SUPREME COURT OF QUEENSLAND

CITATION:	*William Alfred Schwennesen v Minister for Environment & Resource Management* [2010] QSC 81
PARTIES:	**WILLIAM ALFRED SCHWENNESEN** Applicant **v** **MINISTER FOR ENVIRONMENT & RESOURCE MANAGEMENT** Respondent
FILE NO/S:	BS 12028 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application for judicial review
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	19 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2010
JUDGE:	White J
ORDER:	**The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – Request for reasons – Whether "decision of an administrative character" *Broadcasting Authority Act*, s 26(1) *Broadcasting Services Act* 1992 (Cth) *Condamine and Balonne Resource Operations Plan* 2008 *Fisheries Management Act* 1991 (Cth) *Judicial Review Act* 1991, s 4, s 20, s 31, s 33(4)(b), s 38 *Local Government (Planning and Environment) Act* 1990 *Statutory Instruments Act* 1992, s 49(1) *Water Act* 2000, s 10, s 11,s 19, s 35, s 39, s 40, s 41, s 46(1)-(2), s 47, s 49, s 50, s 52, s 55, s 57, s 94, s 95, s 96, s 97, s 98, s 99, s 100, s 102, s 103(2), s 103(5), s 104B, s 105, S 851(2), s 1009

Water Resource (Condamine and Balonne) Plan 2004

Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy (1992) 37 FCR 463

Australian National University v Burns (1982) 43 ALR 25

Braemer 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

The Commonwealth v Grunseit (1943) 67 CLR 58

Currareva Partnership v Welford [2000] QSC 098

Donohue v Australian Fisheries Management Authority [2000] FCA 901; (2000) 60 ALD 137

Evans v Friemann (1981) 35 ALR 428

Griffith University v Tang (2005) 221 CLR 99

HA Bachrach Pty Ltd v Minister for Housing (1994) 85 LGERA 134

Hamblin v Duffy (1981) 34 ALR 333

McWilliam v The Civil Aviation Safety Authority (2004) 214 ALR 251

Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd (1993) 40 FCR 381

Queensland Medical Laboratories v Blewett (1988) 84 ALR 615

R v Toohey; Ex Parte Northern Land Council (1981) 151 CLR 170

RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 185 ALR 573

Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee (2007) 163 FCR 451

SAT FM Pty Ltd v Australian Broadcasting Authority (1997) 75 FCR 604

Visa International Service Association v Reserve Bank of Australia (2003) 131 FCR 300

COUNSEL:	Andrew Greinke for the applicant
	Scott McLeod for the respondent
SOLICITORS:	Shannon Donaldson Province Lawyers for the applicant
	GR Cooper Crown Solicitor for the respondent

[1] The applicant seeks an order pursuant to s 38 of the *Judicial Review Act* 1991 that the respondent Minister provide a written statement of reasons in relation to the determination of the applicant's rights and conditions attaching to his water allocations 58 and 541 arising out of the decision of the Governor-in-Council to make the *Condamine and Balonne Resource Operations Plan* 2008 under s 103(5) of the *Water Act* 2000.

[2] The Minister refused the applicant's request for the provision of reasons on the ground that the decision is not one to which Part 3 of the *Judicial Review Act* applies in that it is not "a decision of an administrative character".[1] The respondent also contends that the application was not made within a reasonable time of the decision.[2] As the evidence reveals, the delay by the applicant was not egregious and, should he be successful on the principal issue, Mr McLeod for the Minister accepted that the request would be unlikely to be characterised as not having been made within a reasonable time.

[3] The applicant is the owner of a property, "Warkon", which abuts the Balonne River, approximately 60 kilometres upstream of Surat. The property lies within the area of the *Water Resource (Condamine and Balonne) Plan* 2004[3] made under the *Water Act* 2000. The applicant held certain water entitlements which were converted to tradable water allocations under the draft resource operation plan for the Condamine and Balonne ("the Draft ROP") released on 20 April 2007.[4] Schedule 4.8 of the Draft ROP set out the conversions for the Condamine and Balonne Water Management Area and included the applicant's water licence 50861N converted to water allocation 58.[5] Schedule 4.10 of the Draft ROP set out the conversion for the Tributaries Water Management Area and includes the applicant's water licence 37165N converted to water allocation 541.

