PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Chief Executive v Di Carlo* [2019] QPEC 40
PARTIES:	**CHIEF EXECUTIVE ADMINISTERING THE ENVIRONMENTAL ACT 1994** (Applicant) **v** **ANTONIO DI CARLO** (Respondent)
FILE NO:	968/19
DIVISION:	Planning and Environment Court
PROCEEDING:	Application for enforcement orders
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	30 July 2019 (delivered *ex tempore)*
DELIVERED AT:	Brisbane
HEARING DATE:	25, 26, 30 July 2019
JUDGE:	RS Jones DCJ

ORDER:

1. **Within 30 days from the date of this order, the Respondent must establish and maintain a clean 10 metre firebreak around the entire boundary of the premises at 81 Grindle Road, Rocklea, comprising Lot 1 of Plan RP112630 (the Premises), with the exception of the shed on the south east boundary fence. The firebreak is to be free from obstacles and flammable and combustible materials including grass, weeds and tyres.**
2. **Within 60 days from the date of this order, the Respondent must achieve the following for the entire premises:**
   - **(i) For individually stacked tyres, the dimensions of the tyre stacks must not exceed 45m long x 5m wide x 3m high. These stacks must be kept clear at all times from flammable and combustible materials including grass, weeds and other loose tyres;**
   - **(ii) For baled tyres, the length of any stack must not exceed 45m long. The width and height of the stacked baled tyres may**

exceed 5m wide x 3m high only if the bales are stacked in accordance with Attachment 1;

(iii) For all tyre stacks (individual, baled or shredded), a batter slope not exceeding 1:1; and

(iv) a minimum 10m separation distance between stacks, or stacks separated by a protective wall in accordance with the *Fire and Rescue Service Act Requisition (No 1)* 2011.

3. **Within 67 days of the date of this order, the Respondent must provide a statutory declaration to the Applicant demonstrating compliance with paragraphs 1 and 2 of the order.**

LEGISLATION: *Environmental Protection Act* 1994

Fire and Rescue Service Act Requisition (No 1) 2011

CASES: *Briginshaw v Briginshaw* (1938) 60 CLR 336

COUNSEL: J Dillon for the applicant
Respondent was self-represented

SOLICITORS: Department of Environment & Science for the applicant

[1] This matter is concerned with enforcement proceedings brought by the Chief Executive administering the Environmental Protection Act, who I will refer to hereafter as the department. The respondent is a Mr Antonio Di Carlo. As I indicated to the parties during final submissions, I consider that this was a matter that required determination sooner rather than later. And it is for that reason that I will give my reasons ex tempore.

[2] I should refer here to Mr Di Carlo's application for an adjournment. Initially, he had legal representation; however, on 18 July 2019, for reasons not explained to me, his solicitors were given leave to withdraw. When the matter came before me initially, Mr Di Carlo applied for an adjournment, indicating he might require up to six weeks. Given the then uncontradicted evidence of Dr Logan, I considered the risk of a catastrophic fire outweighed reasons for granting an adjournment. That was particularly so in circumstances where Mr Di Carlo's primary, if not only, apparent defence was that he was not a relevant person for the purposes of the *Environmental Protection Act* 1994. After the department closed its case on 26 July 2009, I adjourned the matter to 30 July to permit Mr Di Carlo time to consider the department's case against him and his response thereto.

[3] The relief sought is pursuant to section 505(5) of the *Environmental Protection Act*. Shortly put, that section authorises certain bodies – relevantly here, the department – to bring proceedings for orders to remedy or restrain an offence under the Act. That includes a threatened or anticipated offence.

[4] The relief sought by the department is that, within specified timeframes, Mr Di Carlo is to, first, create a 10 metre firebreak around the entire boundary of the subject land, located at 81 Grindle Road, Rocklea. That work is required to be done within 30 days of the orders made by the court. The next steps required of Mr Di Carlo are that, within 60 days, there be carried out appropriate stacking of tyres located on the land, and finally, within 67 days of the date of the order, to provide a statutory declaration to the department stating that the orders have been complied with.

[5] Section 505(5) of the Act relevantly provides that if the court is satisfied that an offence against this Act has been committed, whether or not it has been prosecuted, or an offence against this Act will be committed unless restrained, the court may make the orders it considers appropriate to remedy or restrain the offence.

