



Case Note

Brett Cattle Company Pty Ltd v Minister for Agriculture [2020] FCA 732 (Rares J).

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Overview

This case is about an Australian cattle station operator, Brett Cattle, recovering against the Commonwealth for losses which, the Federal Court found, resulted from a temporary ban on live exports to Indonesia in 2011.

It opens the way for others in the live export chain to claim against the Commonwealth on a similar basis. The case focuses on questions of administrative and tort law, but also has animal welfare implications (not considered specifically in this note).

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Facts of the case

The key facts of the case can be divided into:

- a. those relating to the export control orders that were the focus of the decision, and;
- b. those relating to Brett Cattle's business.

Date	Export control orders	Brett Cattle's business
4 April 2011		<p><i>Contract formed</i></p> <p>Brett Cattle agrees to sell 2,200 cattle to North Australian Cattle Company Pty Ltd (NACC) for delivery on or around 31 May 2011 (at [86]).</p>
3 June 2011	<p><i>First Control Order</i></p> <p>The <u>First Control Order</u> was made on 2 June 2011 and came into force on 3 June 2011.</p> <p>In response to the <u>ABC's <i>Four Corners</i> program</u> aired on 30 May 2011 depicting the inhumane treatment of Australian cattle in Indonesian slaughterhouses, the then Minister for Agriculture, Fisheries and Forestry (the Minister), prohibited the export of live animals to 12 Indonesian slaughterhouse facilities named by the RSPCA and Animals Australia as engaging in the mistreatment of Australian cattle (at [126]) (the First Control Order).</p> <p>The First Control Order includes an exception in circumstances where the Minister is satisfied that the slaughter of the animals will be in compliance with the <u>World Organisation for Animal</u></p>	

	<p><u>Health Terrestrial Animal Health Code (OIE Code</u>, and such an exception clause, an Exception Clause).</p>	
7 June 2011	<p><i>Second Control Order</i></p> <p>The Minister prohibits the export of live cattle to Indonesia for a period of six months (the Second Control Order). The Second Control Order does not include an Exception Clause.</p> <p>Its purpose is specified in the associated <u>Explanatory Statement</u> as follows:</p> <p>‘The purpose of the Order is to suspend the export of live-stock to the Republic of Indonesia for a period of 6 months from the date of commencement of the Order. This will enable the Australian Government to develop a robust regulatory and compliance regime to address concerns regarding slaughter of live-stock in the Republic of Indonesia.’ (the Explanatory Statement of Purpose).</p>	
6 July 2011	<p><i>Replacement of Orders</i></p> <p>The First Control Order and the Second Control Order are repealed.</p> <p>The Secretary of the Department makes a new Order under which ‘exporters to Indonesia needed to satisfy the Secretary that any proposed exports of live cattle to Indonesia would remain only in an auditable closed loop system that ensured that the cattle were traceable and would be treated in accordance with the OIE Code up to and including the time of slaughter.’ (at [241]) (the Third AMLI Order).</p> <p>The Third AMLI Order therefore includes an Exception Clause.</p>	

13 July 2011		<p><i>Contract terminated</i></p> <p>NACC notifies Brett Cattle that, since no export permits had been granted and the timing for such granting was unclear, it terminates its contract with Brett Cattle on the ground of <i>force majeure</i> (at [240]).</p>
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Court proceedings

Brett Cattle led a class action against the Minister and the Commonwealth in the Federal Court.

The key issues in dispute among the parties focused on the making and consequences of the Second Control Order. Under reg 3 of the *Export Control (Orders) Regulations 1982* (Cth) the Minister has power to make orders including relevantly for the purposes set out in s 7 of the *Export Control Act 1982* (Cth) (**Export Control Act**), which allows for regulations prohibiting exports unconditionally or conditionally (by reference to location, specified conditions and/or the obtaining of a consent) (paras [7]–[8]) (the **Ministerial Power**).

Key issues and positions

Issue	Brett Cattle's position	Commonwealth's position
Administrative law	The Second Control Order was invalid (at [3]), because it did not contain an Exception Clause, although the Minister had not taken advice on the validity of an order without an Exception Clause (at [311]).	The Second Control Order was not invalid (at [4]), because it was within the broad scope of the Ministerial Power (at [312]).
Tort law	The Minister committed the tort of misfeasance in public office by making the Second Control Order, because the Minister was recklessly indifferent as to whether the Second Control Order was (a) beyond the Minister's power (the Indifference as to Power ground), and (b) likely to harm live exporters such as Brett Cattle (the Indifference as to Harm ground) (at [3]).	The Minister did not commit the tort of misfeasance in public office by making the Second Control Order (at [4]), because (a) the Minister had no reason to question his power to make the Second Control Order (countering the Indifference as to Power allegation), and (b) there were sound reasons for the Minister taking urgent action in doing so (countering the Indifference as to Harm allegation) (at [315–6]).
Damages	Brett Cattle suffered loss as a result of the Minister's making of the Second Control Order, by reference to hypotheticals under which the Second Control Order was (a) not made, or (b) made with an Exception Clause (at [3] and [396]).	Brett Cattle suffered no loss as a result of the Minister's making of the Second Control Order, because under the hypothetical of a Second Control Order including an Exception Clause, the parties in the live export supply chain would not have met the conditions under the Exception Clause within the time period that Brett Cattle contended (at [4] and [411]).