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

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1 *Judicial Review Act*, ss 4 and 31.
2 *Judicial Review Act*, s 33(4)(b).
3 Published on 3 December 2004.
4 "RBC-3" to the affidavit of Richard Brook Crowthers filed 15 December 2009 in these proceedings, ("Crowthers").
5 At p 230 of the Draft ROP.

in 1992. To answer the question posed on this application it is unnecessary to consider these factual issues further.

[5] The Draft ROP was re-released for public consultation on the Department's website on 27 July 2007 and contained some amendments but none to the applicant's water entitlements, which remained as specified in the original Draft ROP.[6]

[6] On 11 December 2008 the Governor-in-Council approved the *Condamine and Balonne Resource Operations Plan* 2008 ("the Final ROP") for the upper and middle parts of the plan area.[7] On 12 December 2008 the approval of the Final ROP by Governor-in-Council was notified in the Queensland Government Gazette.

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

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

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

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

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

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

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

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

The statutory provisions

[10] The scheme of the *Water Act* 2000 and the *Water Resource (Condamine and Balonne) Plan* 2004 need to be considered before turning to the issue before the court.

(i) The Water Act 2000

The *Water Act* ("the Act") was passed in 2000 to provide, inter alia, for the sustainable management of water and other resources. This occurred against a background of concern about the sufficiency of water for the environment and that water entitlements were tied to the land. The purpose of Chapter 2 with which this application is concerned:[10]

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

The expression "sustainable management" is management that:[11]

> (a) allows for the allocation and use of water for the physical, economic and social well being of the people of Queensland and Australia within limits that can be sustained indefinitely; and
>
> (b) protects the biological diversity and health of natural ecosystems; and
>
> (c) contributes to the following –
>
> (i) improving planning confidence of water users now and in the future regarding the availability and security of water entitlements;
>
> (ii) the economic development of Queensland in accordance with the principles of ecologically sustainable development;

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9 Section 4 of the *Judicial Review Act*.
10 Section 10(1) of the *Water Act*.
11 Section 10(2).

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

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

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

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

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

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

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

The expression "efficient use" of water:[12]

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

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

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

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

[11] The Act sets out certain principles described as "principles of ecologically sustainable development",[13] which it is unnecessary to set out here, but which provide that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations and

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12 Section 10(3).
13 Section 11.

should provide for broad community involvement. Chapter 2 Part 2 concerns water rights. All rights to the use, flow and control of water in Queensland are vested in the State.[14] However, water may be taken and used in an emergency situation such as fire fighting, and a land owner adjoining a watercourse may take water for stock purposes or domestic purposes and may take overland flow water for the same purposes.[15] There are many provisions in this Part of the Act about the conservation of water but only those relevant to the issues in this application need be mentioned further.

[12] To give effect to the purposes of Chapter 2, the Minister must plan for the allocation and sustainable management of water to meet Queensland's future requirements.[16] The chief executive is obliged to provide information for planning purposes and is directed how to do so.[17] The chief executive must also plan for the sustainable management of water use to minimise adverse impacts of water use on land and water.[18]

(ii) Water resource plans

[13] The Minister may prepare a water resource plan for any part of Queensland to advance the sustainable management of water.[19] The purposes of such a plan, inter alia, are to define the availability of water in the plan area, to provide a framework for sustainably managing water and the taking of water, to identify priorities and mechanisms for dealing with future water requirements, to provide a framework for establishing water allocations and regulate the taking of overland flow water if there is a risk that taking overland flow water in the area may significantly impact on the plan's outcomes.[20]

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

14 Section 19.
15 Section 19(2)-(4).
16 Section 35(a).
17 Section 35(b).
18 Section 35(c).
19 Section 38(1).
20 Section 38(3), (4).
21 Section 40.
22 Section 1009.
23 Section 39.
24 Section 40(2).
25 Section 40(4).
26 Section 40(5).

