SUPREME COURT OF QUEENSLAND

CITATION:	*Schwennesen v Minister for Environment and Resource Management* [2010] QCA 340
PARTIES:	**WILLIAM ALFRED SCHWENNESEN** (applicant/appellant) **v** **MINISTER FOR ENVIRONMENT AND RESOURCE MANAGEMENT** (respondent/respondent)
FILE NO/S:	Appeal No 3746 of 2010 SC No 12028 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2010
JUDGES:	Holmes and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – EXCLUDED DECISIONS – DECISIONS OF GOVERNORS-GENERAL AND GOVERNORS – where the appellant asked the respondent Minister for a statement of reasons in relation to the determination of his rights and conditions attaching to his water allocations in relation to the Governor in Council's decision to make the *Condamine and Balonne Resources Operation Plan* 2008 – where the respondent Minister refused to give reasons and contended that the Governor in Council's decision was not of an administrative character – where the appellant applied for an order that the Minister give a statement of reasons pursuant to s 38 of the *Judicial Review Act* 1991 (Qld) – where the primary judge dismissed the application and held that the decision was not of an administrative character – where the appellant argued that the primary judge erred in analysing factors relevant to the assessment of whether the decision was of an administrative character – where the appellant argued that

the primary judge erred in not attributing sufficient weight to the factors that favoured an administrative characterisation of the decision – whether the primary judge erred in characterising the decision as essentially legislative – whether the decision was of legislative or administrative character – whether an analysis of the decision demonstrates that its administrative characteristics were displaced by its legislative characteristics

Acts Interpretation Act 1901 (Cth), s 33(3)
Acts Interpretation Act 1954 (Qld), s 24AA
Judicial Review Act 1991 (Qld), s 4, s 20, s 32, s 38
Water Act 2000 (Qld), s 10(1), s 93(1), s 95, s 100(4), s 103, s 103(5), s 103(7), s 104, s 105, s 106(a), s 107, s 206, s 216
Condamine and Balonne Resources Operation Plan 2008 (Qld), s 11, s 25(1), s 25(2), s 27, s 52, s 290, s 291, s 293, s 305, s 311, s 316, s 371
Water Resources (Condamine and Balonne) Plan 2004 (Qld)

Austral Fisheries Pty Ltd v Minister for Primary Industries & Energy (1992) 37 FCR 463; [1992] FCA 351, applied
Braemar Power Project Pty Ltd v The Chief Executive, Department of Mines and Energy in his Capacity as the Regulator Under the Electricity Act 1994 (Qld) [2008] QSC 241, discussed
Currareva Partnership v Welford [2000] QSC 98, cited
Evans v Friemann (1981) 35 ALR 428; (1981) 53 FLR 229; [1981] FCA 85, discussed
Federal Airports Corporation v Aerolineas Argentinas (1997) 76 FCR 582; (1997) 147 ALR 649; [1997] FCA 723, discussed
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
H A Bachrach Pty Ltd v Minister for Housing (1994) 85 LGERA 134, discussed
Hamblin v Duffy (1981) 34 ALR 333; [1981] FCA 38, cited
McWilliam v Civil Aviation Safety Authority (2004) 142 FCR 74; (2004) 214 ALR 251; [2004] FCA 1701, discussed
Queensland Medical Laboratory v Blewett (1988) 84 ALR 615; [1988] FCA 423, discussed
R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170; [1981] HCA 74, cited
Resort Management Services Ltd v Noosa Shire Council [1995] 1 Qd R 311; [1993] QCA 347, discussed
RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 113 FCR 185; (2001) 185 ALR 573; [2001] FCA 855, applied
SAT FM Pty Ltd v Australian Broadcasting Authority (1997) 75 FCR 604; [1997] FCA 647, cited

The Commonwealth v Grunseit (1943) 67 CLR 58; [1943] HCA 47, cited
Tooheys Ltd v Minister for Business & Consumer Affairs (1981) 36 ALR 64; (1981) 54 FLR 421; [1981] FCA 121, cited
William Alfred Schwennesen v Minister for Environment & Resource Management (2010) 176 LGERA 1; [2010] QSC 81, related

COUNSEL: A J Greinke for the appellant
S A McLeod for the respondent

SOLICITORS: Shannon Donaldson Province Lawyers for the appellant
Crown Solicitor for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and with the order he proposes.

[2] **FRASER JA:** The appellant, a farmer in the Condamine and Balonne catchment, asked the respondent Minister to give a statement of reasons in relation to the determination of the appellant's rights and conditions attaching to his water allocations in relation to the Governor in Council's decision to make the *Condamine and Balonne Resources Operation Plan* 2008 ("the ROP"). The Minister refused to give reasons.

[3] Under s 32 of the *Judicial Review Act* 1991 (Qld) a person is entitled to request reasons for a decision only if the person is entitled to make an application to the court under s 20. Section 20 empowers a person to apply for a statutory order of review only in relation to a decision "to which this Act applies". That term is defined in s 4 to mean, so far as is relevant here, a decision "of an administrative character made… under an enactment". The Governor in Council's decision was made under an enactment, s 103 of the *Water Act* 2000 (Qld), but the Minister refused the request for reasons for the decision on the ground that the making of the ROP was not a decision of an administrative character. The Minister referred also to delay in making the request but that ground for refusing the request was subsequently abandoned.

[4] The appellant applied in the trial division for an order pursuant to s 38 of the *Judicial Review Act* 1991 (Qld) that the respondent Minister give a written statement of reasons. The primary judge upheld the Minister's contention that the decision was not of an administrative character for the purposes of the *Judicial Review Act* 1991 (Qld) and dismissed the application.[1]

The primary judge's reasons

[5] The relevant factual background is set out in the following passage of the primary judge's reasons:

> "[3] The applicant is the owner of a property, "Warkon", which abuts the Balonne River, approximately 60 kilometres upstream of Surat. The property lies within the area of the *Water Resource (Condamine and Balonne) Plan* 2004[2]

[1] *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81.
[2] Published on 3 December 2004.

made under the *Water Act* 2000. The applicant held certain water entitlements which were converted to tradable water allocations under the draft resource operation plan for the Condamine and Balonne ("the Draft ROP") released on 20 April 2007.[3] Schedule 4.8 of the Draft ROP set out the conversions for the Condamine and Balonne Water Management Area and included the applicant's water licence 50861N converted to water allocation 58.[4] Schedule 4.10 of the Draft ROP set out the conversion for the Tributaries Water Management Area and includes the applicant's water licence 37165N converted to water allocation 541.

