SUPREME COURT OF QUEENSLAND

CITATION:	*Bell & Anor v Beattie & Ors* [2003] QSC 333
PARTIES:	**IAN BRUCE BELL** (first applicant) **TREVOR JOHN MAHAFFEY** (second applicant) **v** **PETER DOUGLAS BEATTIE** (first respondent) **ANNA MARIA BLIGH** (second respondent) **THOMAS ALFRED BARTON** (third respondent) **STEPHEN DOMINIC BREDHAUER** (fourth respondent) **JUNITA IRENE CUNNINGHAM** (fifth respondent) **WENDY MARJORIE EDMOND** (sixth respondent) **MATTHEW JOSEPH FOLEY** (seventh respondent) **PAUL THOMAS LUCAS** (eighth respondent) **TERENCE MICHAEL MACKENROTH** (ninth respondent) **ANTHONY MCGRADY** (tenth respondent) **GORDON RICHARD NUTTALL** (eleventh respondent) **HEINRICH PALASZCZUK** (twelfth respondent) **MICHAEL FRANCIS REYNOLDS** (thirteenth respondent) **STEPHEN ROBERTSON** (fourteenth respondent) **MERRI ROSE** (fifteenth respondent) **ROBERT EVAN SCHWARTEN** (sixteenth respondent) **JUDITH CAROLINE SPENCE** (seventeenth respondent) **RODNEY JON WELFORD** (eighteenth respondent) **DEAN MACMILLAN WELLS** (nineteenth respondent)
FILE NO/S:	S7889 of 2003

DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2003
JUDGE:	Mackenzie J
ORDER:	**1. The application is dismissed** **2. The parties have liberty to make submissions in writing as to costs within 14 days**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW AT COMMON LAW – EXCESS OF POWER AND DEFECTIVE USE OF POWERS – ABUSE OF DISCRETIONARY POWER – IN GENERAL – where decision made to submit legislation to Queensland Parliament prohibiting primary producers sending unpasteurised milk or milk products off their property – where application made during adjournment of second reading debate – where applicants sought declaration that a legislative provision having such effect is ultra vires the Parliament's capacity – where applicants sought an order of prohibition – where the applicants sought an injunction that such legislation may not be bought before parliament – where respondents brought cross application to strike out proceedings – whether the proposed legislation would contravene public policy requirements of the common law and the *Legislative Standards Act* 1992 (Qld) ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – JURISDICTION AND GENERALLY – "DECISION" WITHIN ACT'S APPLICATION – "UNDER AN ENACTMENT" – where applicants sought a statement of reasons under *Judicial Review Act* 1991 (Qld) why the decision was made to amend the legislation to enable removal to be prohibited – where twelfth respondent refused reasons – where applicants seek an order that the twelfth respondent provide a statement of reasons for the decision to ban removal – whether decisions reviewable under *Judicial Review Act* – whether decisions of an administrative character made under an enactment or non-statutory scheme or program *Judicial Review Act* 1991 (Qld), s 20(2), s 24, s 32, s 38

Legislative Standards Act 1992 (Qld), s 4, s 23
Parliament of Queensland Act 2001 (Qld), s 8, s 9

Cormack v Cope (1974) 131 CLR 432
Eastgate v Rozzoli (1990) 20 NSWLR 188

COUNSEL: I B Bell appeared on his own behalf in the application filed 4 September 2003 and in the application filed 12 September 2003
No appearance for the second applicant in the application filed 4 September 2003 or in the application filed 12 September 2003
J A Logan SC, with S A McLeod, for the respondent in the application filed 4 September 2003 and in the application filed 12 September 2003

SOLICITORS: I B Bell appeared on his own behalf in the application filed 4 September 2003 and in the application filed 12 September 2003
No appearance for the second applicant in the application filed 4 September 2003 or in the application filed 12 September 2003
Crown Solicitor for the respondent in the application filed 4 September 2003 and in the application filed 12 September 2003

[1] **MACKENZIE J:** The respondents comprise the Queensland Cabinet. The twelfth respondent is the Minister for Primary Industries. The application is one to review their "…decision … made jointly and severally" on 18 August 2003 to:

> "1. Submit legislation to the Queensland Parliament which, if passed and assented to by the Governor, would have the effect of prohibiting in the state (sic) of Queensland, a primary producer from sending off his property any milk or milk products not subjected to mandated chemical modification by the application of heat by a process known as pasteurisation."