notice is published.[27] The Act sets out the matters which the draft water resource plan must contain and the matters which it may contain.[28]

[15] The Minister is directed to consider certain matters when preparing the draft water resource plan, including the State's water rights, the volume and quality of water, national, State and regional objectives and priorities for promoting sustainable development, and existing water entitlements.[29] Once the draft water resource plan has been prepared, the Minister must publish a notice stating where copies of the draft may be inspected, that written submissions may be made and other procedural matters.[30] The Minister may prepare a further draft water resource plan after considering all of the relevant submissions.[31] In preparing the final water resource plan, the Minister must consider all properly made submissions about the draft plan.[32] Such a plan does not have affect until it has been approved by the Governor in Council.[33] A final water resource plan is subordinate legislation for the *Statutory Instruments Act* 1992 and is the water resource plan for the plan area.[34] If the Minister decides not to proceed with the preparation of a draft water resource plan, the Minister must publish a notice advising of that decision and the reason for decision.[35]

[16] A water resource plan may be amended by the Minister or be replaced by a new plan.[36] However, the Governor in Council may approve minor amendments to a water resource plan without going through the processes which are legislated for in preparing a draft water resource plan.[37]

(iii) Resource operations plan

[17] Chapter 2 Part 4 of the Act provides for the implementation of a water resource plan by the preparation of a resource operations plan, the granting of resource operations licences, the conversion of existing water licences and interim water allocations to water allocations, the granting of water allocations, and allowing for the registration of, and dealings with, water allocations.[38] Under the Act the chief executive has the responsibility for preparing a resource operations plan to implement a water resource plan for any water in the plan area.[39] Before doing so the chief executive must prepare a draft resource operations plan.[40] The Act provides for a process to occur, not dissimilar to that for a water resource plan, leading to a final resource operations plan ("ROP") and may be summarised as follows:

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27 Section 41.
28 Section 46(1) and (2).
29 Section 47.
30 Section 49.
31 Section 49.
32 Section 50(1).
33 Section 50(2).
34 Section 50.
35 Section 52.
36 Section 55.
37 Section 57.
38 Section 94.
39 Section 95.
40 Section 95(3).

- A public notice of intention to prepare a draft ROP must be given;[41]
- The notice must state certain matters, including that written submissions may be made about the proposed draft plan;[42]
- After the notice is published, the chief executive must explain, by letter or public meetings, the implications of the notice to as many affected water entitlement holders as possible;[43]
- The chief executive must send a copy of the notice to each local government whose area is included in the proposed plan area;[44]
- The chief executive may send a copy of the notice to any other entity that the chief executive considers appropriate;[45]
- The chief executive is required to give the each holder of an interim resource operations licence specific notice requesting the holder to provide proposed arrangements for the management of the water;[46]
- Certain matters the draft ROP must contain;[47]
- Certain matters the draft ROP may contain;[48]
- The chief executive must consider certain matters when preparing the draft ROP, including all properly made submissions (defined in Schedule 4);[49]
- The chief executive must publish a notice when the draft ROP has been prepared stating where it may be accessed, and that written submissions may be made;[50]
- Following the notice, the chief executive must explain by letter or public meetings the implications of the notice to as many affected water entitlement holders as possible;[51]
- The chief executive must send a copy of the notice and draft ROP to each local government whose local government area is included in the proposed plan area and each holder who made a proposal under s 97 (water infrastructure operators);[52]
- Provision is made for existing water entitlement holders to give the chief executive a notice in the approved form stating the holders wish to be

41 Section 96(1).
42 Section 96(2).
43 Section 96(4).
44 Section 96(5).
45 Section 96(7).
46 Section 97.
47 Section 98(1)(3) and (4).
48 Section 98(2) and (5).
49 Section 99.
50 Section 100(1) and (2).
51 Section 100(4).
52 Section 100(5).