Findings

Rares J found as follows on the key issues.

Issue	Test	Application
<p>Administrative law</p>	<p>The test for validity that Rares J applied was whether the Minister's exercise of the Ministerial Power in making the Second Control Order was proportionate (at [300]; the Commonwealth disputed that this was the correct test: at [313]).</p> <p>This test has three elements:</p> <ul style="list-style-type: none"> • <i>Appropriateness</i> Proportionality requires that an instrument be appropriate - that 'there be a rational connection between the provision in question and the statute's legitimate purpose' at [296]. • <i>Necessity</i> Proportionality requires that an instrument be necessary - that there were no 'other, equally effective, means of achieving the legislative object which had a less restrictive effect on the freedom and were obvious and compelling' at [297]. • <i>Adequateness</i> Proportionality requires that an instrument be adequate in its balance - that the burden on freedoms it imposes are not 'undue or impermissibly burdensome, again having regard to the statutory purpose' at [298]. 	<p>The Second Control Order was invalid, because the Minister exercised the Ministerial Power in a disproportionate way:</p> <ul style="list-style-type: none"> • <i>Appropriateness</i> The Second Control Order was appropriate 'as an interim step towards ensuring that Australian livestock exported to Indonesia would be handled in the future in an ESCAS that complied with the OIE Code' (at [329]). • <i>Necessity</i> However, it was not necessary, because there was 'no evidence that the inclusion of a power to make exceptions could have rendered a control order that imposed an otherwise total prohibition on live cattle exports any less effective in achieving the Government's objective' (at [353]). • <i>Adequateness</i> It was not adequate, because: 'Having regard to the Minister's purpose of developing a regulatory and compliance regime while the absolute prohibition remained in force, it was needlessly burdensome to prohibit someone who already did (or easily could) meet his objectives for that regime, from carrying on businesses or exporting pending its finalisation' (at [358]). Rares J confirmed that the right to carry on business within the law is a fundamental common law right (at [292]), and that Parliament in passing the Export Control Act 'did not intend that the power in s 7 could be used indiscriminately,

		capriciously, unreasonably or so as to cause unnecessary disruption to such lawful trade or economic loss on those engaged in it' (at [359]).
Tort law	The test that Rares J applied was whether the Minister had 'actual knowledge that the action was beyond power or be recklessly indifferent to that possibility 'coupled with knowledge of or reckless indifference to the possibility that his action would cause or be likely to cause injury.'" (at [276] and [283]).	<p>The Minister committed the tort of misfeasance in public office by making the Second Control Order (at [395]), on the basis of his Indifference as to Power and his Indifference as to Harm:</p> <ul style="list-style-type: none"> • <i>Indifference as to Power</i> Rares J found that the Minister had received no advice as to whether the Second Control Order, not including an Exception Clause, would be valid (at [375]), and so acted recklessly in exercising the Ministerial Power (at [381]). • <i>Indifference as to Harm</i> Rares J found that the Minister acted with reckless indifference to the harm that the Second Control Order would cause to exporters who could have satisfied an Exception Clause (at [382]) and to the Indonesian economy (at [386]).
Damages	The test that Rares J applied for evidence of loss was for the plaintiff to prove loss of 'a commercial opportunity that has some value (not being a negligible value). The court values the loss of that commercial opportunity by reference to the degree of probabilities or possibilities.' (at [401], and referred to at [462]) (the Loss of Commercial Opportunity test).	<p>Rares J found that:</p> <ul style="list-style-type: none"> • <i>Hypothetical to apply</i> Damages should be calculated by reference to the hypothetical where the Minister made an export control order containing an Exception Clause instead of the Second Control Order (at [405]–[407]). • <i>Loss of Commercial Opportunity hypothetical</i> NACC (with whom Brett Cattle had contracted) would have been able to export additional cattle during the period from the passing of the Second Control Order until the relevant export approval was in fact obtained (at [460]).