[2] The first applicant, Mr Bell, claims to be a person aggrieved for the purposes of the *Judicial Review Act* 1991 (Qld) because he is a consumer who wishes to have access to unpasteurised milk because of his perception that it is beneficial to certain medical conditions from which he suffers. He is also persuaded, on the basis of study as an interested lay person, that unpasteurised milk is a vital source of nutrition for children, having regard to "serious nutritional deficits in modern foods". It was not argued by the respondents that Mr Bell was not a person aggrieved.

[3] The second applicant, Mr Mahaffey, is a producer of "organically produced fresh milk" whose "family livelihood is threatened by the decision for which review is sought". Mr Mahaffey also says that he does not want his organically produced milk to be unavailable to customers or mixed with other milk and then pasteurised.

[4] There is, in addition to the applicants' proceedings, an application by the respondents to strike out those proceedings. If that were to be unsuccessful,

directions about the further conduct of the original proceedings would be appropriate.

[5] According to Mr Bell, as a civil libertarian of long standing and because he has become a consumer of the milk produced by Mr Mahaffey, he became known to Mr Mahaffey. Mr Mahaffey took up his offer of assistance "should the authorities begin to harass him". Unfortunately, Mr Mahaffey did not appear in person at the hearing due, I was told by Mr Bell, to illness of a key employee. Mr Bell told me that he had authority to appear on behalf of Mr Mahaffey but not in writing. Whilst not doubting what Mr Bell has told me, it would be unwise to give leave to him to appear on Mr Mahaffy's behalf in the formal sense in the circumstances.

[6] However, no application was made for an adjournment on behalf of Mr Mahaffey, service upon whom is not disputed. There is therefore no procedural impediment to proceeding in his absence. Further, I am satisfied that Mr Bell has said all that can be said about the legal issues which are jointly advanced in their application. Factual issues upon which these arguments are founded are also overlapping. I am satisfied that in the particular circumstances of the case, there is no reason not to determine the matter in respect of each applicant, notwithstanding Mr Mahaffey's physical absence from the hearing.

[7] The relief sought by the applicants is set out in the following paragraphs:

> "2. A Declaration that a legislative provision having the effect stated in "1." above, would be ultra vires the Parliament's capacity, inter alia for the reasons that it would contravene Public Policy and the requirements of Section 4 of the Legislative Standards Act. 1992
>
> OR in the alternative,
>
> 3. An Order of Prohibition relating to certain parts of the Primary Industry and Other Legislation amendment Bill or other proposed legislation having the effect named in "1" above.
>
> OR further in the alternative,
>
> 4. A Prerogative Injunction or an Injunction that legislation having or potentially capable of being used to have the effect named in "1." above may not be brought before the Parliament by the Respondents or any of them for a Second Reading until all reasonable endeavours to formulate provisions for a regime not having such effects of actual or potential detriment to the rights and freedoms of citizens are explored and alternative provisions formulated which would comply with the Public Policy requirements of the Common Law and the Legislative Standards Act 1992, inter alia at Section 4 and submitted to the Parliament by the Respondents."

[8] There is also an order sought under s 38 of the *Judicial Review Act*, expressed in the following way:

"5. An order pursuant to Section 38 of the Judicial Review Act 1991 that:

> The Twelfth Respondent forthwith provide to the First Applicant the Statement of Reasons sought by the First Applicant for the Twelfth Respondent's decision to ban the removal from a farm of fresh milk and in relation to which, by letter dated 6th August 2003, the Twelfth Respondent advised the First Applicant of his refusal to comply with the request."

[9] Finally, review of certain conduct of the twelfth respondent is sought in the following terms:

"6. Review of the conduct of the Twelfth Respondent in respect of his refusal (as advised by letter dated 6th August 2003) of the First Applicant's request for a Statement of Reasons pursuant to Section 32 of the Judicial Review Act 1991 for the Twelfth Respondent's decision to ban the removal from a farm of fresh milk".

