

SUPREME COURT OF QUEENSLAND

CITATION: *Gallo v Chief Executive, Department of Natural Resources and Mines* [2017] QSC 331

PARTIES: **JAMES ANTHONY GALLO and AMANDA JOY GALLO**
(Applicants)
v
THE CHIEF EXECUTIVE, DEPARTMENT OF NATURAL RESOURCES AND MINES
(First Respondent)
and
TIM GALE, SENIOR NATURAL RESOURCES OFFICER, DEPARTMENT OF NATURAL RESOURCES AND MINES
(Second Respondent)

FILE NO/S: SC 45 of 2017

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 21 December 2017

DELIVERED AT: Cairns

HEARING DATE: 27 September 2017, further written submissions 28 September 2017, 13 November 2017, 16 November 2017, 15 December 2017, 18 December 2017.

JUDGE: Henry J

ORDERS: **1. Application dismissed.**
2. I will hear the parties as to costs, if costs are not agreed in the meantime, at 9.15 am 31 January 2018 (out of town parties have leave to appear by telephone).

CATCHWORDS: ADMINISTRATIVE LAW — JUDICIAL REVIEW — REVIEWABLE DECISIONS AND CONDUCT — STATUTORY INTERPRETATION — Where applicant seeks statutory review of a decision regarding the applicant's water entitlement as licensees under the *Water Act 2000* (Qld) — where applicant argued the decision-maker erred by failing to take a relevant consideration into account — whether s 66(3)(a) *Water Regulation 2002* (Qld) needed to be taken into account — whether a water entitlement of 0% bespeaks error — whether the decision maker should have

taken the outcomes listed in the *Water Resource (Barron) Plan 2002* (Qld) into account

Water Act 2000 (Qld) ss 25B, 35, 38, 52A(2), sch 4
Water Regulation 2002 (Qld) ss 65, 66(3)(a), 67, sch 17

COUNSEL: M A Jonsson QC for the applicants
 E J Longbottom for the respondents

SOLICITORS: Apels Solicitors and Notary for the applicants
 Crown Law for the respondents

- [1] Mr and Mrs Gallo, the applicants, are farmers and groundwater licence holders on the Atherton Tableland. On 1 July 2016 the second respondent, the duly authorised delegate of the first respondent, notified the Gallos that their announced entitlement for the 2016-2017 water year to take groundwater from the Atherton groundwater management area was “0%”.
- [2] The Gallos seek a statutory order of review of that decision.

Factual background

- [3] The Gallos hold a water licence under the *Water Act 2000* (Qld) (“the Act”)¹ giving them a nominal entitlement of 410 megalitres for the taking of underground water.² They rely upon their entitlement pursuant to that licence to source water from bores situated on their property in order to conduct their farming operations.
- [4] Pursuant to the statutory regime discussed below, groundwater licence holders are from time to time restricted to only extracting a specified percentage of the nominal value of their entitlements. The decisions as to such restrictions take the form of announced entitlements, made at least annually on 1 July.
- [5] The Gallos live within the so-called Atherton groundwater management area, which consists of the Northwest, Central, Yungaburra and Southwest zones. Their farm is in the Southwest zone. The announced entitlements for groundwater licence holders in the Atherton groundwater management area for the 2016-2017 water year were 100% for the Northwest zone, 75% for the Central zone, 50% for the Yungaburra zone and 0% for the Southwest zone.
- [6] Subsequent to being notified of the decision that their announced entitlement was 0% (“the decision”), the Gallos sought a statement of reasons from the decision-maker. The ensuing statement of reasons included:

“...**Decision**

¹ Unless otherwise indicated, references to the Act herein are to the Act as it was as at 1 July 2016.

² Affidavit of James Anthony Gallo court file document 2 Ex AJG1.

I, Tim Gale, Senior Natural Resources Officer, am an officer of the Department of Natural Resources and Mines (DNRM) delegated to exercise the power of the Chief Executive under section 80 of the Barron Resource Operations Plan 2005. On the 1 July 2016, I implemented the requirements of the Chief Executive by deciding that the announced entitlement for the water year in the Southwest zone of the AGMA would be 0%.

Evidence or other material on which findings of fact were made

- Water levels records for bore registered number (RN) 11000159 on the 1 July 2016. ...

Findings on material questions of fact

- Announced Entitlements for the AGMA are determined in accordance with Chapter 5 Part 2 (Water Sharing Rules) of the Barron Resource Operations Plan 2005 (ROP).
- Under Section 80(1)(a) of the ROP the Chief Executive must decide the announced entitlement for each zone within the AGMA on the first day of the water year.
- On 1 July 2016 the water level in bore RN11000159 had been less than 705.68 m AHD for the most recent seven consecutive days in the month before the announced entitlement was decided.
- In accordance with Section 79 of the Barron ROP the announced entitlement percentage for water licences in the Southwest zone corresponding with the abovementioned water level is 0%.