recorded on the water allocations register other than as tenants in common in equal shares (and other matters relating to title);[53]

- Provision is made for review of properly made submissions;[54]
- The chief executive may decide whether or not to prepare a final draft ROP;[55]
- The Governor in Council may approve the final draft ROP if it is not inconsistent with the water resource plan. Such approval is required for the final draft to become the ROP for the relevant water resource plan area;[56]
- Notice of the approval must be gazetted;[57]
- When approved, the final draft is the ROP for the water resource plan.[58]

[18] If the chief executive decides not to proceed with the preparation of a draft ROP or a final draft ROP, then the chief executive is required to publish a notice advising of that decision and the reasons for it and send a copy of that notice to each local government area in the plan area.[59] When a local government receives a copy of the notice it must make a copy available for inspection by the public.[60]

[19] Subdivision 2 provides for the amendment of a ROP. Amendment may be made by the chief executive and if a ROP becomes inconsistent with a water resource plan, then the ROP must be amended.[61] The subsequent provisions set out the method for preparing an amendment similarly to the provisions for changes to a water resource plan by the Minister. The Governor in Council may approve an amendment of a ROP without the procedural requirements relating to the preparation of a ROP if the amendments are minor.[62]

Jurisdiction of the *Judicial Review Act*

[20] A statutory order of review pursuant to the *Judicial Review Act* is limited to decisions "of an administrative character made … under an enactment".[63] This descriptive demarcation reflects the traditional[64] classification of powers as the principal organising theme of the common law of judicial review.[65] It is said to be largely discarded[66] yet any attempt at a definition of "administrative" is reduced to a statement that its antitheses are legislative and judicial.[67] The expression

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53 Section 101(a).
54 Section 102.
55 Section 103.
56 Section 103(5).
57 Section 103(6).
58 Section 103(7).
59 Section 104.
60 Section 104B.
61 Section 105.
62 Section 106.
63 Sections 4 and 20.
64 *Evans v Friemann* (1981) 35 ALR 428 at 433 per Fox ACJ.
65 Aronson, Dyer & Groves *Judicial Review of Administrative Action*, 4th ed (2009) at 73.
66 *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170 per Mason J at 225.
67 *Australian National University v Burns* (1982) 40 ALR 707 at 714; *Evans v Friemann* at 434; *Queensland Medical Laboratories v Blewett* (1988) 84 ALR 615 at 633 per Gummow J; *Griffith University v Tang* (2005) 221 CLR 99 at 123.

"administrative character" is not defined in the *Judicial Review Act* and Lockhart J observed in *Hamblin v Duffy*[68] that it is incapable of precise definition.

[21] Dr Greinke, for the applicant, submitted that observations by Kiefel J in *HA Bacharach Pty Ltd v Minister for Housing*[69] and Selway J in *McWilliam v The Civil Aviation Safety Authority*[70] demonstrated that administrative and legislative decisions were not mutually exclusive and that if the decision in the ROP had sufficient administrative characteristics as well as legislative, that would be sufficient to invoke the operation of the *Judicial Review Act.*

[22] In *HA Bacharach,* Kiefel J, considering a Governor in Council amendment to a strategic plan under the *Local Government (Planning and Environment) Act* 1990, observed that the question of characterisation is sometimes approached by first determining whether the decision or power in question is legislative. Her Honour explained:[71]

> The difficulty with such an approach … is that it assumes that the power exercised is either administrative or legislative and that a clear line may be drawn …

[23] Similarly, Selway J in *McWilliam* protested the neat division, apparently criticising the enumerating of indicia which is applied in many cases. His Honour said:[72]

> However, these decisions should not be understood as suggesting that administrative and legislative decisions fall into two mutually exclusive categories and that such categories can be identified by particular characteristics.