[4] On 22 June 2007, the applicant lodged a detailed submission with the chief executive ("the chief executive") of the Department of Environment & Resource Management and ("the Department"). In summary, the applicant contended that his property had, for many years, had the benefit of a water storage and irrigation system taken from the Balonne River, designed and approved by the Water Resources Commission, in an area known as Warkon Lagoon. This facility was not the subject of an express licence, although it was authorised, and was not reflected in water allocation 541. It had a capacity of 2,571 megalitres while the limit in allocation 541 was 780 megalitres. The applicant sought the amendment of the Draft ROP so that the long existing storage capacity could be converted to a larger water allocation. The applicant's submissions set out the history of his dealings with the Department and the Water Commission, dating from 1977, which, as he understood, had encouraged him to expend monies and to add to the water storage facility on his property. He was of the opinion that once a certain embankment was constructed, the lagoon ceased to be a watercourse; a view that was apparently initially, but not subsequently, shared by officers in the Department. The work ceased after embargos were imposed generally in the Condamine and Balonne areas in 1992. To answer the question posed on this application it is unnecessary to consider these factual issues further.

[5] The Draft ROP was re-released for public consultation on the Department's website on 27 July 2007 and contained some amendments but none to the applicant's water entitlements, which remained as specified in the original Draft ROP.[5]

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3 "RBC-3" to the affidavit of Richard Brook Crowthers filed 15 December 2009 in these proceedings, ("Crowthers").

4 At p 230 of the Draft ROP.

5 While not relevant to the applicant's property, for completeness, a notice was published dated 4 December 2008 pursuant to s 103(5)(b)(i) of the *Water Act* 2000 notifying the decision of the chief executive to defer making any provisions about a particular aspect of the Draft ROP, namely, the Lower Balonne.

[6] On 11 December 2008 the Governor-in-Council approved the *Condamine and Balonne Resource Operations Plan* 2008 ("the Final ROP") for the upper and middle parts of the plan area.[6] On 12 December 2008 the approval of the Final ROP by Governor-in-Council was notified in the Queensland Government Gazette.

[7] By undated letter which Mr Crowthers (the General Manager Water Allocation and Planning in the Department) deposes was forwarded on 12 December 2008, the applicant was notified that the *Condamine and Balonne Resource Operations Plan* 2008 had been finalised for the Upper and Middle Catchment. The applicant received this correspondence on or about 20 December 2008. It included two decision notices about the grant of water allocations – 58 and 541 – under the hand of Aaron Stasi as delegate of the chief executive. In the case of water allocation 58, the nominal volume is 13 megalitres and the volumetric limit is "not greater than 13,000 megalitres per water year". The maximum rate is 5.6 megalitres per day. The water taken under the authority of the allocation cannot be stored. The following appears under the heading "Reasons for the Decision":

> The water allocation 58 is granted under section 121(1) of the *Water Act* 2000 in accordance with the conversion specified for the authorisation for 50861N detailed in the Condamine and Balonne Draft Resource Operations Plan (July 2007).

The same conditions and reasons appear on the decision notice for the grant of water allocation 541, except that the nominal volume is 780 megalitres, the volumetric limit "not greater than 1040.000 megalitres per water year" and the maximum rate is 21.6 megalitres per day.

[8] The applicant did not seek advice from his solicitors about his water allocation grant until 29 January 2009. The delay in seeking that advice was attributed, by the applicant, to the intervening Christmas period and holidays, the demands of the farming operations at that time of the year and the difficulty for the applicant in coming into Dalby (where the solicitors hold their office) from his property and his home in Brisbane, several hours' drive in each case. On 4 February 2009 dialogue commenced with the chief executive about the decisions relating to the water allocations grants. When the applicant applied for an internal review, the Department concluded that he was not entitled to an extension of time under the relevant provisions of the *Water Act*, not being an "interested person".[7]

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6 "RBC-7" to Crowthers. The area is vast, covering hundreds of square kilometres broadly from Killarney/Warwick in the south-east to Toowoomba and across to Miles, Roma and north of Mitchell.

7 Sections 851 and 862 of the *Water Act*.

> [9] The applicant then sought a statement of reasons from the chief executive about the decision to make the Final ROP and, in particular, the decision to grant water allocations 58 and 541. Crown Law responded on behalf of the Department that the decision of the chief executive had been superseded by the decision of the Governor-in-Council to approve the *Condamine and Balonne Resource Operations Plan* 2008 under s 103(5) of the *Water Act* 2000 as the final and operative determination in relation to the ROP. The writer further advised that the applicant was not entitled to a statement of reasons in respect of that decision since the decision was legislative rather than administrative in character and was not, therefore, a decision to which the *Judicial Review Act 1991* applied."[8]

[6] The parties acknowledged the accuracy of the primary judge's following summary of the relevant provisions of the *Water Act* 2000 (Qld) relating to the making of Water Resources Plans in Division 2 of Part 3 and Resource Operations Plans in Division 2 of Part 4 of that Act:

> "[10] The scheme of the *Water Act* 2000 and the *Water Resource Condamine and Balonne) Plan* 2004 need to be considered before turning to the issue before the court.
>
> *(i) The Water Act 2000*
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> *The Water Act* ("the Act") was passed in 2000 to provide, inter alia, for the sustainable management of water and other resources. This occurred against a background of concern about the sufficiency of water for the environment and that water entitlements were tied to the land. The purpose of Chapter 2 with which this application is concerned:[9]
>
> > … is to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water.
>
> The expression "sustainable management" is management that:[10]
>
> > (a) allows for the allocation and use of water for the physical, economic and social well being of the people of Queensland and Australia within limits that can be sustained indefinitely; and
> >
> > (b) protects the biological diversity and health of natural ecosystems; and
> >
> > (c) contributes to the following –

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8 Section 4 of the *Judicial Review Act*.