Reasons for the decision

The Barron ROP mandates that the Chief Executive decide an announced entitlement for the upcoming water year. The ROP is an instrument of legislation that the delegate is required to follow.”³

- [7] The above statement of reasons referred to the *Barron Resource Operations Plan* (“the Barron ROP”).⁴ The Barron ROP is supposed to implement the *Water Resource (Barron) Plan 2002* (“the Barron WRP”). Provisions of the Barron ROP, described in Chapter 5 Part 2’s heading as “water sharing rules”, relevantly provided:

“Part 2 Water Sharing Rules

78 Application of Part 2

This part applies to entitlements for the taking of groundwater from the Atherton groundwater management area.

79 Announced entitlement for water licences and seasonal water assignment notices

- (1) This section applies to water licences and seasonal water assignment notices located in the Central zone, Yungaburra zone, Southwest zone and Northwest zone shown in attachment 2, map 5.
- (2) The announced entitlement percentage stated in table 13, column 4, applies to the nominal entitlement for water licences and seasonal assignment notices – ...
 - (c) for the Southwest zone – when the groundwater level in the registered bore stated in column 2 –

³ Affidavit of James Anthony Gallo court file document 2 Ex AJG5.

⁴ Unless otherwise indicated, references to the Barron ROP herein are to the Barron ROP as it was as at 1 July 2016.

- (i) for deciding the announced entitlement on the first day of the water year – is the level stated in column 3 for the most recent seven consecutive days in the month before the announced entitlement is decided; and
- (ii) for deciding the announced entitlement on the first day of the month after the commencement of water year – is the level stated in column 3 on the last day of the month before the announced entitlement is decided. ...

Table 13

Column 1	Column 2	Column 3	Column 4
Zone	Registered bore number	Water level (AHD)	Announced entitlement percentage
Southwest	RN11000159	Greater than 707.18 m	100
		Less than 707.18 m	75
		Less than 706.88 m	50
		Less than 706.18 m	25
		Less than 705.68 m	0

80 Deciding announced entitlement

- (1) For section 79, the chief executive must –
 - (a) decide the announced entitlement for each zone on the first day of the water year; and
 - (b) if the announced entitlement percentage is less than 100, review the announced entitlements for each zone on the first day of every month after commencement of the water year; and
 - (c) reset the announced entitlement for a zone only if a review under subsection (1)(b) indicates an increased announced entitlement.”

The issues

- [8] It is apparent from the decision-maker’s statement of reasons that he followed the formulaic approach contemplated by s 79 and table 13 of the Barron ROP’s water sharing rules. Under those rules, because the water level in a solitary bore, bore RN11000159, had been less than 705.68 m for the most recent seven consecutive days, the application of table 13 mandated that the relevant announced entitlement percentage was zero.
- [9] If it was proper for the decision-maker to only follow the formulaic approach of the Barron ROP’s water sharing rules, then there appears to have been no error. However, the applicants contend it was incumbent upon the decision-maker, in deciding the announced entitlement, to take considerations broader than the solitary bore result into account.
- [10] The applicants seek an order quashing or setting aside the decision and an order quashing or setting aside all or part of the Barron ROP.⁵ Their grounds, in short, are

⁵ An order referring the decision for further consideration was also sought.

that the making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made and both the decision and the Barron ROP were contrary to the Act and the Barron WRP. They advanced various over-lapping complaints in support of their grounds.⁶

- [11] Because of the overlap in the grounds as argued it is simpler to deal with the applicants' case by dealing with their substantive contentions. The applicant's submissions focussed upon how the rigidity of the water sharing rules does not allow the decision-maker to take account of discretionary considerations relevant to identifying an appropriate water entitlement ("the failure to take a relevant consideration into account issue"). In connection with that issue, the applicants argued that specific discretionary considerations listed in s 66(3)(a) of the *Water Regulation 2002* (Qld) ("the Regulation") needed to be taken into account. Whether that provision applies was the subject of a construction argument ("the construction issue"). It will be convenient to deal with that issue first, although it will not dispense with the failure to take a relevant consideration into account issue.
- [12] The applicant's submissions additionally contended that the water sharing rules were necessarily erroneous in allowing for the possibility of a 0% result ("the 0% issue"). Returning to the failure to take a relevant consideration into account issue, the applicants also argued the bore water levels data on which the water sharing rules determinatively rely is so limited a source of information as to be too confined to properly be the sole relevant consideration for the purposes of the decision ("the sole relevant consideration issue"). In that context they submitted certain outcomes prescribed by the Barron WRP were relevant considerations not taken into account.
- [13] It is convenient to determine the application by progressively determining:
- (1) the construction issue;
 - (2) the 0% issue; and
 - (3) the sole relevant consideration issue.

The first and third issues are variants on, and between them adequately ventilate, the failure to take a relevant consideration into account issue.

The construction issue

- [14] Section 66 of the Regulation⁷ relevantly provides:
- “66 Announced entitlement**
- (1) If the water sharing rules for taking water from a water management area, or a part of the area, require the chief executive to decide an **announced entitlement**, the chief executive must –
 - (a) decide the announced entitlement before the start of the water year to which the announced entitlement relates; ...
 - (2) An announced entitlement is a percentage of a nominal entitlement.

