SUPREME COURT OF QUEENSLAND

CITATION:	*Munya Lake Pty Ltd & Ors v The Chief executive, The Department of Natural Resources and Water* [2010] QSC 58
PARTIES:	**MUNYA LAKE PTY LTD ACN 069 159 940** First Applicant **G & R GRAHAM EQUIPMENT PTY LTD ACN 069 590 067** Second Applicant **GLEN JAMES GRAHAM** Third Applicant **RICHARD CEDRIC GRAHAM** Fourth Applicant **JAMES LYLE GRAHAM** Fifth Applicant **JILLIAN JEANETTE GRAHAM** Sixth Applicant **v** **THE CHIEF EXECUTIVE, THE DEPARTMENT OF NATURAL RESOURCES AND WATER** Respondent
FILE NO/S:	BS 10020 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	3 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19-22 October 2009
JUDGE:	White J
ORDER:	**The application is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW -- JUDICIAL REVIEW –- Jurisdictional Error -- Relevant Considerations and Irrelevant Considerations -- Whether decision by Chief Executive in

personal capacity

Public Service Act 1996, s 57

Public Service Act 2008, s 103

Water Act 2000, s 4, s 8, s 10, s 17, s 19, s 20, s 27, s 32, s 34-40, s 42, s 44-50, s 94-100, s 102, s 103, s 120B, s 1012

Water Resources Act 1989

Water Resource (Condamine and Balonne) Plan 2004, Schedule 5, s 29, s 44, s 45, s 46, s 47, s 48, s 49, s 50

Attorney-General (NSW) v Quin (1990) 170 CLR 1

Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297

Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163

Kelly v The Queen [2004] HCA 12; (2004) 218 CLR 216

Lysaght Bros & Co. Ltd v Falk (1905) 2 CLR 421

Meshlawn Pty Ltd v The State of Queensland [2009] QSC 215

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

O'Reilly v Commissioners of the State Bank of Victoria (1983) 153 CLR 1

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55

Woolworths Ltd v Pallas Newco Pty Ltd [2004] NSWCA 422; (2004) 61 NSWLR 707

COUNSEL: TP Sullivan SC and J Fitzgerald for the applicants

M Hinson SC and S McLeod for the respondent

SOLICITORS: Mallesons Stephen Jacques for the applicants

Crown Solicitor for the respondent

[1] The applicants, represented on this application by Mr Glen Graham, collectively held interests in water entitlements in the St George region of the Condamine and Balonne River systems or had an interest in the properties known together as the Kia-Ora Aggregation which utilised those water entitlements. They challenge four decisions made by the delegate of the respondent chief executive of the Department

of Natural Resources and Water ("the Department") about their water entitlements, allocations and licences under ss 29 and 49 of the *Water Resource (Condamine and Balonne) Plan* 2004 and the decision to prepare a draft resource operations plan to implement that water resources plan. The *Water Resource (Condamine and Balonne) Plan* 2004 is subordinate legislation.

[2] Although the draft resource operations plan was promulgated in July 2007 and the statement of reasons provided on 10 October 2007 a request for trial dates was not made until July 2009 and orders for the filing of material made thereafter.

[3] By the time of the hearing the applicants had sold their interests in the properties. The buyer has been in possession since 21 March 2008. The sale price has an adjustment factor if the applicants are successful, ultimately, in increasing their water entitlements. It is, however, convenient to speak of the applicants in these reasons as the land owners.

[4] The Kia-Ora Aggregation is a major cotton farming operation near St George consisting of some 18,845 hectares. It is fully developed with 8,898 hectares available for irrigated cotton production and 1,910.3 separate hectares available for the production of dryland wheat.

[5] The various parcels of land comprising the Kia-Ora Aggregation were owned in varying combinations by the applicants other than Munya Lake Pty Ltd. The land was leased by those applicants to Munya Lake Pty Ltd.

[6] The Kia-Ora Aggregation consists of three separate irrigation farms.

- Kia-Ora;
- Kia-Ora North, formerly known as "Bubby-Maur" and
- Kia-Ora South, formerly known as "Gulnarbar".

The principal holding had been owned by the Graham family since 1967. The latter two properties were acquired in 2002. Since September 2002 the properties have been operated as a single integrated consolidated farming enterprise by the applicants and known as the Kia-Ora Aggregation.

Background

[7] It is useful to give some background context[1] to the issues raised in the application and an overview of those issues. A water management plan for the Condamine and Balonne catchment area had been under active consideration by the Queensland Government through the Department for some years. In June 2000 a draft Water Allocation Management Plan ("WAMP") made under the *Water Resources Act* 1989 was released for public comment. It received strong local criticism, in particular, that the hydrologic modelling was inaccurate due to the level of continuing development occurring at the time of its release. As a consequence, on 14 August 2000 the then Minister announced a freeze on any new

[1] Principally taken from the affidavits of Gary Kevin Burgess and Simon Hausler filed in these proceedings on behalf of the respondent, the first affidavit of Glen Graham and the Explanatory Notes to the *Water Bill* 2000.

water diversions from the Condamine and Balonne systems and extended time for completion of the region's WAMP. The Moratorium Notice was published on 20 September 2000 prohibiting the commencement of any new works to contain or retain water and requiring work that had been commenced to be completed within a certain time. It was extended from time to time.

[8] As part of the review of the WAMP and the preparation of a new draft water resources plan for the Condamine and Balonne a scientific review panel comprised of three eminent scientists to review the science used in preparing the draft plans was established. The review panel considered the adequacy of the Department's Integrated Quantity and Quality Model ("IQQM") to represent flows and diversions in the Lower Balonne. The review highlighted the need to have accurate information regarding storages and the capacity to take water including overland flow diversions represented in the IQQM. The IQQM is a computer program or hydrologic model based on historic data such as rainfall, run off, stream flow and water entitlement data and can be used to simulate water resource development and extraction levels.

[9] The *Water Resources Act* 1989 had been the principal legislation regulating the allocation of water and the development and operation of irrigation systems in Queensland. It was said to have a number of deficiencies including that there was no power explicitly to consider water for the environment; that there was an incremental licensing system which was seen as having potential to threaten the security of existing entitlement holders; that water was tied to land under the then existing licensing arrangements which was perceived to impose restrictions on agricultural expansion in that new land had to be purchased to acquire more water; that water allocations were tied to licences for works; and that there was no capacity for sharing overland flow.

[10] The *Water Act* 2000 brought most legislative provisions in Queensland about water within one enactment. Its long title identifies the broad subject matters of the Act:

> "An act to provide for the sustainable management of water and other resources, a regulatory framework for providing water and sewerage services and the establishment and operation of water authorities, and for other purposes."

It brought together provisions concerning sustainable management for the planning allocation and use of water and other resources, the regulatory framework for service providers and a governance regime for statutory authorities that provide water services. Each chapter in the Act covers a distinct subject and is discrete.

Legislation Overview

[11] This application is concerned with chapter 2 – Allocation and sustainable management[2] the purpose of which is set out, relevantly, in s 10:

> "(1) … to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water."

---

[2] All rights to the use, flow and control of all water in Queensland is vested in the State and with certain exceptions, require a formal water allocation, s 19.