[10] The last two forms of relief relate to a request on 11 July 2003 by the applicant Mr Bell for a statement of reasons under the *Judicial Review Act* in relation to why, taking into account certain documents that Mr Bell had supplied, the twelfth respondent nevertheless made a decision to change subordinate legislation to affect the supply of raw milk. A statement of reasons was refused on the ground that the decision was not one to which the *Judicial Review Act* applied. However, information explaining the reason for a subsequent announcement of legislative amendment regarding the sale and consumption of unpasteurised milk, with particular reference to the implementation of the Australian and New Zealand Food Standards Code, was provided.

[11] The *Primary Industries and other Legislation Amendment Bill* 2003, cl 49 of which contains an extension of the meaning of "primary produce", was introduced and read for the first and second time on 21 August 2003. Further debate upon the second reading was adjourned on that day. As the definition of "primary produce" stands without the proposed amendment, it means:

"(a) food produced by the production of primary produce; or

(b) an animal, plant or other organism intended for human or animal consumption; or

(c) raw material taken from an animal, plant or other organism for food. … *(in substantially the same condition as when it was taken from the animal, plant or other organism.)*"

The amendment would add the following:

"(d) a substance, other than food –

(i) that is labelled as not intended for consumption by humans or animals; and

(ii) that the Minister is satisfied –

(A) is likely to be consumed by humans or animals; and

(B) if consumed by humans or animals – poses a food safety hazard to the humans or animals; and

(iii) that is prescribed under a regulation to be primary produce."

[12] It is not necessary in order to deal with the critical legal issues in the application to engage in controversy about the respective arguments about the benefit and detriments of unpasteurised milk. The proposed amendment seems to have been prompted by an evident intent to evade existing law by describing the product in a way implying that the product was not for human consumption while expecting that it would be consumed by people minded to use it as food (See Ex D, affidavit of Mr Bell, 2 Sept 2003). Whatever political or public health content the debate has, it is not relevant to the determination of the present application by the respondents to strike out, except to the extent that the applicants claim that what is proposed is an actual or potential detriment to the rights and freedoms of citizens. It is argued that the legislation does not conform to "public policy requirements of the common law and s 4 of the *Legislative Standards Act* 1992".

[13] The following passage in the application for review encapsulates the submission with respect to "common law review":

> "Public Policy and any mainstream theory of jurisprudence dictates that in Australia, needless government intervention in the lives of citizens is improper and that statutes should be interpreted and decisions reviewed by the courts from that standpoint.
>
> The above principle is enshrined in Section 4 of the Legislative Standards Act and the decision sought to be reviewed clearly contravenes that statute. The law requires an evaluation of proposed legislation as against this statute and none was done.
>
> Irrelevant considerations had a significant or substantial part in the making of the decision.
>
> The power was exercised for an improper purpose.
>
> The power was exercised in accordance with a rule or policy.
>
> The power was exercised unreasonably.
>
> The power was exercised when there was no evidence to support the decision made, or in the alternative, evidence so weak that no reasonable person could have come to the same decision".

[14] With regard to "statutory judicial review" reliance is placed on s 20(2)(b),(f),(g),(h) and (l) of the *Judicial Review Act*, and also upon s 24 of it.

[15] It is convenient to consider first the application for a statement of reasons. Subject to irrelevant exceptions, s 32 provides that if a decision to which the *Judicial Review Act* applies is made, a person with standing to seek a statutory order of review may request the decision maker to give a written statement of reasons. It is implicit in this that there must be a "decision of an administrative character" under an enactment or a non-statutory scheme or program funded by amounts appropriated by Parliament or by a tax charge fee or levy imposed by or under an enactment (s 4(b)(ii)).

[16] The applicant seeks an order under s 38 for an order that the twelfth respondent give a statement of reasons. He also seeks review of his conduct in respect of his refusal to give a statement of reasons. The decision in respect of which the reasons are sought is described as a "…decision to ban the removal from a farm of fresh milk."