⁶ Applicant's written submissions [10]-[14].

⁷ Unless otherwise indicated, references to the Regulation herein are as it was as at 1 July 2016.

- (3) In deciding an announced entitlement, the chief executive must consider –
- (a) the following to the extent appropriate for the water management area, or the part of the area, to which the entitlement relates –
 - (i) trends in underground water levels;
 - (ii) long term average sustainable yield;
 - (iii) historical water use;
 - (iv) anticipated water use;
 - (v) water available to supplement water licences in the area;
 - (vi) weather conditions, including weather forecasts; and
 - (b) the water sharing rules for taking water from the area. ...”
(emphasis added)

- [15] Section 66(3) requires that the chief executive “must” consider not only the water sharing rules for taking water from the area, as required by s 66(3)(b), but also the factual matters set out in s 66(3)(a), “to the extent appropriate for the water management area, or the part of the area, to which the entitlement relates”.
- [16] The language of the qualifying words in s 66(3)(a) – “to the extent appropriate” – could theoretically result in none of the s 66(3)(a) considerations influencing the decision. It is difficult to imagine how such a result could occur given the obvious relevance of the considerations to decision-making of this kind, albeit as a matter of degree. However, even to arrive at that result, it would be necessary for the decision-maker to at least consider the extent to which it is appropriate to consider the matters listed in s 66(3)(a). There is nothing in the reasons to suggest that occurred here.
- [17] The decision-maker’s statement of reasons made no reference whatsoever to the considerations listed in s 66(3)(a). The absence of reference to those considerations in the statement of reasons, along with the clear indication in the statement of reasons that the decision-maker merely applied the water sharing rules under the Barron ROP in making his decision, compels the conclusion the decision-maker did not in any way consider the matters set out in s 66(3)(a).
- [18] The question of statutory construction arising here is whether the decision-maker was obliged to consider the matters listed in s 66(3)(a) of the Regulation.
- [19] The applicants contend that the obligation imposed by s 66(3)(a) is clear on the face of the section and that the decision-maker’s failure to comply with it involved him improperly exercising his power or misdirecting himself or involved an exercise of power so unreasonable that no reasonable person could have so exercised the power. It cannot be doubted that the decision had those qualities if the decision-maker was in fact obliged to consider the matters in s 66(3)(a).
- [20] The respondent does not seriously suggest otherwise. Rather, the respondent submits there was no such obligation because, on a proper consideration of the statutory regime, s 66(3) did not apply to the decision at hand.

- [21] Before discussing why the apparently literally applicable s 66(3) does not apply, it is necessary to say something of the legislative scheme.

The legislative scheme

- [22] Chapter 2 of the Act establishes a system for the planning, allocation and use of water with the purpose of advancing sustainable management and efficient use of water.⁸ Section 35 of Chapter 2 obliges the Minister to plan for the allocation and sustainable management of water. Section 38 provides the Minister may prepare a “water resource plan” (“WRP”) for any part of Queensland for purposes including the provision of a framework for sustainably managing water and the taking of water. That preparation involves a publicly consultative process including public notices of the right of any entity to make submissions to the Minister during the proposal phase⁹ and the drafting phase.¹⁰ The Minister must consider all properly made submissions in preparing a final draft WRP for approval by the Governor in Council.¹¹ A WRP approved by the Governor in Council is declared by s 52A(2) to be subordinate legislation.
- [23] Relevantly to the present case, a WRP so approved is the Barron WRP.¹² It applies¹³ to a mapped plan area appearing in its schedule 1 declared by s 7A to be “a water management area called the Barron Water Management Area”. Included within that area is a sector identified as the Atherton groundwater management area. It will be recalled the Gallos live in the southwest zone of that area.
- [24] The purposes of the Barron WRP are set out in s 2:
- “2. Purposes of plan**
The purposes of this plan are –
- (a) to define the availability of water in the plan area; and
 - (b) to provide a framework for sustainably managing water and the taking of water; and
 - (c) to identify priorities and mechanisms for dealing with future water requirements; and
 - (d) to provide a framework for reversing, where practicable, degradation that has occurred in natural ecosystems; and
 - (e) to provide a framework for establishing water allocations; and
 - (f) to regulate the taking of groundwater.”

- [25] Section 11 of the Barron WRP provides:
- “11 Outcomes for water in plan area**
- (1) This part states the outcomes for the sustainable management of water to which this plan applies.
 - (2) Without limiting subsection (1), the outcomes include the allocation and management of water in a way that –

⁸ Section 10 et seq.

⁹ Per s 40.

¹⁰ Per s 49.

¹¹ Per s 50.

¹² Unless otherwise indicated, all references to the Barron WRP herein are to the Barron WRP as at 1 July 2016.

¹³ Per s 4.

