

FEDERAL COURT OF AUSTRALIA

Board of Professional Engineers of Queensland v Gardner [2021] FCA 564

File number: QUD 63 of 2021

Judgment of: **LOGAN J**

Date of judgment: 28 May 2021

Catchwords: **ADMINISTRATIVE LAW** – mutual recognition – appeal from a decision of the Administrative Appeals Tribunal setting aside the decision of the local registration authority – whether the Tribunal erred in their construction of the *Mutual Recognition Act 1992* (Cth) – where certifier registered in New South Wales as “Certifier – fire safety” – whether occupation equivalent to a Registered Professional Engineer in the area of Fire Safety in Queensland – appeal allowed

Legislation: *Constitution* ss 51, 92, 117, 122
Administrative Appeals Tribunal Act 1975 (Cth) ss 43, 44
Mutual Recognition Act 1992 (Cth) ss 4, 17, 21, 28, 29,
Mutual Recognition (Queensland) Act 1992 (Qld)
Professional Engineers Act 2002 (Qld) ss 6, 7, 7A, 115,
Sch 2
Building and Development Certifiers Act 2018 (NSW) ss 4,
5
Building Professionals Act 2005 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
s 6.5
Building and Development Certifiers Regulation 2020
(NSW) Sch 1
Environmental Planning and Assessment Regulations 2000
(NSW)

Cases cited: *Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255
Cole v Whitfield (1988) 165 CLR 360
Frugniet v Australian Securities and Investments Commission (2019) 266 CLR 250
Medical Board of Queensland v Renton (2006) 152 FCR 566
Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41

Re Costello and Secretary, Department of Transport (1979)
2 ALD 934

Sande v Registrar, Supreme Court of Queensland (1996) 64
FCR 123

Street v Queensland Bar Association (1989) 168 CLR 461

Victorian Building Authority v Andriotis (2019) 93 ALJR
869

Division: General Division

Registry: Queensland

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 45

Date of hearing: 17 May 2021

Counsel for the Applicant: Mr B McEniery

Solicitor for the Applicant: Board of Professional Engineers of Queensland LCIU

Counsel for the Respondent: Mr R de Meyrick

Solicitor for the Respondent: Lovegrove & Cotton

ORDERS

QUD 63 of 2021

BETWEEN: **BOARD OF PROFESSIONAL ENGINEERS OF QUEENSLAND**
Applicant

AND: **PETER GARDNER**
Respondent

ORDER MADE BY: **LOGAN J**

DATE OF ORDER: **28 MAY 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Administrative Appeals Tribunal dated 3 February 2021 be set aside.
3. In lieu thereof, the decision of the applicant dated 23 September 2019 under the *Mutual Recognition Act 1992* (Cth) to refuse to grant the respondent registration in Queensland as a registered professional engineer in the area of "Fire" be affirmed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

- 1 Mr Peter Gardner was formerly registered in New South Wales as a C10 – Accredited Certifier – Fire Safety Engineering Compliance by the Building Professionals Board of New South Wales pursuant to the *Building Professionals Act 2005* (NSW) (Building Professionals Act). On the strength of that then current registration, he gave notice to the present applicant, the Board of Professional Engineers of Queensland (Board), pursuant to the *Mutual Recognition Act 1992* (Cth) (Mutual Recognition Act), of that registration, seeking to be registered under the *Professional Engineers Act 2002* (Qld) (Engineers Act) in what he alleged was the equivalent occupation of Registered Professional Engineer Queensland in the area of Fire Safety. Invoking a power granted to it by s 21 of the Mutual Recognition Act, the Board declined to register Mr Gardner. The Board did so on the basis of its conclusion that Mr Gardner’s NSW registered occupation as a certifier was not equivalent to the occupation of a Registered Professional Engineer Queensland in the area of Fire Safety.
- 2 Mr Gardner then sought the review of the Board’s decision by the Administrative Appeals Tribunal (Tribunal). On 3 February 2021, for reasons given in writing that day, the Tribunal set aside the Board’s decision and, in substitution, decided that Mr Gardner be registered in Queensland under the Engineers Act as a Registered Professional Engineer in the area of Fire Safety with the condition that such registration is limited to the provision of professional engineering services relating to buildings.
- 3 In the interval between these two administrative decisions, the *Building and Development Certifiers Act 2018* (NSW) (Certifiers Act) came into force on 1 July 2020. It repealed the Building Professionals Act and made transitional provision in relation to those hitherto registered under that Act. As a result, Mr Gardner’s C10 – Accredited Certifier – Fire Safety Engineering Compliance registration was taken to be, as from 1 July 2020, registration as a “Certifier – fire safety” under the Certifiers Act.
- 4 In its review, at [20] of the Tribunal’s reasons, and taking up an approach jointly commended to it by the parties, the Tribunal tested whether Mr Gardner was entitled to Queensland registration pursuant to the Mutual Recognition Act by reference to his deemed registration as a “Certifier – fire safety” under the Certifiers Act. The Tribunal recorded, at [21], that it