9 Section 10(1) of the *Water Act*.

10 Section 10(2).

(i) improving planning confidence of water users now and in the future regarding the availability and security of water entitlements;

(ii) the economic development of Queensland in accordance with the principles of ecologically sustainable development;

(iii) maintaining or improving the quality of naturally occurring water and other resources that benefit the natural resources of the State;

(iv) protecting water, watercourses, lakes, springs, aquifers, natural ecosystems and other resources from degradation and, if practicable, reversing degradation that has occurred;

(v) recognising the interests of Aboriginal people and Torres Strait Islanders and their connection with the landscape in water planning;

(vi) providing for the fair, orderly and efficient allocation of water to meet community needs;

(vii) increasing community understanding of the need to use and manage water in a sustainable and cost efficient way;

(viii) encouraging the community to take an active part in planning the allocation and management of water;

(ix) integrating, as far as practicable, the administration of this Act and other legislation dealing with natural resources.

The expression "efficient use" of water:[11]

(a) incorporates demand management measures that achieve permanent and reliable reductions in the demand for water; and

(b) promotes water conservation and appropriate water quality objectives for intended use of water; and

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[11] Section 10(3).

(c) promotes water recycling, including, for example, water reuse within a particular enterprise to gain the maximum benefit from available supply; and

(d) takes into consideration the volume and quality of water leaving a particular application or destination to ensure it is appropriate for the next application or destination, including, for example, release into the environment.

[11] The Act sets out certain principles described as "principles of ecologically sustainable development",[12] which it is unnecessary to set out here, but which provide that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations and should provide for broad community involvement. Chapter 2 Part 2 concerns water rights. All rights to the use, flow and control of water in Queensland are vested in the State.[13] However, water may be taken and used in an emergency situation such as fire fighting, and a land owner adjoining a watercourse may take water for stock purposes or domestic purposes and may take overland flow water for the same purposes.[14] There are many provisions in this Part of the Act about the conservation of water but only those relevant to the issues in this application need be mentioned further.

[12] To give effect to the purposes of Chapter 2, the Minister must plan for the allocation and sustainable management of water to meet Queensland's future requirements.[15] The chief executive is obliged to provide information for planning purposes and is directed how to do so.[16] The chief executive must also plan for the sustainable management of water use to minimise adverse impacts of water use on land and water.[17]

(ii) Water resource plans

[13] The Minister may prepare a water resource plan for any part of Queensland to advance the sustainable management of water.[18] The purposes of such a plan, 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 identify priorities and mechanisms for dealing with

12 Section 11.
13 Section 19.
14 Section 19(2)-(4).
15 Section 35(a).
16 Section 35(b).
17 Section 35(c).
18 Section 38(1).

future water requirements, to provide a framework for establishing water allocations and regulate the taking of overland flow water if there is a risk that taking overland flow water in the area may significantly impact on the plan's outcomes.[19]

[14] The Minister is required to publish a notice of the intention to prepare a draft water resource plan for the proposed plan area.[20] Before doing so the Minister must prepare an information report available for public inspection[21] about water allocation and sustainable management issues and arrange for establishing a community reference panel to provide advice about matters relevant to the preparation of a draft water resource plan.[22] The notice must state a number of things including that written submissions may be made about the proposed draft plan.[23] That notice must be sent by the Minister to each local government whose area includes all or part of the proposed plan area[24] and a local government receiving a notice must make a copy available for inspection by the public.[25] The Minister is required to establish a community reference panel immediately the notice is published.[26] The Act sets out the matters which the draft water resource plan must contain and the matters which it may contain.[27]

[15] The Minister is directed to consider certain matters when preparing the draft water resource plan, including the State's water rights, the volume and quality of water, national, State and regional objectives and priorities for promoting sustainable development, and existing water entitlements.[28] Once the draft water resource plan has been prepared, the Minister must publish a notice stating where copies of the draft may be inspected, that written submissions may be made and other procedural matters.[29] The Minister may prepare a further draft water resource plan after considering all of the relevant submissions.[30] In preparing the final water resource plan, the Minister must consider all properly made submissions about the draft plan.[31] Such a plan does not have affect until it has been approved by the Governor in Council.[32] A final water resource

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19 Section 38(3), (4).
20 Section 40.
21 Section 1009.
22 Section 39.
23 Section 40(2).
24 Section 40(4).
25 Section 40(5).
26 Section 41.
27 Section 46(1) and (2).
28 Section 47.
29 Section 49.
30 Section 49.
31 Section 50(1).
32 Section 50(2).

plan is subordinate legislation for the *Statutory Instruments Act* 1992 and is the water resource plan for the plan area.[33] If the Minister decides not to proceed with the preparation of a draft water resource plan, the Minister must publish a notice advising of that decision and the reason for decision.[34]

[16] A water resource plan may be amended by the Minister or be replaced by a new plan.[35] However, the Governor in Council may approve minor amendments to a water resource plan without going through the processes which are legislated for in preparing a draft water resource plan.[36]

(iii) Resource operations plan

[17] Chapter 2 Part 4 of the Act provides for the implementation of a water resource plan by the preparation of a resource operations plan, the granting of resource operations licences, the conversion of existing water licences and interim water allocations to water allocations, the granting of water allocations, and allowing for the registration of, and dealings with, water allocations.[37] Under the Act the chief executive has the responsibility for preparing a resource operations plan to implement a water resource plan for any water in the plan area.[38] Before doing so the chief executive must prepare a draft resource operations plan.[39] The Act provides for a process to occur, not dissimilar to that for a water resource plan, leading to a final resource operations plan ("ROP") and may be summarised as follows:

- A public notice of intention to prepare a draft ROP must be given;[40]
- The notice must state certain matters, including that written submissions may be made about the proposed draft plan;[41]
- After the notice is published, the chief executive must explain, by letter or public meetings, the implications of the notice to as many affected water entitlement holders as possible;[42]
- The chief executive must send a copy of the notice to each local government whose area is included in the proposed plan area;[43]

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33 Section 50.
34 Section 52.
35 Section 55.
36 Section 57.
37 Section 94.
38 Section 95.
39 Section 95(3).
40 Section 96(1).
41 Section 96(2).
42 Section 96(4).
43 Section 96(5).