His Honour added:[73]

> [41] That difficulty is exacerbated in relation to administrative functions simply because, under the Westminster system of government, the executive branch may exercise legislative powers delegated by the parliament. This has the practical effect that it is impossible under Australian constitutional arrangements to draw a clear or "bright line" distinction between legislative and administrative powers.
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> [42] Of course, the ADJR Act does not require that any such distinction be drawn. What it requires is the identification of a "decision of an administrative character". Certainly there are some decisions which are not administrative because they are *essentially* "legislative" or "judicial". However, that does not mean that all decisions must be in one category or another. Although it may be that a particular decision under the Commonwealth Constitution

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68 (1981) 34 ALR 333 at 339.
69 (1994) 85 LGERA 134.
70 (2004) 214 ALR 251.
71 At 138.
72 At 259.
73 At 260.

> could not be both a judicial and an executive decision (although which it is may depend upon the nature of the body that exercises it), there is no reason in principle why the same decision could not be described as being both an administrative and a legislative decision. If it is then it answers the relevant description of a "decision of an administrative character" for the purposes of the ADJR Act, notwithstanding that it may also be "legislative".

[24] Notwithstanding the reservations of Kiefel J and Selway J, the use of the expression "administrative" by the legislature does tend to signify that what is to be kept in mind is the trichotomy between the legislative, the administrative and the judicial "as an exhaustive definition of decision making".[74] In each sphere, as Gummow J recognised in *Blewett*, there are many incidental functions which display some of the characteristics of the principle activities in other fields.[75]

[25] I am not persuaded that these observations by Kiefel J and Selway J are out of step with the approach in cases such as *RG Capital Radio Ltd v Australian Broadcasting Authority*[76] and *Griffith University v Tang*[77]. Analysing the indicators is a useful exercise and, as this case reveals, most decisions in respect of which there is controversy will have features of both. It is ultimately a question of judgment as to whether the factors suggesting the decision is legislative will displace those that would suggest the contrary.

[26] In *Griffith University v Tang*, Gummow, Callinan and Heydon JJ observed:[78]

> The second element of the definition to which attention is given by the case law is the expression "of an administrative character". The evident purpose here is the exclusion of decisions of a "legislative" or "judicial" character. The instability of the distinctions which the statute thus preserves may be appreciated by regard to two Federal court decisions. In *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, a ministerial decision which took effect by substituting a new table of fees for the table set out in a Schedule to the *Health Insurance Act* 1973 (Cth) was held to have a legislative rather than an administrative character. Thereafter, in *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582, a determination by the Corporation in exercise of power conferred by the Federal Airports Corporation Act 1986 (Cth) to make determinations fixing aeronautical charges and specifying those by

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74 *Queensland Medical Laboratories v Blewett* at 633. Mr McLeod, for the Minister, mentioned the "further category" of managerial decisions associated with prisoners' applications for review of decisions about prison conditions. This extension was described as "ill advised and unnecessary" in Aronson, Dyer & Groves at 408. In *Bartz v Chief Executive, Department of Corrective Services* [2001] QSC 392; [2002] 2 Qd R 114, the case to which the learned authors refer, the decision was characterised as administrative but also as one which, in the absence of bad faith, would not otherwise be reviewable; that is, rather like the variable content of procedural fairness, the administrative law constraints on "managerial" decisions will be minimal.

75 See discussion at 634-635.

76 [2001] FCA 855; (2001) 185 ALR 573.

77 [2005] HCA 7; (2005) 221 CLR 99.

78 At [63]; at 123.

whom, and the times at which, the charges were due and payable was held to have an administrative rather than legislative character.

[27] In *Braemer 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),[79] Philip McMurdo J set out[80] factors which Aronson, Dyer & Groves identified from Federal Court decisions as relevant to the characterisation of a decision as legislative.[81] It is convenient to do so here as counsel's approach has been to scrutinise the Minister's decision against these factors, keeping in mind that ultimately the conclusion is a matter for judgment and no single factor is determinative. The factors set out by McMurdo J are:[82]

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

(ii) must be publicly notified in the Gazette or similar publication;

(iii) cannot be made until there has first been wide public consultation;

(iv) incorporates or has regard to wide policy considerations;

(v) can be varied or amended unilaterally by its maker, the analogy being to primary legislation;

(vi) cannot be varied or amended by the executive;

(vii) is not subject to merits review in a tribunal;

(viii) can be reviewed in Parliament (for example, as a disallowable instrument);

(ix) triggers the operation of other legislative provisions; and

(x) has binding effect.