To give effect to this object a water resource plan ("WRP") for a particular area may be prepared.[3] A WRP (which replaced the earlier WAMP) was prepared for the Condamine and Balonne. The *Water Resource (Condamine and Balonne) Plan* 2004 applied to the land in the area depicted in Schedule 1 which included the applicants' land near St George. The purposes of a WRP, inter alia, are to define the availability of water in the plan area; to provide a framework for sustainably managing water and the taking of water; to provide a framework for establishing water allocation; and to regulate the taking of overland flow water. The WRP applies to water in the plan area within a watercourse, lake or spring and to overland flow water.[4]

[12] Chapter 2 part 4 of the Act provides for the implementation of a WRP through the preparation of a resource operations plan ("ROP"), the granting of resource operations licences, the conversion of water licences and interim water allocations to water allocations and the granting of water allocations.[5]

[13] Under the Act the chief executive is given responsibility for preparing a ROP to implement a WRP[6] but before doing so is required to prepare a draft ROP[7]. That task for the Condamine and Balonne was delegated pursuant to s 1012 of the Act to Ms Debbie Best, the Deputy Director-General Water and Catchment Services ("the delegate"). She made the challenged decisions.[8]

[14] In broad outline, the Act provides for the following steps to occur leading to a final ROP:

- a public notice of intention to prepare a draft ROP must be given;[9]
- what the notice must contain including that written submissions may be made by any entity about the proposed draft plan;[10]
- holders of certain interim resource operation licences, resource operation licences or other authorisations to operate water infrastructure to which the ROP is to apply be given a specific notice requesting those holders to provide proposed arrangements for the management of water;[11]
- what the draft ROP must contain;[12]
- what the draft ROP may contain;[13]

---

3 Section 38.
4 Section 8.
5 Section 94.
6 Section 95(1).
7 Section 95(3).
8 Her decision to prepare a draft ROP is challenged by the applicants.
9 Section 96(1).
10 Section 96(2).
11 Section 97.
12 Section 98(1), (3) and (4).
13 Section 98(2) and (5).

- what the chief executive must consider when preparing the draft ROP including all properly made submissions;[14]

- notice (in effect a second notice) of the draft ROP to be given and permitting further submissions to be made about the draft;[15]

- review of submissions;[16]

- a decision to be made whether or not to prepare a final draft ROP after considering the submissions and any referral panel recommendations;[17]

- Governor-in-Council approval of the final draft needed for the final draft to become the ROP for the relevant WRP.[18]

[15] The *Water Resource (Condamine and Balonne) Plan* provides in Part 5 division 3 for the conversion of authorisations under the previous regime to water allocations. The chief executive must decide on the conditions to be imposed for taking unsupplemented water.[19] The manner in which the chief executive is to decide the volumetric limit for taking water under an allocation for unsupplemented water in the Lower Balonne is set out in s 29. The applicants challenge two decisions made by the delegate under that provision.

[16] Similarly Part 5 division 5 provides for regulating the taking of overland flow water. In effect, the authorisation to do so is dependent upon existing works or a reconfiguration of existing works.[20] The chief executive may grant a water licence in substitution for that authorisation. The way in which that decision is to be made is set out in s 49.

[17] Under ss 29 and 49 the chief executive is to have regard to the lesser of two estimates – that based on information provide by the authorisation holder (in effect, the land owner), and the actual capacity or rate and flow conditions as certified by a registered professional engineer. The decision about volumetric limits and water licences may also be informed by any other relevant matter.[21]

The *Water Resource (Condamine and Balonne) Plan* and draft ROP

[18] On 3 December 2003 a draft WRP was published for the Condamine and Balonne. On the same date notice was given that it was intended to prepare a draft ROP. The WRP for the Condamine and Balonne was made on 12 August 2004 and commenced on that date except for Part 5 division 5 which commenced on 1 February 2005. Prior to 3 December 2003 and 12 August 2004 the applicants, mainly through Mr Graham, had had regular dealings with Departmental

---

14 Section 99.
15 Section 100.
16 Section 102.
17 Section 103.
18 Section 103(2) and (3).
19 Section 27.
20 Section 46.
21 Sections 29(6) and 49(8).

officers in relation to water storage or water entitlements concerning the Kia-Ora Aggregation[22] including investigating complaints by a neighbour that the Moratorium had been breached.[23] In November 2004 Munya Lake's advisers prepared an Information Memorandum for the proposed sale of the Kia-Ora Aggregation based on information provided by Mr Graham. That Memorandum stated that the Kia-Ora Aggregation had a water storage capacity of 145,056 megalitres. By December 2004 the Department was aware of this assertion which was inconsistent with its records.

[19] After the promulgation of the draft WRP and notice of the preparation of a draft ROP there were a number of community meetings involving land owners in the area, Departmental officers and visits by members of the expert scientific review panel as well as direct communication with Departmental officers and land owners. Mr Graham engaged in extensive correspondence and other communication with Departmental officers either himself or through his solicitors about, inter alia, water use and storage capacity on the Kia-Ora Aggregation.

[20] In April 2007 the Department released a draft ROP for the Condamine and Balonne. The draft ROP as amended after consultation, was released on 27 July 2007 and notices were published between 7 and 10 August 2007. It provided for the maximum volumetric limit of water storage allocations for the Munya Lake entities in attachment 4.9 (pp 238, 240) as follows:

(a)	Kia-Ora North	-	11,100 megalitres;
(b)	Kia-Ora South	-	8,290 megalitres and
(c)	Kia-Ora	-	116,100 megalitres

The water licence for taking overland flow water on Kia-Ora set out in attachment 4.12 Table 10 is 7,410 megalitres per day. Kia-Ora South was not granted a water licence for overland flow water. Other amounts granted are not challenged.

[21] Further submissions were made to the chief executive as a consequence of the figures in the draft ROP. The applicants contend, inter alia, that these amounts are significantly less than what the water storage limits and overland flow rate should have been had the delegate taken into account more complete information which the applicants allege they provided. Furthermore, they contend that when information was sought by the Department from land owners, it was not made clear that the information would be used to set water rights into the future.

[22] The applicants sought a statement of reasons from the delegate by letter dated 6 September 2007. Those reasons were provided on 10 October 2007.

[23] According to her reasons, the delegate made her decisions about the applicants' water entitlements pursuant to ss 95-101 of the Act and ss 29 and 49 of the *Water Resource (Condamine and Balonne) Plan* 2004. Section 29 provides, relevantly,

---

22 Set out in detail in Mr Graham's first affidavit and also in Departmental officers' affidavits.

23 Affidavit of Simon Hausler at "SHH-14".

"29 **Volumetric limit for unsupplemented water in the Lower Balonne**

(1) The volumetric limit for taking water under an allocation for unsupplemented water in the Lower Balonne is –

(a) …

(b) for other authorisations, the volumetric limit decided by the chief executive having regard to the lesser of –

(i) the total capacity of existing works for storing water on the property; and

(ii) the volume decided by the chief executive based on information supplied by the authorisation holder for the infrastructure assessment.