[17] It can be gleaned from the evidence that, as far as the twelfth respondent is concerned, various "inventive ways" had been employed to circumvent legislation designed to prohibit the sale of unpasteurised milk, by describing it in a way that may have avoided the intent of the legislation. A policy decision had initially been taken to attempt to remedy the situation by subordinate legislation. However, by the time a letter dated 6 August 2003 declining to give a statement of reasons had been conveyed to the first applicant on behalf of the twelfth respondent a decision to legislate had been taken.

[18] One of the reasons why legislation for judicial review of administrative decisions was conceived was to alleviate the position at common law where a person affected by a decision generally had no right to a formal statement of reasons in the absence of provision in the particular statute under which the decision was made for reasons to be given. Legislation that was brought into effect in various jurisdictions reflected what the respective legislatures regarded as its appropriate ambit.

[19] Generally speaking, governments have been left free to decide policy questions. When a policy decision is made to legislate in a particular way, no individual right has been given to compel a formal set of reasons for the decision to be given. The understanding no doubt is that on many issues there will be a wide divergence and even polarisation of views and that normal political forces in a democratic system should ensure that when such decisions are proposed or made, they will be scrutinised by those who have an interest in them and debated in the public arena, not the courts.

[20] The decision relied on by the applicants is not a decision to which the Act applies within the meaning of the *Judicial Review Act*. It is neither made "under an enactment" in the relevant sense nor under a taxpayer funded non-statutory scheme or program. It is no more than a policy decision that a legislative amendment should be proposed for consideration by Parliament. It is not a decision in respect of which a person making it is required to give reasons. As previously noted, notwithstanding this, the rationale for doing so was in fact explained in a letter of 6 August 2003 written on the twelfth respondent's behalf. For similar reasons, the conduct of the twelfth respondent in respect of the refusal to give reasons falls outside the scope of the *Judicial Review Act*.

[21] With regard to the other grounds, the basic premises of the applicants' argument are set out in the first three sentences of the passage quoted in para [13]. In oral submissions, the applicant developed the argument that the proposed legislative power would be exercised in an improper way, contrary to public policy and to the *Legislative Standards Act.* It would contravene the public policy maxim, repeated in the *Legislative Standards Act*, that the rights and liberties of individuals should not be needlessly infringed. He submitted that "needlessly" was the crucial word to be interpreted. He said that attempts had been made to urge a different outcome upon Government officers without success. It was therefore for the court to determine whether the proposed legislation would needlessly infringe or have insufficient regard to the rights and liberties of individuals.

[22] Mr Bell said that he did not submit that the court had power to stop Parliament legislating but submitted that a declaration could be made that the "decision" was inappropriate in terms of public policy and the *Legislative Standards Act.* The focus should be, on this argument, on the decision of Cabinet to promote the passing of the legislation, not the Bill itself.

[23] Section 4(1) of the *Legislative Standards Act* states that for the purposes of the Act fundamental legislative principles are those relating to legislation that underlie a parliamentary democracy based on the rule of law. Section 4(2) states that the principles include requiring that legislation has sufficient regard to:

> (a) rights and liberties of individuals; and
> (b) the institution of Parliament.

Section 4(3) sets out a number of examples of criteria for determining whether legislation has sufficient regard to rights and liberties of individuals. While the various criteria are said only to be examples, none relates directly to the principles expressed by the first applicant. However, since they are only examples, the categories are not closed.

[24] Two things may be said about the Act. One is that it is not an entrenched piece of legislation. Legislation inconsistent with it may therefore, as a matter of ordinary principle, be passed by Parliament. The second is that s 23(1)(f) of the Act clearly implies that Parliament is not prohibited from considering a Bill inconsistent with fundamental legislative principles. All that is required is a statement in an Explanatory Note for the Bill explaining the reason for the inconsistency with fundamental legislative principles. In other words, if there is a departure from fundamental legislative principles, the Minister who presents the Bill to the Legislative Assembly must bring that fact to the notice of the House. The way prescribed for doing that is in the Explanatory Note. At the time the hearing, there was no evidence whether the Explanatory Note for the Bill had been circulated, as required by s 22(1). That must be done prior to the resumption of the second reading debate but not, so far as the Act is concerned, at any more precise time. The resumption of the second reading debate was to happen on a date to be fixed.

