SUPREME COURT OF QUEENSLAND

CITATION: *Hunt & Ors v Dr John Gerrard, Chief Health Officer & Anor; Ishiyama & Ors v Dr Peter Aitken, Former Chief Health Officer & Ors; Baxter & Ors v Dr John Gerrard, Chief Health Officer & Anor* [2022] QCA 263

PARTIES: **In Appeal No 4272 of 2022:**

THOMAS GORDON HUNT
(first appellant)
KALIESHA LEE O'KEEFE
(second appellant)
OCHRE CATERING PTY LTD
ACN 605 220 693
(third appellant)
TROJON HOSPITALITY PTY LTD
ACN 648 268 713
(fourth appellant)
BEAN OBSCENE PTY LTD
ACN 165 542 138
(fifth appellant)
SKY MAKAYLA RIXON
(sixth appellant)
MISSION BEACH TAVERN PTY LTD
ACN 167 635 921
(seventh appellant)
MIGHTY MAC PTY LTD
ACN 641 483 669
(eighth appellant)
MARBEL FOXHOLE PTY LTD
ACN 624 784 872
(ninth appellant)
DAITHI JUDE SPALDING
(tenth appellant)
KANGAVENTURE PTY LTD
ACN 117 452 098
(eleventh appellant)
JAR CONSULTING SERVICES PTY LTD
ACN 602 440 184
(twelfth appellant)
v
DR JOHN GERRARD, CHIEF HEALTH OFFICER
(first respondent)
STATE OF QUEENSLAND
(second respondent)
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first intervener)
QUEENSLAND HUMAN RIGHTS COMMISSION

(second intervener)

In Appeal No 4273 of 2022:

CHERIE JEAN ISHIYAMA
(first appellant)
ROBERT WILLIAM WYLIE
(second appellant)
PETER GRANT MERRILL
(third appellant)
MEGAN RUTH PYNE
(fourth appellant)
SARAH DEW
(fifth appellant)
MEAGAN CLARE CURNOW
(sixth appellant)
MANDA SMOLCIC
(seventh appellant)
v
DR PETER AITKEN, FORMER CHIEF HEALTH OFFICER
(first respondent)
DR JOHN GERRARD, CHIEF HEALTH OFFICER
(second respondent)
STATE OF QUEENSLAND
(third respondent)
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first intervener)
QUEENSLAND HUMAN RIGHTS COMMISSION
(second intervener)

In Appeal No 4758 of 2022:

BENJAMIN ELLIOT VIGNAND BAXTER
(first appellant)
VALERIE BRYCE
(second appellant)
PETER PARRY
(third appellant)
ANTHONY FRANCIS O'BRIEN
(fourth appellant)
RACHEL MAREE ARAMBEPOLA
(fifth appellant)
DONNA GRAY
(sixth appellant)
CASSANDRA SHELLEY FRITH
(seventh appellant)
PETER DAMIEN STANWAY
(eighth appellant)
SUSAN VERA McLEVIE
(ninth appellant)
ANNABEL HILARY MAWBEY

(tenth appellant)
CHARLES IAN McDONALD
(eleventh appellant)
ANDREW BARRY RAWLINGS
(twelfth appellant)
MARY-JANE STEVENS
(thirteenth appellant)
KAREN LEANNE NORTH
(fourteenth appellant)
MELANIE TRAKOSAS
(fifteenth appellant)
BENJAMIN NOSOV
(sixteenth appellant)
JOSHUA TUNLEY
(seventeenth appellant)
SIMON MORRISON
(eighteenth appellant)
CAMERON EVERS
(nineteenth appellant)
MICHAEL STUTH
(twentieth appellant)
DONNA BOWMAN
(twenty-first appellant)
PETER THOMSON
(twenty-second appellant)
DAREN LONGOBARDI
(twenty-third appellant)
v
DR JOHN GERRARD, CHIEF HEALTH OFFICER
(first respondent)
STATE OF QUEENSLAND
(second respondent)
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND
(first intervener)
QUEENSLAND HUMAN RIGHTS COMMISSION
(second intervener)

FILE NO/S:	Appeal No 4272 of 2022 Appeal No 4273 of 2022 Appeal No 4758 of 2022 SC No 966 of 2022 SC No 367 of 2022 SC No 508 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 41 (Dalton J)
DELIVERED ON:	16 December 2022

DELIVERED AT: Brisbane

HEARING DATE: 25 July 2022

JUDGES: Morrison and Flanagan JJA and Davis J

ORDER: **The appeals are dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – REASONS FOR ADMINISTRATIVE DECISIONS – OBLIGATION TO GIVE REASONS – where the Chief Health Officer made a decision to make directions under the *Public Health Act 2005* (Qld) – where the appellants requested a statement of reasons under the *Judicial Review Act 1991* (Qld) – where the appellants are entitled to a statement of reasons if the decision is of administrative character – where the judge determined that the decision was legislative rather than administrative in character– whether the decision was of a legislative character

Acts Interpretation Act 1954, s 14B(3)(e), s 36, sch 1
Civil Proceedings Act 2011 (Qld), s 10
Human Rights Act 2019 (Qld), s 48, s 53, s 58, s 59
Judicial Review Act 1991 (Qld), s 4, s 31, s 32, s 38
Public Health Act 2005 (Qld), s 7A, s 319, s 322, s 324, s 332(1), s 333, s 362B, s 362C, 362D, s 362E, s 362FA, s 362G, s 362H, s 362I, s 263J

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21, cited
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, cited
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2, cited
Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15, cited
Commonwealth v Grunseit (1943) 67 CLR 58; [1943] HCA 47, cited
Federal Airports Corporation v Aerolineas Argentinas (1997) 76 FCR 582; [1997] FCA 723, cited
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478; [2002] HCA 22, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
Idonz Pty Ltd v National Capital Development Commission (1985) 58 LGRA 99; [1985] FCA 462, cited
Kassam v Hazzard (2021) 106 NSWLR 520; [2021] NSWCA 299, explained
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
Mulholland v Australian Electoral Commission (2004) 220 CLR 181; [2004] HCA 41, referred

Potter v Minahan (1908) 7 CLR 277; [1908] HCA 63, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Queensland Medical Laboratory v Blewett (1988) 84 ALR 615; [1988] FCA 423, referred
R v A2 (2019) 269 CLR 507; [2019] HCA 35, cited
RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 185 ALR 573; [2001] FCA 855, referred
Schwennesen v Minister for Environment and Resource Management [2010] QCA 340, explained
Sea Shepherd Australia Ltd v Western Australia & Ors (2014) 313 ALR 184; [2014] WASC 66, cited
Shrimpton v The Commonwealth (1945) 69 CLR 613; [1945] HCA 4, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34, cited

COUNSEL: C S Ward SC, with P F Santucci, for the appellants in Appeal No 4758 of 2022
P Zappia KC, with N C Dour, for the appellants in Appeal No 4272 of 2022 and 4273 of 2022
S A McLeod KC, with B I McMillan, for the respondents
K J E Blore for the first intervener
P Morreau for the second intervener

SOLICITORS: Alexander Law for the appellants in all appeals
G R Cooper, Crown Solicitor for the respondents
G R Cooper, Crown Solicitor for the first intervener

[1] **MORRISON JA:** I agree with his Honour Flanagan JA.

[2] **FLANAGAN JA:** The primary issue in these three appeals is whether the decisions of the Chief Health Officer (CHO) to give five public health directions pursuant to s 362B of the *Public Health Act 2005* (Qld) (PHA) are, for the purposes of the *Judicial Review Act 1991* (Qld) (JRA), decisions of an administrative character.

[3] Dalton J (as her Honour then was) determined that the decisions were not of an administrative character but were of a legislative character. Accordingly, the appellants were not entitled, pursuant to s 32 of the JRA, to request from the CHO a statement of reasons in relation to each decision. As explained by her Honour: "The right to request a statement of reasons is given to a person concerned about 'a decision to which this part applies'." That phrase is defined at s 31 of the JRA relevantly to mean "a decision to which this Act applies". That phrase is in turn defined at s 4 of the JRA, again relevantly, "(a) a decision of an administrative character, …under an enactment…".[1] The appellants' interlocutory applications in each proceeding, pursuant to s 38 of the JRA seeking orders that the CHO provide a statement of reasons in respect of each decision, were dismissed.

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1 *Ishiyama & Ors v Dr Peter Aitken, Former Chief Health Officer & Ors; Baxter & Ors v Dr John Gerrard, Chief Health Officer & Anor; Hunt & Ors v Dr John Gerrard, Chief Health Officer & Anor* [2022] QSC 41 (Judgment), [21].

Background

[4] On 29 January 2020, pursuant to s 319 of the PHA, the Minister for Health and Minister for Ambulance Services made an order declaring a public health emergency in relation to COVID-19. The public health emergency area specified in the order was for "all of Queensland".

[5] In relation to the Hunt appeal, on 24 December 2021 the CHO made a decision to give the *Public Health and Social Measures linked to vaccination status Direction (No. 2)*. On 8 February 2022 the CHO revoked this direction and made a decision to give the *Public Health and Social Measures linked to vaccination status Direction (No. 3)*. On 4 March 2022 the CHO revoked this direction and made a decision to give the *Public Health and Social Measures linked to vaccination status Direction (No. 4)*. I will refer to these three directions collectively as the "Social Measures Direction". The effect of the Social Measures Direction was that the Hunt appellants were prohibited from entering and remaining at a business, activity or undertaking unless they complied with the vaccination entry requirements and provided proof of COVID-19 vaccination. The Social Measures Direction further required persons who owned, controlled or operated a business activity or undertaking whether operating at a private residence, commercial premises or in a public space, to comply with the vaccination entry requirements for the business, activity or undertaking as well as taking reasonable steps to ensure that staff and visitors complied with the vaccination entry requirements for the business activity or undertaking. The Hunt appellants represent a sub-set of visitors entering and remaining at a business, activity or undertaking. They have not complied with the COVID-19 vaccination requirements and were therefore prohibited from entering, remaining, working or providing services in the business, activity or undertaking applicable to them.

[6] In relation to the Ishiyama appeal, on 11 December 2021 the former CHO made a decision to give the *COVID-19 Vaccination Requirements for Workers in a high-risk Setting Direction*. On 4 February 2022, the CHO revoked this direction and made a decision to give the *COVID-19 Vaccination Requirements for Workers in a high-risk Setting Direction (No. 2)*. I will refer to these two directions collectively as the "High Risk Setting Direction". The effect of the High Risk Setting Direction was that a worker was prohibited from entering and remaining in or working in or providing services in a high-risk setting unless the worker had complied with the COVID-19 vaccination requirements. A "high-risk setting" was a service, business or activity declared to be a high-risk setting by the CHO in Schedule 2 to the direction and included kindergartens, schools, corrective services facilities and airports. The appellants in the Ishiyama appeal are persons who are ordinarily employed in a high-risk setting. They are persons who have not complied with the COVID-19 vaccination requirements to enter high-risk settings.

[7] The Baxter appeal concerns a decision of the CHO made on 4 February 2022 to give the *Workers in a healthcare setting (COVID-19 Vaccination Requirements) Direction (No. 3)*. I will refer to this direction as the "Workers in Healthcare Direction". The effect of the Workers in Healthcare Direction was that it prohibited a worker in healthcare from entering, working in, or providing services in a healthcare setting unless the worker complied with the COVID-19 vaccination requirements. The appellants in the Baxter appeal are all employed as workers in a

healthcare setting and have not received a COVID-19 vaccine or are vaccinated but have not agreed to provide proof of their vaccination status.

[8] The appellants have commenced proceedings in the Trial Division seeking statutory orders of review under Part 3 of the JRA, prerogative orders under Part 5 of the JRA as well as declaratory relief pursuant to section 10 of the *Civil Proceedings Act 2011* (Qld) or alternatively pursuant to the Court's inherent jurisdiction. In the Baxter proceedings, relief is also sought pursuant to ss 48, 53, 58 and 59 of the *Human Rights Act 2019* (Qld) (HRA). The declaratory relief sought includes declarations that both s 362B of the PHA as well as the Workers in Healthcare Direction are invalid and of no effect. Declarations are also sought that s 362B and the Workers in Healthcare Direction are incompatible with human rights and that the making of the direction by the CHO was conduct incompatible with human rights or conduct which failed to give proper consideration to human rights. As part of the declaratory relief sought involves the operation of the HRA, both the Queensland Human Rights Commission (QHRC) and the Attorney-General for the State of Queensland have intervened in the Trial Division proceedings. Neither the QHRC nor the Attorney-General however, made any submissions before Dalton J concerning the appellants' applications for the provision of statements of reasons. As the Attorney-General and the QHRC intervened in the proceedings below each are a party to the present appeals: ss 50(1) and 51 of the HRA.

The grounds of appeal

[9] Each notice of appeal, apart from seeking an order that the appeal be allowed, also seeks either orders or declarations that the decisions of the CHO to give the directions are decisions of an administrative character within the meaning of s 4 of the JRA and that the appellants are entitled to request reasons for the making of each of the directions under s 32 of the JRA. The appellants also seek orders for the provision of statements of reasons in relation to each decision to give the relevant direction within seven days. These orders and declarations may only be made if this Court is satisfied that the decisions to give the directions are of an administrative character.

[10] The appeal raises the following four issues:

(i) Did the decisions of the CHO to give the relevant directions determine the content of the law as a rule of conduct or were the decisions the application of a general legislative provision to particular cases? (Issue 1).

(ii) Did the preponderance of other factors indicate whether the decisions were of a legislative rather than an administrative character? (Issue 2).