would have come to a like conclusion even had the earlier NSW registration been the comparator.

5 That approach by the Tribunal meant that the Board raised no issue on the appeal as to whether reference to the current regime by the Tribunal was correct. The Tribunal's reasons, at [20], make it explicit that it was well aware that, ordinarily, in keeping with the review model adopted in s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (Administrative Appeals Tribunal Act) of substituting the Tribunal for the maker of the decision under review, the Tribunal conducts its review by reference to the law as it applied at the time of the decision under review, but always subject to any legislative indication to the contrary. There is a long line of authority which supports this approach. It commences with the Tribunal's decision in *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 and may be traced through a view expressed by Smithers J in his dissenting judgment in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, at 46, to its endorsement by Kiefel CJ, Keane and Nettle JJ in *Frugniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, at [14].

6 The Board has invoked, or at least purported to invoke, this Court's original jurisdiction so as to challenge the Tribunal's decision by way of a statutory appeal pursuant to s 44 of the Administrative Appeals Tribunal Act. It is necessary to add the qualification "purported", because Mr Gardner contended that, even in its amended form, the Board's notice of appeal raises no question of law, only questions of fact, such that the appeal is not competent.

7 Consistent with the approach adopted in the Tribunal, the appeal was conducted by reference to Mr Gardner's current registration as a Certifier – fire safety under the Certifier's Act. There was no submission that, nor in my view would, the outcome would be any different were the yardstick his earlier registration under the Building Professionals Act. In the circumstances, I refrain from further considering the question of correctness of using the Certifiers Act registration as the reference point, much less expressing any concluded view on that subject.

8 In its final, amended form, the questions posed by the Board in its notice of appeal were:

1. In making the Decision did the Tribunal:
 - (a) err in its interpretation and purported application of ss 29 and 31 of the *Mutual Recognition Act 1992* (Cth) (MRA); and
 - (b) fail to give effect to ss 29 and 31 of the MRA as required in the

circumstances before it?

2. Is there a scheme for the registration of professional engineers in New South Wales that is of equivalence to the registration scheme contained in the *Professional Engineers Act 2002* (Qld)?
3. Are the:
 - (a) Queensland occupation of *Registered Professional Engineer in the area of Fire Safety* under the *Professional Engineers Act 2002* (Qld); and
 - (b) the New South Wales occupation of *C10 – Accredited Certifier – Fire Safety Engineering Compliance under the Building Professionals Act 2005* (NSW) (**C10 Accredited Certifier**), or alternatively, the occupation of *Certifier – fire safety* under the *Building Development Certifiers Act 2018* (NSW) (**Certifier – fire safety**), -

equivalent occupations within the meaning of s 29 of the MRA, either with or without the condition imposed by the Tribunal in its Decision?

4. In the making the Decision, did the Tribunal have regard to or take into account an irrelevant consideration (being a consideration not permitted by the applicable statutory regime), and thereby exceed its jurisdiction, in its application of ss 29 and 31 of the MRA, when it relied upon the evidence of Mr Gardner and Mr Glodic to inform itself as to the scope of the activities that:
 - (a) on the one hand, a person accredited as a “C10 – Accredited Certifier – Fire Safety Engineering Compliance” pursuant to the *Building Professionals Act 2005* (NSW), and, a person accredited as a “Certifier – fire safety” pursuant to the *Building and Development Certifiers Act 2018* (NSW); and
 - (b) on the other hand, a Registered Professional Engineer in the area of Fire Safety (RPE Fire Safety) accredited under the *Professional Engineers Act 2002* (Qld),

are authorised to perform?

