

ADMINISTRATIVE CHARACTER

Phrase maintains trichotomy between legislative, executive and judicial acts and decisions: *Resort Mgmt; Evans v Friemann; Tooheys*

Legislative and judicial decisions are not reviewable under the *ADJR/JR Act*. They have recourse to other remedies (Judicial – Appeal/Legislative – declaratory or equitable relief)

1) General Principles of Interpretation

Since the Acts are remedial statutes, the phrase should not be given a narrow or technical construction: *Evans v Friemann; Resort Mgmt v Noosa Shire Council*. It is the character of the decision, not the decision-maker. *S5 JR Act; s3(2) ADJR Act* are relevant in interpreting the phrase: *Evans v Friemann*. Consequently, decisions granting or revoking licenses or making or revoking orders can be characterized as ‘administrative’ – It is the *decision* which must be of an administrative character not the *subject matter*.

In **Evans v Friemann**, Involved attempt to review decision to fail an individual in patent attorney exam. Patent attorneys and system of patents were governed by legislative instruments including regulations dealing with exams. If strict analytical approach taken and only subject matter considered, then decision to fail might be characterized as education (legislative). FOX ACJ reject approach – Decision involves administering patent system set up by legislative instruments. Administrative!

2) The ‘Tests’

It is possible to identify certain indicia. Per Lockhart J in **Hamblin v Duffy**:

- ✓ *Legislative Acts* – usually involve the formulation of new rules of law having general application
- ✓ *Judicial Acts* – generally entail determinations of questions of law and fact in application of general legal rules
- ✓ *Decision of administrative character* – Involves application of general law, rules or policy to particular circumstances

Distinguishing administrative and legislative acts

Where legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, executive authority applies the law in particular cases. It is for executive to maintain and execute laws: **QML v Blewett** per Gummow J

If a decision has actually changed the law it will be legislative: it’s not necessary that it formulates a rule of general application: *VVAA v Cohen; QML v Blewett*

QML v Blewett: The Minister’s decision to adopt a new schedule of medical fees (which appeared at end of Cth statute) had effect of changing law and was legislative. NOTE: Gummow J suggested that had the Minister, instead of endorsing a new schedule to the Act, decided not to change the schedule, then that decision would have been administrative.

Per **RG Capital Radio v ABA**, factors relevant to distinguishing legislative decisions from administrative are:

- 1) *Generality*: Legislative decisions generally determine the content of general, usually prospective application (admin decisions apply rules of that kind to particular cases)
- 2) *Parliamentary Control*: Where a decision is subject to parliamentary control (e.g with by-laws and regulations there is a process of disallowance)
- 3) *Publication*: Requirement of publication suggests decision legislative
- 4) *Public consultation*: Wide public consultation may indicate general nature of decision (In certain circumstances, need for wide public consultation may be indicative that NJ concern and hence suggests administrative)
- 5) *Policy considerations*: If decision involves complex policy decisions
- 6) *Executive variation or control*: If absence of provision for executive variation or control is indicator (refer *Aerolineas Argentinas* per Beazley J)
- 7) *Absence of merits review*: Indicates decision of legislative character
- 8) *Effect*: If decision has binding legal effect (certain stat provisions enlivened once decision made)

*****RG Capital Radio v ABA**

- RG held licences to operate 2 existing commercial radio services in Gosford
- The ABA determined to make a plan for broadcasting services pursuant to *Act* which required ABA to 'prepare in writing licence area plans'
- Plan including making additional broadcasting licence available. Applicant sought review under *ADJR*
- ABA contested decision of admin character

Held (Wilcox, Branson and Lindgren JJ)

- No one consideration decisive of issue
 - The licence plan lays down general parameters within which take place the decision-making process (allocation of licences)
 - Requirement that plan would be published
 - Requirement of wide public consultation (emphasizes the general nature of plan)
 - Breadth of consideration required to take into account
 - Absence of provisions for executive variation/control
 - Plan not subject to merits review
 - Plan has binding legal effect as constitutes background against which applications for, and allocations of, licences are enabled to take place
- Fact that ABA by notice in writing has power to vary plan is neutral
- Fact that no provision for disallowance by parliament and no parliamentary control indicates decision is administrative
- On balance decision is legislative!

A decision to pass subordinate legislation is legislative, not administrative. Similarly, a decision to pass a by-law is generally legislative. However, the fact something is called a 'by-law' is not determinative. May in truth be the application of a law to a particular set of circumstances and in no way changes the law: *MIC v Toohey* (decision to allow duty free entry)