(iii) Does s 362B of the PHA confer powers on the CHO of a legislative nature? (Issue 3).

(iv) In determining whether the decisions were of an administrative character, should the Court have regard to the remedial nature of the JRA? (Issue 4).

The legislative framework

[11] Section 362B, which was the source of the CHO's power to give the directions, falls within Part 7A of Chapter 8 of the PHA. Chapter 8 is entitled "Public health

emergencies". Section 314(a) states that one of the purposes of Chapter 8 is to declare and respond to public health emergencies. Section 315 defines "COVID-19 emergency" to mean the public health emergency declared by the Minister on 29 January 2020 under s 319(2) of the PHA. The effect of s 319 is that the Minister may declare a public health emergency by a signed written order in circumstances where the Minister is satisfied that there is a public health emergency. Prior to declaring a public health emergency the Minister must, if practicable, consult with both the Chief Executive and the CHO. A declared public health emergency may, by s 323(1), be extended by regulation. Section 324(1) requires the Minister to end the declared public health emergency if the Minister is satisfied it is no longer necessary to exercise powers under Chapter 8 to prevent or minimise serious adverse effects on human health.

[12] Section 332(1) provides that on the declaration of a public health emergency the Chief Executive is responsible for the overall management and control of the responses to the emergency. Chapter 8, Part 5 of the PHA also provides for the appointment of emergency officers: s 333. For the purposes of responding to a declared health emergency s 345 gives emergency officers various powers which may be exercised if the emergency officer reasonably believes it is necessary to respond to the declared public health emergency. These powers include requiring a person not to enter or not to remain within a place as well as requiring a person to stay at or in a stated place: s 345(1)(a) and (d).

[13] Part 7A was introduced into the PHA by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* specifically in response to the COVID-19 emergency. Part 7A is entitled "Particular powers for COVID-19 emergency" which is a reference to the defined term in s 315. Section 362A identifies one of the purposes of Part 7A as being to confer additional powers for the COVID-19 emergency on the CHO and emergency officers. As correctly noted by Dalton J, before this amending legislation, Chapter 8 of the PHA conferred no specific powers on the CHO.[2]

[14] The relevant provisions of Chapter 7A are ss 362B, 362C, 362D, 362E and 362FA which provide as follows:

> "**362B Power to give directions**
>
> (1) This section applies if the chief health officer reasonably believes it is necessary to give a direction under this section (a *public health direction*) to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> (2) The chief health officer may, by notice published on the department's website or in the gazette, give any of the following public health directions—
>
> (a) a direction restricting the movement of persons;
>
> (b) a direction requiring persons to stay at or in a stated place;

---

2 Judgment, [3].

(c) a direction requiring persons not to enter or stay at or in a stated place;

(d) a direction restricting contact between persons;

(e) any other direction the chief health officer considers necessary to protect public health.

(3) A public health direction must state—

(a) the period for which the direction applies; and

(b) that a person to whom the direction applies commits an offence if the person fails, without reasonable excuse, to comply with the direction.

362C When public health directions take effect

(1) A public health direction takes effect—

(a) when the direction is given; or

(b) if the direction fixes a later day or time—on the later day or at the later time.

(2) For subsection (1)(a), if the public health direction is published on the department's website and in the gazette, the direction is given when it is first published.

(3) As soon as reasonably practicable after a public health direction is given, the chief health officer must take reasonable steps to ensure that persons likely to be directly affected by the direction are made aware of the giving of the direction.

Examples of steps that may be reasonable for subsection (3)—

- placing signs at particular places
- advertising in newspapers, on radio and on television
- sending emails and text messages

362D Failure to comply with public health directions

A person to whom a public health direction applies must comply with the direction unless the person has a reasonable excuse.

Maximum penalty—100 penalty units or 6 months imprisonment.

362E When public health directions must be revoked

The chief health officer must revoke a public health direction as soon as reasonably practicable after the chief health officer is satisfied the direction is no longer necessary to assist in containing, or to respond to, the spread of COVID-19 within the community.

362FA Delegation

(1) The chief health officer may delegate the chief health officer's functions or powers under this part to—

(a) a deputy chief health officer; or

(b) an appropriately qualified medical practitioner who is a public service officer or employee, or a health service employee.

(2) However, the chief health officer must not delegate the chief health officer's power to give a public health direction.

(3) Subsection (2) does not prevent the chief health officer delegating a function or power under a public health direction.

(4) This section has effect despite the *Hospital and Health Boards Act 2011*, section 53AC."

[15] A number of observations may be made in relation to the provisions of Part 7A and in particular s 362B. First, as provided in s 362A, one of the purposes of Part 7A is to confer additional powers on the CHO for the COVID-19 emergency. The Minister had, pursuant to s 319, declared such an emergency which applied to the whole of Queensland. The CHO's discretionary powers under s 362B therefore constitute additional powers for the purposes of dealing with a health emergency. Secondly, they are powers which the CHO cannot delegate: s 362FA(2).

[16] Thirdly, s 362B applies if the CHO reasonably believes that it is necessary to give a public health direction either to assist in containing or to respond to the spread of COVID-19 within the community. In *Kassam v Hazzard* (2021) 106 NSWLR 520 the New South Wales Court of Appeal considered broadly similar powers given to the New South Wales Health Minister by s 7 of the *Public Health Act 2010* (NSW). Section 7 relevantly provided:

"(1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.

(2) In those circumstances, the Minister –

(a) may take such action, and

(b) may by order give such directions,

as the Minister considers necessary to deal with the risk and its possible consequences.

(3) Without limiting subsection (2) an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary –

(a) to reduce or remove any risk to public health in the area, and

(b) to segregate or isolate inhabitants of the area, and

(c) to prevent, or conditionally permit, access to the area.

Bell P (as his Honour then was) described the breadth of these powers at [51] as follows:

> "Secondly, the powers conferred by s 7(2) are broad, confined only by what 'the Minister considers necessary to deal with the risk and its possible consequences', supplemented by an implied requirement that the Minister undertakes that consideration reasonably: see *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [34]."

The appeal in *Kassam* concerned the validity of orders given by the Minister and whether they were authorised by s 7 of the *Public Health Act*. Bell P observed at [77] that the question of the validity of the orders did not turn upon whether or not they were of an administrative or legislative character.

[17] The term "*reasonably believes it is necessary*" in s 362B, while constituting a limitation on the exercise of power by the CHO, does not detract from the power being described as "broad". The CHO's reasonable belief as to the necessity to give a public health direction is addressed to a wide subject-matter, namely a direction "to assist in containing" or "to respond to" the spread of COVID-19 within the community. The CHO's reasonable belief as to whether a direction is necessary is to be assessed in the context of the CHO seeking to contain and responding to a declared public health emergency. As observed by Bell P in *Kassam* at [52]:

> "… any judicial review of the Minister's exercise of power must be undertaken not by reference to what may have been objectively necessary (even if that were ascertainable, it being a matter upon which views could differ) but by reference to whether it was open to the Minister, acting reasonably, to "consider" that the measures given effect by the Orders were necessary."

[18] Similarly the CHO may give a direction if the CHO reasonably considers that it is necessary to give the direction. If the CHO is satisfied the direction is no longer necessary to assist in containing or to respond to the spread of COVID-19 the CHO must revoke the direction as soon as reasonably practicable: s 362E.

[19] Fourthly, as explained by Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; 209 ALR 582; [204] HCA 41 at [39]:

> "There is, in Australia, a long history of judicial and legislative use of the term "necessary", not as meaning essential or indispensable, but as meaning reasonably appropriate and adapted."

[20] The CHO is therefore empowered by s 362B to give a direction in circumstances where there is a reasonable belief that such a direction is "reasonably appropriate and adapted" to assist in containing or responding to the spread of COVID-19 in the community.

[21] Fifthly, the subject matter of the directions which the CHO may give pursuant to s 362B(2) extends to restricting the movement of persons, requiring persons to stay at or in a stated place, requiring persons not to enter or stay at or in a stated place and restricting contact between persons. Section 362B(2)(e) further empowers the CHO to give any other direction which the CHO "considers necessary to protect public health." While it may be accepted that s 362B(2)(e) should be construed *ejusdem generis* with the type of directions that may be given pursuant to s 362B(2)(a) – (d), given the breadth of the subject-matter for which directions may

be made in (a) – (d) the power of the CHO to give a direction under (e) still constitutes a power of considerable breadth.

[22] Sixthly, by s 362B(2) the CHO gives a public health direction "by notice published on the department's website or in the gazette". Section 362C(2) provides that a direction is given when it is first published on the department's website and in the gazette. Further, s 362C(3) requires the CHO, as soon as reasonably practicable after a public health direction is given, to take reasonable steps to ensure that persons likely to be directly affected by the direction are made aware of the giving of the direction. Examples of steps that may be reasonable for s 362C(3) include placing signs at particular places, advertising in newspapers, on radio and on television and sending emails and text messages. In *Kassam*, Bell P considered the significance of section 7(4) of the *Public Health Act 2010* (NSW) which mandated that an order made by the Minister giving directions was to be published in the Gazette as soon as practicable after it was made. At [56] Bell P considered that this provision:

> "… points towards the potentially broad-reaching effect of such an order and its importance. It is an order designed formally to come to people's attention by publication in the Gazette."

[23] In the present case, the CHO is not only required to give a direction by notice published on the department's website or in the gazette but is also required by s 362C(3) to take additional steps to ensure that the direction comes to the attention of persons likely to be directly affected by it.

[24] Finally, s 362D creates an offence provision. A person to whom a public health direction applies must comply with the direction unless the person has a reasonable excuse.

Explanatory notes

[25] The parties referred to the explanatory notes in relation to a numbers of Bills in support of their competing contentions. The Explanatory Notes to the *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020* (2020 Explanatory Notes) refer to the COVID-19 emergency having been declared for all of Queensland and states:

> "An effective public health response to the COVID-19 emergency will require more than exclusively containment-based strategies such as screening and contact tracing. The response will need to focus on slowing and delaying community transmission rates through social distancing measures and restrictions on public gatherings."

[26] The 2020 Explanatory Notes also refer to the scale of the COVID-19 pandemic as "unprecedented" and the need for a "robust legal framework" to respond to the pandemic:

> "Based on the latest health and medical advice from Queensland and Australian experts, Queensland Health has identified provisions of the [PHA] that should be strengthened to ensure appropriate responses to the COVID-19 pandemic can be undertaken within a robust legal framework. It is necessary to strengthen powers of the [CHO] and emergency officers appointed under the Act to

> implement social distancing measures, including regulating mass gatherings, isolating or quarantining people to assist in containing the spread of COVID-19 and protecting vulnerable populations such as the elderly."

[27] The Explanatory Notes to the *Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021* (2021 Explanatory Notes) relevantly state:

> "The Bill may potentially breach fundamental legislative principles as it delegates powers to make directions to the Chief Health Officer and emergency officers appointed under the [PHA]. Such an approach may be considered a delegation of powers, the exercise of which has potentially significant effect on individuals' rights and liberties. … The public health directions issued must be consistent with the requirements in the Bill and fall within the head of power. They are not, however, subordinate legislation. The remit for any other direction that can be issued is safeguarded by the requirement to be necessary to protect public health. The content of the directions that may be issued under these provisions are technical and detailed in nature and are subject to frequent change due to the rapidly changing COVID-19 pandemic, so are more appropriately prescribed by public health direction than being included in the [PHA]."[3]

[28] The 2021 Explanatory Notes further state:

> "The delegation of administrative powers is appropriately limited and is necessary to ensure swift and targeted responses to the rapidly changing risks are possible."

The appellants submit that the references in the 2021 Explanatory Notes to the public health directions not constituting subordinate legislation and the powers that are being delegated are "administrative" support their primary submission that the decisions to give the directions are of an administrative character. The respondents rely, in particular, on the passage in the 2021 Explanatory Notes that refers to the content of directions being subject to frequent change due to the rapidly changing COVID-19 pandemic, "so are more appropriately prescribed by a public health direction than being included in the Public Health Act". The respondents submit that this passage supports a conclusion that the directions are legislative in character. When the 2020 Explanatory Notes and the 2021 Explanatory Notes are read in full, there are statements that may be used either way to support the competing contentions. In my view, the Explanatory Notes are of limited assistance in determining whether the directions are of an administrative character. The issue is better addressed by the application of the principles identified in *Commonwealth v Grunseit* (1943) 67 CLR 58 and the other applicable indicia identified by this Court in *Schwennesen v Minister for Environment and Resource Management* [2010] QCA 340 and by Edelman J in *Sea Shepherd Australia Ltd v Western Australia & Ors* (2014) 313 ALR 184. This was the approach adopted by Dalton J.[4]

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3 Explanatory Notes, *Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021*, page 30.

4 Judgment, [28] to [31].

The Directions

[29] The relevant parts of each direction are set out in the reasons of Dalton J.[5] I will deal with each of these directions in turn.

