

BRETT CATTLE: A NEW LEASE ON LIFE FOR MISFEASANCE?

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Conventional wisdom has it that a plaintiff rarely succeeds in making out the tort of misfeasance in public office—it is a cause of action that is more relevant in theory than in practice. The recent case of *Brett Cattle Company Pty Ltd v Minister for Agriculture*¹ offers us a rare glimpse into the successful operation of the tort and potentially suggests that it could play a wider role in securing government accountability going forward.

I Factual Background

The *Brett Cattle* case arose out of the 2011 live cattle ban controversy. In May of that year, ABC's *Four Corners* published a report detailing the inhumane handling of Australian cattle in certain Indonesian abattoir facilities. Following public outcry, the Minister for Agriculture, Fisheries and Forestry quickly issued an order which prohibited the export of cattle to those identified facilities, with the possibility of an exemption for a facility if the Minister was satisfied that it would operate pursuant to international standards ('**initial control order**'). Five days later, in response to political pressure, the Minister issued a more extreme revised order which imposed an outright ban on live cattle exports to Indonesia for a period of six months ('**complete ban order**'). Both orders were made pursuant to the *Export Control (Orders) Regulations 1982* (Cth), which were in turn made pursuant to the *Export Control Act 1982* (Cth).

Throughout this time, government advisers consulted with animal rights groups, industry and legal representatives to canvas various practical options to address concerns about animal mistreatment. The optimum outcome was determined to be the implementation of a 'closed loop' system in which each exported animal could be tracked through the supply chain to the point of slaughter, in compliance with international standards. The Minister received advice about a number of means to achieve this outcome, including the imposition of various forms of export restrictions and bans. After a series of protracted negotiations over the following month, the initial control and complete ban orders were revoked and replaced with a departmental order made under the *Australian Meat and Live-Stock Industry Act 1997* (Cth),

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¹ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732.

which formalised the requirement for a closed loop system for live cattle export to Indonesia ('final control order'). As it transpired, a number of exporters were already in—or close to—a position to be able to meet the demands of a closed loop system. A lengthy auditing process ensued (in part impacted by diplomatic issues), and eventually a number of exporters were granted permits allowing limited trade to recommence. In the meantime, however, a number of Australian cattle producers (including Brett Cattle Company Pty Ltd) had suffered financial loss due to cancelled export contracts.

II The Elements of the Tort

The only 'truly public tort'² of misfeasance in public office has attracted considerable academic scrutiny, finding itself occupying a somewhat uncomfortable position between the spheres of public and private law.³ Borrowing from *Mengel*, another Australian misfeasance case involving government regulation of the cattle industry, the elements of the tort require: '(i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duties; (v) which causes loss or harm to the plaintiff'.⁴ It was uncontroversial that a Minister would be considered a public officer, and that the making of an export ban order would constitute the purported discharge of a public duty. It is Rares J's approach to the remaining elements of the tort in the *Brett Cattle* case that warrant attention.

(i) *Invalid or unauthorised act*

The use of tort law as a means to control the exercise of public power is not a novel idea; prior to the advent of modern judicial review, citizens frequently used tort proceedings to challenge public officials who breached their public obligations.⁵ While some torts extend their reach to circumstances in which government officials have acted in a tortious (but valid) manner,⁶ the misfeasance tort is confined to those cases in which public power has been

² Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427, 428.

³ See eg Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337.

⁴ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

⁵ For further information, see eg Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41 *University of New South Wales Law Journal* 1159, 1168–70.

⁶ '[T]he negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires': *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 35 (McHugh J).

exercised in an ‘invalid or unauthorised’ way.⁷ This formulation can be taken to include both acts ‘forbidden by law’⁸—traditionally-conceived illegal acts such as forgery, fabrication of evidence and so on—as well as instances of technical illegality that are reflected in the public law grounds of judicial review. In *Mengel*, Brennan J stated this requirement in the following terms:

the purported exercise of power must be invalid, either because there is no power to be exercised or because a purported exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action.⁹

The *Brett Cattle* case offers us an interesting insight into the concept of invalidity for the purpose of the misfeasance tort.

In the judicial review context, it is of course unremarkable that delegated legislation may be set aside where it has been made in excess of power. It is also unremarkable that reasonableness is considered to be an essential requirement in the making of delegated legislation, sometimes presented in terms of proportionality.¹⁰ However, what is controversial in Rares J’s approach is the employment of the three-step, structured proportionality test that has recently found favour in the High Court in other contexts.¹¹ His Honour applied this test to the complete ban order, finding that (1) while the ban was ‘suitable’ in the sense that it was rationally connected to the applicable regulatory purpose,¹² (2) the ban was not ‘necessary’, as there were other effective and less onerous means to achieve those ends such as the initial and final control orders,¹³ and (3) was not ‘adequate in its balance’ as it was needlessly burdensome on exporters’ common law rights to carry on their business without affecting animal welfare.¹⁴ Accordingly, the order was found to have been invalidly made. Readers are encouraged to see Boughey’s comment in this issue for further explanation of the potential difficulties of this approach and its implications in the public law context.

