

CASE NOTE:

Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95

Court/tribunal	Supreme Court
Type of proceeding	Judicial review
Application of <i>Human Rights Act 2019</i>	Section 58 (conduct of public entities)
Rights engaged	Right to participate in public life (s 23) Right to property (s 24) Fair hearing (s 31)
Outcome	Application refused
Date of decision	5 May 2023

Background

Three groups applied for judicial review of a decision made by the Deputy Premier to ‘call-in’ a development application made by Wanless Recycling Park to establish a new resource and recovery and landfill facility west of Ipswich. Ipswich City Council approved the resource recovery component but refused the landfill component of the development.

While Wanless appealed that decision to Planning and Environment Court, it also requested that the Deputy Premier call-in the entire application. The Deputy Premier may call-in a development application where a ‘state interest’ is involved, which all parties agreed the project was. The effect of a call-in decision means that the approval process for that development is:

- (a) removed from the usual planning system whereby developments are approved or refused by a local council and are then subject to Planning and Environment Court appeals; and
- (b) placed within the jurisdiction of the Minister who has power to assess and decide the application.

The Deputy Premier called-in the application, but had not yet decided whether to approve or reject it.

One group of local residents alleged that the call-in decision was incompatible with their human rights under the *Human Rights Act 2019* (HR Act).

The Court found as a public entity, the Deputy Premier was required to act and make decisions compatibly with human rights, and in making a decision, give proper consideration to human rights. The Court adopted a three stage test to assess compatibility with human rights:

- **Engagement** - where a human rights is relevant, including where it is interfered with or promoted. For example, property might be deprived so that the right in s 24(2) is 'engaged', but the deprivation may not be arbitrary, so that the right is not in fact 'limited'
- **Limitation** – after considering the scope of the right in the broadest possible way, and with recourse to international authority, has a measure placed restrictions, or interfered with, the human rights of a person?
- **Justification** – according to the process set out in s 13.

The local residents first needed to establish a limit, including by reference to any internal limitations (eg arbitrariness). Then the public entity must show that limit was justified according to evidence that is cogent and persuasive.

Three human rights were potentially engaged, but the Court concluded that the residents did not establish that any were limited. Even if they had, applying s 13 of the HR Act, there was a cogent basis for concluding those limits were reasonable and proportionate.

Right to take part in public life (s 23)

The Court concluded that the residents had the opportunity, without discrimination, to participate in the conduct of the call-in process. Wanless, through its lobbyists, was not able to gain more favourable access to the Deputy Premier's office and to public servants during the representation period.

Even then, the Court did not accept that Wanless' lawful engagement of lobbyists limited the rights of the residents to participate in public life. Lobbying may have enhanced Wanless' prospects of persuading the Deputy Premier to make the decision it desired. But the mere enhancement of Wanless' prospects through lobbying did not limit the Ashworth parties' opportunity to participate in the conduct of public affairs. The human right was one of participation, not a right to, or a guarantee of, an equal voice or equality of bargaining power. The right to participate is not a right to a specific outcome from that participation.

Meaning of without discrimination

The Court noted the protection in s 23 was to participate in the conduct of public affairs 'without discrimination'. The Court found it would be difficult to argue that Parliament contemplated that discrimination merely required differential treatment. The concept of discrimination involves making a distinction, as in to discriminate against a minority. Therefore discrimination under the HR Act:

- Incorporates the definition of discrimination in the *Anti-Discrimination Act 1991*; and
- Could also include other analogous grounds of discrimination within the protection (based on the approach taken in Canada).

The Ashworth parties could not demonstrate discrimination on this basis. The residents argued that they were not given the same representation opportunities based on political association, meaning they were discriminated against because of their political belief or activity. However, the court found there was no evidence to support this argument. There was also nothing in the factual material to demonstrate that the residents had been discriminated against on a relevant analogous ground.

Right to property

The Court was willing to adopt a broad interpretation of ‘property’, but even then, did not agree it included a statutory right for the residents to participate in the appeal before the Planning and Environment Court, which was terminated by the call-in. The Court noted the right to property is thought to be a strategic human right, a right that protects other rights but also valuable in itself as a component of human dignity. Personal property such as food, clothing and housing is at the core of the right, as it ‘lies closer to the core of human dignity’. The residents’ dignity, and their ability to enjoy other human rights, were not at stake.

Right to fair hearing

The Court considered that the right to fair hearing would not be limited if those decisions were subject to an independent review. That review did not need be on the merits, only ‘of the legality of the decisions and of the procedures followed’. The Court concluded that ‘this hard-fought litigation is compelling evidence of the availability of a review of the legality of the Deputy Premier’s call-in decision’.

The obligation to give proper consideration

The Court followed the approach of *Martin J in Owen-D’Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273. A decision maker in Queensland is required to at least identify the human rights that may be affected by the decision and to consider whether the decision would be compatible with human rights. However, both those tasks need to be approached in a common sense and practical manner.

The Deputy Premier considered various documents contained in a briefing note when making the call-in decision, including one entitled ‘human rights assessment’. The court found that the Deputy Premier’s reference to the “human rights assessment” document assisted with his consideration. The Deputy Premier was entitled to seek and obtain the advice of public servants.

The Court concluded that the Deputy Premier’s human rights assessment correctly identified the human rights that might have been affected by the call-in decision and correctly considered whether the call-in decision would be compatible with human rights, although the assessment had primarily discussed only freedom of expression (s 21).

This was because the Court had concluded the right to participate in public life was not limited, and the call-in powers were compatible with the right to fair hearing.

Whilst the HR Assessment did not expressly tackle the right to a fair hearing under s 31, the HR Assessment did address the call-in decision’s impact on the opportunity to be heard in Court which, it was thought, may limit freedom of expression under s 21 of the Human Rights Act, but that limitation was thought to be proportionate because of right to be heard that might be afforded by the new process.

The assessment did not specifically mention the right to property in s 24, however it did discuss ‘property rights’ generally.

Other ways the HR Act may have applied

The Court rejected the resident's suggestion that a failure to give proper consideration may have provided a separate ground of judicial review. The intention of the HR Act was 'to change behaviour, not to provide an additional weapon'.

Even if the Court had found a contravention of s 58, section 231(1) of the Planning Act provides that 'unless the Supreme Court decides a decision or other matter under this Act is affected by jurisdictional error, the decision or matter is non-appealable'. Non-appealable is defined as meaning the decision or matter:

- (a) is final and conclusive; and
- (b) may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way under the Judicial Review Act 1991 or otherwise, whether by the Supreme Court, another Court, any tribunal or another entity; and
- (c) is not subject to any declaratory, injunctive or other order of the Supreme Court, another Court, any tribunal or another entity on any ground.

In considering these and other relevant provisions, the Court concluded that there was a clear legislative intention to restrict challenges to Ministerial decisions made in relation to the exercise of a call-in power to limited circumstances.

This was particularly relevant in light of s 58(6) of the HR Act which provides that an act or decision of a public entity is not invalid merely because the entity contravenes its obligations under s 58(1). The Court concluded that a breach of s 58(1) therefore amounts to a non-jurisdictional error.

Thus, even if there had been a breach s 58(1), s 231 would have presented a 'further obstacle' for the residents. However, the Court noted 'it was doubtful that one can go so far as to say that s 58(6) evinces an intention to allow for human rights review to be ousted by privative clauses in other Acts that apply to non-jurisdictional errors of law'.

All other grounds of challenge including allegations of apprehended bias were also dismissed, and the applications refused.

You can read the decision online at <https://www.sclqld.org.au/caselaw/QSC/2023/95>.