		<ul style="list-style-type: none">• <i>Quantification</i> Brett Cattle was able to recover losses incurred due to delayed sales (at [471] and [477]), lost sales (at [465]), agistment (at [489]), cartage (at [490]) and bank charges (at [492]).
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Commentary

Administrative law

Identifying legislative purpose for the proportionality test

All three elements of the proportionality test described above are tested by reference to the 'legislative purpose'. Unfortunately, Rares J's analysis does not clearly identify which of the following three possible legislative purposes should be selected.

1. *Parliament's purpose in granting the Ministerial Power*

Many of the cases cited by Rares J refer to the validity test as analysing the relationship between (a) the purpose for which a power or jurisdiction is granted, and (b) the exercise of that power or jurisdiction (e.g. at [285]–[290], [293]–[294], [301]–[302], [304] and [306]–[307]). This would suggest the proportionality test should be analysed by reference to the relationship between the Second Control Order and the *purpose for which the Ministerial Power was granted*, i.e. ultimately, the Parliament's purpose in making the Export Control Act (**Parliament's Purpose**).

2. *Purpose of Second Control Order*

When Rares J outlines the proportionality test at [295]–[299] and [303], the validity test shifts to analysing the relationship between (a) the purpose of the *statute* (as an end) and (b) the scope of the statute (as a means to an end). This would suggest the proportionality test should be analysed by reference to the relationship between the Second Control Order and the *purpose of the Second Control Order* (**Second Control Order's Purpose**).

3. *Minister's purpose in making Second Control Order*

Some of Rares J's analysis shifts again to the Minister's purpose motivating him to make the Second Control Order (**Minister's Purpose**).

Applying the proportionality test

One aspect of Rares J's application of the proportionality test that warrants attention is that he appears to test different elements of proportionality by reference to different purposes.

- *Appropriateness*

Rares J concludes that the Second Control Order was appropriate at [329] by reference to the Second Control Order's Purpose, which he interprets at [328] as 'using the means of a total prohibition of all exports of livestock to Indonesia for a period of six months, was to allow the Government to work on developing such a regime that would 'address concerns regarding' the slaughter of livestock in Indonesia'.

- *Necessity*

Rares J appears to test the necessity element by reference to the Minister's Purpose, e.g. at [349]: 'It could not have been necessary to achieve the Minister's purpose to prohibit persons who already had a satisfactory system in place that ensured appropriate animal welfare standards applied at all relevant points, or who could implement such a system promptly, from carrying on existing businesses and fulfilling their existing contractual obligations.'

- *Adequateness*

Rares J opens his analysis by considering the *Parliament's Purpose* in according the Ministerial Power at [355]–[356]; when applying the test, however, Rares J shifts to the Minister's Purpose, concluding: 'Having regard to the Minister's purpose of developing a regulatory and compliance regime while the absolute prohibition remained in force, it was needlessly burdensome to prohibit someone who already did (or easily could) meet his objectives for that regime, from carrying on businesses or exporting pending its finalisation.' (at [358]).

Interpretation of the Second Control Order's purpose

Another aspect of Rares J's analysis that warrants attention is his interpretation of the Second Control Order's purpose, which appears to vary throughout the judgment, for instance:

- 'Its objective was to allow the Minister to establish an appropriate regulatory and compliance regime that would ensure that exported cattle would not be subjected to inhumane treatment.' (at [353]). This suggests a hierarchy of purposes, where the (first-order) purpose of the Second Control Order was to allow time to establish a regime; the first-order purpose of the regime, in turn, for the (second-order) purpose of preventing inhumane treatment to animals (the **First Interpretation**).
- 'The purpose of the Second Control Order in suspending trade was, *first*, to develop a regulatory and compliance regime to minimise the risk of exported animals being treated inhumanely in Indonesia, and, *secondly*, to minimise the occurrence of mistreatment in the meantime.' (at [360]). This suggests a pair of (first-order) purposes: to allow time to establish a regime, and to minimise inhumane treatment to animals (the **Second Interpretation**).
- 'The total prohibition was not reasonably appropriate and adapted as a means of attaining the purpose of preventing the mistreatment of livestock exported to Indonesia.' (at [361]). This suggests a single (first-order) purpose of preventing inhumane treatment to animals (the **Third Interpretation**).

It is not clear whether the Second Interpretation or Third Interpretation of the Second Control Order's purpose have any basis in the Explanatory Statement of Purpose:

The purpose of the Order is to suspend the export of live-stock to the Republic of Indonesia for a period of 6 months from the date of commencement of the Order. This will enable the Australian Government to develop a robust regulatory and compliance regime to address concerns regarding slaughter of live-stock in the Republic of Indonesia.