(2) To establish the total capacity for subsection (1)(b)(i), the authorisation holder must give the chief executive a certificate in the approved form from a registered professional engineer.

…

(6) Subsection 1(b) does not limit the matters the chief executive may consider."

[24] The expression "***volumetric limit***" is:

"(2) … the maximum volume of water, in megalitres, that may be taken under the allocation during the period of time, or in the circumstances, stated in the Resource Operation Plan under which the allocation is managed."[24]

[25] The expression "***unsupplemented water***" is water other than supplemented water and "supplemented water" as defined in Schedule 5 of the *Water Resource (Condamine and Balonne) Plan* 2004 as:

"water supplied under an interim resource operations licence, resource operations licence or other authority to operate water infrastructure."

[26] The expression "***existing works***" is defined in Schedule 5 as:

"(1) … works that –

(a) allow taking –

(i) overland flow water; and

---

[24] Section 120B of the Act.

(ii) for section 29, water from a water course, lake or spring: and

(b) either –

(i) were in existence on 20 September 2000; or

(ii) were started, but not completed by 20 September 2000 and …"

If water storage facilities did not fall within that provision then they would not be included in calculations by an engineer under s 29(2).

[27] The expression "***infrastructure assessment***" is defined in Schedule 5 to mean:

"… the infrastructure assessment conducted by the chief executive between November 2002 and April 2003 for the St George and Lower Balonne area."

The applicants contend that no infrastructure assessment was ever conducted by the chief executive consistently with the Schedule 5 definition.

[28] The chief executive is required by s 29(1)(b) to determine the volumetric limit for taking water under an allocation having regard to the lesser of the actual capacity measured by an engineer and the volume decided by the chief executive based on the information supplied by the landowner but keeping in mind that s 29(6) permits the chief executive to consider other matters (consistent with the objects and purposes of the Act and the Plan).

[29] The other provision of the *Water Resource (Condamine and Balonne) Plan* 2004 pursuant to which the delegate made her decision about water licences was s 49 which provides relevantly:

"49 **Water licences for taking overland flow water in the Lower Balonne**

(1) A water licence for taking overland flow water in the Lower Balonne, granted to replace an authority under section 46, must include a maximum rate, in megalitres a day, and the flow conditions for taking the water, decided by the chief executive –

(a) having regard to the lesser of –

(i) the rate and flow conditions under which water can be taken using the works, decided by the chief executive based on information supplied by the authorisation holder for the infrastructure assessment; and

(ii) the actual rate and flow conditions under which the works can take water; and

(b) reduced by 5%.

(2) To establish the rate and flow conditions for subsection (1)(a)(ii), the authorisation holder must give the chief executive a certificate in the approved form from a registered professional engineer.

…

(8) Subsections (1) to (3) do not limit the matters the chief executive may consider."

[30] The expression "***overland flow water***" is defined in Schedule 4 to the Act:

"***Overland flow water***" means water, including flood water, flowing overland, otherwise than in a watercourse or lake –

(a) after having fallen as rain or in any other way; or

(b) after rising to the surface naturally from under ground."

It does not include, relevantly for this application, "tailwater from irrigation if the tailwater recycling meets best practice requirements". The taking of overland flow water is limited by ss 44 – 50 of the *Water Resource (Condamine and Balonne) Plan* 2004 but a land owner may continue to take overland flow water in circumstances set out in s 46. If that situation exists a water licence may be granted.[25]

[31] As can be seen, s 49 provides a methodology very similar to that of s 29. The applicants challenge decisions made by reference to both of these processes.

The decisions

[32] The delegate's decisions by reference to the legislative provisions and the relevant properties are as follows.

Kia-Ora North

Section 29 (volumetric limit)

- The s 29(1)(b)(i) (engineer's certification) figure was 16,435 megalitres.
- The s 29(1)(b)(ii) (information supplied) figure was 11,110 megalitres.
- The s 29(1)(b) (lesser of the two figures) (volumetric limit) was decided to be 11,100 megalitres.

Section 49 (water licence)

[25] Section 47.

There is no challenge to the s 49 decisions as both the engineer's certificate and information assessment information showed that Kia-Ora North did not take overland flow.[26]

Kia-Ora

Section 29 (volumetric limit)

For completeness, the s 29(1)(b) decisions for this property will be mentioned but they are not challenged by the applicants.

Section 29 (volumetric limit)

- The s 29(1)(b)(i) (engineer's certification) figure was 123,307 megalitres.
- The s 29(1)(b)(ii) (information supplied) figure was 116,100 megalitres. The infrastructure assessment information was 93,100 megalitres but correspondence and other information caused the delegate to select 116,100 megalitres.

Section 49 (water licence)

- The s 49(1)(a)(i) (information supplied) figure was 7,800 megalitres per day.
- The s 49(1)(a)(ii) (engineer's certification) figure was 22,645 megalitres per day.
- The chief executive applied the five per cent reduction to the lesser figure rounded to 7,400 megalitres per day.

Kia-Ora South

Section 29 (volumetric limit)

- The s 29(1)(b)(i) (engineer's certification) figure was 8,285 megalitres based on several sources including tailwater return systems which the delegate concluded were substantially constructed after the moratorium period which commenced on 20 September 2000.
- The s 29(1)(b)(ii) (information supplied) figure was 13,000 megalitres.
- The s 29(1)(b) volumetric limit (lesser of two figures) was decided to be 8,290 megalitres.

Section 49 (water licence)

- The section 49(1)(a)(i) (information supplied) figure was zero megalitres per day.
- The section 49(1)(a)(ii) (engineer's certification) figure was 1,460 megalitres per day.

---

[26] Reasons para 3.3.1.3.

- The section 49(1) figure was assessed to be the lesser of the two at zero megalitres per day.

The infrastructure assessment

[33] The parties take very different positions about what is meant by the expression "infrastructure assessment" in ss 29 and 49. The applicants further contend that the chief executive did not conduct an infrastructure assessment between November 2002 and April 2003. Therefore, they argue, no information was supplied by them for that purpose. The applicants contend that the reference to the chief executive in the definition of "infrastructure assessment" in Schedule 5 of the *Water Resource (Condamine and Balonne) Plan* 2004 is a reference to the chief executive in his or her personal capacity. The evidence is uncontroversial that the chief executive had no personal involvement in any information gathering process. The major driver within the Department was Mr Burgess, now Director for Water Planning (Central).

[34] As a different argument, the applicants contend that the information assessment must mean an assessment process which was in fact both conceived and implemented during the relevant period in respect of properties in the Balonne and Condamine area and none occurred because there was no characterisation of the information gathering by the Departmental officers as such a process.[27]

[35] It is the applicants' case that both the existence of an information assessment and the supply of information in respect of it by the applicants as authorisation holders are facts going to the jurisdiction of the chief executive (or delegate if personal involvement is held to be unnecessary) to make decisions pursuant to ss 29(1)(b)(ii) and 49 (1)(a)(i) of the *Water Resource (Condamine and Balonne) Plan* 2004 and without those facts no decision could lawfully have been made under those provisions.