- The chief executive may send a copy of the notice to any other entity that the chief executive considers appropriate;[44]
- The chief executive is required to give the each holder of an interim resource operations licence specific notice requesting the holder to provide proposed arrangements for the management of the water;[45]
- Certain matters the draft ROP must contain;[46]
- Certain matters the draft ROP may contain;[47]
- The chief executive must consider certain matters when preparing the draft ROP, including all properly made submissions (defined in Schedule 4);[48]
- The chief executive must publish a notice when the draft ROP has been prepared stating where it may be accessed, and that written submissions may be made;[49]
- Following the notice, the chief executive must explain by letter or public meetings the implications of the notice to as many affected water entitlement holders as possible;[50]
- The chief executive must send a copy of the notice and draft ROP to each local government whose local government area is included in the proposed plan area and each holder who made a proposal under s 97 (water infrastructure operators);[51]
- Provision is made for existing water entitlement holders to give the chief executive a notice in the approved form stating the holders wish to be recorded on the water allocations register other than as tenants in common in equal shares (and other matters relating to title);[52]
- Provision is made for review of properly made submissions;[53]
- The chief executive may decide whether or not to prepare a final draft ROP;[54]
- The Governor in Council may approve the final draft ROP if it is not inconsistent with the water resource plan. Such approval is required for the final draft to become the ROP for the relevant water resource plan area;[55]

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44 Section 96(7).
45 Section 97.
46 Section 98(1)(3) and (4).
47 Section 98(2) and (5).
48 Section 99.
49 Section 100(1) and (2).
50 Section 100(4).
51 Section 100(5).
52 Section 101(a).
53 Section 102.
54 Section 103.
55 Section 103(5).

- Notice of the approval must be gazetted;[56]

- When approved, the final draft is the ROP for the water resource plan.[57]

[18] If the chief executive decides not to proceed with the preparation of a draft ROP or a final draft ROP, then the chief executive is required to publish a notice advising of that decision and the reasons for it and send a copy of that notice to each local government area in the plan area.[58] When a local government receives a copy of the notice it must make a copy available for inspection by the public.[59]

[19] Subdivision 2 provides for the amendment of a ROP. Amendment may be made by the chief executive and if a ROP becomes inconsistent with a water resource plan, then the ROP must be amended.[60] The subsequent provisions set out the method for preparing an amendment similarly to the provisions for changes to a water resource plan by the Minister. The Governor in Council may approve an amendment of a ROP without the procedural requirements relating to the preparation of a ROP if the amendments are minor."[61]

[7] The primary judge referred to judicial statements about the difficulties in attempting a precise definition of "administrative"[62] and to the reservations expressed by Kiefel J in *H A Bachrach Pty Ltd v Minister for Housing*[63] and Selway J in *McWilliam v Civil Aviation Safety Authority*[64] about characterising decisions by first determining whether the decision was legislative or by assuming that administrative and legislative decisions fell in two mutually exclusive categories. Her Honour then observed that:[65]

> "Notwithstanding the reservations of Kiefel J and Selway J, the use of the expression "administrative" by the legislature does tend to signify that what is to be kept in mind is the trichotomy between the legislative, the administrative and the judicial "as an exhaustive definition of decision making" [*Queensland Medical Laboratories v Blewett* at 633…] In each sphere, as Gummow J recognised in *Blewett*, there are many incidental functions which display some of

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56 Section 103(6).
57 Section 103(7).
58 Section 104.
59 Section 104B.
60 Section 105.
61 Section 106.
62 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 per Mason J at 225; *Evans v Friemann* (1981) 35 ALR 428 at 433 per Fox ACJ; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 633 per Gummow J; *Griffith University v Tang* (2005) 221 CLR 99 at 123 per Gummow, Callinan and Heydon JJ, Gleeson CJ agreeing, Kirby J dissenting; *Hamblin v Duffy* (1981) 34 ALR 333 at 339 per Lockhart J.
63 (1994) 85 LGERA 134 at 138.
64 (2004) 214 ALR 251 at 259 to 260.
65 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [24]-[25].

> the characteristics of the principle activities in other fields [See discussion at 634-635].
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> . . .
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> I am not persuaded that these observations by Kiefel J and Selway J are out of step with the approach in cases such as *RG Capital Radio Ltd v Australian Broadcasting Authority* [[2001] FCA 855; (2001) 185 ALR 573] and *Griffith University v Tang* [[2005] HCA 7; (2005) 221 CLR 99]. Analysing the indicators is a useful exercise and, as this case reveals, most decisions in respect of which there is controversy will have features of both. It is ultimately a question of judgment as to whether the factors suggesting the decision is legislative will displace those that would suggest the contrary."

[8] The primary judge then analysed the decision with reference to the indicators of a legislative decision in the form expressed by Philip McMurdo J in *Braemar Power Project Pty Ltd v The Chief Executive Department of Mines and Energy in his Capacity as the Regulator Under the Electricity Act 1994 (Qld)*:[66]

> "(i) creates new rules of general application, rather than applying existing rules to particular cases;
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> (ii) must be publicly notified in the Gazette or similar publication;
>
> (iii) cannot be made until there has first been wide public consultation;
>
> (iv) incorporates or has regard to wide policy considerations;
>
> (v) can be varied or amended unilaterally by its maker, the analogy being to primary legislation;
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> (vi) cannot be varied or amended by the executive;
>
> (vii) is not subject to merits review in a tribunal;
>
> (viii) can be reviewed in Parliament (for example, as a disallowable instrument);
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> (ix) triggers the operation of other legislative provisions; and
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> (x) has binding effect."

[9] The primary judge noted that no single one of those factors was determinative and that ultimately the conclusion was a matter for judgment.[67] After discussing the

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66 [2008] QSC 241 at [21], derived from the analysis in Aronson, Dyer & Groves, *Judicial Review of Administrative Action* (4th Ed, 2009) at pp 75-76 of *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604; *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 424; and *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

67 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [27].

application of those factors in relation to this decision her Honour concluded that the decision was legislative in character, it was therefore not susceptible to review pursuant to Part 3 of the *Judicial Review Act* 1991 (Qld), and the Minister was thus not required to provide reasons.[68]

The appellant's arguments: analysis of the relevant factors

[10] The appellant accepted that the primary judge identified the factors which were relevant to the question whether the decision was of an administrative character, but the appellant argued that her Honour made mistakes in analysing those factors and failed to attribute sufficient weight to factors favouring an administrative characterisation, particularly the factors that the decision applied to identified individuals and that there was no parliamentary oversight. I will refer to the arguments in more detail in the course of considering the relevant factors.