[6] The department readily accepts that the onus rests on it to satisfy the court that the relief sought ought be granted. It also quite correctly recognised that, having regard to the seriousness of the allegations made and the consequences of the relief sought, the department is required to prove its case at the higher end of the civil standard, in accordance with the *Briginshaw* principles. That, of course, is a reference to the well-known decision of the High Court in *Briginshaw v Briginshaw*.[1]

[7] In essence, to ground the relief sought, the department alleges that Mr Di Carlo has failed to comply with an environmental protection order without reasonable excuse.

[8] That is an offence pursuant under section 361 of the Act. It is also alleged against Mr Di Carlo that he is guilty of unlawfully causing serious and material environmental harm, which are offences under sections 437 and 438 of the Act.

[9] During his opening, Mr Dillon, counsel for the department, tendered what he described to be a list of issues to be determined. That list became exhibit 2 in the proceeding and relevantly posed the following questions: whether, by failing to

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1 (1938) 60 CLR 336.

comply with the requirements of the environment protection order dated 6 December 2016, the respondent has committed, or is continuing to commit, an offence against section 361 of the *Environmental Protection Act* 1994; whether the court should make an order pursuant to section 505 of the *Environmental Protection Act* to remedy or restrain the following offences against the Act; Contravening the requirements of an environmental protection order dated 6 December 2016, pursuant to 361; and, failing to ensure that a corporation does not unlawfully cause serious, material environmental harm, pursuant to section 493 subsection (2), read in conjunction with sections 437 and/or 438 of the Act. I would add to that list, of course, that it is also necessary for the court to be satisfied that it is Mr Di Carlo who is personally liable to meet those orders, or comply with those orders.

[10] Dealing with each of the sections referred to in the list for determination, section 361 prescribes that it is an offence not to comply with an environmental protection order and, in particular, the recipient of such an order, must not wilfully contravene an environmental protection order. Section 437 and 438 of the Act are each concerned with creating the offence or offences of causing serious environmental harm or material environmental harm. Section 493 (2) and section 505 of the Act have already been referred to.

[11] For the following reasons, for the purposes of section 505 (5) of the Act, I am satisfied that relief of the type sought ought to be granted. That is, I am satisfied that an offence under the *Environmental Protection Act* has been committed, and will continue to be committed unless restrained.

[12] By way of background, as has already been identified, the subject land is located at Grindle Road, Rocklea. The land is situated in an intensively developed industrial area. On or about 26 April 2015, pursuant to a commercial tenancy agreement, Barton Ventures Pty Ltd, as lessor, tenanted the land to Ace Recycling Queensland Pty Ltd. A Mr Williams signed on behalf of the lessor, and Mr Di Carlo on behalf of Ace Recycling, as its "authorised signatory." That tenancy agreement is exhibit 5 in the proceedings.

[13] On 27 August 2015, an application for an environmental authority was applied for in respect of the subject land. The environmentally relevant activities were identified as being "tyre recycling" and "transporting tyres." It is not in dispute that

that authority was sought in respect of the subject land. Subsequently, on 10 September 2015, a permit was issued to Grindle Services Pty Ltd for tyre recycling and tyre transport. During his evidence, Mr Di Carlo stated that the reference to him being the CEO of Grindle Services Pty Ltd was not of his doing and, that the signature on that document was a digital replica, or otherwise a forgery of his signature. I am unable to accept that evidence for the reasons given below.

[14] The authority was issued, and thereafter, tyres were transported and stored on the subject land. The evolution of the coverage of the site with tyres of various sizes, and also of the coverage of other material, including rubber crumbs, is shown in aerial photographs which became exhibits 1 and 13. According to Mr Di Carlo, further clean-up work has been undertaken by him since those aerial photographs were taken. I will say something more about that in a moment.

[15] Since issuing the environmental authority, two fires have occurred on the land, the first on 28 March 2016. That involved what was described as a tyre fire. Following that, on 30 March 2016, the Queensland Fire Emergency Services issued a requisition to Mr Di Carlo, requiring him to undertake certain steps to reduce the risk of tyre fires on the site.