(a) Social Measures Direction

[30] The Social Measures Direction relevantly provide:

> "*Public Health and Social Measures linked to vaccination status Direction (No. 2)*
>
> Summary
>
> Effective from: 9.55am AEST 24 December 2021
>
> Posted: 24 December 2021
>
> Direction from Chief Health Officer in accordance with emergency powers arising from the declared public health emergency
>
> *Public Health Act 2005* (Qld)
>
> Section 362B
>
> On 29 January 2020, under the *Public Health Act 2005,* the Minister for Health and Ambulance Services made an order declaring a public health emergency in relation to coronavirus disease (COVID-19). The public health emergency area specified in the order is for 'all of Queensland'. Its duration has been extended by regulation to 26 March 2022 and may be further extended.
>
> Further to this declaration, I, Dr John Gerrard, Chief Health Officer, reasonably believe it is necessary to give the following direction pursuant to the powers under s 362B of the *Public Health Act 2005* to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> Preamble
>
> 1. This Public Health Direction outlines the requirements for *businesses, activities and undertakings,* including *COVID-19 vaccination requirements* for owners, operators *visitors* and *staff* entering and remaining in *businesses, activities and undertakings*
>
> 2. This Public Health Direction is to be read in conjunction with other Public Health Directions issued under section 362B of the Public Health Act 2005 that have not expired or been revoked.
>
> Citation
>
> 3. This Public Health Direction may be referred to as the *Public Health and Social Measures Linked to Vaccination Status Direction (No.2).*
>
> Revocation

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5 Judgment, [6] to [18].

4. The *Public Health and Social Measures Linked to Vaccination Status Direction* made on 17 December 2021, is revoked from time of publication of this public health direction.

Commencement

5. This Public Health Direction applies from time of publication until the end of the declared public health emergency, unless it is revoked or replaced.

Application

6. This Public Health Direction applies to a *business, activity or undertaking* in Queensland listed in Schedule 1, and to an owner or operator, *staff* and a *visitor* who enters the *business, activity or undertaking.* The specific requirements relating to a *business, activity or undertaking* in this Direction prevail to the extent of any inconsistency with a general requirement of the *Movement and Gathering Direction (No. 12).*

7. Nothing in this Public Health Direction removes a vaccination requirement for a person who is required to be vaccinated for COVID-19 under another public health direction. Nor does this Public Health Direction prevent the responsible person for a high risk setting from requesting and retaining information or records authorised or required under an Act or Regulation.

PART 1 - DIRECTION - PUBLIC HEALTH AND SOCIAL MEASURES LINKED TO VACCINATION STATUS

Vaccination Entry Requirements - Business, Activity or Undertaking in Schedule 1

7. A person may only enter and remain at a *business, activity or undertaking* where they:

   a. comply with the *vaccination entry requirements* relating to the *business, activity or undertaking* and *provide proof of COVID-19 vaccination* prior to entering the *business, activity or undertaking* or prior to being served or upon request; or

   b. are *unvaccinated* and provide evidence of a *medical contraindication* prior to entering the *business, activity or undertaking* or prior to being served or upon request; or

   c. are *unvaccinated* and provide evidence of being a *COVID-19 vaccine trial participant* or a medical certificate or a letter from a medical practitioner, certifying that the person is currently taking part in a *COVID-19 vaccine trial*

      Note: a person who enters a venue to access a COVID-19 vaccination at a vaccination centre within the business, activity or undertaking must only enter that part of the venue that is the vaccination centre and must not remain

any longer than required, unless otherwise permitted to do so under this Direction.

8. A person who owns, controls or operates a *business, activity or undertaking* listed in Schedule 1 in Queensland, whether operating at a private residence, commercial premises or in a public space, must when operating the *business, activity or undertaking*:

   a. comply with the *vaccination entry requirements* for the *business, activity or undertaking*; and

   b. take reasonable steps to ensure *staff* and *visitors* comply with the *vaccination entry requirements* for the *business, activity or undertaking*; and

   c. clearly display the requirement for *staff* and *visitors* to be *fully vaccinated* and provide evidence of COVID-19 vaccination or of a *medical contraindication*; and

   d. request and sight *proof of COVID-19 vaccination* or evidence of a *medical contraindication* required under Part 2; and

   e. request and sight evidence that the person is a *COVID-19 vaccine trial participant.*

   f. clearly display the *Check in Qld app* QR code at each entry to the business that is used by *staff* or *visitors*

   g. collect *contact information* required under Part 3; and

   h. comply with any *COVID-19 density limits* for the *business, activity or undertaking*; and

   i. operate in accordance with the *COVID-19 checklist* or *COVID safe site plan,* where required.

   Note: the requirements of this public health direction apply to premises or a public space only to the extent that the business, activity or undertaking is conducted at the premises or public space. Where a business, activity or undertaking is conducted from a private residence, for example, the requirements of this public health direction only apply to the part of the private residence used by or for the business, activity or undertaking."

[31] Dalton J explained that:

> "The businesses, activities or undertakings subject to [the Social Measures Direction] are defined in Schedule 1 of the direction to be hospitality and entertainment venues, stadiums, festivals, libraries, museums and galleries, et cetera. Again there is exemption for medical contraindication and vaccine trial participation. The direction also obliges a person who controls a business, activity or undertaking subject to it to collect contact information from anyone who visits one of the venues."

(b) High-Risk Setting Direction

[32] The High-Risk Setting Direction relevant provides:

> "*COVID-19 Vaccination Requirements for Workers in a high-risk setting Direction*
>
> Summary
>
> Effective from: 8:30am AEST 11 December 2021
>
> Posted: 11 December 2021
>
> Direction from Chief Health Officer in accordance with emergency powers arising from the declared public health emergency
>
> *Public Health Act 2005* (Qld)
>
> Section 362B
>
> On 29 January 2020, under the *Public Health Act 2005,* the Minister for Health and Minister for Ambulance Services made an order declaring a public health emergency in relation to coronavirus disease (COVID-19). The public health emergency area specified in the order is for 'all of Queensland'. Its duration has been extended by regulation to 26 March 2022 and may be further extended.
>
> Further to this declaration, I, Dr Peter Aitken, Chief Health Officer, reasonably believe it is necessary to give the following directions pursuant to s 362B of the *Public Health Act 2005* to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> Guidance
>
> This public health direction applies to workers who enter, work in, or provide services in a high-risk setting. The direction defines how a high-risk setting is identified by the Chief Health Officer and specifies the COVID-19 vaccination requirements and related obligations for workers and employers operating in a high-risk setting. The direction recognises that an employer may mandate vaccination for employees, where otherwise permitted at law, based on the requirements of a role.
>
> Preamble
>
> 1. This Public Health Direction applies to *workers* in settings where there is:
>
>   a. high risk of transmission of the COVID-19 virus; or
>
>   b. the setting is used by a large number of vulnerable persons; or
>
>   c. a sudden reduction in available workforce due to COVID-19 cases or quarantine would significantly affect the continuity of critical services resulting in potential consequential public health and safety risks to the community.

2. This Public Health Direction supplements existing public health directions already made to contain or respond to the spread of COVID-19 by mandating vaccination of workers in healthcare settings, in quarantine facilities and in vulnerable facilities. Nothing in this public health direction reduces the requirements of those public health directions.

3. Separately from the requirements of Public Health Directions, under sections 362G and 362H of the *Public Health Act 2005,* and *emergency officer (public health)* can require a person to comply with additional directions if the emergency officer believes it is reasonably necessary to assist in containing, or to respond to, the spread of COVID-19 in the community.

Citation

4. This Public Health Direction may be referred to as the *COVID-19 Vaccination Requirements for Workers in a High-Risk Setting Direction.*

Commencement

5. This Public Health Direction applies from time of publication commences until the end of the declared public health emergency, unless it is revoked or replaced.

Application

6. This Public Health Direction applies to *workers* in a *high-risk setting* in the public, private and non-government sectors, and identifies the COVID-19 vaccination and related requirements for *workers, employers* and *responsible persons* in *high risk settings.*

7. This Public Health Direction does not apply to people who visit the *high-risk setting* to access or use its services, either for themselves or as a support person for someone else.

8. The requirements of this public health direction prevail where a *worker* is required to be vaccinated under this direction, and another public health direction also applies to the *worker* but does not require the worker to be vaccinated. The *worker* must comply with the *COVID-19 vaccination requirements* for *workers* in a *high-risk setting.*

PART 1 - WORKERS IN A HIGH-RISK SETTING

Worker

9. A *worker* must not enter and remain in, work in, or provide services in a *high-risk setting* unless the *worker* complies with the *COVID-19 vaccination requirements* in paragraph 17.

Examples: a contractor, union official, regulator, auditor, courier, performer, or sales representative must comply with the COVID-19 vaccination requirements to work in a high-risk

setting even though they may only occasionally enter the setting as part of their work duties.

10. An *employer* whose employees or contractors work in a *high-risk setting* must notify *workers* of the *COVID-19 vaccination requirements* and take all reasonable steps to ensure that a *worker* does not enter and remain in, work in, provide services or volunteer in a *high-risk setting* if the person does not meet the *COVID-19 vaccination requirements* or have a *medical contraindication* for *COVID-19 vaccines.*

High-risk setting

11. A *high-risk setting* is a service, business or activity declared to be a *high-risk setting* by the Chief Health Officer in *Schedule 2*."

(c) Workers in Healthcare Direction

[33] The Workers in Healthcare Direction relevantly provides:

"*Workers in a healthcare setting (COVID-19 Vaccination Requirements) Direction (No. 3)*

Summary

Effective from: 4.30pm AEST 4 February 2022

Posted: 4 February 2022

Direction from Chief Health Officer in accordance with emergency powers arising from the declared public health emergency

Public Health Act 2005 (Qld)
Section 362B

On 29 January 2020, under the *Public Health Act 2005*, the Minister for Health and Minister for Ambulance Services made an order declaring a public health emergency in relation to coronavirus disease (COVID-19). The public health emergency area specified in the order is for 'all of Queensland'. Its duration has been extended by regulation to 26 March 2022 and may be further extended.

Further to this declaration, I, Dr John Gerrard, Chief Health Officer, reasonably believe it is necessary to give the following directions pursuant to s362B of the Public Health Act 2005 to assist in containing, or to respond to, the spread of COVID-19 within the community.

Guidance

This public health direction applies to *workers in healthcare* who enter, work in, or provide services in a *healthcare setting*. The direction sets out the *COVID-19 vaccination requirements* for *workers in healthcare*, their *employers* and *responsible persons* in *healthcare settings*, with limited exceptions, to assist in containing

the spread of COVID-19 in vulnerable settings, including health, disability and aged care settings, and in the broader community."

…

Citation

This Public Health Direction may be referred to as the *Workers in a Healthcare Setting (COVID-19 Vaccination Requirements) (No. 3) Direction.*

Commencement

This Direction applies from time of publication until the end of the declared public health emergency, unless it is revoked or replaced.

Application

This Direction applies to *workers in healthcare*, including those in the National Registration and Accreditation Scheme, all self-regulated allied health professionals and all other individuals who work in a *healthcare setting*.

PART 1 - COVID-19 VACCINATION REQUIREMENTS FOR WORKERS IN HEALTHCARE

A *worker in healthcare* must not enter, work in, or provide services in a *healthcare setting* unless the *worker in healthcare* complies with the *COVID-19 vaccination requirements*.

The *COVID-19 vaccination requirements are that*:

a. a *worker in healthcare* must be *fully vaccinated*;"

[34] Dalton J summarised the other parts of the Workers in Healthcare Direction as follows:

"Part 2 of the direction contains exceptions for persons who are "unable to be vaccinated due to a current medical contraindication" but provides that those workers must comply with various requirements, such as the use of PPE and testing requirements. There are other exceptions provided for: participation in a COVID-19 trial; circumstances of critical workforce shortage; emergencies, and the like.

Part 3 imposes obligations to keep records in relation to COVID-19 vaccine compliance on various persons, such as employers.

Part 5 of the direction gives an emergency officer (public health) the power to compel a worker in healthcare or their employer to comply with additional directions if the officer believes that is reasonably necessary.

Part 6 is over six pages long. It contains definitions of various terms, such as: COVID-19 vaccine; COVID-19 test; COVID-19 PCR test; COVID-19 RAT; fully vaccinated; healthcare setting; medical contraindication; proof of COVID-19 vaccination and worker in healthcare. It is from the definitions that the seemingly simple provisions, such as paragraph 7, (above) acquire meaning. Through the use of

> defined terms the CHO prescribes such matters as what persons are within the ambit of the direction; what places are not to be entered by non-vaccinated persons; what constitutes vaccination, and what constitutes proof of vaccination. The entire direction is 16 pages long."

[35] Each of the three directions contained a notice as to penalty in similar terms. The Workers in Healthcare Direction provided as follows:

> "PART 7 – PENALTIES
>
> A person to whom the direction applies commits an offence if the person fails, without reasonable excuse, to comply with the direction.
>
> Section 362D of the *Public Health Act 2000* provides:
>
> Failure to comply with the Public Health Directions
>
> A person to whom a Public Health Direction applies must comply with a direction unless the person has a reasonable excuse.
>
> Maximum penalty – 100 penalty units or 6 months imprisonment.
>
> Dr John Gerrard, Chief Health Officer
>
> 4 February 2022
>
> Published on the Queensland Health website at 4:30pm."

[36] Each of the directions stated that it applied from the time of publication until the end of the declared public health emergency unless it was revoked or replaced.

Issue 1 – Did the decisions of the CHO to give the relevant directions determine the content of the law as a rule of conduct or were the decisions the application of a general legislative provision to particular cases?

[37] As observed by Dalton J distinguishing between administrative and legislative acts can be difficult.[6]

[38] In *Kassam*, Leeming JA noted that the distinction between administrative and legislative is problematic and depends on context.[7] His Honour also noted Professor Aronson's endorsement of the observation of Lehane J in *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at 591; 147 ALR 649 at 657; 50 ALD 54 at 61, cited in Aronson, *Judicial Review of Administrative Action and Government Liability* (6th ed, Law Book Co, 2017), page 91 that:

> "[i] If there is anything that the authorities make plain…it is that general tests will frequently provide no clear answer".[8]

[39] Nevertheless, in the present case the proper characterisation of the decisions is necessary because of the provisions of the JRA. The JRA does not define the expression "a decision of an administrative character". The expression does

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6 Judgment, [23], fn 4.
7 *Kassam*, [153].
8 *Kassam*, [154].

however exclude decisions of a legislative or judicial character: *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 633–634 per Gummow J.

