

Animals' Angels e.V v Secretary, Department of Agriculture [2014] FCAFC 173 (19 December 2014)

Government not obligated to exercise power under s23(1) of AMLI Act



Facts

Case facts

In 2008 there was an export of livestock from Fremantle to Malaysia, via Singapore, on the *MV Hereford Express*. The exporter was a licensed body, called International Live Export Pty Ltd ('ILE').

This case was an appeal by Animals' Angels (the appellant) from the Federal Court, where the appellant sought judicial review in relation to a decision of the Secretary for the Department of Agriculture (the respondent) not to exercise the power conferred onto them under s 23(1) of the *Australian Meat and Livestock Industry Act 1997 (Cth)* ('the AMLI Act').

The primary judge, in addition to rejecting the substantive arguments of the appellant, found that it did not have the standing to bring the proceedings.

Appellant's claims

The appellant's main grounds of appeal were as follows:

Standing

The appellant believed they had a 'special interest' as: (1) it was recognised by government as a significant stakeholder in the area of live export, (2) it engaged in activities relevant to the impugned decision, and (3) its organisational objects included those interests that it sought to vindicate in challenging the respondent's decision.

Mandatory duty

s 23 of the AMLI Act provides a mandatory duty of the part of the respondent to issue a licensee a show of cause notice where the respondent believed, on reasonable grounds, that one of the matters contained in s 23(1)(a)-(g) existed. The primary judge disagreed and thus failed to find that the respondent had breached this mandatory duty.

Improper exercise of power

The decision of the Secretary was an improper exercise of power as conferred by s 23(1) of the AMLI Act, as the decision involved both a failure to take into account relevant considerations and an unreasonable finding '*infected by illogicality and irrationality*'.

Duty under s 23

The respondent was under a duty to consider whether to issue a show cause notice under s 23 of the AMLI Act, and failed to exercise this duty with regards to ILE.

Cost orders in public interest litigation

The costs orders made by the primary judge (consistent with the usual rule that costs follow the event) should be departed from, as this was a 'public interest litigation', the respondent's claim

for public interest immunity was 'spurious', and as the appellant expended additional costs due to the respondent's approach to discovery.

Decision

Summary

The Court found that the Appellant's grounds of appeal, except that relating to standing, were not made out. Thus the respondent succeeded on all substantive grounds, and the appeal was dismissed.

The Court rejected the statutory construction of the AMLI Act put by the appellant, and ruled that the provision in question conferred a discretionary and permissive power onto the respondent. Moreover, the Court upheld the costs orders from the primary judge.

Reasoning

Standing

Although not required to be decided, the Court found it "convenient" to still address the issue of standing.

The Court found that the appellant did have standing to bring the case, which, it reasoned at [119], was largely supported by the fact that the "*relevant government department has recognised the appellant's particular status in the area of live animal export*".

The Court also considered each matter relied on by the primary judge in his conclusion on standing, and relevantly found that the appellant did have the requisite special interest, concluding at [120] that:

- the appellant does have sufficient presence in Australia;
- it had been recognised in Australia by the relevant department of the Commonwealth;
- it had devoted financial resources to animal welfare in Australia;
- the broader and global nature of the appellant's objects or purposes do not derogate from the appellant's engagement in Australia;
- the appellant's Australian activities do intersect with the appellant's objects or purposes; and
- the nature of the decision sought to be reviewed directly impacts on animal welfare, which is at the centre of the appellant's objects or purposes.

The appellant's other grounds of appeal

None of the Appellant's other grounds of appeal were made out. With regards to the effect of section 23 of the AMLI Act,

the Court found that the statute confers discretion on the respondent to issue the notice referred to in s 23(1), rather than a mandatory duty.

By looking at the wording of the provision, the Court found:

- i. Both the ordinary meaning and the applicable interpretive direction from the *Acts Interpretation Act* of 'may' suggests a "presumptively permissive" meaning of the word.
- ii. The word 'may' can be contrasted with obligatory language in the neighbouring provisions of the legislation.
- iii. The provision, rather than conferring rights, establishes a "public power" which requires consideration of broader public interests and policy. Thus from a purposive perspective, the provision is supposed to have a strong discretionary element.
- iv. The language of the matters in s 23(1)(a)-(g) were too broad in their potential causes to deprive the respondent of its discretion.
- v. The fact that there are other routes by which the Commonwealth can regulate such issues means that the respondent should not be bound to exercise the power in question, when they might consider the alternative routes more appropriate in certain cases.

The Court also concluded that there was no improper use of power under s 23(1). Through proper statutory construction, there is no barrier to prevent new evidence being considered, and there is no legal obligation to form the belief referred to in s 23(1). Accordingly, the steps the respondent took did not involve illogicality, irrationality or legal unreasonableness. The Court did not agree that the respondent acted inflexibly in applying a policy without considering the merits. As such, the Court stated at [91] that the "*obligations on the Secretary contended for by the appellant do not find a basis in the statutory language*", and thus there is not such duty as alleged.

With regards to the appellant's costs argument, the Court found that the decision of the primary judge was correct.

Comments

Although the appellant was unable to succeed on any of their substantive grounds of appeal, the case was still significant for animal welfare organisations. The Full Court found that the appellant did have sufficient interest in the matter, thus granting them standing. This precedent is likely to make it easier for other similar organisations to establish standing, and thus be able to bring legal challenges in matters concerning the welfare of animals.

The case also illustrated the impotence of the current live export legal regime in Australia, in confirming that the Government is under no obligation to exercise its powers conferred under s 23(1) of the AMLI Act, even when an exporter

has clearly broken the law. This shows that the legislative scheme for live export is in need of reform.

Finally, the Court stated at [130] that there is "*no general principle that the usual order as to costs should not apply if the subject matter of the litigation is a matter of 'public interest'*". The implication of this statement is that animal rights or welfare organisations cannot be assured that, in the event that they are unsuccessful in court that they will not have significant costs awarded against them.

The full decision can be found online [here](#).