- (a) recognises that the natural state of watercourses, lakes, springs and aquifers has changed because of the taking of, and interfering with, water; and
- (b) achieves a balance in the following outcomes –
 - (i) the economic outcomes mentioned in section 12;
 - (ii) the social outcomes mentioned in section 13;
 - (iii) the ecological outcomes mentioned in section 14.”
 (emphasis added)

[26] Sections 12, 13 and 14 thereafter list a variety of economic, social and ecological outcomes for water in the plan area, relevantly providing:

“12 Economic outcomes

Each of the following is an economic outcome for water in the plan area—

- (a) the provision for the continued use of all water entitlements and other authorisations to take or interfere with water;
- (b) the protection of the probability of being able to take water under a water entitlement;
- (c) the allowing of water to be used for the following—
 - (i) agriculture; ...
- (d) the encouragement of continual improvement in the efficient use of water;
- (e) the provision of mechanisms that support water being made available for the following— ...”

[27] It is noteworthy that the outcomes are expressly stated by s 11(1), to be outcomes for the “sustainable management of water” – a topic alluded to in the Barron WRP’s purposes at s 2(b). It is inevitable though that the content of outcomes for the sustainable management of water is relevant to decision making when establishing water allocations and regulating the taking of groundwater, which are the purposes in s 2(e) and (f). That is because such decisions necessarily bear upon the sustainable management of water.

[28] Part 4 of Chapter 2 of the Act provides for the implementation of a WRP through, inter alia, the preparation of a resource operations plan (“ROP”). It is required by s 98(1)(h) of the Act that a draft ROP must “state how the draft plan addresses the water resource plan ... outcomes”.

[29] Pursuant to s 96(2)(i) of the Act the chief executive must prepare a draft ROP “if, when the resulting water resource plan is to commence, it needs to provide for ... water sharing rules”.

[30] The Barron WRP expressly identifies such a need in its implementation schedule:

“62 Implementation schedule

- (1) This section states –
 - (a) the proposed arrangements for implementing this plan;
 and

- (b) the priorities for the conversion to or granting of water allocations.
- (2) Within 1 year after the commencement of this plan, it is proposed to prepare a resource operations plan –
 - (a) to convert authorisations in a priority area to water allocations; and
 - (b) to deal with unallocated surface water available for future water requirements in the plan area; and
 - (c) for water in a priority area – to make environmental management rules, water sharing rules, water allocation change rules and seasonal water assignment rules; and
 - (d) to implement the monitoring requirements in part 7.
- ...
- (4) Subsections (2) and (3) do not limit the matters that may be included in the resource operations plan.” (emphasis added)

[31] Curiously s 62(2)(c), which is the only section in the Barron WRP to make any reference to “water sharing rules”, only refers to making water sharing rules for water “in a priority area”. Pursuant to s 61 the areas described in schedule 9 are priority areas for “the conversion to or granting of water allocations to take water in the plan area”. However, none of the areas described in schedule 9 appears to include the applicant’s property. The closest appears to be the area described as “the Barron River priority area”, which at s 2 of schedule 9 is defined as “the Barron River and its tributaries upstream of Lake Tinaroo”. On the face of it the groundwater potentially accessed by the applicants is not accessed within a river or tributary. This anomaly was not the subject of any attention in oral argument. While not directly explained by any statutory provision it may be explicable by inference from statutory provisions and their history. Further submissions were sought on the point. In the end result the applicants have not sought to take the point in support of their application.¹⁴

[32] Section 100 of the Act requires the chief executive to publish a notice when the draft ROP has been prepared, stating, inter alia, that written submissions may be made about it. Where any such submission requests changes be made to a water sharing rule, s 102 requires the chief executive to arrange for a review panel to review the draft plan and submissions and make recommendations to the chief executive. Subsequent to that process s 103(2) empowers the chief executive to prepare a final draft ROP which, pursuant to s 103(5), the Governor in Council may approve if it is “not inconsistent with the final water resource plan”. The Barron ROP resulted from such a process and, as its s 2 provides, its purpose is to implement the Barron WRP.

[33] Part 6 of the Act, which empowers the chief executive to grant water licences or permits, requires in s 205(1) that the chief executive must make decisions under pt 6 in accordance with a WRP or a ROP, if either such plan has been approved for an area.

Resolution of the construction issue

¹⁴ Copies of the relevant email communications and submissions have been directed to be placed on the court file as per filed documents.