[Emphasis in original]

- 9 As oral submissions progressed, attention came to focus upon whether the Tribunal had misconstrued and thereby misapplied the “equivalence” test found in s 29 of the Mutual Recognition Act, having regard to this conclusion concerning that test, made in *Medical Board of Queensland v Renton* (2006) 152 FCR 566 (*Renton*), at [31], by Kiefel J when a judge of this Court:

The inquiry is as to whether the statute under which registration is granted in the first State itself authorises the activities of the profession in the second State.

Neither party to the appeal gainsaid the correctness of that conclusion. Rather, the issue on the appeal became whether the Tribunal had indeed made the inquiry required by law?

Whether the Tribunal did so does raise a question of law, which means that the appeal is competent.

10 The conclusion reached by Kiefel J in *Renton* forms part of an important discussion by her Honour about the operation of the Mutual Recognition Act once a person gives notice to an interstate (or Territory) registration authority. For that reason, and so as to highlight the context in which that conclusion was reached, it will be necessary later in these reasons for judgment to set that discussion out in full. The Tribunal was well seized of this discussion, which is reproduced in its comprehensive reasons. Before turning to that discussion, it is necessary to describe the origins and general scheme of the Mutual Recognition Act.

11 The enactment of the Mutual Recognition Act followed an intergovernmental agreement between the Commonwealth government and the governments of the several States and self-governing territories with respect to the facilitation of a national market for goods and services. A sequel to that agreement was references by the several States (relevantly, for Queensland, the *Mutual Recognition (Queensland) Act 1992* (Qld)) to the Commonwealth which ensured that, in addition to s 122 of the *Constitution* (Cth) as to the territories, the Commonwealth Parliament had the requisite legislative competence, in reliance upon s 51(xxxvii) of the *Constitution*, validly to make the Mutual Recognition Act have comprehensive national application.

12 There is a yet wider context relevant to the construction of the Mutual Recognition Act. This was highlighted by Gageler J in *Victorian Building Authority v Andriotis* (2019) 93 ALJR 869 (*Victorian Building Authority v Andriotis*), at [52]. From the establishment of the Commonwealth, the *Constitution* had provided for freedom of interstate trade, commerce and intercourse (s 92) and prohibited state laws which discriminated against the residents of different States on the basis of interstate residence (s 117). These provisions plainly envisaged the existence of a national market but it was not until the late 1980's with the seminal judgments in *Cole v Whitfield* (1988) 165 CLR 360, in relation to s 92, and *Street v Queensland Bar Association* (1989) 168 CLR 461, in relation to s 117, that their meaning and effect was settled. The Mutual Recognition Act is responsive to this constitutional scheme and its elucidation.

13 The purpose and general scheme of the Mutual Recognition Act are described in several judgments delivered in *Victorian Building Authority v Andriotis*, at [3] – [7], per Kiefel CJ,

Bell and Keane JJ; at [54] – [57] per Gageler J; and at [105] – [119] per Nettle and Gordon JJ. These descriptions I do not repeat but respectfully incorporate by reference.

14 At the heart of the scheme in its application to the provision of services is what is known as the “mutual recognition principle”, as specified in s 17 within Pt 3 of that Act. That section provides:

Entitlement to carry on occupation

- (1) The mutual recognition principle is that, subject to this Part, a person who is registered in the first State for an occupation is, by this Act, entitled after notifying the local registration authority of the second State for the equivalent occupation:
 - (a) to be registered in the second State for the equivalent occupation; and
 - (b) pending such registration, to carry on the equivalent occupation in the second State.
- (2) However, the mutual recognition principle is subject to the exception that it does not affect the operation of laws that regulate the manner of carrying on an occupation in the second State, so long as those laws:
 - (a) apply equally to all persons carrying on or seeking to carry on the occupation under the law of the second State; and
 - (b) are not based on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation.

15 *Victorian Building Authority v Andriotis* confirms what a reading of the text of s 17 suggests, which is that occupational registration in one State or Territory is, of itself, sufficient to ground an entitlement to registration for the equivalent occupation in another State or Territory: [24] – [25] per Kiefel CJ, Bell and Keane JJ; at [74] – [76] per Gageler J; at [98] and [121] per Nettle and Gordon JJ and at [163] and [174] per Edelman J. A registration authority of another State or Territory and, when its review jurisdiction is invoked, the Tribunal, have no role to play as “occupational gatekeepers” in relation to those who give notice to that registration authority based on their registration elsewhere in the Commonwealth in respect of an equivalent occupation.