[36] The applicants do not argue that the whole draft ROP process is flawed, rather, that as a consequence of no lawful decision being made under ss 29(1)(b)(ii) and 49(1)(a)(i), the chief executive is left with only one figure upon which to base a decision setting the volumetric limit or water licence, namely, actual capacity or rate and flow as certified by the engineer.

[37] The chief executive submits that there is a power of delegation by the chief executive and, in any event, it could not be the legislative intention that the chief executive must exercise the powers conferred by the many Acts administered by the Department personally. The reference to the infrastructure assessment is found only in ss 29 and 49 of the *Water Resource (Condamine and Balonne) Plan*, the delegate argues, and is a mode of regulating the exercise of the power rather than establishing a pre-condition for its existence.

The chief executive

[38] The applicants contend that the reference to the "chief executive" in the definition of "***infrastructure assessment***" in Schedule 5 to the *Water Resource (Conadamine and Balonne) Plan* is a reference to the chief executive in his or her personal

---

[27] Compare the reasons advanced by Mr Burgess for the November 2002 meetings in St George at para [14] of his affidavit with the explanation in Mr Bressington's email.

capacity and seek to support this by a consideration of the many references to chief executive in the Plan. These are largely references to the chief executive "deciding", "considering" and "ensuring", "within jurisdiction" expressions, whereas the Schedule 5 definition refers to the infrastructure assessment "conducted by the chief executive". The applicants contend that "conducted by" means the process of information gathering actually directed by the chief executive. The evidence revealed that much of the senior executive direction for this process was done by Mr Burgess. It was not to be suggested by this submission that the chief executive could not be assisted by his or her officers but, that in a real and practical sense, the chief executive must have directed the gathering of information.

[39] Mr Hinson SC for the chief executive submitted that the applicants had fallen into the construction error of employing the definition of infrastructure assessment in isolation from the provisions of the Act and the *Water Resource (Condamine and Balonne) Plan* and in treating it as substantive law. This argument finds expression in the observation of McHugh J in *Kelly v The Queen*:[28]

> "…the function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. There is, of course, always a question whether the definition is expressly or impliedly excluded. But once it is clear that the definition applies, the better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment."

[40] Mr Hinson makes two points about this. The first is the express legislative provision for delegation in s 1012 of the Act and in s 57 of the *Public Service Act* 1996.[29] Whilst the final decision maker is an authorised delegate of the chief executive, which the applicants do not challenge, that does not answer completely the contention that the chief executive is required to act personally in the conduct of the information assessment. Those who actually conducted the infrastructure assessment were not delegates in the sense employed in s 1012 or s 57 of the *Public Service Act*. The second point is that no express statutory authority is required to conduct an infrastructure assessment unlike, for example, the power to prepare a ROP.

[41] The general responsibilities of the chief executive are set out in the *Public Service Act* 1996. The chief executive of the Department is responsible, relevantly, for:

> "(1) (a) defining Departmental goals and objectives in accordance with Government policies and priorities; and

---

[28] [2004] HCA 12; (2004) 218 CLR 216 at 253.

[29] The relevant legislation in operation at the relevant time, now s 103 of the *Public Service Act* 2008.

(b) managing the department in a way that promotes the effective, efficient, economical and appropriate management of public resources; and

(c) deciding organisational and staffing structures for the department having regard to the need for the department to management public resources, effectively, efficiently, economically and appropriate; and

(d) adopting management practices that are responsive to changing Government policies and priorities and allow decisions and action to be taken promptly…"

Without limiting those stated responsibilities the chief executive is also responsible for:

"(2) (a) departmental priorities;

…

(d) duties of departmental employees, and qualifications required to be held by departmental employees to undertake particular duties;

…

(n) matters arising out of the chief executive's powers under this Act and other Acts."

[42] The chief executives of government departments cannot, personally, exercise all the powers conferred by statute on them[30] and cannot, practically, delegate all matters. It would require a clear expression of an intention in the legislative enactment to require personal involvement. Counsel for the chief executive have identified the chief executive's powers and functions under the Act. They are extensive. It is one only of the numerous enactments administered by the Department.[31]

[43] Clearly the chief executive may act through suitably qualified officers of the Department to carry out the many tasks entrusted by, inter alia, the Act. Mr Garry Burgess held the position of Principal Policy Officer Water Planning in the Department at the relevant time. From approximately September 1996 until March 2003 he was responsible for the project management of the Condamine and Balonne water planning process which included the development of the draft WAMP and subsequent development of the draft WRP for that area. It was at Mr Burgess' direction that the information gathering exercise was undertaken and in which he participated acting on the recommendation of the scientific review panel. It was that process that became known as the infrastructure assessment.[32] Mr Burgess instructed Mr Leach, who was stationed in the St George office of the

---

30 *O'Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1 per Gibbs CJ at 11-13; per Wilson J at 30-32.

31 See exhibits 8 and 9.

32 See Mr Burgess' affidavit, paras [12]-[15].

Department, and Mr Levings, a project officer at St George, and other officers to invite all landholders in the Lower Balonne to meet with Departmental officers to clarify and communicate all relevant information relating to the taking of water from the Lower Balonne system. There is no criticism of Mr Burgess' qualifications to undertake this exercise.

[44] The conclusion is that the chief executive need not have personally conducted the infrastructure assessment.

Was the infrastructure assessment process a jurisdictional fact?

[45] The applicants contend that the chief executive had no jurisdiction under s 29(1)(a)(ii) and s 49(1)(a)(i) because the authorisation holders had provided no information for an infrastructure assessment.[33] Whether that is so is a matter of statutory construction.[34] The appropriate approach was expressed by Spigelman CJ in *Timbarra*[35] as follows:

> "Any statutory formulation which contains a factual reference must be construed so as to determine the meaning of the words chosen by parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation. There is nothing special about the task of statutory construction with regard to the determination of the issue whether the factual reference is a jurisdictional fact. All the normal rules of statutory construction apply."

[46] It is axiomatic that the meaning of a particular provision in an enactment must be ascertained "by reference to the language of the instrument viewed as a whole".[36] To ascertain if a fact is jurisdictional, that is, that its existence is a precondition to the exercise of the power, the observation of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* is, respectfully, apt :[37]

> "…but the context, the general purpose and policy of a provision and its consistency and fairness are sure regards to its meaning and the logic with which it is constructed."

[47] Further observations of Spigelman CJ in *Woolworths Ltd v Pallas Newco Pty Ltd*[38] assist:

> "What is required is a careful analysis of the statute which confers the jurisdiction. Consideration must be given to the language of the power under consideration and to the total context of the legislative scheme in which the power is conferred, including the scope and nature of the jurisdiction and of the fact said to be jurisdictional."

When engaged in this construction exercise his Honour emphasised that what was involved was a specific application of the fundamental principle of judicial review

---

33 *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 177, cited with approval in *Kirk v Industrial Relations Commission of NSW* [2010] HCA 1 at [72].

34 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63-64; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389.

35 At [39].

36 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 per Mason and Wilson JJ.

37 (1955) 92 CLR 390 at 397; and see *Project Blue Sky* at [69].

38 [2004] NSWCA 422; (2004) 61 NSWLR 707 at [6].

of statutory decision making referring to the statement of principle by Brennan J in *Attorney-General (NSW) v Quin:*[39]

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power."