[16] The second fire occurred on 27 June 2017. Again, that fire was described as a tyre fire. Following that event, on 6 December 2017, the department issued the subject environmental protection order ("EPO"). That order was directed to Mr Di Carlo personally. The environmental protection order followed a notice requiring relevant information issued by the department to Mr Di Carlo.

[17] The EPO required Mr Di Carlo, as a "related person of Grindle Services Pty Ltd," to do the following things:

1. By 5 pm on 20 January 2017, establish and maintain a clean, 10 metre firebreak around the entire premises boundary, with the exception of the shed on the southeast boundary fence. The firebreak is to be free from obstacles, inflammable material and combustible materials, including grass, weeds and tyres.
2. By 5 pm on 24 March 2017, Mr Di Carlo was required to achieve the following, for 50 per cent of the footprint of the premises:

- First, for individually stacked tyres, the dimensions of the tyre stacks must not exceed 45 metres long by five metres wide by three metres high;
- for baled tyres, the length of any stack must not exceed 45 metres long. The width and height of stacks of baled tyres may exceed five metres wide and three metres high, only if the bales are stacked in accordance with the document which is attached to the order.
- Otherwise, for all tyres stacks – individual, baled or shredded – a batter slope was not to exceed one to one; and
- A minimum 10 metre separation distance between stacks, or stacks separated by a protective firewall, was required in accordance with the *Fire and Rescue Services Act.*

[18] Other obligations were also imposed, but it is unnecessary to go into those for the purposes of determining the outcome of this proceeding. The EPO also identified that penalties might flow from non-compliance, and also set out details about how one could review and/or appeal the order. I would note here that the substantive relief sought is broadly consistent with the *Fire and Rescue Services Act Regulation (No.1)* 2011, insofar as it is concerned with storage and stockpiling of tyres in open spaces. Further, no appeal was lodged concerning the issuing of the order.

[19] Given the history of the previous two fires and the condition of the site, insofar as the stacking of tyres was concerned, the EPO was issued because of concerns of another major environmentally harmful fire occurring. I would note here, that on the evidence before me, I am satisfied that the EPO was regular and otherwise lawful. It is also uncontroversial that the obligations required under that order have not been complied with.

[20] As to the risk of a further fire, the department relied on the evidence of a Dr Logan. His report became exhibit 4. Dr Logan was cross-examined by Mr Di Carlo, but that cross-examination, in my view, in no way undermined the substance of his evidence. Dr Logan is the director of the Research and Scientific Branch of the Queensland Fire and Emergency Services. His qualifications and expertise clearly establish him as an expert, capable of giving evidence of the type he did. He holds a Bachelor of Science in Chemistry, a Masters of Science (Chemistry) with Honours and a Doctorate obtained in 1994. He has also received a number of awards for various contributions, including an Australia Day achievement medallion for

outstanding contribution to improve state responses and capabilities to chemical, biological and radiological incidents.

[21] According to Dr Logan, whilst it was not possible, in his opinion, to ascertain the exact number of tyres on the site, in total, his estimate of the tyre mass was between 6214 to 9957 tonnes. According to Mr Di Carlo, at one stage, there was up to in the order of 48,000 tonnes of rubber on the site, comprising of tyres and other rubber product. Also, according to him, since about August 2018, that has been reduced to about 26,000 tonnes of rubber on site. I am simply unable to reconcile the differences in these tonnages. But, as Mr Di Carlo said – to use his words – there is a lot of rubber product stored on the site. I would point out here that that is clearly the case by reference to the aerial photographs in exhibits 1 and 13.

[22] In paragraph 14 of his report, Dr Logan identified that stacks of tyres and shredded tyres can be ignited through various causes, being, in particular, spontaneous combustion, lightning strikes, bushfire, accidental ignition, including smoking or welding and arson. The risk of bushfire is not a high risk in my view, having regard to the physical location of the land.

[23] The doctor heatedly disagreed with Mr Di Carlo's assertion that tyre stacks could not ignite as a consequence of spontaneous combustion. The doctor's evidence – at least as I understood it – was that in certain circumstances, when densely stacked and compacted, as is the case here, spontaneous combustion is a genuine risk. Clearly, a lightning strike, while a remote risk, is still nonetheless a risk. The most obvious and likely risk, in my view, is that of a fire being deliberately lit – that is, arson.