[25] Since recently, the Queensland Parliament website records the Explanatory Note which is consistent with paras [12] and [17] above in that it refers to prevention of circumvention of the intended operation of the *Food Production (Safety) Act* by supplying produce labelled as not for human consumption or animal consumption to consumers who are likely to eat the product. The view is also expressed in the note that the amendment is consistent with fundamental legislative principles.

[26] Counsel for the respondents also informed me that as the proceedings may touch, in part, upon the powers, privileges and immunities of Parliament, the outline of submissions had been drawn to the attention of the Speaker of the Legislative Assembly in his role as traditional defender of such privileges on behalf of the House. He said that he was instructed to inform the court that The Honourable the Speaker had read the outline, was in general agreement with it in so far as it concerned the powers, privileges and immunities of the Parliament, but did not, at this stage and as presently advised, intend to seek to be heard either as *amicus curiae* or otherwise in the proceeding.

[27] In *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 199, Kirby P said that the power to issue injunctions and to make declarations in relation to the deliberative stages of proceedings in Parliament will virtually always be refused out of the necessity to permit Parliament to conclude its deliberations. Even after the passage of legislation, and before presentation of the Bill to the Governor for royal assent, the courts will "virtually never" issue an injunction or make a declaration at that stage. It will be left to the applicant to seek relief after the royal assent has been given and the Bill has become law.

[28] He said that it was in this way that the courts in Australia had achieved an appropriate balance between:

> (a) the fulfilment of their role as guardians of the rule of law, including in respect of any requirements that may be laid down by law and which Parliament is obliged to obey in respect of the passage of the particular law; and
>
> (b) the respect which is conventionally accorded to a separate branch of Government with its own ancient rights and privileges reflected in the *Bill of Rights* of 1689, established by long standing tradition and recognised in many places including in the law of Parliament.

As to (b), see also *Parliament of Queensland Act* 2001, ss 8 and 9.

[29] It is not necessary to elaborate on the second of the propositions in para [26] since the legislation has not yet reached that stage. I am content to refer to the succinct statement by Gibbs J in *Cormack v Cope* (1974) 131 CLR 432 as follows:

> "It has been emphatically laid down that the settled practice of this Court is to refuse to grant relief in respect of proceedings within Parliament which may result in the enactment of an invalid law and that the proper time for the Court to intervene is after the completion of the law making process; *Hughes & Vale Pty. Ltd. V. Gair* [(1954) 90 CLR 203]; *Clayton v. Heffron* [(1961) 105 CLR 214]."

[30] It was submitted on behalf of the respondents that the applicants' real objections to the Bill go to its substance not to any issue of procedure. The real complaint is that if the Bill is enacted the resulting Act would contravene the first applicant's human rights and impact upon the second applicant's business. It was submitted that there was no warrant for intervention by the court on those grounds. For reasons of construction to which reference has been made previously the argument that the *Legislative Standards Act* provides a reason for intervention is misconceived.

[31] To the extent that there is an argument based on "public policy", there can be no doubt that the most that can be said is that there are differing viewpoints on the issue of whether unpasteurised milk should be available to members of the community. Health related issues are a part of the argument. Where a decision to implement a particular policy is made in a case of the present kind, arguments concerning the validity or otherwise of the factual basis upon which the decision is made and whether the limitation of the freedom of someone to do the contrary is a sound decision, must be resolved in the court of public opinion not a court of law.

[32] Insofar as the application is based on public policy and the *Legislative Standards Act*, the arguments on behalf of the applicants are contrary to principle. Insofar as

intervention at the present stage of the legislative process is sought, established practice is that relief would not be granted. The application for the relief referred to in para [7] above must therefore fail.

[33] To the extent that the application may rely on the *Judicial Review Act*, the policy decision to promote an amendment to legislation is not one to which the *Judicial Review Act* applies for reasons set out earlier in relation to the definition of what decisions are subject to the Act. Since that is the case, the case is one to which s 48 applies. No reasonable basis for the application exists. The application is therefore dismissed. With regard to costs, the parties have leave to make written submissions within 14 days.

[34] **Orders:**

1. The application is dismissed;
2. The parties have liberty to make submissions in writing as to costs within 14 days.