- [34] As already explained, s 66 of the Regulation appears to impose a mandatory obligation on the chief executive in deciding an announced entitlement to not only consider the water sharing rules for taking water from the area, which did occur in this case, but also to consider, to the extent appropriate, the various considerations listed in s 66(3)(a), which did not occur in this case.
- [35] The respondent advanced a number of arguments as to why that literal interpretation ought not apply and submitted that s 66 of the Regulation only applies to water sharing rules declared by the Minister and not to water sharing rules implemented pursuant to a ROP.
- [36] “Water sharing rules” is defined in schedule 4 of the Act as follows:
 “Water sharing rules means –
 (a) for a water entitlement, or other authorisation to take water under this Act, managed under a resource operations plan – the water sharing rules included in the plan; or
 (b) for a water licence, or other authorisation to take water under this Act, not managed under a resource operations plan – the water sharing rules prescribed under a regulation; or
 (c) for an interim water allocation or other authorisation to take water under this Act, managed under an interim resource operations licence – the water sharing rules included in the interim resource operations licence under which the interim water allocation or other authorisation is managed.”
- [37] Under that definition the term “water sharing rules” used in s 66(3) of the Regulation has the literal potential to relate to three different types of water sharing rules, namely:
 (a) water sharing rules included in a ROP; or
 (b) water sharing rules prescribed under a regulation, where the relevant licence or authorisation to take water is not managed under a ROP; or
 (c) water sharing rules included in an interim resource operations licence.
- [38] The respondent submits that the three types of water sharing rules contemplated by the definition of water sharing rules in schedule 4 of the Act are mutually exclusive regimes, highlighting the presence of the word “or” between the relevant subparagraphs. An argument advanced against the rules being mutually exclusive regimes is that, in the era in question, water management areas mentioned in schedule 10 column 1 of the *Water Regulation 2002* were also the subject of a ROP, namely the Lower Callide, Prospect Creek and Upper Callide groundwater sub areas. It is unnecessary to resolve the significance of that anomaly to the respondent’s argument because the use of the term “or” in the definition simply recognises that there are different types of water sharing rules in respect of the three different forms of authorisations to take water listed in the definition. It does not of itself signal that s 66 necessarily relates to a confined number of those three different forms of authorisations to take water.
- [39] At first blush the words of s 66 relate to any water sharing rules for taking water from a water management area, the content of which “require the chief executive to decide an announced entitlement”. What appears to matter for s 66 is not which of the three types of water sharing rules is under consideration but whether the water sharing rule under

consideration has content requiring the chief executive to decide an announced entitlement.

- [40] However, as the respondent eventually identified in submissions received with leave after the hearing of oral argument,¹⁵ the definition of “water licence” under the Regulation has a confining effect upon the application of s 66. The Regulation’s dictionary in Schedule 17 relevantly provides:

“**water licence**, for sections 65, 66 and 67, means a water licence not managed under a resource operations plan.”¹⁶ (emphasis added)

- [41] The Gallos’ licence¹⁷ does not on its face specify whether it is managed under a ROP but it is readily apparent from its geographical references that it is a licence to take underground water from a location which is within the Atherton groundwater management area. It is apparent from the general content of the Barron ROP that it managed licences to take groundwater from the Atherton groundwater management area. More specifically, in Chapter 5 Part 2 of the Barron ROP, s 78 provides Part 2 applies to “the taking of groundwater from the Atherton groundwater management area” and s 78 provides that it applies to “water licences ... located in” the various zones within that groundwater management area, including the zone in which the Gallos reside. It follows, the Gallos’ water licence is managed under a resource operations plan. Because the words “water licence” in ss 65-67 mean “a water licence not managed under a resource operations plan”, the references to water licence in ss 65-67 are not references to the Gallos’ water licence.

- [42] The significance of this for the application or non-application of s 66(3) can only be appreciated by considering s 66(3)’s context within ss 65-67. Section 65 provides a “nominal entitlement” is the volume of water authorised to be taken during a year “under a water licence”. Section 66 provides for the chief executive’s decision as to an “announced entitlement” to take water. Section 67 provides the “annual entitlement for a water licence to which the announced entitlement relates” is calculated by multiplying the nominal entitlement by the announced entitlement and making certain adjustments. The three sections operate collectively in progressively dealing with a nominal entitlement and then an announced entitlement and then with how those two entitlements interact to determine an annual entitlement for a water licence. The references to the words “water licence” in ss 65 and 67 are more overt than in s 66. Nonetheless s 66 uses those words in the context of notification of water licence holders at s 66(1)(b)(i) and more particularly in the context of considering water available to supplement water licences in s 66(3)(a)(v). Further, the reference at the outset of s 66(1) to water sharing rules for taking water from a water management area must necessarily relate to taking water pursuant to a water licence. As much is self-evident but in any event confirmed by s 67 referring to “a water licence to which the announced entitlement relates”.

¹⁵ The submissions exchanged on this issue and associated communications have been directed to be placed on the court file as per filed documents

¹⁶ Schedule 17.

¹⁷ Affidavit of James Anthony Gallo court file doc 2 ex AFG 1.

