

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2013 2202

JADE APPLEBEE

Appellant

v

MONASH CITY COUNCIL

Respondent

JUDGE: CROUCHER J
WHERE HELD: Melbourne
DATE OF HEARING: 18 October 2013
DATE OF JUDGMENT: 10 December 2013
CASE MAY BE CITED AS: Applebee v Monash City Council (No 2)
MEDIUM NEUTRAL CITATION: [2013] VSC 680

ADMINISTRATIVE LAW – Appeal on questions of law from decision of Victorian Civil and Administrative Tribunal – Declaration by Council that appellant’s dog a “restricted breed dog” pursuant to s 3(1) of the *Domestic Animals Act* 1994 (Vic) – Declaration affirmed by Tribunal on review – Whether error in Tribunal relying on an “overall impression” of compliance of dog with *Standard for Restricted Breed Dogs in Victoria* or part thereof – Whether error in testing “overall impression” of compliance against other parts of Standard – Whether error in Tribunal failing to take into account expert evidence that the distances from withers to the elbow and the elbow to the ground were not equal – Whether error in Tribunal relying on own “overall impression” that those distances were “generally equal” – Meaning of “generally equal” – Appeal allowed – Matter remitted to Tribunal for fresh hearing.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr E N Magee QC with Mr A E Klotz and Ms S C Bailey	Phoenix Legal Solutions
For the Respondent	Mr P Connor	Hoeys Lawyers

HIS HONOUR:

Introduction

- 1 Jade Applebee owns a dog named Kerser. When Kerser was about ten months old, he was seized and impounded by Monash City Council ("the Council"). The Council declared Kerser to be an American Pit Bull Terrier, and therefore a "restricted breed dog", within the meaning of s 3(1) of the *Domestic Animals Act* 1994 (Vic) ("the DA Act"). This means that Kerser will be destroyed unless the declaration is set aside. Kerser has been impounded for 12 months.
- 2 Ms Applebee wants Kerser home, alive. She tried, but failed, to persuade the Victorian Civil and Administrative Tribunal ("the Tribunal") that the declaration was wrong.¹ An Associate Judge of this Court refused an application for leave to appeal against the Tribunal's order.² Subsequently, I allowed Ms Applebee's appeal against the Associate Judge's decision and granted her leave to appeal against the Tribunal's order.³ Originally, the appeal against the Tribunal's order was listed for oral hearing before me on 18 October 2013. But, by agreement of the parties, that appeal was ultimately heard on the papers.
- 3 For reasons that follow, I would allow the appeal against the order of the Tribunal; set aside that order; and remit the matter to the Tribunal, differently constituted, to be heard and decided afresh.

A brief chronology of events

- 4 On 4 December 2012, the Council seized and impounded Kerser. On 11 December 2012, the Council gave notice to Ms Applebee, pursuant to s 98A of the DA Act, that Kerser had been declared to be a restricted breed dog – in particular, an American Pit Bull Terrier.
- 5 As indicated above, the result of such a declaration is that Kerser will be destroyed.

¹ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394.

² *Appleby v Monash City Council* [2013] VSC 282. The appellant was incorrectly described in the proceedings before the Associate Judge as "Jane Appleby".

³ *Applebee v Monash City Council* [2013] VSC 481.

Section 84P(b) of the DA Act provides that the Council may destroy a dog at any time after its seizure if the dog is a restricted breed dog that is not able to be registered. Under s 41EA, there is a prohibition on keeping a restricted breed dog that was not registered in Victoria before 30 September 2011. Under s 17(1AA), the Council is not permitted to register such a dog. Kerker could not be registered before 30 September 2011 because he was not born until 1 February 2012.

- 6 Ms Applebee's application for review of the Council's decision was heard at the Tribunal over two days, on 20 February and 18 March 2013. The Deputy President heard competing evidence as to whether Kerker fell within Part 1 of the *Standard for Restricted Breed Dogs in Victoria* ("the Standard"), which concerns American Pit Bull Terriers. On the second day of the hearing, the Deputy President viewed Kerker in the company of the respective expert witnesses and counsel for the parties.
- 7 On 3 April 2013, the Deputy President affirmed the Council's declaration and published reasons for her decision.⁴
- 8 On 16 May 2013, an Associate Judge of this Court heard Ms Applebee's application for leave to appeal, on a question of law, pursuant to s 148(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("the VCAT Act").
- 9 On 29 May 2013, the Associate Judge refused the application and published reasons for her decision.⁵
- 10 On 6 and 7 August 2013, I heard Ms Applebee's appeal against the Associate Judge's decision.
- 11 On 6 September 2013, I allowed that appeal, granted her leave to appeal against the Tribunal's order upon some grounds but not others and published reasons for my decision.⁶

⁴ *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394.

⁵ *Appleby v Monash City Council* [2013] VSC 282. The order refusing leave to appeal was not authenticated until 14 June 2013, at which time an order was also made that Ms Applebee pay the Council's costs of the application.

⁶ *Applebee v Monash City Council* [2013] VSC 481.