A passage from *Project Blue Sky* illuminates the present inquiry:

> "… A … test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."[40]

[48] As mentioned, the applicants contend that notwithstanding that the infrastructure assessment is a jurisdictional fact the chief executive can proceed to decide the volumetric limit or the water licence under ss 29 and 49. One might question whether, if the applicants are correct about jurisdictional error, how they can make this assertion.

[49] The major purposes and provisions of the Act and the *Water Resource (Condamine and Balonne) Plan* have largely been mentioned above. The chief executive is empowered to make a ROP to implement a WRP for any water in a plan area. A ROP must be preceded by a draft ROP.[41] The *Water Resource (Condamine and Balonne) Plan* commenced in August 2004. On that occurrence the chief executive was then empowered to prepare a ROP to implement the WRP. Pursuant to the Act the chief executive was required to publish a notice of the intention to prepare a draft ROP including details of how it was intended that community and technical consultation for the preparation of the draft plan would take place[42] and that written submissions could be made.[43] As soon as practicable after the notice was published the chief executive was required to explain by letter or public meeting the implications of the notice to as many affected water entitlement holders as possible.[44] The chief executive was also required to give each holder of an interim resource operations licence, a resource operations licence or other authorisation to operate water infrastructure for the management of water to which the proposed plan was intended to apply a notice requesting the holder to provide proposed arrangements for the management of the water.[45] Section 99 of the Act sets out the matters which the chief executive must consider when preparing the draft ROP and amongst those matters is the WRP for the plan area.

[50] Consistently with the mandated contents of a draft WRP[46], the *Water Resource (Condamine and Balonne) Plan* identified its purposes including providing a framework for sustainably managing water and the taking of water and providing a framework for establishing water allocations.[47] The desired outcomes for the plan area are set out extensively in s 9. They include that water is to be allocated and managed in a way that achieves a balance between a number of outcomes including

---

39 (1990) 170 CLR 1 at 35-36.
40 At [93].
41 Sections 95(3) and (98)(1)(a).
42 Section 96(2)(c).
43 Section 96(2)(d).
44 Section 95(4).
45 Section 97(1).
46 Section 46(1).
47 Section 3.

making water available to support economic activity in the plan area; to minimise any adverse affect on individual enterprise; consistently with Murray Darling Basin agreements and commitments to implement a cap on taking water; to recognise multiple users of water; in the Lower Balonne to provide for the granting of water licences to take overland flow water and to reduce the impact of the operation of water infrastructure on natural flow regimes.

[51] Amongst the strategies for achieving the identified outcomes is a directive that the chief executive must not make a decision that would increase the average volume of water available to be taken in the plan area[48] and that a decision made in preparing the first ROP must be consistent with certain identified objectives. Amongst the strategies to achieve the mandated outcomes is the preparation of the ROP. Other strategies include the conversion of authorisations to water allocations and provisions about supplemented and unsupplemented water and the regulation of overland flow water.

[52] Central to the processes set out in ss 29 and 49 are the identification of specific matters to which the chief executive must have regard when making wider decisions about water sharing rules in the plan area.[49]

[53] By the time the *Water Resource (Condamine and Balonne) Plan* 2004 was promulgated there was in existence a document entitled "Property Irrigation Infrastructure and Licence Information: St George and Lower Balonne Area" April 2003 prepared by Mr Levings. He had collated updated schematic maps and information obtained from land owners. In about April 2003 Mr Burgess instructed Dr Harding, a scientific consultant to the Department, who had attended meetings with land owners and was the scientist responsible for preparing the IQQM, to use the information collected to update the IQQM.

[54] The evidence reveals that there was a significant amount of communication both in Brisbane and St George between Departmental offices and individual authorisation holders and landowners as well as public meetings and individual meetings to gather information the purpose for which was clearly related to the regulation of water in the area, whether or not on each occasion that purpose was actually articulated. It seems somewhat disingenuous, without being disrespectful to Mr Graham, to say, as often as he does, that had he known that future rights were to be established from the information provided that he would have taken greater care in providing that information. The re-assessment of water entitlements was a matter of major importance in the district. It had been ongoing for some years. Complaints about what Mr Graham was doing on the properties were investigated by several senior Departmental officers in the context of water entitlements and building works and the Moratorium. No doubt the requests for information and the calling of meetings were vexing for a busy and financially stretched farmer, but, it might be asked, what did Mr Graham think the information concerned if not the regulation of water entitlements.

[55] The purpose in identifying the information in ss 29(1)(b)(ii) and 49(1)(a)(i) was to set limits for taking water consistent with the many purposes and desired outcomes in the legislation. There was no unfairness in the legislative decision to confine the information supplied for the infrastructure assessment to the period November 2002

---

48 Section 17.

49 Sections 32, 34 and 44 – 50.

to April 2003, contrary to the applicants' submissions, since s 29(6) did not limit the matters the chief executive could consider when setting the volumetric limit for unsupplemented water in the Lower Balonne or granting a water licence for taking overland flow water and it is clear from the statement of reasons that other and later material was considered.

[56] The information-gathering process was a past event. It was unnecessary, in any jurisdictional sense, or indeed, as a matter of procedural fairness (relied on in argument by the applicants) to flag expressly to the applicants in advance that that was what was occurring. I have concluded that the provision of information supplied by the authorisation holder during the period identified was for the infrastructure assessment as referred to in ss 29 and 49 of the *Water Resource (Condamine and Balonne) Plan* 2004.

Characterisation and nature of information supplied by the authorisation holder

[57] The denial that there was, qualitatively, any information supplied by the authorisation holder for the infrastructure assessment has been dealt with and the submission that the delegate took into account irrelevant considerations in considering that information must meet the same fate as the jurisdictional fact contention. The applicants further contend that, in effect, by failing to act upon the information provided by the applicants, in some respects, the delegate failed to take relevant matters into consideration. It is necessary to mention in more detail some of that flow of information.

Between November 2002 and April 2003

[58] Mr Graham had supplied the Department with information about water storage volumes and water flow in response to Departmental requests from 1999 as part of the WAMP process. It was well understood by Mr Graham that the collection of this information was part of the Queensland government's response to its commitments made to the Murray-Darling Basin Ministerial Council concerning water take within the Condamine – Balonne Basin area.[50]

[59] Mr Leon Leach, the local Departmental officer contacted the authorisation holders in the plan area in early November 2002, including the Munya Lake interests, seeking their co-operation in the release of storage volume information and other water flow information to the scientific review panel and the community reference group. In respect of each of the applicants' properties Mr Leach wrote:

> "To assist you I have provided the storage volumes as provided by you as well as the storage volume that is used in the IQQ Model.
>
> Would you please check the data below for any errors or omissions, and confirm that the information is correct. It is also important to identify how storages are filled: eg, from water harvest, overland flow water types (A or B), or with tailwater.
>
> Would you also be able to identify whether the diversion is gravity or pumped?"

---

[50] Mr Graham's first affidavit, paras 41 and 42.