16 In turn this means that attention necessarily focuses upon whether the registration elsewhere is in respect of an “equivalent occupation”? Section 28 of the Mutual Recognition Act mandates that this be determined in accordance with Pt 3 of that Act. Within Div 4 of Pt 3, the key provision is s 29, which provides:

General principles

- (1) An occupation for which persons may be registered in the first State is taken

to be equivalent to an occupation for which persons may be registered in the second State if the activities authorised to be carried out under each registration are substantially the same (whether or not this result is achieved by means of the imposition of conditions).

- (2) Conditions may be imposed on registration under this Part so as to achieve equivalence between occupations in different States.
- (3) This section has effect subject to any relevant declarations in force under this Division.

17 In *Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence* (2000) 100 FCR 255 (*Board of Examiners v Lawrence*), at [64], French J (as his Honour then was) posed and answered the presently pertinent question in this way:

[W]hat is the occupation for which that person is registered in the “first State”? That however is a question to be *answered by reference to the terms of the “registration” in the first State informed by or read with the statutory provisions under which such registration is effected.*

[Emphasis added]

18 In *Renton*, at [27], Kiefel J cited with approval and adopted this statement. Having so done, her Honour elaborated on it, at [28] – [33], in a presently pertinent discussion of principle, which should now be set out in full:

28. The objective of the mutual recognition principle does not prevent a conclusion that there is no equivalent occupation, as French J recognises (at [67]). *Sande v Registrar* was a case in which there was no equivalent occupation in the second State. The applicant had been registered in South Australia as a conveyancer but the law of Queensland had ceased to recognise it as a profession, one for which registration could be obtained. In the present case it may be said that the registration of a medical practitioner in either New South Wales or Queensland would entitle a person to registration in that occupation in the other State. The question which here arises is whether the occupation the subject of registration under the New South Wales Act is equivalent to the profession of intensivist for which registration may be obtained under the Queensland Act. Equivalence is tested, pursuant to s 29(1), by determining whether the activities authorised to be carried out under each registration are substantially the same, or may be so with the imposition of conditions. That question is to be determined by reference to the terms and statutory context of the registration in each State, as French J observed (at [68]).

29. The approach of the Tribunal was to consider, in the first place, what was authorised by the New South Wales Act. It observed that s 99 of that Act authorises the practice of medicine and this was expressed to include surgery. It then reasoned that it may be taken to authorise other specialities. At another point the Tribunal observed that a person would not infringe that Act by carrying on the profession of intensivist in New South Wales under a general registration. If a person could undertake that work it could be said that the New South Wales Act authorises the same activities as the Queensland Act with respect to an intensivist.

30. There are a number of difficulties in the process of construction undertaken by the Tribunal, in my respectful view. Section 99 of the New South Wales Act may authorise the undertaking of surgery in conjunction with the practice of medicine, but it does not recognise surgery, or any other specialty, as a distinct occupation or profession for which registration may be granted. It may be seen from the provisions relating to conditional registration that it recognises that some persons may hold qualifications from specialist colleges or institutions as specialists, but it does not provide for their registration as such. No legal entitlement to carry on the profession of intensivist or other specialty is provided by the system of registration under the New South Wales Act.
31. The Tribunal's approach to the question of what activities the New South Wales Act authorises a medical practitioner to undertake is also attended with difficulty. It equates the authority following from registration in an occupation or a profession with activities which are not prohibited by the statute. Such an approach once again shifts the focus from the occupation and the registration of it. In my respectful view the requirements of equivalence of occupation under the *Mutual Recognition Act* are not met by considering whether a person may carry out in the first State activities associated with the profession for which registration is sought in the second State. The inquiry is as to whether the statute under which registration is granted in the first State itself authorises the activities of the profession in the second State. For the mutual recognition principle to operate, an affirmative answer is required. In the present case the answer must be negative.
32. Neither the New South Wales Act nor the Queensland Act list the activities associated with the professions in question. They must be taken to be the activities usually associated with the profession which is the subject of the registration. In some cases evidence may be necessary to identify those activities. It may be accepted for present purposes that there are activities undertaken by an intensivist which set that profession apart from the general practice of medicine.
33. The construction which I consider the *Mutual Recognition Act* requires has the effect that a person who is not registered as an intensivist in another State cannot achieve registration in that profession in Queensland. This may apply to other professions. Persons who may be carrying on the profession of intensivist elsewhere, but not registered under a statutory scheme which includes the registration of that specialist profession, would need to fulfil the requirements of the Queensland Act. I do not consider this result to be inconsistent with the objectives of mutual recognition. It follows from the requirement of equivalence of occupation the subject of registration. The mutual recognition principle has no operation where one State does not provide for the registration of an occupation or profession. The *Mutual Recognition Act* does however recognise, in the definition of "occupation", that there may be registration granted for a specialty as a separate occupation or profession. Where State legislation does provide for registration of a specialty as a separate occupation the mutual recognition scheme may have operation.
- 19 The statement by Kiefel J in *Renton*, at [32], that, where the answer does not emerge just from a consideration of the regulatory regimes for an occupation that, in some cases, evidence may be necessary to identify "activities usually associated with the profession