- 12 At the request of the Council, I directed that the appeal against the Tribunal's decision be heard separately from the hearing of the appeal against the decision of the Associate Judge. Among the reasons for taking that course was that one of the grounds on which leave to appeal was granted (the substance of which became Ground 3 of the present appeal) was raised for the first time during the hearing of the appeal before me, so that the Council did not have a great deal of time to respond to it. The Council has now had the opportunity of providing more detailed written submissions on the point. Another reason was that the Council indicated it would seek to put transcript of the hearing at the Tribunal before the Court on an appeal and that such transcript may be material to the determination of the appeal. As it happened, no such transcript was placed before me on the appeal against the Tribunal's order.
- 13 Originally, the appeal was listed for oral hearing on 18 October 2013. But, by agreement between the parties, the matter ultimately was heard on the papers. Each party relied on the same material that was before me on the appeal from the decision of the Associate Judge. Each party also filed further written submissions.

The relevant law

Introduction

- 14 Before turning to the grounds of appeal and counsel's submissions, I shall set out parts of the DA Act, the Standard and the leading decision in this area of the law, as well as parts of the reasons of the Tribunal:

The Domestic Animals Act 2004 (Vic)

- 15 Section 98A(1) of the DA Act provides that, "[i]f an authorised officer is of the opinion that a dog is a restricted breed dog, the authorised officer may make a declaration to the effect that the dog is a restricted breed dog".
- 16 Section 3(1) defines "restricted breed dog" to mean a dog which is any one of five breeds specified, the fifth of which is the "American Pit Bull Terrier (or Pit Bull Terrier)".

17 Section 3(3) provides that “[a] dog that falls within an approved standard for a breed
of dog specified in a paragraph of the definition of *restricted breed dog* is taken to be
a dog of that breed”.

18 Section 3(4) provides that, for the purposes of s 3(3), “an approved standard is a
standard that has been approved by the Minister and published in the Government
Gazette”. On 1 September 2011, the Victorian Government published in the
Government Gazette the *Standard for Restricted Breed Dogs in Victoria*, Part 1 of which
is entitled “American Pit Bull Terrier (APBT, Pit Bull Terrier)” (“the Standard”).⁷

Part 1 of the Standard

19 Part 1 of the Standard commences by stating that “[a] dog that meets the description
of a dog in this Part is an American Pit Bull Terrier” (except in certain circumstances
that are inapplicable in the present case).

20 Next, under the heading “General appearance and characteristics”, the following is
stated:

The American Pit Bull Terrier is a medium sized dog and is strongly built with well
defined muscles. The breed is noted for its climbing ability and subsequent strength
in its hindquarters.

The overall outline of the breed indicates it to be slightly longer in length (point of
shoulder to buttocks) than height (withers to ground). Bitches may be slightly longer
than males.

The distance from withers to the elbow and the elbow to the ground is generally
equal.

21 The Standard then sets out the various characteristics of the American Pit Bull
Terrier under headings relating to specific aspects of its anatomy. Photographs and
diagrams are also used. Under the heading “Head”, there are descriptions and/or
diagrams for the muzzle, head profile, skull, lips, teeth, nose, eyes and ears. A
similar approach is taken under the subsequent headings relating to the neck,
forequarters, body (forechest, back and loin), hindquarters, feet, tail, coat, colours
and height and weight.

⁷ Parts 2 to 5 of the Standard relate to other breeds of dog.
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Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council

22 *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 (“*Dudas*”) is the leading decision on the test to be applied in determining whether a dog falls within the Standard.

23 In *Dudas*, Kaye J rejected an argument that, in order for a dog to “fall within” the Standard for the purposes of s 3(3) of the DA Act, the dog must conform with each of the individual characteristics specified in the Standard.⁸

24 Instead, Kaye J held that, in order for a dog to “meet the description” of an American Pit Bull Terrier, there must be “a substantial, or high, level of correspondence between the characteristics of the particular dog in question, and the description of those characteristics in the Standard”.⁹ His Honour added the following:¹⁰

100 Obviously, in an individual case, the question whether there is the requisite high or substantial level of correspondence between the dog, and the Standard, will ultimately be one of appropriate judgment in the particular case. That judgment may depend on the expert opinion (if any) available to the authorised officer or, on review, to the Tribunal, as to whether any particular characteristics or criteria, specified in the Standard, are of particular importance in determining whether there is a high or substantial level of correspondence between the characteristics in the Standard and the particular dog in question, so that it can be properly concluded that the dog “meets the description” of the dog in the Standard. However, in the end, as a matter of proper construction, the relevant characteristics of the dog in question must be assessed, in quantitative and qualitative terms, to have a substantial or high level of correspondence with the criteria specified in the Standard, in order that it “meet the description” of a dog in that part of the Standard.

25 Later in his judgment, when rejecting an argument to the effect that, because the dog in question had a dewlap (or loose skin), it was not open to find that the neck complied with the Standard despite other aspects of the neck matching the relevant criteria the Standard, Kaye J said this:¹¹

111 As stated by the Senior Member, the comparison, which is required to be undertaken, for the purposes of the Standard, does not simply involve ticking particular boxes. Rather, it involves an assessment of each aspect of the anatomy specified in the Standard, and of each of the individual parts of the description of that aspect of the dog’s anatomy. It would therefore be appropriate for an authorised

⁸ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 at [91].