[60] Mr Graham wrote his response on the faxed request documents from Mr Leach correcting some of the figures and ticking his agreement with others[51] and returned the documents by fax. The following information was provided in those responses:

"Bubby-Maur" (Kia-Ora North)	11,110 megalitres (IQQM 10,900 megalitres)
"Gulnarbar" (Kia-Ora South)	13,000 megalitres (IQQM 12,600 megalitres
Kia-Ora	104,300 megalitres including 9,600 megalitres for Western Lake (IQQM 94,700 megalitres)

[61] Mr Graham now says that the figures he provided were "estimates only" in the case of Kia-Ora North and in the case of Kia-Ora North and Kia-Ora South he did not include channel or surge areas as he did not consider that they were required. But the Departmental officers clearly understood that the figures were only estimates. The engineering certification was to provide accurate figures. In response to the request to check the overland flow rates he wrote on the documents dealing with Kia-Ora that he did not know anything about this and inserted his own estimated figures. Of these he now says that they did not include the separate diversion capability of about 2,800 megalitres per day via a 1,200 millimetre pipe. He deposes that it was his understanding when he responded to the gravity diversion rates that the information required were estimates only for the purposes of the WAMP process. Mr Graham's covering letter to Mr Leach of 13 November 2002 state that Kia-Ora needs to be amended as per "your letter 08-08-2000 (see attached)" and Kia-Ora gravity which was attached.

[62] Mr Graham subsequently telephoned Mr Leach and told him that the figures in relation to the gravity diversion rates were conservative estimates and needed to be confirmed after a big flow in the river. In a further note about the Kia-Ora information Mr Graham said he told Mr Leach that all of the figures were estimates only and would be surveyed after construction was completed. Mr Leach agreed that Mr Graham conveyed that information to him.

[63] By letter dated 14 November 2002 Mr Graham responded to oral requests from Mr Sorensen, the district manager of the Department, about works on Kia-Ora South and the completion of other work. Mr Graham undertook to fill the ring tank on Kia-Ora South to full supply level less the volume of water stored in the tailwater return channel only "if a stormwater situation fills the tailwater return channel". He noted that Mr Sorensen and two other officers of the Department inspected the development works and were satisfied with them.

[64] In February 2003 officers of the Department visited Kia-Ora South concerned about works comprising a 928 megalitre dam on Kia-Ora South to examine and discuss those works against the background of the Moratorium Notices of 16 August and 29 October 2001. Mr Sorensen referred to the flow path locally known as "The

---

[51] Some markings on the copy documents exhibited were those of Mr Glenn Lyons, an irrigation consultant, whose role in providing information is discussed below.

Glear" not as a watercourse but that the works were taking overland flow. Mr Graham was required to address certain questions in a statutory declaration.

[65] Mr Graham instructed his solicitors to prepare a suitable response and statutory declaration. That statutory declaration responded to the questions posed by Mr Sorensen that the tailwater return system for irrigation farming was to capture the first flush run off from chemically treated cropped plants and any contaminated stormwater to minimise run off to neighbouring properties. Mr Graham swore that the purpose of the construction works was not to capture overland flow from the flow path of The Glear and that Munya Lake did not intend to use the works in the future for the purpose of capturing overland flow from "The Glear". Subsequently, as discussed below, the applicants argued that there had been some earlier unspecified residual water storage capacity prior to the installation of the tailwater return system.

[66] As mentioned above, Mr Levings collated information received from authorisation holders into a document entitled "Property Irrigation Infrastructure and Licence Information: St George and Lower Balonne Area" dated April 2003. Maps of each of the Kia-Ora Aggregation properties with information about its water storage and works were contained on a single sheet for each property. A note on each states:

> "Details of overland flow, infrastructure volumes and diversions represent information provided by the relevant landholder/s."

The information for each property is in a box on the document. There are two relevant headings "Storage Name" and "Volume". The information under "Volume" is described as "Est provided by landholder." The figures for Kia-Ora are the same as provided by Mr Graham in response to Mr Leach's requests in November 2002 save for RT4 which is 12,000ML in Mr Graham's response and 10,400 megalitres in the entry in Mr Levings' information sheet. Mr Graham's handwritten note "Western Lake (see attached) 9,600" does not appear recorded in Mr Levings' document. The total from the information provided, as described in the document, is 93,100 megalitres. However, 116,100 megalitres was adopted as the storage volume figure by the delegate taking into account other information and the applicants do not challenge that figure.[52]

[67] For Kia-Ora North the estimated figure from the land holder is 11,110 megalitres. That was information provided by Mr Graham to Mr Leach.

[68] For Kia-Ora South the volume is 13,000 megalitres. That was information provided by Mr Graham to Mr Leach.

[69] The delegate considered that material.[53]

Information provided by Mr Lyons

[70] As mentioned above, Mr Brassington of the Department sent an email to water users in the Condamine Balonne Basin, including to Mr Graham, on the subject "Opportunity to discuss IQQM with Paul Harding". Mr Brassington wrote:

> "Dear Water Users,

---

[52] This information appears twice in Mr Levings' exhibit at pp 48 and 55.

[53] Para 1.4 of the statement of reasons.

> Consultant to [the Department's] Water Assessment Group, Paul Harding, will be visiting St George on 28 and 29 November 2002 to discuss any issues involving the IQQM for the Condamine Balonne.
>
> Should anybody wish to meet with Paul to discuss their individual licence information and the model, please contact me on … to make an appropriate time."

[71] All water users were contacted by telephone to attend. An appointment was made for the Munya Lake interests for Friday 29 November 2002. Mr Graham deposes that he was unable to attend that meeting and asked Mr Glenn Lyons to do so. Mr Lyons had for about ten years been employed by the Department in the Farm Advisory Services Group trained to design irrigation systems for use on farms and water licensing work. After he left the Department in about 1994 he was employed as a Development Manager at Cubbie Station and performed some ad hoc consulting work for the applicants in respect of the Kia-Ora properties. In 1997 he started his own consultancy company to provide advice to farms in the St George and surrounding areas and was engaged as a consultant by the Munya Lake entities. From 1998 he was contracted to Munya Lake on a regular basis to perform tasks as a development manager. He also provided that consultancy advice to Kia-Ora South and Kia-Ora North after they were purchased. He provided consultancy advice to other properties.