Creates new rules of general application, rather than applying existing rules to particular cases

[11] In *The Commonwealth v Grunseit*[69] Latham CJ said that the general distinction between legislation and the execution of legislation is that "legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases." As the primary judge observed, this distinction is not itself of sufficient assistance to answer the question of characterisation in this case.[70] Her Honour referred to Gummow J's observation in *Queensland Medical Laboratory v Blewett*[71] that to accept that distinction was "not necessarily to accept the further proposition that to qualify as a law, a law must formulate a rule of general application" and to the discussion by Lehane J in *Federal Airports Corporation v Aerolineas Argentinas*[72] of authorities for the proposition that a decision which imposes obligations and is of general operation may nevertheless be administrative in character.

[12] Notwithstanding those qualifications the primary judge regarded this consideration as favouring a legislative characterisation. Her Honour concluded that the ROP was couched for the most part in non-specific terms with its purpose being the implementation of the *Water Resources (Condamine and Balonne) Plan* 2004, and that the ROP followed and gave effect to the mandated outcomes of that plan by specifying processes, rules and limits which were consistent with the environmental flow objectives and providing for monitoring and reporting arrangements to assist in the ongoing assessment of where the water allocations and management arrangements would contribute to the plan outcomes.[73]

[13] The appellant argued that the primary judge should have concluded instead that the ROP does not relevantly formulate rules of general application. The appellant emphasised the provision in the ROP that obliges the chief executive to grant water allocations under the *Water Act* 2000 (Qld) to licence holders under the earlier

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68 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [41].

69 (1943) 67 CLR 58 per Latham CJ at 82.

70 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [28]-[29].

71 (1998) 84 ALR 615 at 635.

72 (1997) 147 ALR 649 at 657.

73 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [33].

legislation for water authorisations converted under the ROP in accordance with a schedule which fixes the volumetric limits and maximum rates and imposes a condition that water taken under such allocations cannot be stored.[74] The effect of the appellant's argument was that this provision defined the essential character of the ROP as administrative.

[14] However that provision is itself an aspect of the much broader scope of the ROP, which regulates the long term use of the water resource "to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water."[75] Consistently with the breadth of that object the prescribed content of a resource operations plan does not focus upon any individual interest. Section 98(1) of the *Water Act* 2000 (Qld) provides that the draft resource operations plan must:

> "(a) state the water resource plan for which the draft plan is being prepared; and
>
> (b) contain a map of the proposed plan area; and
>
> (c) state the water to which the draft plan is intended to apply; and
>
> (d) identify any water infrastructure to which the draft plan is intended to apply and how it will be operated; and
>
> (e) state how the chief executive will sustainably manage water to which the draft plan is intended to apply; and
>
> (f) state the water and natural ecosystem monitoring practices that will apply in the proposed plan area; and
>
> (g) state how the draft plan addresses water resource plan outcomes."

[15] Accordingly, within the very large area of the State in which the ROP applies it regulates the purposes for which water taken under a water allocation may be used,[76] it regulates all future applications for water licences under s 206 of the *Water Act* 2000 (Qld) and for amendments to water licences made under s 216 of the Act,[77] and it regulates applications to interfere with the flow of water or to increase interference with the flow of water in a water course, lake or spring to impound water.[78] It provides for the measurement and public availability of records of an extensive array of information about water, including the water available to be taken and water taken,[79] and an ecological performance monitoring and assessment program.[80] It imposes obligations upon water allocation holders and others to make

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74 *Condamine and Balonne Resources Operation Plan* 2008, s 52 and attachment 10(B) and 10(D). The appellant's water allocations are number 58 in attachment 10(B) 'Unsupplemented water allocations located within the Condamine and Balonne Water Management Area' and number 541 in attachment 10(D) "Unsupplemented water allocations located in the Condamine and Balonne Tributaries Water Management Area".

75 *Water Act* 2000 (Qld), s 10(1).

76 *Condamine and Balonne Resources Operation Plan* 2008, s 11.

77 *Condamine and Balonne Resources Operation Plan* 2008, s 25(1), (2).

78 *Condamine and Balonne Resources Operation Plan* 2008, s 27.

79 *Condamine and Balonne Resources Operation Plan* 2008, s 290.

80 *Condamine and Balonne Resources Operation Plan* 2008, s 291.

records of the volumes of water taken,[81] and it authorises the chief executive to prepare and decide resource operations management guidelines to provide operational procedures for the management of water, including the management of water holes and "any other matters that the chief executive may wish to consider".[82] Those provisions are quintessentially legislative in character, providing an extensive series of new rules of general application in a large geographical area for subsequent implementation by the executive.

[16] Furthermore, as the primary judge held,[83] the water allocation conversions in the ROP were themselves the culmination of a long administrative process strongly influenced by considerations of general application. Her Honour considered that the arrangement was similar to that in the plan held to be legislative in *Austral Fisheries Pty Ltd v Minister for Primary Industries & Energy*,[84] being dominated by considerations of general application which allowed individuals to make submissions at several of the stages leading to the final ROP.[85] In *Austral Fisheries* the plan created a formula for quotas to divide up the total allowable catch of a particular fish amongst the fishery participants based upon prior catch history and financial investment. The plan was also applicable to future participants and included provisions having general application in the fishery. The appellant argued that *Austral Fisheries* was distinguishable because no formula for allocations appears in the ROP, which instead makes specific allocations to identified entities. The primary judge's analysis demonstrates that her Honour did not overlook that and other differences, particularly that the plan in *Austral Fisheries* was disallowable by Parliament and that provision was made for reconsideration of decisions made under it, a matter considered by O'Loughlin J as an indicator that the plan was legislative in character.[86] There were nevertheless such similarities between the ROP and the plan in *Austral Fisheries* as to render the legislative characterisation of that plan of some relevance here. Each scheme involved both the promulgation of new rules of general application in relation to the use of a scarce resource in a very large area as well as the allocation of individual, transferable rights to use the resource to existing users under a process dominated by considerations of general application and which allowed individuals to make submissions at stages leading up to the final decision.