The decision applies to identified individuals

[28] As is clear from more recent authorities, the distinction between legislative and administrative acts, which was said in *Commonwealth v Grunseit*[83] to be essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases, does not, of itself, sufficiently assist. As Gummow J observed in *Blewett*, to accept that distinction "is

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79 [2008] QSC 241.

80 At [21].

81 At pp 75-76. *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604; *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 185 ALR 573; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 424; *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

82 At [21].

83 (1943) 67 CLR 58 per Latham CJ at 82.

not necessarily to accept the further proposition that to qualify as a law, a law must formulate a rule of general application".[84]

[29] The observations of Lehane J, with whom the other members of the court agreed, in *Federal Airports Corporation v Aerolineas Argentinas* are pertinent:[85]

> If there is anything that the authorities make plain – and *Blewett* is no exception – it is that general tests will frequently provide no clear answer. It is, after all, not difficult to point to authority which supports the proposition that a decision which imposes obligations and if of general operation may nevertheless be administrative or executive: thus, Mason J, said in *Kioa v Minister for Immigration (West)* (1985) 159 CLR 550 at 584; 62 ALR 321 at 346:
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> > 'But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly.'
>
> Deane J, at CLR 632, refers to the same distinction between those administrative decisions which affect the rights of a person in an individual capacity and those which affect a person as a member of the general public or of a class of the general public: see also the judgment of Jacobs J in *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 452; 14 ALR 1, quoted by Mason J in *Kioa.*

His Honour concluded that there was "no escape" from the need to examine closely the particular provisions and the particular circumstances.

[30] The applicant contends that the Final ROP does not, relevantly, formulate rules of general application but determines specific water allocations to particular individuals and can thus be distinguished from cases such as *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy*,[86] *Donohue v Australian Fisheries Management Authority*[87] and *RG Capital.* *Austral Fisheries* has facts not dissimilar to the present. A plan of management for a fishery was based on catch logbooks for orange roughy and financial investment in the industry submitted by individual fishermen and subsequently allocated transferable quotas to fishermen already in the industry. After discussing the legislative framework for the Minister's decision, O'Loughlin J concluded:[88]

> However, in addition to all those matters, the structure of the *Fisheries Act* s 7B(5) indicates, quite clearly, that a plan of management is intended to have general application to the fishing

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84 At 635.
85 (1997) 147 ALR 649 at 657.
86 (1992) 37 FCR 463.
87 (2000) 60 ALD 137.
88 At 472.

> industry as well as specific application to those members of the industry who were working in the relevant fishery.

That provision set out what a plan of management may make provision for, including the division of the fishing capacity permitted for the fishery into units, the allocation of units of fishing capacity in the fishery to particular persons, and the reconsideration of decisions made under the plan of management. His Honour concluded that the latter was an indicator in favour of the elevation of the plan of management to the stratum of legislative decision.[89] The plan of management was disallowable by the parliament, a feature not present here.

[31] In *Donohue v Australian Fisheries Management Authority*,[90] the applicants sought review of an order made by a delegate of the Australian Fisheries Management Authority under the *Fisheries Management Act* 1991 (Cth) which prohibited fishing by pelagic long lining in a specified area of the Southern Bluefin Tuna Fishery unless, prior to leaving port, the person was the owner or lessee of a Statutory Fishing Rights granted under the Southern Bluefin Tuna Management Plan assigned to a nominated boat. Heerey J concluded that the order was legislative in character because it promulgated a general rule not directed to any particular persons but to any person who might, during the specified period, intend to fish by a particular method in a specified area.

[32] In *RG Capital*, the Full Court of the Federal Court, quoting with approval the learned authors of de Smith[91] advised caution:

> Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is not surprising that the opinion of judges as to the proper characterisation of a statutory function is at variance.