- [43] In the light of the definition of “water licence” and s 66’s context amidst ss 65-67 I conclude 66 does not apply to the making of an announced entitlement for a water licence managed under a ROP.
- [44] The applicant tried to salvage the above explained impact of the Regulation’s dictionary definition of “water licence” upon the interpretation of s 66 by highlighting the reference in the dictionary to “water management area”, a term also used in ss 66 and 67. Schedule 17, the dictionary, relevantly provides:
“water management area see section 56”.
- [45] Section 56 in turn provides:
“56 Water management areas
 (1) The chief executive may declare an area of the State to be a water management area for water not managed under an interim resource operations licence or a resource operations licence.
 (2) The declaration may be for –
 (a) fixing water charges payable to the chief executive; or
 (b) allowing seasonal water assignments and making seasonal water assignment rules; or
 (c) prescribing water sharing rules; or
 (d) implementing water metering under part 7
 (3) The chief executive may name the area, for example, the ‘Barker-Barambah Creeks water management area’.
 (4) A subartesian area declared under section 102 is also a water management area.
 (4A) A water resource plan or a resource operations plan may declare a part of the plan area to be a water management area.
 (5) The chief executive must display a map or plan showing the boundaries of a water management area in the department’s regional office in or near the area.
 (6) The chief executive must –
 (a) give notice of the declaration to the persons authorised to take water from the area; or
 (b) publish a notice about the declaration in a newspaper circulating generally in the area.
 (7) Subsection (6) does not apply to a water management area declared under a water resource plan or a resource operations plan.”
- [46] The applicant submits that by reason of s 56 references to a “water management area” within the meaning and for the purposes of the Regulation are apt to include a water management area declared as such by a WRP or a ROP. In this case the relevant water management area is declared by the Barron WRP (see paragraph [25] above). Thus, it is submitted, the references to “water management area” in ss 66 and 67 must mean those provisions do apply to announced and annual entitlements imposed under water sharing rules arising out of, or under, a WRP or a ROP and s 66 therefore does apply in the present case.
- [47] The applicant’s submission has some cosmetic appeal in drawing, like the respondent’s submission does, upon the Regulation’s dictionary in Schedule 17 but there the parallel

ends. Schedule 17 approaches the definition of “water licence” quite differently to the definition of “water management area”. Whereas it actually contains a substantive definition of “water licence” its reference to “water management area” merely states “see section 56”. Whereas the definition of “water licence” in Schedule 17 specifically confines its meaning to ss 65, 66 and 67, there is no such parallel in s 56. Indeed s 56 does not purport to define the words “water management area” and rather it provides for the declaration of water management areas.

- [48] The effect of s 56 is of general import and not expressed as confined to particular sections of the Regulation. Its presently relevant effect is that a reference to a “water management area” in the Regulation has the potential to relate to a water management area declared by the chief executive or declared under a WRP or a ROP. Whether such a reference in fact relates to a water management area declared by all, some or only one of those modes must inevitably turn upon the context in which the reference is being considered.
- [49] However, the fact that the references to “water management area” in s 66 have the potential, considered in isolation, to be references to water management areas declared by any of the above modes does not provide a logical basis to ignore or doubt the meaning which flows from the rest of the section’s language or its context amidst ss 65-67. As already discussed, that language and context, informed by a definition of water licence which is specifically confined to those sections, has the consequence that the announced entitlement for water licences to which s 66 relates is not an announced entitlement for a water licence managed under a ROP.
- [50] Such a conclusion is consistent with the content of the Barron ROP, which deals in its own specific way with the making of an announced entitlement by the chief executive per its ss 79 and 80, discussed above. The language of ss 79 and 80 suggests the chief executive must decide an announced entitlement by giving consideration to the formula prescribed by s 79. The absence of reference in those sections to any consideration other than that formula suggests it is the sole consideration in making the decision. That is consistent with the Regulation’s s 66(3)(a) having no application here.
- [51] In the event I am wrong in my conclusion on the construction issue in favour of the respondent I record short reasons why I found the other arguments advanced by the respondent on the point to be unconvincing. Those arguments effectively sought to explain why the apparently relevant and prudent considerations listed in s 66(3)(a) would be thought unnecessary in the context of the chief executive deciding an announced entitlement for a water licence managed under a ROP.
- [52] The respondent laboured the point that a draft ROP must be developed by a process of preparation, public consultation and scrutiny, much like the WRP it implements, and must be consistent with. This was said to contrast with the absence of such a prescribed process of preparation and public consultation in respect of water sharing rules prescribed under a regulation.
- [53] The argument appeared to be that because the formulaic approach of water sharing rules in the Barron ROP was a product of a prescribed process of preparation and public

consultation, it would be thought unnecessary by the legislature for the chief executive to have to do no more than merely consider those rules in deciding an announced entitlement. However, the mere fact that one category of water sharing rules is the product of a prescribed process of preparation and public consultation whereas another may not be, does not logically support an inference that, where the former category of rules applies, it would be unnecessary for the chief executive to consider the apparently prudent and relevant considerations listed in s 66(3)(a). Indeed, the formulaic approach of the water sharing rules in this case illustrates why it might have been thought desirable that consideration ought additionally be given to considerations of the kind listed in s 66(3)(a) whenever the chief executive is announcing an entitlement.