[40] In determining that the CHO's decisions to issue the public health directions were not of an administrative character, Dalton J commenced with an analysis of the decision of the High Court in *Commonwealth v Grunseit* as follows:

> "Grunseit concerned the *National Security (Aliens Service) Regulations 1942 No. 39*. By reg 8 of these wartime regulations it was provided that:
>
> "(1) The Minister of State for the Army may direct that -
>
> (a) Any male refugee alien under the age of sixty years who has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in any part of the Naval Military or Air Forces of the Commonwealth . . . shall perform such service in Australia as is directed by the Minister of State for Labour ... being service which the alien is, in the opinion of the Minister issuing the direction, capable of performing."
>
> Pursuant to reg 8, on 17 August 1942 the Minister for the Army directed that:
>
> " ... every male refugee alien, and every male enemy alien other than a refugee alien who -
>
> (a) is of, or above, the age of eighteen years, and under the age of sixty years; and
>
> (b) has not, within fourteen days after he first became liable to register, volunteered and been accepted for service in some part of the Naval, Military or Air Forces of the Commonwealth, shall perform such service in Australia as is directed by the Minister of State for the Interior, not being service in the Armed Forces, but being service which the alien is, in the opinion of the Minister of State for the Interior, capable of performing."
>
> The direction of 17 August 1942 was held to be an exercise of executive power; the High Court rejected the argument that it was an exercise of legislative power. Latham CJ determined the case this way:
>
> "... In the case of orders, some orders would plainly be executive, as, for example, where in pursuance of a power created by legislation a particular person was ordered by another person to do a particular thing. 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. Attention has been given in the United States of America to this distinction for the

> purpose of applying the doctrine which is there accepted of the separation of legislative, executive, and judicial power. My brother Williams referred to the case of *JW Hampton Jr & Co v United States*, where it was said: 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.' ...
>
> In the present case, in my opinion, the direction of the Minister for the Army applies the general rule which is laid by reg. 8 to particular cases which are described by reference to common characteristics. The law is not altered by the direction of the Minister; it is neither extended nor limited. The direction makes the law applicable in certain cases, the content of the law not being changed. The case might be more open to argument if the order of the Minister created a new rule of conduct depending on circumstances or considerations which were not stated or indicated in the regulation. I agree with the decision of Williams J that the order of the Minister for the Army in this case was of an executive, not of a legislative character, and that it was therefore not necessary to lay it before Parliament." – pp 82-83.
>
> Starke J expressed similar reasoning, 'This direction is not of a legislative character, for it prescribes in itself no rule of conduct for the subject but simply executes the power given by reg 8 of the *Aliens Service Regulations*.' – p 93."

[41] Dalton J considered that the relevant directions determined "the content of the rule of law". Her Honour reasoned as follows:[9]

> "In this case there are a number of factors which are indications that the decisions to make the directions was of a legislative character. The most important is that the CHO directions determine the content of the rule of law. It is these directions that determine which citizens the rules apply to; what citizens must do to be regarded as vaccinated, and in what circumstances unvaccinated citizens may attend various places to which they would otherwise have free access.
>
> I reject the argument that it is s 362B of the PHA which determines the content of the rule of law. That argument amounts to saying that with respect to the topics listed in s 362B(2), the law is what the CHO says it is. Section 362B does not in substance or in fact provide the content of rules of law. Section 362B is properly to be regarded as empowering the CHO to determine the content of the rules of law in relation to the topics enumerated at subsection (2) thereof. It is the CHO who determines what are the rules of law which apply and, for how long those rules apply sees 362B(3) and s 362E of the PHA.

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9 Judgment, [32]–[35].

> There is no doubt that the CHO made directions pursuant to powers given to him by the PHA, but he could not in substance be said to simply have applied legislative provisions of that Act or to have executed provisions of that Act. By making the directions, he was determining the content of the rules of law which were to apply in Queensland.
>
> The rules were to apply generally to people in Queensland. They applied prospectively. They had significant impact on the employment, recreation, rights to freedom of movement and bodily integrity of many people."

[42] The appellants submit that her Honour erred in two respects in applying the test in *Grunseit*. The first error is that her Honour applied a different test than that stated in *Grunseit*, namely 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". The applicants submit that her Honour applied a different test by referring to the directions as "determining the content of the rule of law" as set out in the passage at [41] above. The second error is that, even accepting her Honour identified the correct test, it was otherwise misapplied in concluding that the directions were not of an administrative character.

[43] The first error alleged may be dealt with briefly. The appellants submit that the test identified by her Honour by use of the words "determine the content of the rule of law" effectively meant that if the executive "is in fact supplying content to the general rule of law which is set out by Parliament then it's engaging in a legislative function". This reads too much into the phrase used by her Honour. Her Honour identified and quoted the relevant test as set out in *Grunseit*. Her Honour also referred to the decision of this Court in *Schwennesen* where Fraser JA considered ten indicia which had been recognised by McMurdo J (as his Honour then was) in the earlier case of *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 at [21]. The first of those ten factors included the *Grunseit* test as one of those factors indicating that the decision was of a legislative character. The Court in *Schwennesen* described this test as follows:

> "(i) creates new rules of general application, rather than applies existing rules to particular cases;"

[44] In circumstances where her Honour had twice set out the correct test, her Honour's use of the phrase "determine the content of the rule of law" may be properly viewed as a paraphrasing of the *Grunseit* test. Further, her Honour's analysis in determining whether the decisions to give the directions were of an administrative or legislative character was consistent with the test stated in *Grunseit*.

[45] As to the second error, the appellants submit that the primary judge erred in the application of the *Grunseit* test both in holding that "section 362B does not in substance or in fact provide the content of rules of law"[10], and in holding that the CHO "could not in substance be said to simply have applied legislative provisions of that Act or to have executed provisions of that Act"[11]. The appellants submit that

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10 Judgment, [33].

11 Judgment, [34]; Hunt and Ishiyama appellants' written submissions, paragraph 42.

the directions given by the CHO were no more than an execution of the general rule of conduct enacted by Parliament in s 362B:

> "To be more specific, in the Ishiyama Proceedings the CHO applied the general rule in s 362B(2)(c) by directing that specified persons (that is unvaccinated "workers") not enter and remain in a stated place (a place identified by the Direction as a "high-risk setting"). In the Hunt proceedings the CHO applied the general rule in s 362B(2)(c) by directing that specified persons (unvaccinated owners, staff and customers) not enter and remain in a stated place (the place of the businesses, activities or undertakings identified in the Direction)."[12]

[46] The application of the test stated in *Grunseit* requires a comparison between the relevant provisions of the PHA and the directions. The need for such a comparison is evident from a consideration of *Grunseit* as well as other authorities including *Sea Shepherd Australia Ltd v Western Australia & Ors* and *Federal Airports Corporation v Aerolineas Argentinas*. The comparison in *Grunseit* revealed that the direction issued by the Minster for the Army closely reflected the wording of the relevant regulation. Latham CJ therefore concluded that the law was not altered by the direction nor was it extended or limited. The Chief Justice however recognised that the case may have been more "open to argument if the order of the Minister created a new rule of conduct depending on the circumstances or considerations which were not stated or indicated in the regulation."

[47] In *Sea Shepherd* Edelman J considered two exemption instruments given pursuant to s 7 of the *Fish Resources Management Act 1994* (WA) which purported to exempt various persons from the operation of that Act. Section 7(1) gave the relevant Minister a discretion, by instrument in writing, to exempt a specified person or specified class of persons from all or any of the provisions of the Act. Section 7(2) provided that the Minister may only grant an exemption for one or more purposes which included in s 7(2)(c) "public safety". The Minister made a decision to issue exemptions under s 7(1) to the State of Western Australia, the Premier and the Minister for Fisheries enabling them to implement a strategy for the elimination of three species of shark which were "totally protected fish" under the *Fish Resources Management Act 1994* (WA).

[48] Edelman J decided that the exemption instruments were of "administrative effect":

> "[87] The first reason that supports the administrative effect of exemptions made under s 7 of the Fish Resources Management Act is that those exemptions are better understood as applying a general provision to particular cases rather than creating a rule of conduct.
>
> [88] While I accept that this broad factor deriving from Latham CJ is not always easy to apply, the approach of the Full Federal Court in *Ministry of Industry & Commerce* is apt. As I have explained, in that case the general rule described in broad terms the goods which were to have the benefit of exemption or a lower rate of duty. The Minister had a power to apply that general rule to particular cases.

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12 Hunt and Ishiyama appellants' written submissions, paragraph 38.

> [89] So too, the same approach applies in s 7 of the Fish Resources Management Act. The section prescribes a general rule in broad terms concerning the power to exempt a specified person or specified class of persons from all or any of the provisions of this Act. That broad rule is conditioned upon a requirement that one or more of seven listed purposes is satisfied. The issue of an exemption instrument is then an application of that general rule." (citations omitted).

[49] Edelman J considered *Minister of Industry & Commerce v Tooheys Ltd* as follows:

> "[75] In that case, the minister refused to make a determination under s 273 of the Customs Act 1901 (Cth) that item 19 of a customs tariff applied to particular goods. A determination that item 19 applied would have meant that no duty would have been payable on the relevant goods. One question for the Full Federal Court was whether the minister's refusal to make a determination was "a decision of an administrative character" within the meaning of s 3(1) of the Administrative Decisions (Judicial Review) Act. The Full Court held that it was such a decision. The Court quoted with approval from the trial judge as follows:
>
> > 'When, therefore, a decision is made by the Minister to make a determination under s 273 of the Act in relation to item 19 of the Tariff he is deciding that specific goods fall within the general description contained in that item and should be allowed in at a lower rate of duty or at no duty at all. Item 19 of the Tariff, in effect, lays down a general rule by describing in broad terms the goods which are to have the benefit of exemption or a lower rate of duty and s 273 read with other provisions of Pt XVI enables the Minister in his discretion to apply that general rule to particular cases. In my view this does not amount to changing the law. He is simply applying it to the exercise of his discretion to a particular set of circumstances. This may amount to doing the work which a Parliament may have done had it been equipped to specify in advance all the goods it intended to cover but it does not follow from this that the Minister's decision is legislative in character'."

[50] The appellants also refer to *Federal Airports Corporation v Aerolineas Argentinas.* Section 56(2) of the *Federal Airports Corporation Act 1986* (Cth) gave the Federal Airports Corporation a discretion to, from time to time, make determinations fixing or varying aeronautical charges and specifying the persons by whom the charges were payable and the times when the charges were due and payable. Pursuant to this power, the Federal Airports Corporation made a determination imposing a charge per landing at various airports throughout Australia based on the weight of the relevant aircraft. Lehane J (with whom Beaumont and Whitlam JJ agreed) considered that the exercise in determining whether the decision or instrument was administrative or legislative required a close examination of the particular

provisions and the particular circumstances.[13] Lehane J, having considered the relevant provisions of the *Federal Airports Corporation Act* including s 56, concluded that the determination fixing a charge was an administrative rather than a legislative act. This was because the determination made by the Federal Airports Corporation was one made "in the course and for the purpose of its commercial operation: that is, in the execution or administration of the FAC Act."[14]

[51] While these cases are of general assistance in identifying how the test in *Grunseit* is to be applied, each is limited to its own particular statutory context. In the present case, a comparison of the powers conferred on the CHO by s 362B of the PHA with the content of the relevant directions supports the conclusion that the directions determined the content of a law as a rule of conduct. The powers conferred on the CHO by s 362B are powers conferred for the purposes of Part 7A, namely to confer additional powers on the CHO for the COVID-19 emergency: s 362A. As observed above, the power of the CHO to give directions is expressed in broad language. The CHO is empowered by s 362B to give a direction in circumstances where the CHO holds a reasonable belief that such a direction is necessary to assist in containing or responding to the spread of COVID-19 in the community. As explained at [17] to [20] above, the term "reasonably believes that it is necessary" in s 362B, while constituting a limitation on the exercise of power by the CHO, does not detract from the power being described as "broad".

[52] Section 362B(2)(a) gives the CHO the power to make a direction restricting the movement of persons. The subsection does not however, prescribe the basis or the extent of the restriction to the movement of persons nor the class of person whose movement may be subject to such a direction. Similarly, s 362B(2)(c), which empowers the CHO to give a direction requiring persons not to enter or stay at or in a stated place, does not prescribe the basis or extent of such a requirement. It is the directions which identify the basis and extent of the restrictions and requirements and to whom they apply. It is the directions which establish and impose specific obligations (as rules of conduct on classes of persons). The Social Measures Direction, for example, imposes obligations on visitors, staff, owners and operators of a business, activity or undertaking. Visitors and staff are either required to provide proof of vaccination, proof of a medical contraindication or proof of participation in an approved vaccine trial in order to enter and remain at a prescribed business, activity or undertaking. The obligations imposed on owners and operators include making all reasonable efforts when a visitor enters the business activity or undertaking, or prior to serving or assisting them, to confirm that the visitor meets the COVID-19 vaccination entry requirements. This obligation also extends to staff. Owners and operators are also required to make reasonable efforts when a visitor enters the business, activity or undertaking to collect the required contact information. Other obligations include compliance with any COVID-19 density limits for the business, activity or undertaking and a further requirement to operate in accordance with the COVID-19 checklist or COVID Safe Site Plan where applicable. The Social Measures Direction also prescribes the way in which contact information is to be given and how records are to be maintained.