[72] Mr Graham was adamant that Mr Lyons was not authorised to provide any information at the meeting on behalf of the Munya Lake entities or make any commitments or agreements for them. He believed that the meeting was an information session like many others that had been held at the time. He deposed:

> "While I have no specific memory of the meeting, I am sure that I never authorised Glenn Lyons to give information regarding water or storage entitlements on my behalf or to make commitments on my behalf, because this is something that I have never done… If I had known that the meeting was to be one of importance I would have attended personally, most probably with my solicitor…"[54]

[73] Mr Lyons also regarded the meeting as "just another informal information gathering process".[55] He took some documents with him but could not clearly remember specific documents. It was plain when Mr Lyons gave evidence that although attempting to be of assistance, he had very little recollection of this meeting. That was hardly surprising given the lack of importance that he attributed to it, that it occurred in 2002 and that he did not make his affidavit until 7 October 2008. Mr Lyons said he was "bamboozled" by being faced with a panel of several Departmental representatives who all began firing questions at him when he walked into the meeting room. Those present were Dr Harding, Mr Leach, Mr Levings and Mr Burgess. He did recall

> "… that when the Department representatives indicated storage figures to me which I thought were incorrect I would say to them words to the effect of 'no, that's not right'."[56]

---

54 Mr Graham's second affidavit paras 17 and 18.
55 Affidavit of Mr Lyons, para 19.
56 Affidavit of Mr Lyons, para 20.

[74] A document which Mr Lyons recalled was given to him by Mr Graham about the meeting was as follows:

> "DO NOT GIVE ANY MORE INFORMATION
>
> Meeting with Paul Hardy [sic] Friday 29 November 2002 8.00am
>
> 1. Water Harvesting Monthly Extraction Out of Model.
>
> 2. Water Harvesting Extraction File.
>
> 3. Flow File (copies of all of the above).
>
> 4. 5% of water unaccounted water in model? Where was that going to?
>
> The channel area?
>
> Surat?
>
> Chinchilla?"[57]

Mr Lyons said that he understood the direction from Mr Graham to give no more information meant that he was not precluded from giving information and explaining generally how the farm worked and to discuss data which had been presented previously.

[75] The principal Departmental officers recall that at the meeting Dr Harding discussed with Mr Lyons whether the water harvesting licence details were accurate. Schematic maps for the Kia-Ora Aggregation properties were produced and discussed. Dr Harding made a number of notations on the maps identifying various water storages on Kia-Ora and Kia-Ora South. In discussions about storage located near the western boundary of Kia-Ora (Western Lake) Mr Lyons said that it was real storage but Mr Leach expressed the view that it would not be included because it did not come under the provisions relating to existing works under the moratorium provisions. Mr Lyons did not challenge that contention. Mr Burgess recalled that there was a discussion on the volume of water that could be stored on farm channels. Mr Lyons stated that the volume was 400 megalitres which was regarded as quite high by the Departmental officers and Dr Harding. Mr Lyons was insistent that that figure should be included and, after discussion, it was recorded on the map for Kia-Ora. There was also a discussion about extra water harvesting pumps beyond those authorised to take water from the Balonne River under the licences but Mr Lyons explained that they were back up pumps only.

[76] Mr Burgess was quite firm in recalling that when the issue of the overland flow take on Kia-Ora South was discussed Mr Lyons said that Kia-Ora South had no overland flow take from water breaking out from the Balonne River.

[77] Because Mr Lyons' handwriting, which he identified, appears on a number of the documents which were responsive to Mr Leach's email of 12 November 2002 seeking information from Mr Graham about the IQQM storage volumes and other

---

[57] Exhibit 6 to Mr Lyons affidavit.

matters, he accepted that it was likely that he conveyed some of those corrections at the meeting although his answer in cross-examination by Mr Hinson was that he could not recall. Mr Lyons agreed that if figures were put to him in the course of the meeting there was no reason why he would not have agreed that they were correct. Mr Lyons well understood that storage capacities were one of the inputs into the IQQM and were significant.

[78] Mr Lyons did not indicate to members of the meeting that he had attended in any limited capacity on behalf of Munya Lake and he did not attend on behalf of any other land owner water user.

[79] The applicants contend that not only did Mr Lyons have no actual authority to provide any information to the Department he had no ostensible authority to do so. Actual authority is irrelevant to this question. Ostensible authority is concerned with the appearance of authority.[58]

[80] Mr Graham made an appointment on receipt of the email from Mr Bressington and asked Mr Lyons to attend in the Munya Lake interests. The email inviting attendance, although not expansive, identified that it was in respect of the IQQM. This was of vital interest to authorisation holders seeking to convert to allocations and licences. Mr Lyons did not receive that email, it was sent to Mr Graham. So far as those attending from the Department were concerned, Mr Lyons was at the meeting as, indeed he was, to represent the Munya Lake interests. No reservations about his capacity to answer inquiries or provide information about the Kia-Ora Aggregation were communicated either by Mr Lyons or by Mr Graham to the Departmental officers constituting the meeting. Furthermore, Mr Lyons was known to Departmental officers as a person who was regularly retained by Mr Graham. For example, he is mentioned as being present with Mr Graham during the inspection of the alleged Moratorium breaching works prior to September 2002. Whatever information Mr Lyons gave was given as ostensible agent of the applicants.

Letter of 19 March 2003

[81] On 13 March 2003 Mr Graham received by facsimile transmission a letter from Mr Levings concerning the Kia-Ora Aggregation infrastructure schematics. Mr Levings wrote:

> "Please find attached a schematic of water resource infrastructure on Kia-Ora, South Kia-Ora, North Kia-Ora and Beardie [another property not the subject of this application]. This information has been compiled through discussions and represents information provided to the Department about storage details and overland flow. To complete the picture could you provide information regarding pump configuration; including pump locations, size and capacities for North Kia-Ora.
>
> Please review this material and send a return fax of the amended schematic to [phone number].

---

[58] *Lysaght Bros & Co. Ltd v Falk* (1905) 2 CLR 421 per Griffith CJ at 428; *Dal Pont Law of Agency*, 2nd ed (2008) p 530.

> Should you wish to discuss the matter further, you can contact me on [phone number]."[59]

These were the documents which were included in the information assessment document compiled by Mr Levings including the volumetric and flow figures.

[82] Mr Graham deposes that on 19 March 2003 he forwarded a letter to Mr Levings about those documents. This letter has been unable to be located within any Departmental files despite what appear to have been extensive searches by a great many officers. A considerable amount of time at the hearing was devoted to the way in which Mr Graham usually communicated with the Department; where he was at the particular time; whether the letter was sent by post and so on. I accept that the letter was not received by Mr Levings. The Department did not receive a copy until some years later in 2006 from the applicants' solicitors. It is likely that it was sent, given the solicitor's input. It is possible that it failed to be delivered or that, in some other way, the Department, being a very large organisation, it somehow went astray.

[83] The following was in the letter:

> "The water resource infrastructure set out on the plans attached to your facsimile are out of date and incorrect. In particular, the threshold, storage and pumping schedules for each of the properties are incorrect.
>
> I have previously provided updated information in relation to 'Kia-Ora' water resource infrastructure to the St George District Office of the Department of Natural Resources and Mines.
>
> I will be grateful if you could send to me by post photocopies of each of the plans attached to your facsimile in A2 configuration. I will then update and correct the details on those plans and forward them to you as per your request."

Mr Levings was not surprised to get no response from Mr Graham and Mr Graham did not follow up Mr Levings' failure to respond to his request. It is the chief executive's contention that that letter from Mr Graham contained no new information merely noting that the information had been provided to the St George office.

Subsequent information

[84] There were many communications between Mr Graham and his solicitors and officers of the Department during and after 2003 up until the promulgation of the draft ROP and thereafter. When the draft ROP was released in April 2007 it did not propose water allocations for the granting of water licences for the Kia-Ora Aggregation properties because the engineer's certificates which were required to be provided by the landholders for the purposes of ss 29 and 49 had not been provided within the time stipulated by the Munya Lake entities. Those certificates were received by the Department on 3 May 2007 and were compliant on 17 May 2007.