- [54] It ought be borne in mind that the formulaic approach of the water sharing rules in this case turns solely upon consideration of a seven consecutive day period of water levels in respect of an individual bore. While it may be readily accepted that data of that kind provides some indication of water availability, it says nothing as to more longstanding trends in underground water levels, historical patterns of water use, anticipated water use, the alternative water supplies available to supplement water licences, or weather conditions or weather forecasts. These are all matters listed for consideration to the extent appropriate in s 66(3)(a). That is unsurprising. They all go in different ways to the likely future extent of available water, a consideration of obvious potential relevance to deciding the appropriate entitlement percentage. They are variables which do not lend themselves to encapsulation in formulaic rules, even if such rules are the product of a highly consultative process.
- [55] In answer to the risk that formulaic rules as the sole determinative consideration may result in unsatisfactory outcomes the respondent emphasised the Minister has the overriding power to make emergency declarations¹⁸ to avoid injustice. However, the safety net of such crisis powers hardly presents as an obviously intended alternative tool of management to simply taking relevant and prudent considerations into account in the first place when managing decisions.
- [56] For these reasons the respondent could not justify the absence of any requirement in applicable water sharing rules of the Barron ROP requiring the chief executive to consider matters of the kind listed in s 66(3)(a) in deciding announced entitlements. That does not diminish the determinative significance, explained above, of the Regulation's definition of water licence and its effect upon the construction issue. It is however a point of particular relevance to the sole consideration issue discussed below.

The 0% issue

- [57] The applicants' submissions also relied upon an underlying argument that an announced entitlement of 0% is inconsistent with the objectives of the Barron WRP, specifically its requirement, pursuant to s 11(2)(b), that the outcomes for the sustainable management of water include the allocation and management of water in a way that achieves a balance in the economic, social and ecological outcomes mentioned in ss 12, 13 and 14 respectively. The applicants argued that an announced entitlement of 0% is necessarily inconsistent with the achieving of such a balance. That argument is unsustainable.

¹⁸ The Act s 25B.

- [58] True it is, an announced entitlement of 0% suggests, at least from the Gallos' perspective, that ecological outcomes have weighed determinatively in the balance against economic or social outcomes, particularly as those outcomes affect the Gallos. However there is an inherent tension between the outcomes – hence the need identified in s 11(2)(b) to balance them. Where potentially competing considerations are taken into account in a balancing exercise, they should not be accorded some pre-ordained minimum weight. In the event that, as a result of that balancing process, one consideration is ultimately given no or “zero” weight – as sometimes occurs for instance in judicial decision-making – that does not of itself mean there must have been an error in the balancing process.
- [59] It is in the nature of the economic, social and ecological outcomes described in ss 12, 13 and 14 that there will be tension between them, so that, as the availability of water varies, so too would the weight given to each of those outcomes vary. In order to achieve a balance between those outcomes in the long run, it may well be necessary in deciding announced entitlements from time to time to sometimes decide on a 0% entitlement.
- [60] If there has been an announced entitlement of 0% at the outset of one water year, it does not automatically follow that there has been a failure to allocate and manage water in a way that achieves a balance between economic, social and ecological outcomes. It can be readily imagined that events beyond the control of those managing the Barron WRP, such as illicit water use or illicit water diversion or unanticipated prolonged drought, may give rise to an imbalance between the economic, social and ecological outcomes to which the plan aspires, with the consequence that those outcomes need to be managed in such a way as to restore a balance between them.
- [61] The applicants' arguments in respect of the 0% issue must fail. Importantly however, they fail because it does not follow merely from the fact of a 0% result that it fails to achieve a balance in the economic, social and ecological outcomes described in ss 12, 13 and 14. That is to say nothing of whether those considerations were in fact taken into account in the making of the decision, as distinct from in creating the formula under which the decision was made, an aspect which is relevant to the sole consideration issue.

The sole relevant consideration issue

- [62] The applicants submit the bore water level data which the water sharing rules rely on is so limited a source of information as to render it too confined to serve as the sole consideration determining the decision.
- [63] That it was the sole factual consideration is clear. The statement of reasons for the announced entitlement indicate that, other than the provisions of the Barron ROP, the only factual information informing the decision was that on 1 July 2016 the water level in bore RN11000159 had been less than 705.68 m AHD for the most recent seven consecutive days in the month before the announced entitlement was decided.

[64] The applicant made something of the fact the bore in question, while near the border of Southwest zone is not actually within it. Of itself that does not bespeak error for it is conceivable, depending upon the physical state of the catchment for groundwater, that the water level of a particular bore may inform the likely state of groundwater levels in nearby areas.

[65] The more concerning point made by the applicant is the solitary role of a single bore’s water level in a period of seven consecutive days in the determination of an announced entitlement. That is a determination which, the applicants submit, requires consideration of the economic, social and ecological outcomes for the sustainable management of water stated in ss 12, 13 and 14 of the Barron WRP. The submission is in substance a complaint both that the relevant water sharing rules of the Barron ROP are contrary to the authority of the Act and the Barron WRP and that the decision maker failed to take a relevant consideration into account.

[66] It will be recalled s 98(1)(h) of the Act requires that a draft ROP must “state how the draft plan addresses the water resource plan ... outcomes”. It is not apparent whether the Barron ROP in draft form stated how it addressed those outcomes but the Barron ROP purports to do so at s13, which provides:

“13 Addressing water resource plan outcomes

Attachment 3 lists the outcomes of the Water Resource (Barron) Plan 2002 and how this plan addresses those outcomes.”