[53] The High-Risk Setting Direction imposes an obligation on all workers, visitors and service providers to be fully vaccinated in order to enter and remain, work, or

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13 *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at page 591.

14 *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at page 592.

provide services in any high-risk setting. The direction also prescribes the way in which vaccination status must be proved. It prescribes the records that employers and responsible persons are required to keep about the vaccination status of workers. The High-Risk Setting Direction requires compliance with PPE guidelines and PPE requirements for critical workforce shortage exceptions. The direction also regulates the COVID-19 testing requirements and the reporting of results as well as regulating the requirements relating to medical contraindications and proof thereof. The direction also prescribes the obligation of an employer to ensure a person prohibited under the direction does not enter, work or provide services in a high-risk setting.

[54] The Healthcare Setting Direction creates similar obligations but in a healthcare setting.

[55] Each of the directions therefore creates new rules of conduct which while having the general effect of either restricting the movement of persons or requiring persons not to enter or stay at a stated place impose significant additional obligations on wide classes of persons. As observed by Dalton J, these rules of conduct:

> "…were to apply generally to people in Queensland. They applied prospectively. They had significant impact on the employment, recreation, rights to freedom of movement and bodily integrity of many people."[15]

[56] The appellants submit that the obligations contained in the directions:

> "… enables the executive to apply the rules by "gap-filling" where appropriate so as to execute the rule in accordance with the statute. Even substantial "gap-filling"… does not transform the application of the rule from an administrative exercise of power to a legislative one."[16]

The obligations created by the directions however, go well beyond "gap-filling". In exercising the general power to restrict the movement of persons and to require persons not to enter or stay at or in a stated place, the CHO, by deciding to give the directions, imposed significant obligations on wide classes of persons.

[57] Dalton J in determining that the directions were of a legislative nature referred to the broad nature and impact of the directions. Her Honour observed:

> "This is another strong indicator of legislative effect. It was recognised by Leeming JA in *Kassam v Hazzard*, a New South Wales Court of Appeal case dealing with a similar challenge to COVID-19 rules. Leeming JA described similar orders made in response to the COVID emergency in New South Wales as having some administrative characteristics but went on to say, 'On the other hand, as a matter of substance, the orders are 'legislative' in the sense that they prescribe general norms of conduct, with real sanctions if breached which were applicable to thousands, indeed millions, of people'." (citations omitted).[17]

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15 Judgment, [35].
16 Appellants' joint written submissions in reply, paragraph 7.
17 Judgment, [39].

[58] The appellants submit that her Honour erred in relying on the statements of Leeming JA in *Kassam*. This submission is based on the statutory power considered by the New South Wales Court of Appeal in *Kassam* being materially different to the provisions of the PHA. This distinction is without substance. While the power conferred on the Minister by s 7 of the *Public Health Act 2010* (NSW) may be considered wider than the power conferred on the CHO by s 362B, both powers may be described as broad. Leeming JA's statement was an observation that the orders made by the Minister pursuant to s 7 "prescribed general norms of conduct" as did the directions considered by Dalton J.

[59] The appellants submit that even if the Court considers that the directions determine the content of the law as a rule of conduct, Dalton J gave this consideration too much weight:

> "What instead should have been given central attention by the primary judge was that the power to give the directions in s 362B of the PHA turns on whether the CHO "*reasonably believes it necessary*". The corresponding obligation to "revoke" the Direction (imposed by s 362E of the PHA) turns on the CHO being "*satisfied the direction is no longer necessary*". That language is consistent with Parliament have (sic) reposed an administrative power on the CHO to make Directions. Furthermore, the CHO's reasonable belief, or state of satisfaction, to satisfy ss 362B and/or 362E of the PHA would ordinarily be subject to judicial review, as that state of satisfaction will be a jurisdictional fact in the sense described by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [130]– [131]."[18]

[60] The words in s 362B "*reasonably believes it is necessary*" according to the appellants "is an administrative decision-making formulation that is seen across the cases".[19]

[61] Accepting for present purposes that the words in s 362B "*reasonably believes it is necessary*" constitute a jurisdictional fact, the appellants do not explain in their submissions why this particular factor should be given "central attention" in determining whether the CHO's decisions to give the directions are of an administrative character for the purposes of the JRA. As is evident from the relief sought by the appellants in the proceedings in the Trial Division, set out at [8] above, the relief goes beyond seeking statutory orders of review under Part 3 of the JRA, and extends to prerogative orders under Part 5 of the JRA, as well as declaratory relief. That is, for the appellant to challenge the legality of the directions, including whether the suggested jurisdictional fact was satisfied, does not require the CHO's decisions to give the directions to be of an administrative character for the purposes of the JRA.

[62] The wording and operation of s 362B is, of course, relevant in considering whether the directions given pursuant to the section determine the content of a law as a rule of conduct. It is also relevant in this respect to have regard to the breadth of the power conferred by s 362B on the CHO as discussed at [17] to [20] above.

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18 Appellants' (Baxter) written submissions, paragraph 44.

19 Appellants' (Hunt and Ishiyama) written submissions, paragraph 27.

[63] In *Kassam*, the provision under consideration, s 7 of the *Public Health Act 2010* (NSW), also made the exercise of power subject to the Minister considering, on reasonable grounds, that a situation had arisen that was, or likely to be, a risk to public health. The breadth of this jurisdictional fact was considered by Lemming JA in the following terms:

> "[157] The power conferred by s 7 is very broadly stated, turning as it does upon what the Minister "considers" to be "necessary". That is substantially broader than familiar phrases such as "necessary or convenient" or "for the purpose of" which are regularly seen in regulation making powers.
>
> [158] The power is expressed to turn upon what the Minister considers necessary to deal with the risk to public health and its possible consequences. Both the risk and the possible consequences are apt to be things in the future. Both risk and possible consequences are inherently uncertain and insusceptible to prediction. That tends to support a broad meaning to be given to the words "action" and "order" in s 7.
>
> [159] The premise of the power is that there is a risk to *public* health. At the heart of the concept of public health is a danger to members of the public. It is plainly within the scope and purpose of the statute that there might be danger to *many* members of the public. It is plain from s 7(3) that the power extends to the making of orders which direct the segregation and isolation of inhabitants in an area and the curtailment of access to an area, and the opening words of s 7(3) ("Without limiting subsection (2)") entail that subs (2) extends to but is not limited by what is explicitly envisaged by s 7(3).
>
> [160] All of those considerations are in the teeth of any implication that s 7 only extends to the taking of action and making orders which give directions which are "administrative" as opposed to "legislative". I note for completeness that the reference in s 7(7) to "administrative review" is a red herring. It merely picks up the language of "administratively reviewable decision" required by the *Administrative Decisions Review Act 1997* (NSW). This does not greatly bear upon the nature of the power.
>
> [161] For the reasons given by the President as supplemented by the above, the applicants' ultra vires submission based upon the legislative/administrative distinction must be rejected."

[64] Similarly, in the present case, the breadth of the jurisdictional fact is only one matter to be weighed along with other indicia, in determining the character of the decisions.

[65] For the above reasons, the decisions of the CHO to give the directions determined the content of the law as a rule of conduct and did not constitute the application of a general legislative provision to particular cases.

Issue 2 – Did the preponderance of other factors indicate whether the decisions to give the directions were of a legislative rather than an administrative character

[66] The appellants do not suggest that her Honour erred in identifying the other factors which may indicate whether a decision is of a legislative rather than an administrative character. The relevant other factors, considered by this Court in *Schwennesen* and by Edelman J in *Sea Shepherd*, were summarised by her Honour as follows:

> "The 10 factors recognised as indicating that a decision was of a legislative character were:
>
> "(i) creates new rules of general application, rather than applies existing rules to particular cases;
>
> (ii) must be publicly notified in the Gazette or similar publication;
>
> (iii) cannot be made until there has 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;
>
> (vi) cannot be varied or amended by the Executive;
>
> (vii) is not subject to merits review in a tribunal such as the AAT;
>
> (viii) can be reviewed in Parliament (for example, it is a disallowable instrument);
>
> (ix) triggers the operation of other legislative provisions; and
>
> (x) has an effect which is binding."
>
> It can be seen that the first of these factors derives from the case of *Grunseit.*
>
> The decision in *Schwennesen* recognises that no single factor is determinative – [9] and that not all of the indicia will point in the same direction. Ultimately it is "a question of judgment as to whether the factors suggesting that the decision is legislative will 'displace those that would suggest to the contrary'." – [34]. I would add that because the Court will be obliged to make a distinction between legislative and executive action in widely varying cases, some factors will assume more weight in some cases than in others. As well, the circumstances of any particular case may suggest other criteria for analysis. In *Sea Shepherd Australia Ltd & Anor v Western Australia & Ors* (above), Edelman J listed the factors which he had summarised and adapted from the caselaw:
>
> "(i) the greater the control that Parliament has over the power reposed in the executive the more legislative the instrument will be in effect;

(ii) a requirement of wide public consultation before an instrument takes effect is an indicator that it has legislative effect;

(iii) the wider the range of considerations that the decisionmaker is entitled to take into account, the more likely the instrument will be characterised as legislative in effect;

(iv) a broad nature and impact of the decision will be another indicator of legislative effect;

(v) the absence of executive control of the decision indicates that it has a legislative effect; and

(vi) the omission of a power of merits review by an administrative tribunal is another indicator of legislative effect."– [80].

Immediately after listing these factors Edelman J remarked:

"[81] These are not exhaustive factors. At the end of the day, the question of whether an instrument has legislative effect is to be answered by considering whether the instrument bears sufficient resemblance to legislation, having regard to those qualities usually present in legislation. The more legislative qualities that are present in the instrument the more it is likely to have a legislative effect."

[67] The appellants' submission is that Dalton J erred in her application of these factors and in the significance or insignificance which she attached to them.[20] The weight or significance to be given to these factors will in each case be a matter of judgment. The appellants have, in my view, failed to establish any error as to how her Honour considered and applied these factors.

(a) Publication of the directions

[68] Her Honour considered that the requirement for publication is consistent with the directions being legislative in character. As her Honour observed:

> "It is an obvious corollary of the fact that the CHO is making new rules of conduct which apply generally to persons in Queensland."[21]

[69] Section 362B(2) provides that a direction is given by notice published on the Department's website or in the gazette. Section 362C provides that a direction is given when it is first published. Further, s 362C(3) requires the CHO, as soon as reasonably practicable after a direction is given, to take reasonable steps to ensure that persons likely to be directly affected by the direction are made aware of the giving of the direction is given, to take reasonable steps to ensure that persons likely to be directly affected by the direction are made aware of the giving of the direction. Her Honour considered these requirements to be significant:

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20 Appellants'(Hunt & Ishiyama) written submissions, paragraph 43.

21 Judgment, [36].

> "The essential point is that the directions must be published, and are not effective until they are published in a way which allows rapid and widespread access to them by members of the public."[22]

[70] The appellants place no significance on publication submitting that the relevant provisions of the PHA requiring publication of directions "are intended to facilitate the execution of the administrative power and are not indicative of any legislative quality of enhancing public means of access to it".[23] The appellants further submit that the status of publication and the weight to be afforded to it is unclear. Edelman J, for example, did not include it in his list of factors in *Sea Shepherd* unlike this Court in *Schwennesen*. Further, Aronson and Groves also do not include publication in their list of factors and express caution about its status and use.[24] In *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 73 at [58], while the Full Court of the Federal Court did not consider publication to be a compelling indication of the legislative character of a decision, observed that publication was nonetheless "consistent with the decision having a legislative character". As noted at [22] above, Bell P in *Kassam* considered the significance of publication in the gazette as pointing towards the potentially broad reaching effect of such an order and its importance.

[71] Her Honour did not err in taking publication into account as a relevant factor. Her Honour did not treat publication as a compelling factor, nor can it be said that she gave this factor "considerable weight" as submitted by the appellants. Her Honour specifically noted that both legislative and administrative decisions are routinely published in the Government Gazette.[25]

(b) The binding effect of the directions

[72] Section 362D creates an offence provision and provides that a person to whom a public health direction applies must comply with the direction unless the person has a reasonable excuse. Her Honour considered that this indicated a decision of a legislative character:

> "Also closely associated with the fact that the directions create new rules of conduct of general application are that, (i) the population is bound by the rules and that, (ii) disobedience to the rules will trigger the operation of the penalty provision at s 362D of the PHA. These are both indications that the directions are legislative in character."[26]

[73] The appellants do not challenge that the binding effect of a decision is one of the accepted indicia supporting a conclusion that it is of a legislative character. The appellants submit however, that Dalton J gave this factor too much weight.[27] This submission cannot be accepted. Her Honour, in the passage quoted above, does not assign any particular weight to this factor.

(c) Parliamentary oversight

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22 Judgment, [37].
23 Appellants' (Hunt & Ishiyama) submissions, paragraph 57.
24 Aronson and Groves, *Judicial Review of Administrative Action and Government Liability* (Thompson Reuters, 7th Edition, 2020) at [2.490], pages 113–114.
25 Judgment, [37].
26 Judgment, [38].
27 Appellants' joint written submissions and reply, paragraph 25.

[74] Dalton J acknowledged that the directions given by the CHO are not subject to parliamentary supervision or disallowance. Her Honour accepted that this is a relevant indication against the directions being legislative in character. However, her Honour considered that an absence of parliamentary supervision "is not fatal to a characterisation as legislative". In this respect, her Honour noted that there was no power of parliamentary disallowance in *Schwennesen*. Also, in *RG Capital Radio* the Full Court at [56] considered that the absence of such a factor is not fatal to a characterisation of a decision as legislative.