The court noted that the licence area plans which the Authority was required, by virtue of s 26(1) of the *Broadcasting Authority Act*, to prepare, determined the number and characteristics of broadcasting services that were to be available in particular geographical areas in Australia. The considerations were general ones but the licensed area plan could be prepared for an area where such services already existed and would, therefore, have implications for an existing licensee. The court concluded that the plan laid down general parameters within which the allocation of licences was decided and for which the Act provided and, thus, was legislative.

[33] Mr McLeod submitted that while the fixing of the water allocations directly operated on the applicant, it was akin to the substitution of a new table of fees for an existing table, such as occurred in *Blewett*, where it was held to be legislative in character. While there are similarities, the analogy is not complete. Nonetheless, the tables setting out the water allocation conversions in the Final ROP are the culmination of a long administrative process and are strongly influenced by considerations of general application. The Final ROP itself is couched, for the most

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89 The characterisation of the decision as legislative was not an aspect of the appeal which was dismissed: *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

90 [2000] FCA 901; (2000) 60 ALD 137.

91 *Judicial Review Administrative Action*, 5th ed (1995) p 1006 at [46].

part, in non-specific terms with its purpose being the implementation of the *Water Resource (Condamine and Balonne) Plan* . The Final ROP follows and gives effect to the mandated outcomes of that plan by specifying processes, rules and limits which are consistent with the environmental flow objectives. It provides for monitoring and reporting arrangements to assist in the ongoing assessment of whether water allocations and management arrangements in the plan area will contribute to the achievement of the plan outcomes.[92]

[34] Notwithstanding those general provisions, Dr Greinke submitted that s 52 of the Final ROP is an example of the particular rather than the general. It provides:

> **Granting of unsupplemented water allocations**
>
> The chief execution must grant unsupplemented water allocations for the existing water authorisations converted under Division 2 –
>
> (a) for the Upper Condamine Water Management Area – in accordance with Attachment 10(A);
>
> (b) for the Condamine and Balonne Water Management Area – in accordance with Attachment 10(B); and
>
> (c) for the Condamine and Balonne Tributories Water Management Area – in accordance with Attachment 10(D).

But in that respect the arrangement is similar to the scheme in *Austral Fisheries*. The process is dominated by considerations of general application which allow individuals to make submissions at several of those stages leading to the Final ROP.

Parliamentary oversight

[35] The *Water Resource (Condamine and Balonne) Plan* 2004 is subordinate legislation. It was held by Dutney J in *Currareva Partnership v Welford*[93] to be legislative in character. His Honour observed that the plan determined the law in a binding way and was of general application. However, he noted that it did not have this effect until it received assent from the Governor in Council assent.[94] Since the *Water Resource (Condamine and Balonne) Plan* 2004 is subordinate legislation, it must be tabled in the Legislative Assembly and is subject to disallowance.[95] A ROP is not subordinate legislation and is not tabled in the Legislative Assembly and subject to disallowance. Mr McLeod does not dispute that oversight by Parliament is a strong indicator that a decision is legislative rather than administrative.[96] Such an absence is not fatal to the characterisation of a decision as legislative. The Full Court of the Federal Court observed in *RG Capital Radio*:[97]

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92 Section 18 of the Final ROP.
93 [2000] QSC 098.
94 At [19].
95 Section 49(1) of the *Statutory Instruments Act* 1992.
96 *Blewett* at 634 and *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* [2007] FCA 1352; (2007) 163 FCR 451 at 460.
97 At [56].

> The absence of any provision for disallowance by parliament points against characterisation of a decision … as legislative. However, although persuasive, the absence is not fatal to such a characterisation. No case declares provision for disallowance to be a litmus test of legislative character. Its absence is to be taken into account as a fact pointing against that character, but that is all. Ultimately, we feel, it is outweighed by other considerations.