[67] The attachment 3 to which s 13 refers lists “links” between the Barron ROP and the outcomes of the Barron WRP. It lists each limb of each outcome and against it lists broadly descriptive content of operational aspects of the Barron ROP. The content of such listings is repetitive, with “-water sharing rules” being listed often, though not always. Such entries do not specifically state how the water sharing rules address the limb of the outcome against which it appears. The approach taken appears to have been that nominating the operational aspects of the Barron ROP against the different limbs of the outcomes is sufficient by inference to indicate how the Barron ROP addresses the Barron WRP outcomes. Whether that is a sufficiently informative approach to stating how the draft plan addresses the outcomes was not specifically argued and need not be decided here.

[68] It is however relevant for present purposes to appreciate that attachment 3 shows different and multiple operational aspects were selected to address different limbs of the Barron WRP outcomes. The point may be illustrated by quoting the attachment’s content in respect of s12, economic outcomes:

Economic outcomes of the Water Resource (Barron) Plan 2002 (section 12)	Resource operations plan rules
(a) the provision for the continued use of all water entitlements and other authorisations to take or interfere with water	<ul style="list-style-type: none"> - granting and converting authorisations - operating and environmental management rules - water sharing rules

(b) the protection of the probability of being able to take water under a water entitlement	- operating and environmental management rules - water sharing rules
(c) the allowing of water to be used for the following— (i) agriculture (ii) aquaculture (iii) hydro-electric power generation (iv) industrial needs (v) small scale uses (vi) stock purposes (vii) tourism and recreational uses (viii) urban needs	- operating and environmental management rules - water sharing rules - water allocation change rules - transfer of water licences - seasonal water assignments
(d) the encouragement of continual improvement in the efficient use of water	- water sharing rules - monitoring and reporting requirements - transfer of water licences - seasonal water assignments
(e) the provision of mechanisms that support water being made available for the following— (i) growth in industries dependent on water resources in the plan area (ii) particular groundwater licences in the Atherton groundwater management area	- amending authorisations - operating and environmental management rules - dealing with water licences - transfer of water licences - seasonal water assignments

[69] The above quoted extract demonstrates water sharing rules are not the only means by which the outcomes in s 12(a), (b), (c) and (d) are addressed and that water sharing rules are not included at all as one of the means by which s 12(e) is addressed. The theme emerging is that a combined approach has been taken in ensuring the Barron ROP addresses the Barron WRP outcomes. That is, the provisions of the Barron ROP have been structured or co-ordinated to ensure that they collectively address the Barron WRP outcomes.

[70] It is unrealistic to expect every operational decision under the Barron ROP has to discretely take into account every outcome contemplated in ss 12, 13 and 14. Such decisions are made pursuant to a broader scheme or plan – the Barron ROP – which draws together a variety of operational approaches to allocating and managing water, to in combination implement the Barron WRP. Such a multi-faceted approach is unremarkable given the Barron WRP's requirement at s 11 that the outcomes for sustainable management of water include the allocation and management of water in a way that achieves a balance in the ss 12, 13 and 14 outcomes.

- [71] This demonstrates that to the extent the applicant's submissions relevant to the sole relevant consideration issue are premised on the notion those outcomes had to be discretely considered by the decision maker, the premise is flawed. The rules under which the decision was made are part of a broader scheme which in combination addresses those outcomes.
- [72] As to the argument the decision was premised on a solitary relevant consideration it is necessary to bear in mind that consideration was identified as part of a deliberative process and in the context of a broader plan. In that sense it is not a solitary consideration, for, while singular, it has been arrived at in the context of a scheme or plan in which multiple considerations are in play.
- [73] It may reasonably be inferred from the deliberative process engaged in to give rise to a ROP, that proper scientific consideration was given to the reliability of the bore in question as a source of data as to available underground water levels. Similarly, it may reasonably be inferred that the level identified as being so low as to give rise to a 0% result was also the product of proper scientific consideration. In any event the applicant carries the onus and in the absence of specific evidence of such matters it is not inherently implausible that the bore and bore result selected was a sound indicator of a critically low groundwater level in the vicinity of the Gallos' farm.
- [74] It ought be remembered there is a degree of tension as between the Barron WRP outcomes. It is entirely plausible that the planners identified a critically low point in the bore's level which, if reached, meant outcomes other than providing continued use of groundwater to farmers like the Gallos deserved greater weight in the overall balancing of outcomes, so great as to justify a 0% allocation.
- [75] Bearing in mind the combined approach of the Barron ROP the mere fact that the decision here turned upon a solitary relevant consideration does not bespeak error in the decision or illegitimacy in the Barron ROP.
- [76] The applicant's argument founded on the sole relevant consideration issue must also fail.

Conclusion

- [77] In light of the above conclusions the application should be dismissed. It will be necessary to hear the parties as to costs.

Orders

- [78] My orders are:

1. Application dismissed.
2. I will hear the parties as to costs, if costs are not agreed in the meantime, at 9.15 am 31 January 2018 (out of town parties have leave to appear by telephone).