[75] The appellants submit that her Honour erred in finding that the lack of parliamentary oversight or disallowance was not fatal to characterising the directions as legislation. The appellants refer to the observations of Professor Craig that the quality of legislation and its distinction as legislative in character follows from the notion that a legislative rule of conduct is ordinarily controlled by the legislature at some point in the rule-making process.[28]

[76] In *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 635, Gummow J in deciding that the new table of medical benefits was of an "essentially legislative character" placed considerable weight on the fact that the Minister's decision to substitute a new table was subject to parliamentary disallowance. Dalton J however, made specific reference to *Queensland Medical Laboratory v Blewett* and the importance of this consideration. Her Honour considered this factor and correctly concluded that it was not fatal to the decisions being of a legislative character. The appellants have not demonstrated any error in her Honour's consideration of this factor.

(d) Consultation and wide policy considerations

[77] Her Honour considered that these were neutral factors reasoning as follows:

> "[42] In some cases, such as *Schwennesen* and *RG Capital Radio Ltd*, the facts that the decision-maker was obliged to engage in wide public consultation and have regard to wide policy considerations were considered to be indicators that the decision was of a legislative character.
>
> [43] The Full Court of the Federal Court in *RG Capital Radio* thought that the relevance of wide public consultation as an indica of legislation was that it "emphasise[d] the general nature of a licence area plan, and so adds weight to the first consideration dealt with ... above [content of a general rule rather than particular application of a rule]." – [61]. More generally, it may be that it is thought the requirement for wide public consultation mimics something of the democratic process in creating legislation. In discussing a similar factor - the breadth of policy considerations which a decision-maker was to take into account as indicating a legislative quality, the Full Court in *RG Capital Radio* did not place great weight on this factor, commenting, "More persuasive are the nature and impact of the resulting decision" – [66].

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28 Craig, *Administrative Law* (Street & Maxwell, 9th Edition, 2021) at 15–44.

> [44] The decisions of the CHO to make directions under emergency powers in the PHA are very different from the type of decisions in *Schwennesen* and *RG Capital Radio*. In circumstances of a public health emergency, someone uniquely qualified to address medical matters and public health measures urgently, namely the CHO, is given power to make directions he or she believes necessary to assist in containing the spread of COVID-19 within the community or which are necessary to protect public health – s 362B. The circumstances in which the power to make directions is to be exercised are very different to, say, the power to make directions as to sustainable water use over large geographical areas (*Schwennesen*) or to make decisions about radio licensees having regard to social, economic, commercial and technological factors over a wide geographical area of radio broadcasting (*RG Capital Radio*).While the requirement for wide public consultation and application of wide policy considerations could be seen in those cases to be an indicator that the character of the decisions made was legislative, I do not see the absence of such requirements in the circumstances here as any strong indication that the decisions were of an administrative character. I regard them as neutral."

[78] The appellants submit that Dalton J erred in considering these factors to be "neutral factors". This submission should be rejected. Her Honour's recognition of these factors as being neutral was correct in the circumstances of the present case. As explained by her Honour, the directions made by the CHO were to respond to a declared public health emergency. Further it was recognised in the 2021 Explanatory Notes that the amendments to the PHA "were progressed urgently with limited opportunity for public and parliamentary scrutiny." The lack of public consultation reflects the urgent need for Parliament to respond to a public health emergency. Given the breadth of the power conferred on the CHO in the context of a public health emergency, the absence of any requirement for the CHO to engage in wide public consultation and have regard to wide policy considerations, is entirely unsurprising. There was no error in Dalton J treating these factors as neutral.

(e) Capable of being unilaterally varied by decision maker and executive control

[79] Her Honour dealt with these factors as follows:

> "The CHO directions cannot be brought to an end or varied except by the CHO – s 362E. The CHO cannot delegate this power – s 362FA(2). In more than one case it has been held that the fact that the rule-maker can vary or amend the rules was an indication that the function had a legislative character. The analogy was with primary legislation. More recent cases have regarded this as a neutral factor in circumstances where the *Acts Interpretation Act* gives any rule-maker power to amend or rescind rules made. Regarding this factor together with that at (vi) in the list from *Schwennesen*, "cannot be varied or amended by the executive", and factor (v) in the list from *Sea Shepherd*, "the absence of executive control of the decision", I

> think that these are some indications that the decision to make a CHO directive is legislative. The fact that the power to make and revoke directions can only be exercised by the CHO, and not by the other officers of the executive who are to deal with public health emergencies (the chief executive, a deputy CHO, or an emergency officer) is, in the context of the PHA, of some significance because it marks the power of the CHO to give directions as a singular power not to be shared with the executive more generally."[29]

Her Honour relied on these two factors identified in *Schwennesen* as providing some indication that the decisions of the CHO to give the directions are legislative.

[80] The appellants submit that her Honour, in having regard to these two factors, erred in two respects. First, the appellants submit that Chapter 8 of the PHA confers significant executive control over the power of the CHO to give directions under s 362B(2). This is a reference to the power of the Minister under s 324 to end the declared public health emergency if the Minister is satisfied it is no longer necessary to exercise powers under Chapter 8 to prevent or minimise serious adverse effects on human health. If the Minster was to end the declared public health emergency, the CHO would be unable to exercise any of the powers under Part 7A as they are particular powers to be exercised for the COVID-19 emergency. The power of the Minister does not however extend to making, revoking or amending the directions given by the CHO. The Minister's power in the context of the COVID-19 emergency is an overarching power to end the declared public health emergency. This overarching power does not, in my view, detract from the fact that it is the CHO who possesses the power to give, revoke and amend a public health direction.

[81] The appellants' second submission is that Dalton J's approach departs from *Schwennesen* which accorded these factors neutral weight given that there exists a power to vary or amend the exercise of power under s 24AA of the *Acts Interpretation Act 1954* (Qld) in any event.[30] This submission should not be accepted as her Honour made specific reference to the more recent cases which have regarded these factors as neutral factors because of s 24AA of the *Acts Interpretation Act*. Her Honour was correct to consider that these factors gave some indication that the decisions to issue the directions were legislative. The power to give, amend or revoke a direction was one that could only be exercised by the CHO and not by other officers of the executive empowered to deal with the public health emergency. As correctly observed by her Honour, it marked the power of the CHO to give directions as a singular power not to be shared with the executive more generally.[31]

(f) No merits review

[82] Her Honour considered the fact that the decision to issue directions was not subject to merits review in a tribunal as being "weakly supportive of the idea" that the decision to make a direction is of a legislative character.[32] The appellants submit that her Honour erred in considering this factor as being "weakly supportive" and should have treated this factor as at best neutral. In *Schwennesen* the Court

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29 Judgment, [40].
30 Appellants' joint written submissions in reply, paragraph 23.
31 Judgment, [41].
32 Judgment, [41].

considered that the absence of a process for merit review of a decision was a factor, "not particularly weighty, but it nevertheless did point to a legislative characterisation".[33] As correctly submitted by the respondents, the weight given to this factor by Dalton J was in keeping with the decision of this Court in *Schwennesen* and does not reveal error.

Issue 3 – Does s 362B of the PHA confer powers on the CHO of a legislative nature?

[83] Before her Honour, the Hunt and Ishiyama appellants submitted that when consideration was given to the subject matter, scope and purpose of the PHA so as to identify the nature of the power in s 362B and the nature of the repository of that power, the directions should be classified as being of an administrative character.

[84] In rejecting this submission, Dalton J reasoned as follows. Her Honour accepted that the fact that the CHO is part of the executive is irrelevant in determining the nature of the directions. Her Honour noted however, that legislation may confer a power to legislate on a member of the executive. Dalton J accepted that the powers given to the emergency officers under Parts 6 and 7 of Chapter 8 of the PHA are powers to take executive action and make decisions of an administrative nature. As her Honour observed:

> "They allow executive officers to give particular people particular directions to do particular things…".[34]

[85] Dalton J however, considered that the powers of emergency officers which are executive in nature, were to be contrasted with the CHO's power to make directions:

> "The CHO is not by force of statute an emergency officer or an emergency officer (medical), although no doubt the Chief Executive of the Health Department could appoint him or her to either of those roles. Part 7A Division 2 is the only part of Chapter 8 that gives the CHO powers in a public health emergency, so in that sense the powers are not "additional". The powers given to the CHO are given in a separate Division of Part 7A. They are to make directions. There are no powers of a clearly executive kind such as those at ss 345, 347, 362G, 362H or 362I given to the CHO. The CHO may generally delegate his or her powers or functions under any Act to a deputy CHO – s 53AC [*Hospital and Health Boards Act 2011* (Qld)]. However, the CHO may not delegate the power to give a public health direction – s 362FA(2) PHA.
>
> I think that the legislative scheme, and that at Chapter 8, Part 7A in particular, provides the power for the CHO to make directions as a singular power, and that there is demarcation between, (i) that power and the other executive powers given by Chapter 8, and (ii) between that power and other powers given to the CHO."

[86] The appellants submit that as a matter of statutory interpretation, Dalton J erred in giving an interpretation to s 362B that demarcated the CHO's power as a singular power of a legislative kind. They submit:

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33 *Schwennesen*, [30].

34 Judgment, [51].

> "The CHO and the emergency officers were no more than different cogs in the same administrative wheel. Each were given powers to execute defined rules of a persons to assist in responding to a public health emergency. The Legislature saw no difference in the characterisation of those powers; both were exercising administrative power."[35]

[87] No error has been demonstrated. The powers exercised by emergency officers are easily distinguished from the power of the CHO under s 362B to give public health directions. As her Honour observed:

> "The contrast is between the particular and the general and, in my view, between the exercise of administrative power and the exercise of legislative power."[36]

Issue 4 – In determining whether the decisions of an administrative character, should the Court have regard to the remedial nature of the JRA?

[88] The appellants submit that Dalton J erred in failing to have regard to the remedial nature of the JRA. Dalton J did however consider this issue as follows:

> "It was submitted by the applicants that because the JRA was a remedial Act, the phrase "of an administrative character" should not be construed in an unduly technical or restrictive way. An associated point is that there is dicta in several cases to the effect that a decision or act might bear both administrative and legislative characters".
>
> Both these arguments were dealt with, correctly with respect, in *Schwennesen*. There have been numerous cases interpreting the phrase "of an administrative character" in the JRA and its analogues. All of them have accepted that "the evident purpose of the expression 'of an administrative character' was to exclude decisions of a 'legislative' or 'judicial' character'". Further:
>
> > '[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)'."

[89] Neither the appellants, nor the QHRC sought to challenge the correctness of the statement of Fraser JA in *Schwennesen* at [37]. The appellants submit however, that when regard is had to the remedial nature of the JRA, the proper approach to the question of whether a particular decision is administrative (or not) should be made having regard to whether it affects the rights, interests, liberties or legitimate expectations of any person rather than solely by reference to set criteria or indicia.[37] The difficulty with this submission is that the approach adopted by her Honour was

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35 Hunt & Ishiyama appellants' written submissions, paragraph 61.

36 Judgment, [52].

37 Appellants' (Baxter) outline of written submissions, paragraph 15.

orthodox and in keeping with authority. It was by a consideration of the test in *Grunseit* and of other indicia that her Honour determined that the CHO's decisions to give the directions were not of an administrative character, but were legislative. Once that determination was made, the remedial nature of the JRA as explained by Fraser JA, does not justify treating a decision as being of an administrative character if analysis of the decision demonstrates that its administrative characteristics are displaced by its legislative characteristics.

Disposition

[90] The appeals should be dismissed.

[91] **DAVIS J:** The appellants applied for orders requiring the Chief Health Officer (CHO) to provide reasons for his decisions to issue public health directions pursuant to s 362B of the *Public Health Act 2005* (PHA).[38]

[92] An obligation upon the CHO to provide reasons only arises if the directions are decisions "of an administrative character".[39] Decisions made in exercise of delegated legislative power are not decisions of an administrative character.[40]

[93] It was held by the learned primary judge that the decisions of the CHO were made in exercise of legislative, not administrative, power and so no obligation to give reasons arose. The appellants challenge that conclusion.

[94] The question on appeal goes to the heart of the constitutional arrangements of those jurisdictions who follow the Westminster system adopting, as it does, the separation of powers.[41]

[95] The distinction between legislative and administrative power was explained in *Commonwealth v Grunseit*[42] as:

> "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."[43]

[96] Over the years since *Grunseit* was decided, concern has been expressed as to the difficulty in application of the test.[44] Various features have been identified as important in determining whether the power vested by a statute is legislative or administrative in nature.[45]

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38 *Judicial Review Act 1991*, ss 32 and 38.

39 *Judicial Review Act 1991*, s 4.

40 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 633-634 and *Griffith University v Tang* (2005) 221 CLR 99.

41 *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 at 633, citing *Evans v Friemann* (1981) 35 ALR 428.

42 (1943) 67 CLR 58.

43 At 82.

44 See, for example, *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at 591 point B.

45 *Braemar Power Project Pty Ltd v The Chief Executive, Department of Mines and Energy in his capacity as Regulator Under the Electricity Act 1994 (Qld)* [2008] QSC 241 at [20] and following, *Schwennesen v Minister for Environment and Resource Management* [2010] QCA 340 at [8], *Sea Shepherd Australia Ltd and Anor v Western Australia and Ors* (2014) 313 ALR 184 at [77] and following.