[17] The appellant referred also to *Federal Airports Corporation v Aerolineas Argentinas*,[87] but the primary judge referred to that case only for the propositions that a decision which imposes obligations and is of general operation may nevertheless be administrative and that there is no escaping the need to examine closely the particular provisions and the particular circumstances.[88] The case is otherwise not relevant here. The Federal Court there characterised as administrative a determination fixing a charge payable by all those who chose to use airports

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81 *Condamine and Balonne Resources Operation Plan* 2008, s 293, 305, 311, 316.

82 *Condamine and Balonne Resources Operation Plan* 2008, s 371.

83 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [33].

84 (1992) 37 FCR 463.

85 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [34].

86 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [30].

87 (1997) 76 FCR 582.

88 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [29].

generally vested in the Federal Airports Corporation or its services or facilities. That characterisation was influenced by the consideration that the determination was made by the Corporation, "in the course and for the purpose of its commercial operation".[89]

[18] Whilst the aspect of the ROP emphasised by the appellant favoured an administrative characterisation if that aspect was considered in isolation, the considerations identified by the primary judge supported the conclusion that the decision to make the ROP was essentially legislative in character.

Parliamentary oversight

[19] The appellant contended that the primary judge erred by failing to accord "very powerful weight" to the fact that there was no provision for parliamentary disallowance of the ROP. The primary judge noted that the ROP was not subordinate legislation, that it was not tabled in the Legislative Assembly and subject to disallowance, and that the respondent did not dispute that oversight by Parliament was a "strong indicator" that a decision was legislative rather than administrative.[90] Her Honour took that into account but held that the absence of provision for disallowance by Parliament, whilst persuasive, was not fatal to the characterisation of the decision as legislative. That conclusion was supported by the decision her Honour cited, *RG Capital Radio Ltd v Australian Broadcasting Authority*.[91]

[20] The appellant referred to Gummow J's statement in *Queensland Medical Laboratory & Ors v Blewett*[92] that the Federal legislative powers of the Parliament authorise the Parliament to repose in the Executive an authority of an essentially legislative character, "at least where the exercise of the authority is subject to a measure of parliamentary control." However Gummow J did not decide that the absence of a measure of parliamentary control precludes a conclusion that a decision is not of an administrative character and his Honour's decision has not been understood in that way.[93] The appellant referred also to Gummow J's observation that if the Minister decided not to make a determination that a new pathology services table be substituted in a schedule of the *Health Insurance Act* 1973 (Cth) (which would in effect have amended the statute, subject to the procedures for parliamentary disallowance of the determination), the matter would stop there, "and it may be accurate to say that his decision was of an administrative character; cf *Minister for Industry and Commerce v Tooheys Ltd*, supra".[94] That does not advance the appellant's case. There is no analogy between a failure by the Minister in such a case to make a determination and the decision by the Governor in Council to promulgate the ROP.

Identity of the decision-maker

[21] Nor do I accept the appellant's further argument that an administrative characterisation is supported by the consideration that the "effective" decision-

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89 *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 per Lehane J, Beaumont and Whitlam JJ agreeing, at 592.

90 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [35].

91 (2001) 185 ALR 573 at 584, paragraph [56].

92 (1988) 84 ALR 615 at 634.

93 See *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 at 582 to 584, paragraphs [51]-[56], and particularly at [52].

94 *Queensland Medical Laboratory & Ors v Blewett* (1988) 84 ALR 615 at 635.

maker is the chief executive and not the Minister whereas the Minister is the effective decision-maker in relation to a water resource plan. There is no clear hierarchy of decision-makers such as to suggest that the decision to make the ROP should not be characterised as legislative. As the primary judge pointed out,[95] whilst the chief executive is the principle decision-maker throughout the ROP process[96] the Governor in Council has the important role of determining whether the ROP "is not inconsistent with the water resource plan"[97] as well as a discretionary power whether to approve the ROP.

Wide public consultation

[22] It was common ground that a requirement of wide public consultation was an indicator of legislation.[98] The appellant argued that the primary judge erred in rejecting the appellant's argument that the statutory requirement for wide public consultation was instead directed to natural justice considerations so that it indicated that the decision was administrative. The appellant emphasised that a difference between the processes for water resource plans and resource operation plans was that in the latter case specific notice to affected individuals was required. A similar contention was rejected in *RG Capital Radio*,[99] in which the Full Court of the Federal Court concluded that the obligation in that case was directed instead to ensuring that the broadcasting authority would promote the objects of the *Broadcasting Services Act* 1992 (Cth) relating to demand within Australia. I would respectfully adopt the primary judge's reasoning in the following passage:[100]

> "A reference to the purposes of Chapter 2 of the Act, the *Water Resource (Condamine and Balonne) Plan* and the ROP demonstrate a much wider range than individual entitlements to water. A ROP may be prepared to advance the sustainable management of water and thereby provide a framework for establishing water by providing allocations, but it is just one method amongst many. When preparing a draft ROP, the chief executive must consider all properly made submissions and those submissions are likely to come from a range of conservation and economic interests, as well as past users of the water. That the Act provides for explanation to and consultation with water entitlement holders [Section 100(4)] does not support the contention that a draft ROP in its consultation process is specifically directed to water entitlement holders."

[23] The appellant argued that in *Resort Management Services Ltd v Noosa Shire Council*[101] this Court found that administrative decisions can involve not only wide public consultation but also complex policy questions, such as the amendment of a town planning scheme. What was in issue in *Resort Management Services* was not the character of an amendment of a town planning scheme but the character of a resolution made by a local government to proceed with an application for

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95 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [36].

96 *Water Act* 2000 (Qld), section 95 and following.

97 *Water Act* 2000 (Qld), section 103(5).

98 See *Currareva Partnership v Welford* [2000] QSC 98.

99 *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 at 585.