which is the subject of the registration” appears to have been treated by the parties as a charter for the tendering of much evidence as to activities which were undertaken in NSW by a “Certifier – fire safety” and by a professional engineer in the field of fire safety in Queensland, of pre-requisite qualifications, and of reports concerning the presence or absence and merits of registration regimes. Mr Gardner gave detailed evidence on these subjects, as did a witness called for the Board, a Mr Glodic. The Board’s submissions on the appeal were noteworthy for their eschewing the evidence given by Mr Glodic.

20 The Tribunal considered that the present case was different to *Renton*, because here there were equivalent occupations. The Tribunal found:

66. In *Renton* there was no registration for the specialist qualification of an intensivist in any state other than Queensland, whereas in the present matter it can be said that the occupation of fire safety engineer is registered in New South Wales, albeit by a different name.

21 Four factors grounded this, in the Tribunal’s view:

- (a) the *Environmental Planning and Assessment Regulations 2000* (NSW) (Environmental Planning and Assessment Regulations) “presently defines fire safety engineer to mean a person registered under the Certifiers Act whose registration authorises the person to exercise the function of a fire safety engineer”, at [68];
- (b) the initial accreditation held by Mr Gardner “was C10 – Certifier in Fire Safety Engineering Compliance, and while that description has changed under the Certifiers Act and Regulations the knowledge and skills required have not shifted from being engineering focused”, at [69];
- (c) a Fire Safety Engineering – Education Report prepared by the Warren Centre prior to the enactment of the Certifiers Act and Regulations had the “aim ... to prepare the ground for future work to promote a positive evolution of fire safety engineering education and the associated accreditation processes” with that report calling for “a more consistent approach to recognition and regulation of Fire Safety Engineers”, at [70]; and
- (d) Engineers Australia as the profession’s peak body in their May 2020 report titled “Registration of Engineers: the Case for Statutory Registration.” had “call[ed] for a uniform registration system for professional engineers” with the position in New South Wales being:

“In NSW ... the registration or licensing regimes are for engineers involved

in the building sector only. The regimes do not cover other areas of engineering like mechanical, electrical, aeronautical”, at [71].

22 On the basis of these four factors, the Tribunal concluded, at [72], that *Renton* was distinguishable, because:

72. The Tribunal considers that in this instance the *Renton* case is distinguished on the basis that there is recognition of the profession or trade of engineers in fire safety and relevant registration/certification process in place in New South Wales. As such the present matter is not a matter where the Mutual Recognition principles do not apply.

Elaborating on this, the Tribunal stated, at [78]:

78. While the Certifier Act is not registering persons as professional engineers, it is registering them as specialist certifiers who undertake in the fire safety category what can in the Tribunal’s view be considered to be akin to the services described by the Professional Engineers Act as professional engineering services. Mr Glodic confirmed in his evidence that this is in fact the case.

23 This reasoning grounded Mr Gardner’s submission that all that was entailed in this case was a finding of fact that the occupation of “Certifier – fire safety” in NSW was an equivalent of a professional engineer in the field of fire safety in Queensland, or at least, as the Tribunal had done by its decision, that equivalence could permissibly be achieved by the imposition of conditions.

24 The Tribunal’s approach is not, with respect, consistent with the question and answer offered by French J in *Board of Examiners v Lawrence* or with the discussion, in the passage quoted from *Renton*, of the operation of s 29 of the Mutual Recognition Act.