⁷ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

⁸ The now-defunct *Beautesert* tort was limited to unlawful acts of this nature: *Northern Territory v Mengel* (1995) 185 CLR 307, 336.

⁹ *Northern Territory v Mengel* (1995) 185 CLR 307, 356.

¹⁰ *Attorney-General (SA) v Adelaide Corporation* (2013) 249 CLR 1.

¹¹ *McCloy v New South Wales* (2015) 257 CLR 178.

¹² *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [329].

¹³ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [352]–[354].

¹⁴ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [358].

(ii) Done maliciously

The second element of the misfeasance tort which drew significant attention in the *Brett Cattle* case was that of malice.¹⁵ This element of the tort has been framed in different ways throughout its history, and can be understood as comprising two alternative limbs.¹⁶ The first (and most demanding) limb is that of targeted malice. This limb involves the deliberate misuse of power, capturing ‘actual intention to cause injury’,¹⁷ conduct ‘specifically intended to injure a person’¹⁸ or engaged in ‘with the predominant intent of damaging a person’.¹⁹ The second alternative limb (relevant in *Brett Cattle*) addresses less egregious cases than the first, capturing knowing or recklessly unlawful acts that give rise to loss or damage. This limb consists of two mental ingredients: (1) *knowledge or recklessness as to the legality of the act*, and (2) *knowledge or recklessness as to the harm that will be occasioned*. Without access to Cabinet documents which might have revealed the Minister’s actual decision-making process, Rares J relied on evidence of the information that was before the Minister in order to draw inferences as to his state of mind on these issues.

Looking first at the required mental connection to the legality of the act, the courts have described this in terms of a form of ‘deliberate blindness’²⁰ or ‘conscious maladministration’,²¹ arising where ‘a public official recklessly disregard[s] the means of ascertaining the extent of his or her power’.²² On this point, Rares J noted that the Minister had not received any departmental or legal advice as to the legality of the complete ban order in its ultimate form; the advice which had been received was in some cases only in draft form and in other cases highly general in nature.²³ His Honour found that when the Minister made the order, he knew that some exporters were in—or close to—a position to operate within a closed loop system, and that the form of the complete ban order did not allow the Minister to grant exceptions for those exporters. The Minister was found to have ‘closed his mind’ and ‘shut his eyes’ to the possibility that the order would be invalid,²⁴ and ‘plunged ahead’ with making the order

¹⁵ *Northern Territory v Mengel* (1995) 185 CLR 307 370 (Deane J).

¹⁶ *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 137 (Auld LJ).

¹⁷ *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

¹⁸ *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 191 (Lord Steyn).

¹⁹ *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1, 191 (Lord Steyn).

²⁰ *Northern Territory v Mengel* (1995) 185 CLR 307, 371 (Deane J).

²¹ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 375 [124] (Gummow J). See also *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153–54 [11]–[15].

²² *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ).

²³ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [375].

²⁴ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [377]–[378].

without advice as to its validity.²⁵ In that context, Rares J inferred that the Minister had deliberately taken a risk as to the invalidity of the order, and ‘did not care whether it turned out to be so’.²⁶

The second aspect of the recklessness limb addresses the connection between an official’s state of mind and the plaintiff’s loss, and has been the subject of debate over the past two decades.²⁷ In part, this confusion stemmed from a misreading of a passage in *Mengel*, which indicated that ‘liability [for misfeasance] requires an act which the public officer knows is beyond power and which involves a *foreseeable risk of harm*’ (emphasis added).²⁸ This gave rise to the suggestion that the tort could be made out in cases where an official *ought to have known* that their act would cause loss, even if they had not adverted to that possibility in a subjective sense.²⁹ The NSW Court of Appeal recently rejected this reading in *Obeid v Lockley*,³⁰ an approach with which Rares J agreed: ‘Mere foreseeability of harm is a long way short of an intention to inflict the harm or a reckless indifference to the likelihood that a person affected by the abuse of power would suffer harm as a result.’³¹

Even adopting this more stringent test, Rares J found that the threshold was met in this case as the Minister knew, or had been reckless as to, the harm which would arise from the complete ban order.³² It was clear that the Minister had made the order with the intention of suspending current and future trade, and Rares J concluded that the Minister had made this decision ‘not caring that it would damage unjustifiably persons in Australia as well as some businesses in Indonesia’.³³ His Honour noted that ‘[c]learly enough, [the Minister] knew that the order itself would cause immediate economic loss to many persons’, and that the Minister had acted with reckless indifference to that impact when he took the risk of making an invalid order.³⁴

²⁵ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [380].