100 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [37].

101 [1995] 1 Qd R 311.

amendment of a planning scheme. The Court did observe that the features that the resolution involved policy or political considerations did not distinguish legislative decisions from administrative decisions, but the conclusion that the local government's resolution was administrative in character hinged upon the statutory requirement for subsequent approval by the Governor in Council and publication in the Gazette before the planning scheme amendment became binding.[102] There is no relevant analogy with this case, where the ROP came into force as a result of the Governor in Council's decision to approve the draft ROP.

Power of amendment

[24] The primary judge found an indication of legislative character in the provisions of the *Water Act* 2000 (Qld) authorising the chief executive to amend an ROP. Section 105 of the *Water Act* 2000 (Qld) provides that the chief executive may amend a resource operations plan,[103] that if an amendment produces inconsistency with the water resource plan the chief executive must amend the resource operation plan to remove that inconsistency[104] and that ss 95 to 104 must be followed for preparing the amendment, with necessary changes.[105] (Sections 95 to 104 are the provisions dealing with the preparation and approval of resource operation plans which the primary judge summarised in paragraphs 17 and 18 of her Honour's reasons.) Section 106(a) provides that an amendment may be made by the Governor in Council without ss 95 to 104 applying if the amendment is minor or insubstantial.

[25] The appellant argued that the primary judge erred in drawing an analogy between these provisions and the power of the Australian Broadcasting Authority to vary a plan, which Sundberg J found in *SAT FM Pty Ltd v Australian Broadcasting Authority*[106] was analogous to a legislature's power to amend legislation. In *RG Capital* the Full Court of the Federal Court referred to that observation and accepted the submission that the consideration was neutral because s 33(3) of the *Acts Interpretation Act* 1901 (Cth) provided that where an Act conferred a power to make a grant or issue any instrument the power should, unless the contrary intention appeared, be construed as including a power to repeal, rescind, revoke, amend, or vary any such instrument.[107] As that provision applied to any instrument, including one expressing a decision of an administrative character or a non-administrative character, the power to vary a licence area plan given by the enactment in that case was neutral as to the correct characterisation of the plan.

[26] That reasoning is directly applicable in relation to Queensland legislation in light of the analogous interpretative provision in s 24AA of the *Acts Interpretation Act* 1954 (Qld).[108] It is arguable that in this case some weight might be placed on the

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102 *Resort Management Services Ltd v Noosa Shire Council* [1995] 1 Qd R 311 at 313 to 315 and 318, referring to the *Local Government (Planning and Environment) Act* 1990 (Qld), ss 2.1, 2.18(2)(b), and 2.20.

103 *Water Act* 2000 (Qld), section 105(1).

104 *Water Act* 2000 (Qld), section 105(2) and (3).

105 *Water Act* 2000 (Qld), section 105(4).

106 *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604 at 608(e), referred to in *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [38].

107 *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 at 586, paragraphs [67]-[69].

108 Although s 24AA of the *Acts Interpretation Act* 1954 (Qld) does not specifically include the power to "rescind", "revoke" or "vary" any such instruments.

consideration that any substantial amendment of the ROP, even in relation to a provision that might be regarded as of an administrative character if considered in isolation, must involve extensive and broad consultation. However the respondent did not pursue such an argument. I accept that this factor should not be treated as having weight.

Binding legal effect

[27] Before the primary judge the appellant conceded that the ROP does have binding legal effect but the appellant argued that this indicator was counterbalanced by the fact that the binding legal effect did not relate to rules of general application but only to the specific grants of water allocations.

[28] In *RG Capital Radio*[109] the Full Court of the Federal Court referred to Sundberg J's conclusion in *SAT FM* that the plan discussed in that case had "carry-on" effect (in summary, regulating the allocation of new broadcasting services bands licences). The Full Court agreed that this consideration was an indication that the decision in *RG Capital Radio* was of a legislative character; it was, "a general measure of a kind one might expect to find contained in the statute, if this were practicable, constituting the legislative background against which applications for, and allocations of, licences are enabled to take place." The appellant argued that this case differed because the relevant binding legal effect was not in relation to rules of general application but relevantly consisted of specific water allocations. The appellant referred to s 107 of the *Water Act* 2000 (Qld), which provides:

> "On and from the day a resource operations plan has effect –
>
> (a) the interim resource operations licences and other authorisations to operate infrastructure identified in the plan cease to have effect; and
>
> (b) the chief executive must grant resource operations licences and distribution operation licences in the approved form and in accordance with the plan for the water to which the plan applies."

[29] However the ROP has the broad effect in the area of the catchments discussed earlier. As the primary judge pointed out, s 107 operates in respect of every entity which takes water in the plan area.[110] It is not limited to the conversion of interim resource operations licences and other authorisations. In my respectful opinion the primary judge was correct in regarding the binding legal effect of the ROP as an indication that the decision was of a legislative character.

Appeal by way of merits review

[30] The primary judge noted the absence of any provision for a merits review about the making of a ROP and observed that provision for the review of a decision is an indication that it is of an administrative character.[111] The appellant did not challenge

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109 *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573 at 588, paragraph [77].

110 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [39].

111 *Austral Fisheries Pty Ltd v Minister for Primary Industries & Energy* (1992) 37 FCR 463 per O'Loughlin J at 471 to 472; *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604 per Sundberg J at 608 to 609.

those conclusions but argued that the primary judge should have found that this consideration was neutral or of little weight. I accept that this indication is not particularly weighty, but it nevertheless did point to a legislative characterisation.

Effect of the analysis of the relevant factors

[31] Although I have held that the primary judge should not have attributed weight to the presence of the power of amendment as an indication of the legislative character of the decision, her Honour's analysis of the other factors required the conclusion that the decision was essentially legislative in character.