[97] The starting point though must be the proper construction of the PHA. It is necessary to determine the meaning of the words of s 362B by reference to purpose and context,[46] which includes relevant extrinsic materials such as the Explanatory Notes to the *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020* by which the provision was enacted.[47]

[98] Section 6 of the PHA defines its objects as "… to protect and promote the health of the Queensland public". How that is to be achieved is described in s 7, which includes "responding to public health emergencies". That is the subject matter of Chapter 8.

[99] Section 314 identifies the purpose (relevantly here) of Chapter 8 as "… to declare and respond to … public health emergencies". The term, "public health emergency" is defined by s 315 as follows:

> "***public health emergency*** means an event or a series of events that has contributed to, or may contribute to, serious adverse effects on the health of persons in Queensland."

[100] The Minister may declare a public health emergency pursuant to s 319 and that enlivens powers in various persons. Section 319 is in these terms:

> "**319 Declaration of public health emergency**
>
> (1) This section applies if the Minister is satisfied—
>
> (a) there is a public health emergency; and
>
> (b) it is necessary to exercise powers under this chapter to prevent or minimise serious adverse effects on human health.
>
> (2) The Minister may declare a public health emergency by a signed written order (a ***public health emergency order***).
>
> (3) However, before declaring a public health emergency the Minister must, if practicable, consult with the chief executive and the chief health officer.
>
> (4) If it has not been practicable to consult with the chief executive or the chief health officer under subsection (3), the Minister must consult as soon as practicable after the declaration of the public health emergency.
>
> (5) A public health emergency order takes effect from its declaration by the Minister by signed written order."

[101] The Minister's powers arise upon establishment of a jurisdictional fact which has two elements: satisfaction that there is a public health emergency,[48] and satisfaction

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46 *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 269 CLR 507 at [32]-[37] and see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.

47 *Acts Interpretation Act* 1954, s 14B(3)(e).

48 Section 319(1)(a).

that it is necessary that powers exercisable under Chapter 8 be enlivened.[49] The declaration cannot be made until there has been consultation with the Chief Executive or the CHO[50] unless that is not practicable.[51]

[102] Upon declaration of a public health emergency, various powers arise in the Chief Executive,[52] the CHO and emergency officers.

[103] By s 8 and Schedule 2 of the PHA, the CHO is the person appointed as such under the *Hospital and Health Boards Act 2011*. Section 52 of that Act provides that the CHO "is to be employed as a public service officer or as a health service employee".

[104] Section 53 of the *Hospital and Health Boards Act 2011* defines the functions of the CHO as:

> "**53 Functions of chief health officer**
>
> The functions of the chief health officer are—
>
> (a) to provide high-level medical advice to the chief executive and the Minister on health issues, including policy and legislative matters associated with the health and safety of the Queensland public; and
>
> (b) any functions given to the chief health officer by the chief executive; and
>
> (c) other functions under this or another Act."

[105] The CHO is very much part of the executive administration.

[106] By s 332 of the PHA, it is the Chief Executive, not the CHO, who "is responsible for the overall management and control of the response to the emergency".[53] It is the Chief Executive who may appoint emergency officers.[54]

[107] By ss 332(3) and 332(4):

> "**332 Coordination responsibility**
>
> (1) …
>
> (3) For coordinating the response by emergency officers to the declared public health emergency, the chief executive may give directions about the circumstances in which powers available to emergency officers under this chapter may be exercised.
>
> (4) A direction given under subsection (3)—
>
> (a) may be general or limited to a particular class of emergency officers; and
>
> (b) may be given on conditions."

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49 That is the purpose and effect of s 319(1)(b).
50 Section 319(3).
51 Section 319(4).
52 *Acts Interpretation Act 1954*, s 36, Schedule 1.
53 Section 332.
54 Section 333.

[108] There is no jurisdictional fact limiting the power given to the Chief Executive to give directions of the type identified by s 332(3) and (4). It appears, although it is unnecessary to decide, that those subsections may delegate legislative power to the Chief Executive to further define the statutory grant of power to emergency officers otherwise made by s 345.

[109] Emergency officers are appointed by the Chief Executive pursuant to Part 5 of Chapter 8. Section 345 vests power in the emergency officers. It provides:

> "**345 Emergency powers**
>
> (1) An emergency officer responding to a declared public health emergency may do any of the following the emergency officer reasonably believes is necessary to respond to the declared public health emergency—
>
> (a) require a person not to enter or not to remain within a place;
>
> (b) require a person to stop using a place for a stated purpose;
>
> (c) require a person to go to a stated place;
>
> (d) require a person to stay at or in a stated place;
>
> (e) require a person to take measures to remove from the person a substance that is a hazard to human health, for example, by showering;
>
> (f) direct the movement of a person, animal or a vehicle into, out of, or around the public health emergency area;
>
> (g) require a person to state the person's name and residential address;
>
> (h) require a person to answer questions by the emergency officer;
>
> (i) clean or disinfect a place, structure or thing;
>
> (j) carry out insect or pest control;
>
> (k) demolish stated structures or other property;
>
> (l) contain an animal, substance or thing within the public health emergency area;
>
> (m) remove an animal, substance or thing from a place;
>
> (n) destroy animals at a place or remove animals from a place for destruction at another place;
>
> (o) dispose of an animal, substance or thing at a place, for example, by burying the animal, substance or thing;

(p) take action in relation to property including, for example, to allow the officer to take control of a building for the purposes of the emergency;

(q) require a person to give the emergency officer reasonable help to exercise the emergency officer's powers under paragraphs (i) to (p).

(2) However, an emergency officer may exercise a power under subsection (1)(k) or (n) only with the written approval of the chief executive.

(3) If a person fails to comply with a requirement or direction under subsection (1)(a) to (f), an emergency officer may, with necessary and reasonable help and force, take action to enforce the requirement or direction.

(4) For subsection (1)(g), the emergency officer may require the person to give the officer evidence of the correctness of the stated name or residential address if the officer reasonably suspects the stated name or address to be false.

(5) When making a requirement or direction mentioned in subsection (1) or (4), the emergency officer must—

(a) warn the person it is an offence to fail to comply with the requirement or direction, unless the person has a reasonable excuse; and

(b) tell the person of the effect of section 346(2)." (emphasis added)

[110] The powers of emergency officers arise upon establishment of a jurisdictional fact, namely the emergency officer reasonably believing that it "is necessary to respond to the declared public health emergency". No party suggests or could suggest that an emergency officer acting under Chapter 8 of the PHA is exercising delegated legislative power.

[111] The "COVID-19 emergency" is recognised as a particular "public health emergency". Section 315 defines "COVID-19 emergency" for the purposes of Chapter 8 as:

> "***COVID-19 emergency*** means the public health emergency declared by the Minister on 29 January 2020 under section 319(2), as extended and further extended under section 323.
>
> *Editor's note—*
>
> The public health emergency order that declared the COVID-19 emergency was published in the gazette on 31 January 2020 under section 321(1)(a)."

[112] Part 7A of Chapter 8 was enacted to deal with the COVID-19 pandemic. As recognised by s 315 of the PHA, a public health emergency was declared by the Minister on 29 January 2020 in response to the pandemic.

[113] Section 362B, which is the critical section, is:

> "**362B Power to give directions**
>
> (1) This section applies if the chief health officer reasonably believes it is necessary to give a direction under this section (a ***public health direction***) to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> (2) The chief health officer may, by notice published on the department's website or in the gazette, give any of the following public health directions—
>
> (a) a direction restricting the movement of persons;
>
> (b) a direction requiring persons to stay at or in a stated place;
>
> (c) a direction requiring persons not to enter or stay at or in a stated place;
>
> (d) a direction restricting contact between persons;
>
> (e) any other direction the chief health officer considers necessary to protect public health.
>
> (3) A public health direction must state—
>
> (a) the period for which the direction applies; and
>
> (b) that a person to whom the direction applies commits an offence if the person fails, without reasonable excuse, to comply with the direction." (emphasis added)

[114] Section 362A is important. It provides:

> "**362A Purposes of part**
>
> The purposes of this part are—
>
> (a) to confer additional powers for the COVID-19 emergency on—
>
> (i) the chief health officer; and
>
> (ii) emergency officers; and
>
> (b) to protect the confidentiality of particular personal information collected in relation to the COVID-19 emergency."

[115] Section 362A shows that Part 7A is not designed to create some new scheme or regime. It is designed to confer "additional powers" to respond to the particular demands of the pandemic. No additional powers are conferred by Part 7A upon the Chief Executive, who, as already observed, may, by s 332, have received a delegation of legislative power.

[116] Emergency officers receive their additional powers through s 362G. It provides:

> "**362G Power to give directions under this division**
>
> (1) An emergency officer may give a person a direction under this division if the emergency officer reasonably believes the direction is necessary to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> (2) Also an emergency officer may give the person 1 or more further directions under this division if the officer reasonably believes the further directions are necessary for a purpose mentioned in subsection (1).
>
> (3) A direction given under this division must—
>
> (a) be in writing; and
>
> (b) state that the person to whom the direction is given commits an offence if the person fails, without reasonable excuse, to comply with the direction; and
>
> (c) state any other matters required under this division.
>
> (4) To the extent of any inconsistency between a public health direction given by the chief health officer and a direction given by an emergency officer under this division, the public health direction prevails.
>
> (5) In this section—
>
> ***reasonably believes*** means believes on grounds that are reasonable in the circumstances." (emphasis added)

[117] The directions which may be given under s 362G by emergency officers are identified by ss 362H and 362I. They are:

> "**362H Directions to stay at particular places**
>
> (1) An emergency officer may give a person a direction to—
>
> (a) stay at or in a stated place for a stated period of not more than 14 days (the ***isolation period***) unless the person is permitted under the direction to leave the place for stated purposes or in stated circumstances; and
>
> (b) comply with stated conditions during the isolation period.
>
> (1A) Also, an emergency officer may give a parent of a child a direction to—
>
> (a) keep the child at or in a stated place for a stated period of not more than 14 days (also the ***isolation***

period) unless the child is permitted under the direction to leave the place for stated purposes or in stated circumstances; and

(b) ensure the child complies with stated conditions during the isolation period.

(2) For subsection (1)(a) or (1A)(a), the place may be the person's home or another place decided by the emergency officer.

Examples of another place—

a hospital, an isolation area established under section 352

(3) For subsection (1)(b) or (1A)(b), the conditions may provide for matters including—

(a) whether other persons may enter the place; and

(b) how the person's contact with other persons is restricted; and

(c) the purposes for which the person may leave the place.

Examples of purposes—

- to obtain medical care or medical supplies
- to avoid an emergency situation

(4) For subsection (1A), a person is a parent of a child if the person is—

(a) the child's mother; or

(b) the child's father; or

(c) someone else, other than the chief executive (child safety), having or exercising parental responsibility for the child.

(5) In this section—

chief executive (child safety) see section 158. …

362I Directions given in relation to particular facilities

(1) An emergency officer may give the owner or operator of any business or undertaking a direction under subsection (2).

(2) A direction may require the owner or operator to do 1 or more of the following, at a stated time, in a stated way or to a stated extent, in relation to any facility used in conducting the business or undertaking—

(a) open the facility;

(b) close the facility;

(c) limit access to the facility.

Example of a direction for paragraph (c)—

a direction requiring the operator of a facility to restrict the access of visitors to the facility

(3) A direction given under this section must be in writing and state the period for which it applies."

[118] Parliament prescribed a jurisdictional fact as a precondition to the powers under s 362G arising in favour of emergency officers. That jurisdictional fact is that "the emergency officer reasonably believes the direction is necessary to assist in containing, or to respond to, the spread of COVID-19 within the community". Upon the existence of the requisite belief, which must be held on reasonable grounds, a discretionary power arises to give directions. No party suggested, or could suggest, that s 362G delegated legislative power to emergency officers.

[119] Section 362B, which empowers the CHO to give a public health direction, has the same structure as s 362G. No only is the power in s 362B, like the power vested by s 362G, limited to circumstances where a jurisdictional fact exists, but the jurisdictional fact in both sections is identical.

[120] The power under the section to give a public health directive arises only where the CHO holds a particular state of mind. He must "believe" it is "necessary"[55] to give the public health direction in order to fulfil the object of the grant of power, namely "to assist in containing, or to respond to, the spread of COVID-19 within the community". Then it is for the CHO to make directions pursuant to s 362B.

[121] I have had the considerable benefit of reading the careful analysis of the case on appeal conducted by Flanagan JA in his judgment. His Honour has come to a different view on the appeal to mine.

[122] A critical conclusion reached by his Honour is:

"[52] Section 362B(2)(a) gives the CHO the power to make a direction restricting the movement of persons. The subsection does not however, prescribe the basis or the extent of the restriction to the movement of persons nor the class of person whose movement may be subject to such a direction. Similarly, with s 362B(2)(c) which empowers the CHO to give a direction requiring persons not to enter or stay at or in a stated place does not prescribe the basis or extent of such a requirement. It is the directions which identify the basis and extent of the restrictions and requirements and to whom they apply. It is the directions which establish and impose specific obligations (as rules of conduct on classes of persons)."

[123] In that paragraph, his Honour discusses the point at which my view differs from his. I agree that upon exercise of the powers vested by s 362B, the CHO prescribes how

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55 Necessary means reasonably appropriate and adapted, not essential or indispensable: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39].

citizens might or might not move within the State. That does not, in my view, however, relevantly create rules of conduct. The restrictions imposed are consequences of the CHO fashioning directions within the strictures imposed by the legislation and the powers are administrative in nature.