[24] Controversy exists about how the two fires, to which I have already referred, started. But, on balance, it seems more likely than not that they were the product of being deliberately lit. While damage from the first fire was minimal, if any, off site, the remedial cost, as a consequence of the second fire, was just under $68,000. Pursuant to section 617 of the *Environmental Protection Act*, the threshold for what might constitute serious environmental harm is $50,000. It also exceeds the threshold for material environmental harm for the purposes of section 16 of that Act.

[25] While I strongly suspect that the second fire constituted an offence for the purposes of both sections 437 and 438, it is unnecessary for me to finally determine that issue. That is so because the evidence establishes that an offence under section 361 of the Act, and that an offence likely of the types identified in section 437 and 438 will result if activities on the site are not restrained.

[26] According to Dr Logan, if a fire did start on the subject land and was not immediately extinguished, the consequences could be, to use his words, "catastrophic." In response to a question by Mr Di Carlo, the doctor said:[2]

> "You've got a state of affairs. What I have indicated is that there are many origins of fire. Self-heating, absence of arson, is one of the more likely causes, other than man-made causes of fire. The difficulty here is that we have a large pile that is almost singular, based on the photographs that I have seen – that that fire will easily become catastrophic. And then there is significant difficulties to extinguish, and impacts on the community responders, your business and then the clean up afterwards."

[27] There are also numerous references to the potential catastrophic consequences of a significant fire occurring on the subject land. By way of summary, Dr Logan concluded, in paragraphs 57 to 59 of his report:

> "The storage management of the tyres, crumb and shredded tyres applied at the Grindle Road site poses significant challenges for the QFES to extinguish and prevent any fire spreading to involve the entire site, and cause significant community and environmental impacts off site. The QFES has modified its response arrangements for this site.
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> Tyre fires are complex fires that generate heat, smoke and debris that will readily contaminate adjacent soil and water. The plume will cause significant impacts on the adjacent community and environment some distance downwind from a tyre fire. Community protection will be particularly challenged in this suburban area. A significant tyre fire will impose significant operational challenges and the remediation requirements for the site, adjacent sites and the impacted environment. The clean-up costs may readily exceed $1,000,000.
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> When the site features are considered in combination with the likely impact of a fire on the community/environment and the inherent difficulties to safely extinguish the fire, the clean-up notice should be implemented. An important element is to incorporate measurable and timely performance measures."

[28] The evidence – and particularly that of Dr Logan – leads me to comfortably conclude the following. First, the current conditions – and by that I mean the number of tyres and the way they are stacked on the subject land – pose a real and

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2 Transcript (T)1-53, ll 25-35.

significant risk of a fire with potentially catastrophic consequences for the environment. That current situation is environmentally unacceptable. Indeed, in this context, Mr Di Carlo, in his own affidavit, recognises that, as it presently stands, the site poses significant environmental "difficulties". Here, I am referring to exhibit 13 at paragraphs 10 and 11. I also comfortably conclude that the obligations imposed under the environmental protection order were, overall, necessary and, if not complied with, would leave the subject land in the abovementioned condition. Finally, quite clearly by reference to the evidence of Dr Logan and the aerial photographs, no meaningful attempts have been made to comply with any of the orders imposed under the environmental protection order.

[29] Accordingly, prima facie, relief of the type sought ought be granted, as an offence has been committed of the type described pursuant to section 361 and there is a risk of a further offence or offences being committed.

[30] Being adequately satisfied about risk, what then needs to be addressed is to determine whether or not Mr Di Carlo is the person responsible, or ought be held responsible, for responding to the environmental protection order. That order was issued to Mr Di Carlo, as being a related person of Grindle Services Pty Ltd.

[31] In his affidavit, Mr Di Carlo deposes to a number of matters. First, on or about January 2018, control of Grindle Road was transferred to Rubbacycle Pty Ltd, of which he is a director, and the chief executive officer. He also acknowledges that, at the time he took control of the site, he was aware that it was operating in "*severe breach*" of the *Environmental Protection Act*. He then went on to say that he has taken what he describes to be all reasonable steps to bring the land into compliance with the environmental protection order and the *Environmental Protection Act* and, in particular, to reduce the stockpile of tyres and crumbed tyres by approximately one fifth within 12 months and, according to him, through negotiations with Queensland Fire Services, to further reduce the stockpiles and comply with environmental standards.