25 It may be accepted that disparity of occupational description as between the registration regimes of different States or territories does not necessarily mean that an occupation given a particular name in one is not in substance equivalent to an occupation given another name in its legislation requiring registration to undertake it. For example, “legal practitioner” in one State or territory may perhaps be equivalent to “barrister and solicitor” in another. The registered occupation of “mechanic” in one State or territory may be equivalent, on examination of the legislation concerned, to the registered occupation of “automotive engineer” in another.

26 The definition of “occupation” in s 4 of the Mutual Recognition Act admits of a need, which may be an uncontroversial given in many cases but not all, to make a finding as to what is the occupation which is registered. The definition states:

“occupation” means an occupation, trade, profession or calling of any kind that may be carried on only by registered persons, where registration is wholly or partly dependent on the attainment or possession of some qualification (for example, training, education, examination, experience, character or being fit or proper), and includes a specialisation in any of the above in which registration may be granted.

The finding ought ordinarily to emerge just from a consideration of exactly what in terms of the legislation is the occupation to which the registration regime applies. As Kiefel J concluded in *Renton*, that question is not answered by looking at what activities might, upon registration, lawfully be undertaken in the sense that they are not prohibited. In that case, those practising medicine in NSW had to be registered and needed no further registration under statute in order to undertake the activities of an intensivist. But that did not mean that the statutory regime in that State provided for the registration of intensivists.

27 By the same token, though there be like occupational descriptions, closer scrutiny of the registration regimes concerned may be reveal that, as between particular States or territories, two quite different occupations, in substance, are registered. Hence the importance of the inquiry specified by Kiefel J in *Renton* as to whether the statute under which registration is granted in the first State itself authorises the activities of the profession in the second State.

28 With all respect to those responsible for its adoption, ascertaining what upon the grant of registration NSW law itself authorises in respect of the specified occupation “Certifier – fire safety” is not straightforward. It well merits the Tribunal’s description, “haphazard”.

29 By s 5 of the *Certifiers Act*, such a certifier may, upon registration, lawfully undertake “certification work” which, materially and as defined in s 4 of that Act, means:

4 Definitions

“certification work” means the following –

(a) the exercise of a function of a certifier (including a principal certifier) specified in section 6.5 of the *Environmental Planning and Assessment Act 1979*,

...

(d) the exercise of any other function of a registered certifier under the certification legislation or under another Act or law,

(e) any other work of a kind prescribed by the regulations,

but does not include work of a kind that is excluded from this definition by the regulations.

30 By s 6.5 of the *Environmental Planning and Assessment Act 1979* (NSW) it is provided:

6.5 Functions of certifiers (including principal certifiers)

(cf previous s 109E)

- (1) A certifier has the following functions in relation to building work—
 - (a) issuing construction certificates for building work,
 - (b) carrying out inspections of building work (but only if the certifier is the principal certifier or the inspection is carried out with the approval of the principal certifier),
 - (c) issuing occupation certificates (but only if the certifier is the principal certifier),
 - (d) issuing compliance certificates (but only if the certifier is the principal certifier when the certificate is an authorised alternative to an occupation certificate).

Note—

Section 6.27 requires a principal certifier who issues an occupation certificate to ensure that a building manual is provided to the owner of the building.

...

- (4) A certifier also has any other functions conferred or imposed on the certifier under this or any other Act.

Note—

A certifier has the function of issuing complying development certificates under Part 4.(5)

A certifier must not issue a certificate under this Part—

- (a) in any case in which this Part provides that the certificate is not to be issued, or
- (b) in any case in which the function of issuing the certificate is not conferred on the certifier by this Part.

Maximum penalty—Tier 3 monetary penalty.

- (6) The Minister may provide guidance to certifiers on the exercise of their functions under this Part.

31 Clause 11 of Sch 1 to the *Building and Development Certifier Regulations 2020* (NSW) provides:

- (1) A registered certifier who holds a certifier—fire safety class of registration is authorised to issue a compliance certificate under the Planning Act for performance solutions for the following to the extent that fire safety is involved—
 - (a) the design of building work,
 - (b) constructed building work.
- (2) Building work involves fire safety for the purposes of subclause (1) if it

relates to—

- (a) fire safety systems and components of fire safety systems, or
- (b) the safety of persons in the event of fire, or
- (c) the prevention, detection and suppression of fire.

(3) In this clause—

fire safety system has the same meaning as in the *Building Code of Australia*.

32 As to the Queensland regime and the activities itself authorised, in respect of the registered occupation of “practising professional engineer”, an answer is more readily ascertained.

