or is disallowed then the subordinate legislation is taken never to have been made or approved

³ *Maryrorough Solar Pty Ltd v The State of Queensland [2019] QSC 135*, p 8, paragraph 37.

⁴ *State of Queensland v Maryrorough Solar Pty Ltd [2019] QCA 129*.

⁵ *State of Queensland v Maryrorough Solar Pty Ltd [2019] QCA 129*.

- the Supreme Court ruling was not binding on higher courts or on another court with the same jurisdiction. The subsequent Court of Appeal decision confirmed the Supreme Court decision, and is binding on other courts
- a member is given a statutory right to give notice of and move a disallowance motion by section 50 of the *Statutory Instruments Act 1992*
- the scheme for notification, tabling and consideration of disallowance motions contained in the *Statutory Instruments Act 1992* is a scheme to ensure Parliament's oversight of its delegated authority.⁶

The Speaker's Ruling of 6 June 2019 stated that the notice of motion for disallowance would take precedence and be considered during the next Tuesday sitting evening when disallowance motions are considered and when it can be moved.⁷

3.5 Electrical Safety Amendment Regulation (No. 1) 2019

The Electrical Safety Amendment Regulation (No. 1) 2019 was notified on 19 July 2019. It amended the Electrical Safety Regulation 2013 by omitting section 73A, which was previously inserted by the Solar Farms Amendment Regulation. The original amendment has therefore been repealed.

The repeal of section 73A by Electrical Safety Amendment Regulation (No. 1) 2019 is consistent with the Court of Appeal confirmation on 27 June 2019 that section 73A of the Electrical Safety Regulation 2013 was invalid.

3.6 Speaker's ruling of 8 August 2019

Subsequent to the Electrical Safety Amendment Regulation (No. 1) 2019 (outlined in 3.5 above), on 8 August 2019 the Speaker tabled a second ruling on the notice of a motion to disallow the Solar Farms Amendment Regulation. The ruling noted that the reasons for the earlier ruling persisted, however, the repeal of section 73A of the Electrical Safety Regulation 2013 raised 'the different issue as to whether a disallowance motion can be moved in respect of an instrument, the effective provision of which has been repealed.'

The Speaker ruled that due to the change in underlying circumstances since the notice of motion, 'the motion should not proceed'. The ruling stated the member 'should be permitted the opportunity to withdraw the notice of motion in accordance with Standing Order 68. If the Notice of motion is not withdrawn, the Assembly may order that the notice of motion be expunged from the notice paper under Standing Order 70.

3.7 Committee comment

The committee notes the Court of Appeal decision in *State of Queensland v Maryborough Solar Pty Ltd* [2019] QCA 129, which ruled that section 73A of the Electrical Safety Regulation was invalid.

The committee also notes the *Speaker's Ruling – Notice of motion of disallowance, subordinate legislation held invalid by court*, and the more recent Electrical Safety Amendment Regulation (No. 1) 2019 which omitted section 73A from the Electrical Safety Regulation.

Finally, the committee also notes the notice of a disallowance motion which is on the Notice Paper.

⁶ Hon Curtis Pitt MP, Speaker of the Queensland Parliament, 'Speaker's ruling - notice of motion of disallowance, subordinate legislation held invalid by court', 6 June 2019, <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T826.pdf>

⁷ Hon Curtis Pitt MP, Speaker of the Queensland Parliament, *Speaker's ruling - notice of motion of disallowance, subordinate legislation held invalid by court*, 6 June 2019, pp 1, 4.

4 Electrical Safety (Codes of Practice) and Other Legislation (Solar Farms) Amendment Notice 2019 – SL No. 47

The Electrical Safety (Codes of Practice) and Other Legislation (Solar Farms) Amendment Notice 2019 (the Codes of Practice Amendment Notice) inserted a new *Construction and Operation of Solar Farms Code of Practice 2019* into Schedule 1 of both the Electrical Safety (Codes of Practice) Notice 2013 and the Work Health and Safety (Codes of Practice) Notice 2011.

Following the Court of Appeal decision noted above, and the consequent omission of section 73A from the Electrical Safety Regulation, the Codes of Practice Amendment Notice has limited effect. After those actions, both the Electrical Safety Code of Practice 2013 and the Work Health and Safety Code of Practice included notes to indicate that specified pages of the Code of Practice which refer to section 73A of the Electrical Safety Regulation should be disregarded, following omission of section 73A from the Electrical Safety Regulation 2013.

5 Recommendation

The committee recommends that the Legislative Assembly note this report.



Ms Leanne Linard MP
Chair
August 2019

Education, Employment and Small Business Committee

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