[32] If I could pause here for a moment, it was quite clear that Mr Di Carlo accepts that, as the site currently exists, it is, to use his own words, "*In severe breach of the Environmental Protection Act*," and that it does not otherwise comply with what is required under the environmental protection order. However, he says he is unable

to carry out any more remedial works any more quickly than as currently proceeding, as a consequence of what he describes as financial distress resulting from, first, having to defend court proceedings and other actions taken by the department; second, industrial and industry wide factors affecting the value of the product on site, and finally, the scale of the problem which presently exists on the site.

[33] In this context, Mr Di Carlo refers to a meeting with a Mr Monaghan and a Mr Tucker of Queensland Fire Services, who supposedly stated that they were satisfied with his actions to date. On balance, I find that evidence unpersuasive.

[34] It is Mr Di Carlo's defence that he has never been, at any relevant time, a related person for the purposes of the Act. Section 363AB casts a wide net over who may be described as being a related person for the purposes of the Act. However, it is unnecessary, at this stage, to plough through all of the relevant subsections of section 363AB to determine this matter.

[35] In his affidavit, Mr Di Carlo says that the reason why he did not appeal the environmental protection order, on the basis of, by way of an example, that he was not a related person, was because he was not aware of his legal rights to appeal.

[36] In paragraphs 2 and 3 of his affidavit, he deposes:

> "I am not, have never been and have never held myself out to be an executive officer of Grindle Services Pty Ltd (in liquidation). I have never sought an environmental authority under the business name of Grindle Services Pty Ltd."

[37] Those assertions are, of course, entirely at odds with the application for an environmental authority for a prescribed environmentally relevant activity to which I have already referred.

[38] I am satisfied that the application was, in fact, signed by Mr Di Carlo as the CEO of Grindle Services Pty Ltd, having its business address at 81 Grindle Road Rocklea, being the subject land.

[39] According to Mr Di Carlo, Tony and Patrick Forbes were directors of Grindle Services and were responsible for the daily management of the site and most likely for the alleged forged application referred to above. I am unable to accept that evidence for a number of reasons. First, company searches reveal that neither of

those men were ever directors, officers or shareholders of that company. Second, the evidence of the department officers called to give evidence made it clear that they had always dealt with Mr Di Carlo in respect of any matters of substance concerning the subject land. Third, Mr Di Carlo failed to provide any independent probative evidence to support that assertion.

[40] It is also sufficiently clear that Mr Di Carlo was a person capable of significantly benefitting financially from the operations being conducted on the land and was a person who had a relevant connection with Grindle Services Pty Ltd, in that he was a person who had been, in the previous two years, in a position to influence the company's conduct in relation to the the extent to which that company was to comply with its obligations under the Act.

[41] The evidence of the department officers, particularly that of Mr Jeffree, Mr Scott and Mr Blanchard make it sufficiently clear that Mr Di Carlo, at all times, represented that he was the person in control of the subject land. During a particularly heated exchange between Mr Di Carlo and Mr Jeffree during his evidence, Mr Jeffree, on more than one occasion, stated that, on a number of occasions, Mr Di Carlo had made it clear that it was he who was in control of what occurred and did not occur on the subject land. That evidence is consistent with that of other witnesses, and in particular, Messrs Lund and Blanchard.

[42] In this context, it was also of some relevance, in my view, that Mr Di Carlo was not only the person on site when the two fires occurred, but took direct action in trying to influence how those fires ought be extinguished. As I understand the evidence, in respect of the first fire, his intervention was beneficial. However, in respect of the second fire, his intervention was considered to be sufficiently disruptive to have him removed from the site.

[43] Also, in this context, is the response to an email sent to Mr Di Carlo on 22 November 2018 concerning compliance with the environmental protection order, Mr Di Carlo returned fire. In that response, apart from a number of abusive and threatening assertions, he, as the chief executive officer of Tyremil, stated that the department's actions had, among other things, cost the company in excess of $120,000, caused him personally major ongoing damage and damaged his every day trading affairs. At the time this email exchange took place, according to him, the

business and control of the land was then that of Rubbacycle Pty Ltd, which I have said he was a director and CEO.