33 One purpose of the Engineers Act is to ensure that only an individual who is a “practising professional engineer” and registered as such may carry out “professional engineering services”: s 115(1). Another is to ensure that an individual who is a practising professional engineer carries out professional engineering services only in an “area of engineering” for which the individual is registered under the Engineers Act: s 115(3). These purposes are achieved by a compulsory registration system. Each of the terms highlighted is defined in the Engineers Act:

- “practising professional engineer” means a registered professional engineer who carries out, or is responsible for the carrying out of, professional engineering services (s 7 and Schedule 2 Dictionary);
- “registered professional engineer” means a person registered as a registered professional engineer under the Act (s 7 and Schedule 2 Dictionary);
- “professional engineering service” means an engineering service that requires, or is based on, the application of engineering principles and data to a design, or to a construction, production, operation or maintenance activity, relating to engineering, and does not include an engineering service that is provided only in accordance with a prescriptive standard (s 7 and Schedule 2 Dictionary);
- a “prescriptive standard” means a document that states procedures or criteria—
 - (a) for carrying out a design, or a construction, production, operation or maintenance activity, relating to engineering; and
 - (b) the application of which, to the carrying out of the design, or the construction, production, operation or maintenance activity, does not require advanced scientifically based calculations.(s 7 and Schedule 2 Dictionary)
- an “areas of engineering” is one for which either:
 - (a) there is an assessment scheme; or
 - (b) qualifications and competencies are prescribed under section

10(1)(b).

(s 7 and Schedule 2 Dictionary and s 7A)

- an “assessment scheme” means a scheme approved under part 6A of the Act.
(s 7 and Schedule 2 Dictionary)

34 The registration regime in the Engineers Act supports these purposes. It is no part of these purposes to affect the operation of the Mutual Recognition Act: s 6 of the Engineers Act.

35 The Board is obliged to publish the areas of engineering on its website: s 7A(2), Engineers Act. One such “areas of engineering” is “Fire”, which is expressed to be:

Fire engineering is the application of scientific and engineering principles, rules [Codes], and expert judgement, based on an understanding of the phenomena and effects of fire and of the reaction and behaviour of people to fire, to protect people, property and the environment from the destructive effects of fire.

36 The essence then of the activities which are authorised by the Engineers Act upon the registration of an individual as a “registered professional engineer” are found in the definition of “professional engineering service”. They are not found just in the provision of a service in accordance with a “prescriptive standard”. Instead, the activities permitted by registration in that occupation entail the application of engineering principles in one or more “areas of engineering” for which an individual is registered.

37 Contrary to the submissions made on Mr Gardner’s behalf, an examination of the NSW law in respect of the occupation of “Certifier – fire safety” discloses that that law does not itself authorise the provision of an engineering service that requires, or is based on, the application of engineering principles and data to a design, or to a construction, production, operation or maintenance activity, relating to engineering. It certainly authorises certification that building work meets such a design but not the formulation of such a design by the application of engineering principles. There is a qualitative difference between certifying that building work complies with a design and formulating a design.

38 The result of the required examination ought, with respect, at the very least to have given the Tribunal pause for thought about whether “Certifier – fire safety” and “practising professional engineer” were equivalent occupations at all. However, the morass of oral and other evidence before the Tribunal, which extended to comparing various prerequisite educational qualifications (see the Table reproduced in [70] of the Tribunal’s reasons), served to distract from recourse to governing legislation. Further, it is not hard to see how the definition in the Environmental Planning and Assessment Regulations that a fire safety

engineer means a person registered under the Certifiers Act whose registration authorises the person to exercise the function of a fire safety engineer might have had Siren-like qualities. All that does is, to define for the purposes of those regulations, who amounts to a “fire safety engineer” and to conflate the activities authorised to be undertaken by such a person with those authorised by the Certifiers Act. And that Act does not itself authorise a “Certifier – fire safety” to apply engineering principles and data to a design, or to a construction, production, operation or maintenance activity, relating to engineering.

39 Having regard to the application of the respective registration regimes, the conclusion which the Tribunal ought to have reached was that they were not applicable to equivalent occupations.