For instance, the references to 'minimise' in the Second Interpretation do not appear in any of the Minister's remarks or in the evidence of departmental minutes, briefings or talking points prepared for the Minister; the Third Interpretation leaves out the allowance of time to establish a regime altogether.

It is not clear how the Second Interpretation or the Third Interpretation fit with the rules for interpretation of the purpose, and for extrinsic materials relevant to interpreting the meaning of the Second Control Order in accordance with ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth) read together with s 13 of the *Legislation Act 2003* (Cth).

Possible alternative approaches

The reason that these aspects of the analysis warrant attention is as follows: if the proportionality test was instead analysed by reference to the Parliament's Purpose, or alternatively to the Explanatory Statement of Purpose as the Second Control Order's Purpose, it is not clear whether Rares J could have found the Second Control Order invalid.

If the proportionality test was analysed by reference to the Parliament's Purpose, there would not be an obvious basis for finding the Second Control Order to be disproportionate.

The Ministerial Power is broadly defined and there are no specifically stated objectives of the Export Control Act which could be used as the legislative purpose for a proportionality test analysis; on its face, s 7 of the Export Control Act clearly allows prohibition of exports to a place without conditions.

Alternatively, if the proportionality test was analysed by reference to the Explanatory Statement of Purpose as the Second Control Order's Purpose, it is not clear how the Second Control Order could be disproportionate to such a purpose.

An order that contained an Exception Clause would not be necessary as an 'other, equally effective, means of achieving the legislative object which had a less restrictive effect on the freedom and were obvious and compelling', for the Explanatory Statement of Purpose goes to the *implementation* of a supply chain assurance system, and an Exception Clause has no bearing on that; nor would it be inadequate, that is, 'undue or impermissibly burdensome, again having regard to the statutory purpose', that is, for the purpose of allowing time to 'develop a robust regulatory and compliance regime to address concerns regarding slaughter of live-stock in the Republic of Indonesia'.

Tort law

The questions above as to Rares J's application of the proportionality test to determine the administrative law question also bear on the tort law question.

It would be hard to see how the Minister could have acted with Indifference as to Power if the Ministerial Power was, in fact, exercised validly - especially since Rares J expressly held that the Minister's Indifference as to Harm partially depended on the Minister's Indifference as to Power (at [385]), which finding would clearly be affected by a different analysis of the proportionality test under which the Second Control Order was valid.

A key consequence of this judgment is its (arguable) lowering of the bar to find a public officer having committed the tort of misfeasance:

- *Indifference as to Harm*

An export control will, by its very nature, impact exporters - if it did not, it would not be an 'export control'. According to Rares J's application of the Indifference as to Harm test, a public officer could face the risk of failing this test each time that it makes an export control without a prior impact statement, despite the fact that, in cases of urgency, legislation applicable to instruments such as the Second Control Order does expressly permit such impact assessments not to be performed in advance in cases of urgency (at [293]).

- *Indifference as to Power*

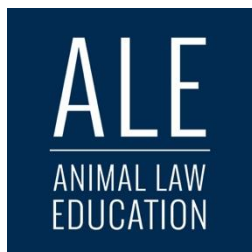
Despite the fact that the Ministerial Power clearly on its face extends to the power to prohibit exports to a place unconditionally, according to Rares J's application of the Indifference as to Power test, a public officer could face the risk of failing this test each time that it makes an export control order in a manner that is disproportionate to the relevant purpose (although, as noted above, it is not clear from the judgment what purpose Rares J uses as the relevant purpose).

Damages

Several points in Rares J's calculation of damages deserve consideration.

- The fact that NACC terminated its contract with Brett Cattle on the ground of force majeure a full week after the Third AMLI Order came into effect and the Second Control Order was repealed (see timeline at the beginning of this note), implying that NACC was not able to obtain an export permit by that time pursuant to the Exception Clause in the Third AMLI Order, was not discussed in Rares J's hypothetical as to losses.
- The hypothetical that Rares J adopted to calculate losses to Brett Cattle relied on the assumption that 'the Minister and the Department would have sought to implement the theorised system effectively and pragmatically so as to keep as much of the live export trade operating as possible' (at [418]). This assumption does not appear straightforward, that the Minister - who made an outright ban on live exports to Indonesia for 6 months, having told industry a few days before making the order that 'your social license is lost' (at [140])—could be assumed to have sought to 'keep as much of the live export trade operating as possible'. If one *bans* an export, assuming that same person would seek to maximise that same export is not necessarily the most natural assumption.

However, as the Commonwealth has decided not to appeal Rares J's decision, the issues set out above will likely go unanswered.



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