[124] Statutory powers authorising the giving of directions are common. They exist in the PHA in favour of emergency officers.[56] They exist in the *Police Powers and Responsibilities Act 2000* in favour of police officers[57] and in the *Dangerous Prisoners (Sexual Offenders) Act 2003*[58] and *Corrective Services Act 2006*[59] in favour of Corrective Services officers.

[125] Any exercise of a power to direct will result in a unique direction governed by the exercise of discretion given the nature of the power and the circumstances under which the power is exercised. That is typical of the exercise of administrative power.

[126] An exercise of the power under s 362B(2) will result in a unique direction, or a unique set of directions. The CHO will determine those particulars identified by Flanagan JA in the passage I have quoted above, but will do so within the strictures of s 362B.

[127] Further restraint upon the exercise of power is imposed through the objective element of the requisite belief. Subjective belief in the necessity to respond to the pandemic is not sufficient. The belief itself must be reasonable.

[128] Reasonableness is the hallmark of the exercise of administrative power. Even in the absence of some express requirement of reasonableness, it is assumed that Parliament intended that administrative power will be exercised reasonably.[60] What is "reasonable" introduces questions of proportionality.[61] The decision must be reasonable by reference to the nature of the power and the circumstances of its exercise.

[129] The power does not arise at all except where the prerequisite of reasonable belief of necessity to exercise the power arises. When it does arise, the CHO may make the directions identified in s 362B(2). However, Parliament has, by the words of s 362B, limited which of those powers can be exercised in which circumstances. Only those particular directions which the CHO reasonably believes are "necessary … to assist in containing, or to respond to, the spread of COVID-19 within the community" may be given. That must be the proper construction of s 362B.[62]

[130] The directions which were given by the CHO were described by both the primary judge and Flanagan JA as "broad". True it is that the directions affect millions of people. Many statutes confer administrative power in a way which empowers the

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56 *Public Health Act 2005*, Chapter 8, Part 6, Part 7 and Part 7A, Division 3.
57 For examples, ss 48, 143, 177, 179, 645, Chapter 19, Part 1.
58 Section 16B.
59 Sections 20, 200A.
60 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.
61 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [30] and [31].
62 *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 629-630, *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 per Kirby and Callinan JJ in dissent on other points at [69] and [70].

executive to make decisions affecting many persons. Town planning statutes are an example.[63]

[131] Section 362B(2)(e) may seem wide and virtually limitless. In my view, that is not so. COVID-19 is an infectious disease. Section 362B(2) is designed to prevent transmission. Subsections 362B(2)(a), (b), (c) and (d) all have the purpose of restricting transmission by restricting movement of citizens. Section 362B(2)(e) would, in my view, be read *ejusdem generis*, especially given that s 362B(2) empowers the CHO to interfere with fundamental rights,[64] although, as observed in *Kassam v Hazzard*,[65] the principle of legality may have limited operation in the construction of a statute which expressly restricts rights.[66]

[132] Not only has Parliament limited the circumstances in which the power arises and directions can be given, but has also limited the duration of the life of the directions. By s 362B(3)(a), the direction must state the period over which the direction applies. It may only prevail for a stated period and must be withdrawn earlier if the CHO's reasonable belief in its necessity ceases.[67]

[133] The respondents rely upon *Kassam v Hazzard*,[68] a recent decision of the New South Wales Court of Appeal concerning powers exercised to deal with the COVID-19 pandemic. The case concerned the operation of s 7 of the *Public Health Act 2010* (NSW) which provides:

> "**7 Power to deal with public health risks generally**
>
> (1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.
>
> (2) In those circumstances, the Minister—
>
> (a) may take such action, and
>
> (b) may by order give such directions,
>
> as the Minister considers necessary to deal with the risk and its possible consequences.
>
> (3) Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary —
>
> (a) to reduce or remove any risk to public health in the area, and
>
> (b) to segregate or isolate inhabitants of the area, and

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63 See generally, *Idonz Pty Ltd v National Capital Development Commission* (1985) 58 LGRA 99 at 122, a case concerning unidentifiable groups of people.

64 *Potter v Minahan* (1908) 7 CLR 277, *Coco v The Queen* (1994) 179 CLR 427 at 437.

65 (2021) 106 NSWLR 520.

66 At [80]-[93] and [163]-[166].

67 Section 362E.

68 (2021) 106 NSWLR 520.

(c) to prevent, or conditionally permit, access to the area.

(4) An order must be published in the Gazette as soon as practicable after it is made, but failure to do so does not invalidate the order.

(5) Unless it is earlier revoked, an order expires at the end of 90 days after it was made or on such earlier date as may be specified in the order.

(6) Action may not be taken, and an order has no effect, in relation to any part of the State for which a state of emergency exists under the *State Emergency and Rescue Management Act 1989*.

(7) An application may be made to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of any of the following decisions —

(a) any action taken by the Minister under this section other than the giving of a direction by an order under this section,

(b) any direction given by any such order."

[134] Pursuant to s 7, the minister made declarations and directions. Justice of Appeal Leeming observed:

> "[144] In some respects, the impugned orders have a hybrid character. They are described by the President. They are not 'statutory rules' within the meaning of s 21 of the *Interpretation Act 1987* (NSW). That denies to them the statutory presumption of validity effected by s 45(1) of that statute, but also means that they are not subject to tabling and disallowance under Pt 6. It is true that that reduces the scope for scrutiny, but counterbalancing that is the fact that the order must expire of its own force within 90 days; contrast most statutory rules (such as regulations) which are disallowable but will generally expire after five years: s 10(2) of the *Subordinate Legislation Act 1989* (NSW). On the other hand, as a matter of substance, the orders are 'legislative' in the sense that they prescribe general norms of conduct, with real sanctions if breached which were applicable to thousands, indeed millions, of people. For what it is worth, they also appear on the NSW legislation website, prominently, on a page titled 'COVID-related legislation'."

[135] The question in *Kassam* was different to that in the current appeals. A right of review of the decisions made in New South Wales existed whether or not the decisions were of a legislative or administrative character. It was argued that on a proper construction of s 7, only decisions of an administrative nature were

authorised. That submission was rejected. The New South Wales Court of Appeal did not determine whether the decisions were administrative or legislative in nature.

[136] Section 7 of the New South Wales Act is very different to s 362B of the PHA. By s 7, the primary grant of power to the Minister is to do anything ("take such action") to deal with a risk to public health once the Minister has reasonably determined that such a risk exists.[69] Even then, Leeming JA thought some factors pointed to the directions being administrative in nature.[70]

[137] In my view, the directions being considered in the present appeals did not determine the content of the law as a rule of conduct. They implemented the laws of Parliament by:

1. an exercise of power which only arose in the strict circumstances identified by Parliament;
2. for a purpose narrowly defined by Parliament;
3. only to the extent authorised by Parliament, namely to the extent that it was "necessary" to meet the purpose for which the grant of power was made;
4. for the limited time that Parliament prescribed that the power could be exercised.

[138] In my view, those features classically define the power as one of an administrative nature and no further analysis is necessary to dispose of the appeal. However, others have considered further factors upon which I should comment.

[139] The consequence of a breach of a public health directive is the commission of an offence.[71] It is very common for there to be criminal consequences for the breach of the product of an administrative decision, especially one to issue a direction. It is an offence to disobey a direction of a police officer.[72] It is an offence to disobey the direction of a Corrective Services officer.[73] There are other examples within the PHA; it is an offence to disobey a direction of an emergency officer.[74] The fact that there are criminal sanctions upon disobedience of a public health direction does not, to my mind, suggest that the power is otherwise than administrative.

[140] It was thought significant by the primary judge that the decision must be published in the Gazette or the Department's website. That requirement, it was reasoned, suggested that the power was legislative.[75] That, in my view, is just a consequence of the fact that the power, limited as I have explained it, once exercised, affects many people and it is necessary for the decision to be widely publicised so that persons do not move within the community spreading COVID-19.

[141] A lack of parliamentary oversight was regarded by the primary judge as a factor which might suggest that the directions were decisions of an administrative character, but in the end, her Honour thought that not to be determinative.[76] I agree

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69 *Kassam v Hazzard* (2021) 106 NSWLR 520 at [51].
70 At [144].
71 *Public Health Act 2005*, s 362D.
72 *Police Powers and Responsibilities Act* 2000, s 791.
73 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 43AA; obedience with orders is a condition of a supervision order; ss 16, 16A and 16B.
74 *Public Health Act* 2005, s 362J.
75 Judgment at [36].
76 Judgment at [58] and [59].

that the factor is not determinative but think that it quite clearly favours characterisation of the power as an administrative one.

[142] Justice Gummow, in *Queensland Medical Laboratory v Blewett*,[77] found that a power to declare a table of medical benefits was a power of an "essential legislative character". His Honour placed weight on the fact that the decision of the Minister to declare the new table could be countermanded by Parliament.

[143] Here, the lack of parliamentary oversight is particularly significant, having regard to the structure of s 362B. The CHO must be a doctor. He must be one capable of fulfilling the functions of CHO as defined by the *Hospital and Health Boards Act*. By s 362B, it is the CHO who makes the assessment as to whether the making of the public health directive is "necessary" to fulfil the prescribed purpose of responding to the pandemic. The restraint then is that the exercise of power is subject to his belief being "reasonable". That there is no parliamentary oversight is consistent with a grant of executive power to an officer entrusted to implement the laws created by Parliament.

[144] There is no requirement under the legislation for the CHO to consult and no necessity to have regard to wider policy considerations. These factors are identified in cases like *Schwennesen v Minister for Environment and Resource Management*[78] and *RG Capital Radio Ltd v Australian Broadcasting Authority*[79] as suggesting that a power should be categorised as administrative. The learned primary judge accepted that proposition but thought that s 362B was very different to the legislation being considered in those cases because this was emergency legislation and, therefore, consultation and reference to wider policy considerations was impossible. Her Honour thought these were then neutral factors.[80]

[145] Section 362B evidences policy enacted by the Parliament. The purpose of s 362B is to vest additional powers on the CHO to be exercised in his judgment provided he holds the requisite belief reasonably. There is no scope for consultation and wider policy considerations because the CHO is to implement the law (and policies) prescribed by the Parliament in the PHA.

[146] The primary judge thought it significant that the CHO's directions cannot be brought to an end or varied except by the CHO. That was considered to be a factor suggesting that the power was legislative.[81] However, not only has Parliament prescribed the confines under which the power can be exercised, it has required the CHO to revoke the public health direction once satisfied that it is no longer necessary.[82] Further, the Minister may bring the directions to an end by revoking the public health emergency declaration.[83] These features which control the duration of the direction strongly suggest that the CHO's powers are administrative in nature.

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77 (1988) 84 ALR 615 at 635-636.
78 [2010] QCA 340.
79 (2001) 185 ALR 573.
80 Judgment at [42]-[44].
81 Judgment at [40].
82 Section 362F.
83 Sections 322 and 324.

[147] The primary judge thought that the fact that the decision to issue a public health directive was not subject to a merits review in a tribunal, was "weakly supportive of the idea" that the decision to make a direction is of a legislative character.[84]

[148] Few administrative decisions are subject to merits review. This might be a consideration in assessing some legislation. However, in my view, s 362B clearly grants administrative power. Like most administrative decisions, it is reviewable through the JR Act but not on its merits.

Conclusions

[149] In my view, s 362B shows all the classic features of a grant of administrative power. In particular:

1. the power is only exercisable upon establishment of a jurisdictional fact;
2. the jurisdictional fact requires a particular subjective state of mind to be held by the decision-maker;
3. the power does not arise unless that state of mind of the decision-maker is held reasonably, thus invoking considerations of proportionality;
4. the exercise of the power is limited by subject matter, purpose and time, all of which are governed by the provisions of the statute.

[150] There can be no doubt that the members of Parliament who voted to amend the PHA to introduce Part 7A actually intended that the powers vested in the CHO be administrative. The Explanatory Notes to the *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020* and the *Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021* provide:

> "Based on the latest health and medical advice from Queensland and Australian experts, Queensland Health has identified provisions of the [PHA] that should be strengthened to ensure appropriate responses to the COVID-19 pandemic can be undertaken within a robust legal framework. It is necessary to strengthen powers of the [CHO] and emergency officers appointed under the Act to implement social distancing measures, including regulating mass gatherings, isolating or quarantining people to assist in containing the spread of COVID-19 and protecting vulnerable populations such as the elderly."[85]

And:

> "The Bill may potentially breach fundamental legislative principles as it delegates powers to make directions to the [CHO] and emergency officers appointed under the [PHA]. Such an approach may be considered a delegation of powers, the exercise of which has potentially significant effect on individuals' rights and liberties. ...
>
> The public health directions issued must be consistent with the requirements in the Bill and fall within the head of power. They are not, however, subordinate legislation. The remit for any other

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84 Judgment at [41].

85 Explanatory Notes, *Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020*, page 3.

> direction that can be issued is safeguarded by the requirement to be necessary to protect public health. The content of the directions that may be issued under these provisions are technical and detailed in nature and are subject to frequent change due to the rapidly changing COVID-19 pandemic, so are more appropriately prescribed by public health direction than being included in the [PHA]."[86]

And:

> "The delegation of administrative powers is appropriately limited and is necessary to ensure swift and targeted responses to the rapidly changing risks are possible."[87] (emphasis added)

[151] In my view, that is what was achieved.

[152] I would:

1. allow the appeal;
2. set aside the decision below;
3. order the respondents to deliver statements of reasons within 28 days;
4. order the respondents to pay the appellant's costs of the appeal.

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86 Explanatory Notes, *Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021*, page 30.

87 Explanatory Notes, *Public Health and Other Legislation (Further Extension of Expiring Provisions) Amendment Bill 2021*, page 31.