40 In *Sande v Registrar, Supreme Court of Queensland* (1996) 64 FCR 123 (*Sande*), at 144, in observations exactly in conformity with what would later be said in *Victorian Building Authority v Andriotis* as to the general purpose and scheme of the Mutual Recognition Act, Lockhart J (with whom Spender J agreed) stated:

The Act is intended to remove artificial barriers to the mobility of services and labour caused by regulatory differences among the States and Territories of Australia. If a person is registered to carry out an occupation in one State or Territory, then he or she should be able to be registered and to carry on the equivalent occupation in any other State or Territory, without undergoing examinations or other assessments with respect to educational qualifications and experience. Nevertheless, the Act preserves the right of the State or Territory in which the applying person seeks to practise (described in the Act as the second State) to regulate the manner of carrying on an occupation in that State, so long as the laws of that State apply equally to persons carrying on or seeking to carry on the occupation under the law of the second State (ss 17 and 20 of the Act).

In Queensland, a discrete profession, the activities of which may entail the application of engineering principles and data to a design, or to a construction, production, operation or maintenance activity, relating to engineering, has been identified and may not lawfully be practised in that State unless the individual concerned is registered. That regime extends to the “area” of engineering termed “Fire”. In NSW, there may well be individuals who practise the equivalent profession in that area but there is presently no applicable registration regime for that profession. So a person whose only registration in that State is that of “Certifier – fire safety” is not in that State prohibited from providing a service which entails the application of engineering principles and data to a design, or to a construction, production, operation or maintenance activity, relating to engineering. But that does not mean that the NSW regime which provides for the registration of a “Certifier – fire safety” itself authorises the provision

of those services. It does not. The position, therefore, is no different to that exposed in *Renton*.

41 It would be nothing to the point that there is an overlap in practice, perhaps a large one, between many services provided by a “Certifier – fire safety” and by a practising professional engineer in the area of “Fire”, perhaps because there is much work available certifying that building work complies with a particular design. That is because, while the respective registration regimes each authorise such activities, the NSW regime does not itself authorise the application of engineering principles and data to a design, or to a construction, production, operation or maintenance activity, relating to engineering. The NSW regime provides for the registration of a different occupation. A practising professional engineer in the area of “Fire” may, in NSW, be required to obtain and maintain registration a “Certifier – fire safety” in order lawfully to provide some professional services in that State, but that does not mean that the NSW regime provides for the registration of the individual concerned as a practising professional engineer in the area of “Fire”. The present position is different to *Board of Examiners v Lawrence*, where the imposition of a condition achieved occupational equivalence.

42 Even though, unlike in *Sande*, it appears that there are equivalent engineering professions in NSW and Queensland, registration to practise that profession is only required in Queensland. A question which was not necessary to resolve in *Sande*, because the occupation of “conveyancer” had ceased to exist in Queensland, was whether, had it still existed but not been covered by a registration regime, Mr Sande would have been entitled to be registered as a solicitor in Queensland with the condition that he only undertake conveyancing, on the strength of his South Australian registration as a Land Agent, because there was an overlap of activities in the field of conveyancing? The answer, in my view, would have to have been in the negative, because they were just not equivalent occupations in the first place. Thus the condition which the Tribunal imposed in the belief that it thereby achieved occupational equivalence did no such thing. Having regard to the respective regulatory regimes, NSW requires one occupation to be registered and Queensland another. No amount of conditioning could convert the occupation of “Certifier – fire safety” into the separate occupation of practising professional engineer in the area of “Fire”. It is not a case where the Engineers Act impermissibly creates an artificial barrier, only that it provides for a particular occupational registration where other States and Territories presently do not.

- 43 In the circumstances, there is no occasion to remit the proceeding to the Tribunal. Undertaking the required inquiry can lead to only one conclusion, which is that a person who is registered as a “Certifier – fire safety” in NSW is not entitled to registration in Queensland as a “registered professional engineer”. The Tribunal ought therefore to have affirmed the decision of the Board. There will be orders accordingly.
- 44 In deference to a request made in the course of submissions made on Mr Gardner’s behalf, which reflects a position not disputed by the Board in the event that its appeal succeeded, it should be stated that these conclusions and those orders have nothing at all to say, one way or the other, as to Mr Gardner’s eligibility, apart from reliance on the Mutual Recognition Act, for registration in Queensland as a “registered professional engineer” in the area of “Fire”. It would fall to the Board to consider any such registration application which Mr Gardner may make on its merits.
- 45 It will be necessary to hear the parties as to costs.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan.

Associate:

Dated: 28 May 2021