The decision-maker

[36] The applicant argues that, notwithstanding that the Final ROP is approved by the Governor in Council, the effective decision-maker is the chief executive, not the Minister, to be contrasted with the Minister as the effective decision-maker in relation to a water resource plan. It is the applicant's contention that this hierarchy of decision-makers as between a water resource plan and a resource operations plan is a further indicator that decisions of the Final ROP are of an administrative character. Whilst the chief executive is the principal decision-maker throughout the ROP process,[98] the Governor in Council has an important role to play at the end. The Governor in Council must determine if the Final ROP "is not inconsistent with the water resource plan".[99] A further discretion then exists: the Governor in Council "may" approve the Final ROP. It was conceded by Mr McLeod that the chief executive's decision-making power with respect to the preparation of a Draft and Final ROP is susceptible to characterisation as administrative but that the decision to approve the Final ROP is legislative.

Wide public consultation

[37] Dr Greinke contended that although the requirement for wide public consultation, mandated in the Act, the *Water Resource (Condamine and Balonne) Plan* 2004 and the Condamine and Balonne Resource Operations Plan, is generally characterised as an indication that the decision is legislative,[100] in the ROP, it is intended to afford natural justice to those affected. In *RG Capital Radio*, the Full Court responded to the submission that the wide public consultation required by the *Broadcasting Services Act* 1992 (Cth) was directed to natural justice considerations and therefore a pointer to the decision being one of an administrative nature, by concluding that the obligation was directed to ensure that the Broadcasting Authority would promote the objects of the Act relating to demand within Australia. A reference to the purposes of Chapter 2 of the Act, the *Water Resource (Condamine and Balonne) Plan* and the ROP demonstrate a much wider range than individual entitlements to water. A ROP may be prepared to advance the sustainable management of water and thereby provide a framework for establishing water by providing allocations, but it is just one method amongst many. When preparing a draft ROP, the chief executive must consider all properly made submissions and those submissions are likely to come from a range of conservation and economic interests, as well as past users of the water. That the Act provides for explanation to and consultation with water entitlement holders[101] does not support the contention that a draft ROP in its consultation process is specifically directed to water entitlement holders.

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98 *Water Act* 2000, s 95 and following.

99 *Water Act* 2000, s 103(5)

100 *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604 at 608 per Sundberg J.

101 Section 100(4).

Power of amendment

[38] In *SAT FM* Sundberg J likened the power of the Australian Broadcasting Authority to vary a plan as analogous to the legislature's power to amend legislation.[102] The chief executive may amend[103] a ROP following the procedure set out in sections 95 to 104 of the Act. The amended ROP must be consistent with the Water Resource Plan.

Binding legal effect

[39] It is conceded by Dr Greinke that the ROP does have a binding legal effect, in that it enlivens provisions of the Act. He contends, however, that this indicator is counter-balanced by the fact that the binding legal effect is not in relation to rules of general application but consists of specific grants of water allocations. By s 107:

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

These entitlements operate in respect of every entity which takes water in the plan area. This is an indicator that the decision is one of a legislative character.[104]

Appeal by way of merits review

[40] There is no appeal by way of merits review about the making of a ROP although there is a limited entitlement not here present. Under Chapter 6 of the Act, a person who has been given an information notice or a compliance notice by the chief executive may appeal, but only to the extent "a different decision, consistent with the plan or declaration, could have been made".[105] Provision for the review of a decision is an indication that it is of an administrative character.[106]

Conclusion

[41] No single consideration is decisive in concluding if a decision is administrative in character. When the considerations to which reference has been made are weighed, and the lengthy process with provision for submission and review prior to the final direction of the Minister to make the ROP is considered, it seems reasonably clear that the decision by the Minister to promulgate the ROP is one which is legislative in character. It is not, therefore, susceptible to review pursuant to Part 3 of the *Judicial Review Act*. The Minister is thus not required to provide reasons.

[42] The application is dismissed.

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102 At s 608(e).
103 Section 105 of the *Water Act*.
104 *SAT FM* at 608-9; *RG Capital* at 588.
105 Section 851(2).
106 *Austral Fisheries* at 471; *SAT FM* at 608.