The appellant's further arguments

[32] The appellant argued that the primary judge's reasons were inadequate because of the omission of specific reference to the relative weights assigned to each of the different factors. No authority was cited for the proposition that this was a necessary aspect of the judicial analysis. Her Honour's reasons explained that those indications which favoured an administrative characterisation (notably the provision for specific water allocations to particular individuals, the absence of parliamentary oversight, and the provision for explanation to and consultation with water entitlement holders[112]) were reasonably clearly outweighed by those indications favouring a legislative characterisation (notably that the individual water allocations flowed from a long administrative process and were themselves strongly influenced by broader considerations of general application, that those individual allocations were only one aspect of the ROP, that for the most part the ROP made a variety of provisions to give effect to the statutory objectives applicable in the catchments, that consistently with that broad effect of the ROP there was a much wider range of consultation than merely with existing water entitlement holders, and that those broad effects of the ROP were given binding legal effect). The primary judge's reasons were adequate and, in my respectful opinion, persuasive.

A decision of an administrative and legislative character?

[33] The appellant argued that the primary judge erred by considering whether the weight of the factors indicating a legislative character displaced the factors to the contrary. The premise of this argument was the proposition that a decision may be of an administrative character and amenable to review under the *Judicial Review Act* 1991 (Qld) even if it might also display legislative characteristics. For this proposition the appellant relied upon Selway J's dicta in *McWilliam*:[113]

> "However, these decisions should not be understood as suggesting that administrative and legislative decisions fall into two mutually exclusive categories and that such categories can be identified by particular characteristics.
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> . . .
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> That difficulty is exacerbated in relation to administrative functions simply because, under the Westminster system of government, the executive branch may exercise legislative powers delegated by the parliament. This has the practical effect that it is impossible under

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112 *Water Act* 2000 (Qld), section 100(4).

113 *McWilliam v Civil Aviation Safety Authority* (2004) 214 ALR 251 at 259 and 260.

> Australian constitutional arrangements to draw a clear or "bright line" distinction between legislative and administrative powers.
>
> Of course, the ADJR Act does not require that any such distinction be drawn. What it requires is the identification of a "decision of an administrative character". Certainly there are some decisions which are not administrative because they are *essentially* "legislative" or "judicial". However, that does not mean that all decisions must be in one category or another. Although it may be that a particular decision under the Commonwealth Constitution could not be both a judicial and an executive decision (although which it is may depend upon the nature of the body that exercises it), there is no reason in principle why the same decision could not be described as being both an administrative and a legislative decision. If it is then it answers the relevant description of a "decision of an administrative character" for the purposes of the ADJR Act, notwithstanding that it may also be "legislative"."

[34] The primary judge accepted that most decisions in respect of which there is a controversy will have both legislative and administrative features and that it was ultimately a question of judgment as to whether the factors suggesting that the decision is legislative will "displace those that would suggest the contrary".[114] In that context, her Honour's ultimate conclusion that it was "reasonably clear" that the decision was legislative in character[115] conveyed that the decision was not of an administrative character for the purposes of the *Judicial Review Act* 1991 (Qld) because those factors which otherwise might have suggested such a character were displaced by the legislative characteristics of the decision. In my respectful opinion that was a conventional analysis. On that analysis the decision was not within the category of administrative decisions suggested by Selway J in *McWilliam* as "both an administrative and a legislative decision".[116]

[35] The appellant argued that the provision in the ROP for the conversion of existing water rights into rights under the *Water Act* 2000 (Qld) could be treated as a separate decision of an administrative character even though other elements of the ROP were legislative. The appellant did not cite any authority for that proposition. The enactment under which the ROP was made, s 103(5) of the *Water Act* 2000 (Qld), empowered the Governor in Council to "approve the final draft" resource operations plan. Under s 103(7) of the *Water Act* 2000 (Qld), when the final draft resource operations plan is approved by the Governor in Council it is "the resource operations plan for the water resource plan". Those provisions are not consistent with the view that the decision to make the ROP may be divided up into a series of severable decisions for the purposes of judicial review.

[36] The appellant also argued that the primary judge should have adopted a broader interpretation of the concept of "administrative character" because the *Judicial Review Act* 1991 (Qld) was remedial legislation. In *Evans v Friemann* Fox ACJ observed that the Commonwealth Act upon which the *Judicial Review Act* 1991 (Qld) was based was "a remedial one, and should so far as reasonably possible be

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114 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [25].

115 *William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81 at [41].

116 *McWilliam v Civil Aviation Safety Authority* (2004) 214 ALR 251 at 260.

given a wide construction and application."[117] It is clear that Fox ACJ did not intend to convey that the Act had not maintained the broad distinction between the administrative, legislative, and judicial, even though it had proved virtually impossible to arrive at criteria which would distinguish in all cases those three concepts. His Honour observed that there was little doubt that this trichotomy was intended to be maintained and that decisions properly to be regarded as of a legislative or judicial nature were excluded.[118] Similarly, in *Resort Management Services Ltd v Noosa Shire Council*[119] this Court saw no contradiction between the necessity to maintain the "orthodox trichotomy between legislative, executive (or administrative) and judicial acts and decisions" and the obligation to avoid a narrow or technical construction of the requirement that a reviewable decision must be of an administrative character. The instability of the distinctions between "administrative", "legislative", and "judicial" decisions was also referred to in *Griffith University v Tang*,[120] but the majority affirmed that the evident purpose of the expression "of an administrative character" was to exclude decisions of a "legislative" or "judicial" character.

[37] The remedial nature of the *Judicial Review Act* 1991 (Qld) does not justify treating a decision as being of an administrative character if analysis of the decision demonstrates, as the primary judge held, that its administrative characteristics are displaced by its legislative characteristics. The decision was essentially legislative and it was therefore not of an administrative character. For that reason the decision is not amenable to review under the *Judicial Review Act* 1991 (Qld).

Proposed order

[38] I would dismiss the appeal with costs.

[39] **MULLINS J:** I agree with Fraser JA.

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117 (1981) 35 ALR 428 at 435, followed by Ellicott J in *Tooheys Ltd v Minister for Business & Consumer Affairs* (1981) 36 ALR 64 at 73.

118 *Evans v Friemann* (1981) 35 ALR 428 at 433 to 434.

119 *Resort Management Services Ltd v Noosa Shire Council* [1995] 1 Qd R 311 at 317 the Court cited *Hamblin v Duffy* (1981) 34 ALR 333 and *Evans v Freimann* (1981) 35 ALR 428.

120 (2005) 221 CLR 99 per Gummow, Callinan and Heydon JJ at 123, paragraph [63].