[44] During the course of this proceeding, a raft of companies were referred to: Grindle Services Pty Ltd, the Tyremil Group, Ace Recycling Queensland Pty Ltd. Each of those companies were, or are now under external administration. In respect of Mojo Investments Pty Ltd, it has been wound up, pursuant to an order of the court. It is unnecessary to get to the bottom of the exact nature and extent of the relationship between these companies. It is also unnecessary to unravel what, if any, relationship existed between the business being conducted on the subject land and that being conducted on another site located at Kingston.

[45] What is clear is that Mojo Investments was, to use Mr Di Carlo's words, a family company. It was a company from which Mr Di Carlo was intended to derive a financial benefit. It is also clear that that company held a significant shareholding in other companies associated with the rubber recycling industry. Those companies included Ace Recycling Queensland Pty Ltd, the company to which I have referred as being a tenant on the subject land and the one where Mr Di Carlo signed the tenancy documents as being the authorised signatory of that company.

[46] Another company was referred to from time to time as being the Tyremil Group, of which Mr Di Carlo had represented that he was the chief executive officer. Also, in respect of that company, one of the businesses' addresses was the subject land. The final company is Grindle Services Pty Ltd, which has already been referred to in some detail.

[47] While the level of control of those companies was controversial, at the very least, according to Mr Di Carlo, Mojo Investments held a 30 per cent shareholding in each of those three companies. The purpose of the companies was to make a profit from the recycling of tyres. In this context, Mr Di Carlo's evidence was that, currently – if only it was able to be processed – up to $11,000,000 worth of stock was stored on the site. The totality of the evidence makes it more than sufficiently clear that since the environmentally relevant activity authority has been applied for and issued, Mr Di Carlo has been heavily involved with, and, if not solely in control, then substantially in control, of what has occurred on the subject land.

[48] For these reasons, I am also satisfied that Mr Di Carlo is a related person for the purposes of the *Environmental Protection Act*, pursuant to section 363AB (2)(a), (2)(b) and (3)(a), being a person who stood to gain significant financial benefit from the businesses being conducted on the land, and was a person contemplated by subsection (2)(b) and was also a person in a position to influence the conduct of Grindle Services Pty Ltd in the manner contemplated by subsection (3). I am also satisfied that Mr Di Carlo is in breach of the environmental protection order by virtue of him failing to carry out the work specified therein, and that, if not restrained by appropriate orders, an offence under the *Environmental Protection Act* will, or will be highly likely to be committed in the future.

[49] Finally, as a consequence of the above, the orders of the court – pursuant to section 505(5) of the *Environmental Protection Act* – ought be in the terms contemplated in the originating application. Those orders are well known to the parties and I will not repeat them now, but they will be included in the final publication of these reasons, which I reserve the right to tidy up before publication. In respect of the question of costs, I will order that I will hear from the parties in due course as to the question of costs.

[50] For the reasons given, the orders of the court are:

1. Within 30 days from the date of this order, the Respondent must establish and maintain a clean 10 metre firebreak around the entire boundary of the premises at 81 Grindle Road, Rocklea, comprising Lot 1 of Plan RP112630 (**the Premises**), with the exception of the shed on the south east boundary fence. The firebreak is to be free from obstacles and flammable and combustible materials including grass, weeds and tyres.
2. Within 60 days from the date of this order, the Respondent must achieve the following for the entire premises:

    (i) for individually stacked tyres, the dimensions of the tyre stacks must not exceed 45m long x 5m wide x 3m high. These stacks must be kept clear at all times from flammable and combustible materials including grass, weeds and other loose tyres;

    (ii) for baled tyres, the length of any stack must not exceed 45m long. The width and height of the stacked baled tyres may exceed 5m wide

x 3m high only if the bales are stacked in accordance with Attachment 1;

(iii) for all tyre stacks (individual, baled or shredded), a batter slope not exceeding 1:1; and

(iv) a minimum 10m separation distance between stacks, or stacks separated by a protective wall in accordance with the *Fire and Rescue Service Act Requisition (No 1)* 2011.

3. Within 67 days of the date of this order, the Respondent must provide a statutory declaration to the Applicant demonstrating compliance with paragraphs 1 and 2 of this order.