²⁶ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [381].

²⁷ See further, Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis 2019) 439–40.

²⁸ *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ).

²⁹ See eg *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, 387–88 [263].

³⁰ *Obeid v Lockley* (2018) 355 ALR 615, 648–53 [153]–[172] (Bathurst CJ), 665–67 [242] (Leeming JA).

³¹ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [283].

³² *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [382].

³³ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [382].

³⁴ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [385].

(iii) *Causing loss or harm*

The third element of Rares J's misfeasance finding which warrants discussion is that of causation of loss. Proof of damage is an essential element going to liability for misfeasance in public office.³⁵ It is clear enough that that the export control ban led to a significant financial impact on those involved in the Australian cattle export industry (though that loss would prove difficult to quantify).³⁶ It is perhaps less straightforward whether the ban order can be said to have *caused* that loss in a legal sense. Counterfactual analysis in relation to the exercise of public power may be a simple task in cases where there is only a limited legal manner in which power may be exercised.³⁷ However, demonstrating causation in public law cases can be very complicated in circumstances that involve the exercise of *discretionary* power.³⁸ In *Lock v ASIC*, Gleeson J put this in terms that:

The causation question requires consideration of what the relevant public officer would have done if there had been no such deliberate omission. In the case of an unlawful decision not to exercise a discretionary power, there may have been a range of alternative lawful decisions, one of which might include a lawful decision not to exercise the power.³⁹

How can it be said, in such a case, that loss would not have arisen 'but for' the invalid exercise of power? There is a risk that in answering this question, the court will be drawn into the territory of indicating how the power *should* have been exercised, raising the spectre of an infringement of the separation of powers.

Brett Cattle presents one such difficult case. The Minister had a discretionary power to make orders with respect to export control. As demonstrated by the facts of this case, there were any number of ways in which the Minister could have decided to exercise this power, ranging from making no order at all, to making an order targeting particular facilities (the initial control order), to making an order which provided for exceptions to compliant exporters (the final control order), to imposing a complete export ban (the complete ban order). Before it can be said that the Minister's ultimate choice to impose a complete ban

³⁵ *Watkins v Secretary of State for the Home Department* (2006) 2 AC 395.

³⁶ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [401].

³⁷ eg in false imprisonment cases where a plaintiff is imprisoned pursuant to a technically invalid order, it is not unusual for the courts to consider whether the order would have been validly made in any event, rendering the detention 'inevitable': *Lewis v Australian Capital Territory* (2020) 381 ALR 375, 424 [179] (Edelman J). See further Gageler J at 384–86 [35]–[41].

³⁸ Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337, 354–57; Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 *Law Quarterly Review* 427, 444.

³⁹ (2016) 248 FCR 547, 579 [138] (Gleeson J).

caused loss to the plaintiffs, it is necessary to consider what would have happened had the Minister not imposed that ban. There is a real risk that answering this question would invite the court to reach a conclusion about what the Minister ought to have done in the alternative.

The plaintiffs sought to circumvent this issue by presenting hypothetical ‘scenarios’ which were said to represent what ‘would have occurred’ if the Minister had not proceeded to impose the complete ban order.⁴⁰ Rares J took up this invitation, and inferred that if the Minister had ‘acted with a proper appreciation of [his] power’ it was likely that the Minister would have adopted the ‘obvious and compelling’ option of imposing an order that allowed him to grant exceptions to exporters who met the required standards, in a similar form to the final control order.⁴¹ The Minister did not put on evidence as to what he would have done,⁴² and Rares J’s inference was therefore based on the form of the initial and final control orders, and informed by his proportionality analysis in respect of the complete ban order. Again, then, the adoption of a structured proportionality test can be seen to have influenced the assessment of liability.

III Conclusion

The law reports contain many examples of unsuccessful misfeasance cases, reinforcing that the tort sets a high threshold that will be met only in the most clear of cases. Given the facts of *Brett Cattle*—notably that it involved the exercise of a discretionary legislative power informed by a protected political decision-making process—it is perhaps surprising that it would stand as an example of such a clear case. While the government has elected not to appeal the decision, it has reserved its rights to challenge Rares J’s application of legal principle in the future.⁴³ Until that time, we are left to wonder whether *Brett Cattle* will pave the way towards a wider role for the misfeasance tort going forward.

⁴⁰ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [396].

⁴¹ *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [405].

⁴² The Commonwealth objected that he could not do so without revealing Cabinet deliberations: *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732, [404].

⁴³ Attorney-General’s Department, ‘Federal Court of Australia Decision on Live Cattle Export Ban’, Media Release, 22 July 2020 <<https://www.attorneygeneral.gov.au/media/media-releases/federal-court-australia-decision-live-cattle-export-ban-22-july-2020>>.