---

[59] First affidavit of Mr Graham "GJG-37".

The process for the determinations

[85] An Anomalies Panel was formed within the Department for the Condamine and Balonne draft ROP. The panel comprised Departmental officers with particular expertise relating to water licences and water flow information peculiar to the St George region. The panel was formed primarily to make recommendations to Ms Best for the purposes of approving the draft ROP. Mr Hausler was the chair of the Anomalies Panel. He was aware from discussions and generally that during the period November 2002 to April 2003 land holders did not have accurate survey information about the volume of their off stream storages and the Department understood that the information supplied by them would have been estimated volumes only. In considering the infrastructure assessment the Anomalies Panel had regard to the April 2003 information material as collated and the various other communications from authorisation holders on the file.

[86] Where there were anomalies, discrepancies or issues of contention identified through the process the Panel attempted to ascertain the true position by considering a wide range of supporting information. Mr Hausler sets out the material to which the Panel had reference at para 27 of his affidavit. It included information from Departmental files and records; information supplied prior to 2002 by authorisation holders; field visits and assessments; aerial photographs and satellite images; survey plans and the digital cadastral database. Mr Hausler was aware of the stream of information from Mr Graham and his solicitors to the Department between 2003 and 2007 regarding the determination of water entitlements for the Kia-Ora properties. It was contained in a compendium of documents. When considering the Kia-Ora Aggregation water entitlements the Anomalies Panel undertook a review of the additional information to determine the validity and accuracy of specific issues relating to the Kia-Ora properties including information provided by previous authorisation holders and that the properties were operated as an aggregate; that the Department had not responded to Mr Graham's letter dated 19 March 2003; that the works on Kia-Ora South were constructed in accordance with the Moratorium; there were additional storages located on Kia-Ora South in the engineer's certificate; the existence of overland flow works on Kia-Ora South in the engineer's certificate; and additional and different overland flow works on Kia-Ora South in the engineer's certificate.

[87] Mr Hausler conceded that the panel did not follow up the letter dated 19 March 2003 and did not put it before the delegate but he was of the view that he conveyed orally to the delegate any issues relating to the Kia-Ora Aggregation. The list of material the delegate relied on includes material from the applicants and their solicitors. I have concluded that the delegate "brought her mind to bear" on the necessary issues.[60]

[88] The Anomalies Panel considered a number of documents prior to making its recommendations including the *Water Resource (Condamine and Balonne) Plan* 2004, the schematic maps from Mr Levings compilation of April 2003, the water licences relevant to each property, the licence to interfere application by previous land holders for Kia-Ora South, and certain documents relating to the compliance investigation conducted in 2002 by the Department on Kia-Ora South to which

---

[60] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31 per Gibbs CJ; *Meshlawn Pty Ltd v The State of Queensland* [2009] QSC 215.

reference has already been made. The Panel also considered the engineer's certificates provided for each of the properties, the Information Memorandum of November 2004 prepared for the sale of Kia-Ora by Munya Lake's advisers, aerial photographs of the Munya Lake properties and other mattes set out at para [31] of Mr Hauslers' affidavit.

[89] Mr Hausler and Mr Saji Joseph, Director Water Planning South West met with Ms Best on 19 July 2007. They presented her with the Anomalies Panel's recommendations and the documentation that supported those recommendations.

Discussion

[90] As has been set out above, the applicants do not challenge a number of determinations made by the delegate. The delegate determined that the s 29(1)(b)(ii) figure for Kia-Ora based on information supplied by the authorisation holder for the infrastructure assessment was 116,100 megalitres. This is not challenged. The delegate determined that the figure for Kia-Ora South was 13,000 megalitres. This figure is not challenged.

[91] The delegate determined the Kia-Ora North figure pursuant to s 29(1)(b)(ii) as 11,100 megalitres. The applicants have challenged that decision, as discussed, because:

- There was no infrastructure assessment and no information supplied by the authorisation holder for the infrastructure assessment.
- As a result the delegate had no jurisdiction to make the determinations that she did because an infrastructure assessment is a jurisdictional fact and without it she could not embark upon the exercise of her powers.
- If the infrastructure assessment is not characterised as a jurisdictional fact nonetheless they are facts which must be established in order to make the decision and there was no material from which the delegate would reasonably be satisfied that those facts existed.
- Since the material which was taken into account by the delegate was not information supplied by the authorisation holder for the infrastructure assessment she took into account an irrelevant consideration.

[92] The applicants do not challenge the delegate's determination for Kia-Ora that the volumetric limit under s 29(1)(b) is 116,100 megalitres as the lesser of the two figures. The applicants challenge the decision under s 29(1)(b) in relation to Kia-Ora North that the volumetric limit would be 11,100 megalitres, being the lesser of the two figures. They challenge the decision for Kia-Ora South that the volumetric limit would be 8,290 megalitres, being the lesser of the two figures. The challenge to the s 29(1)(b) figure for Kia-Ora South is not based on the want of infrastructure assessment. The applicants submit that the delegate failed to take into account in determining the s 29(1)(b)(i) figure that there was existing water infrastructure works on Kia-Ora South which could be identified on a 14 March 2002 aerial photograph and erred in finding that works for the storage of overland flow water would lose their status as existing works if they were subsequently incorporated into a tailwater return best practice system.

[93] The delegate concluded that the tailwater return systems were not "existing works" within the meaning of Schedule 5 of the *Water Resource (Condamine and Balonne) Plan* because they were not in existence on or started by 20 September 2000 and completed by 30 November 2001 and were not works that allow taking overland flow water.

[94] The photograph, and a subsequent photograph, were in the material placed before the delegate. The delegate found that those works were not works that allowed taking overland flow water. That was consistent with the explanation in Mr Graham's statutory declaration of 12 March 2003 that the purpose of the works on Kia-Ora South was not to capture overland flow water. Mr Graham deposed that there was a storage area on Kia-Ora South produced by a bund and channels in existence when it was purchased in September 2002. It had existed on the property prior to 2000, had been used in part to create a storage area and in part for tailwater purposes. He contended that it had stored water and could be seen on the photograph of 14 March 2002. Mr Graham's recollection is not supported by the information which was provided by the former owner of Kia-Ora South in 2000.

[95] Mr Graham said that he told the Department on 31 October 2006 that no new water storages had been constructed on Kia-Ora South since the purchase in September 2002. The report by Mr Sorensen shows that an embankment was constructed along the southern boundary or in the process of being constructed as at May 2002. The November 2003 aerial photograph shows that the bund was raised and widened after May 2002. The applicants concede this. That fact is that the delegate had all necessary information to found her decision and what she made of the photograph was a matter for her.

Conclusion

[96] Although the applicants disagree with some of the decisions made by the delegate about water entitlements they have not identified any failure to *take into account* any relevant material or information which might have caused her to come to a different decision. I have discussed and dismissed the other grounds, namely that of jurisdiction, no evidence, and the personal involvement of the chief executive in the infrastructure assessment, advanced by the applicants for challenging the decisions of the delegate in the body of these reasons and rejected them.

Order

The application is dismissed.