⁹ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 at [99].

¹⁰ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 at [100].

¹¹ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 at [111].

officer (and thus the Tribunal) to note the aspects of a particular part of the anatomy (for example the neck) which complied with the Standard, and those which did not. That analysis would be taken into account in the overall assessment as to whether there was, in totality, a high or substantial degree of correspondence between the dog in question and the restricted breed dog described in the Standard. For that reason, I do not consider that the Senior Member did make an error of law (or otherwise) in expressing his conclusions in relation to the neck.

The Tribunal's reasons

26 I now turn to the Deputy President's reasons in the present case. After setting out the background to the matter, identifying the witnesses and observing that Kaye J in *Dudas* had held that "the requirement that a dog 'meet the description' of the American Pit Bull Terrier must contemplate a substantial or high level of correspondence between the characteristics of the particular dog in question and the description of those characteristics in the Standard",¹² the Deputy President said this:¹³

General appearance and characteristics

18. The American Pitbull Terrier is a medium sized dog and is strongly built with well defined muscles. The breed is noted for its climbing ability and subsequent strength in the hindquarters. The overall outline of the breed indicates it to be slightly longer in length (point of shoulder to buttocks) than height (withers to ground). Bitches may be slightly longer than males. A distance from withers to the elbow and elbow to the ground is generally equal.

19. Ms Graley felt the overall appearance of the dog complied with this aspect of the Standard. She said "the dog is a medium sized dog that is strongly built with well defined muscles. The hindquarters have clearly defined muscles". Ms Graley emphasised that a dog's physical attributes change as it ages and although the dog was only 10 months of age that it was already showing the attributes of the breed.

20. Ms Graley stated that that the "dog's head, body and hindquarters are all in proportion with each other".

21. In her evidence before me, Ms Harwood emphasised that Kerser did *not* meet the requirements of the Standard in a general sense. She emphasised that the Pitbull is a fighting dog which needs to be able to barrel itself against its opponent in a pit and requires great strength coupled with an ability to latch on and keep on. She gave evidence that Kerser lacks the bone and musculature that one would expect to see in a Pitbull.

22. The measurements given by the parties were not consistent with each other.

23. Ms Graley gave his weight as 26.6 kgs. Ms Harwood said there was no facility to weigh the dog but conceded he was good weight for his height.

24. Ms Graley gave Kerser's height as 52cm which would comply with the Standard. Ms Harwood gave his height as 54cm which would not comply.

¹² *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394 at [1]-[17].

¹³ *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394 at [18]-[34].

25. Ms Graley gave Kerker's length as 51cm and noted that the length is only slightly longer than the height. Ms Harwood gave the length as 55cm and stated that this would make the dog generally equal which makes it square.
26. The measurements withers to elbow also varied between the parties. Ms Graley measured him at 22cm; Ms Harwood at 24cm.
27. The parties agreed on the measurement of elbow to ground as being 30cm.
28. Ms Graley and her team used a measuring tape and gave evidence that there was some difficulty in measuring Kerker because he was not being co-operative. Ms Harwood used a metal measuring rod and tape, which she stated was the only accurate method of obtaining measurements. She stated that she had no difficulty measuring Kerker. The applicant asked me to prefer the evidence of Ms Harwood over Ms Graley. The applicant pointed to the difficulties experienced by the respondent when taking measurements from Kerker as evidencing the superior expertise of Ms Harwood.

Discussion

29. The differences between the parties relating to the measurements of Kerker were not resolved when we attended to view him. Kerker proved uncooperative in allowing measurements to be taken. Neither party was able to take any accurate measurements despite ongoing efforts to do so. I was not in these circumstances able to draw the inference against Ms Graley that the applicant had implored me to draw. I was also unable to conclude that the measuring rod preferred by Ms Harwood would have given a more accurate measurement because Ms Harwood did not bring any measuring equipment with her to the view.
30. In these circumstances I was left to rely on my overall impression of the animal rather than being assisted with precise measurements. This is in keeping with the philosophy of the Standard in any event.
31. The Standard states, for example, that –
 " the disparity between height and weight is considerable and importance should be placed on the overall consideration of the assessment of the dog rather than adhering absolutely to the guidelines on height".
32. My impression of the dog was one of broad compliance with the Standard.
33. I observed a medium sized dog who appeared to me to be strongly built with well defined muscles with some strength in the hindquarters. He appeared to me to be slightly longer in length (point of shoulder to buttocks) than height (withers to ground) with the distance from withers to the elbow and elbow to the ground generally equal.
34. The Standard provides a mechanism through which it is possible to also fragment a dog to ensure all aspects of the animal have been considered when reaching a conclusion as to whether or not the dog meets the description of a restricted breed dog. I turn now to a consideration of those fragments in order to test my general impression of Kerker. (Underlining added. Emboldening and italics in the original.)

27 Next, under each of the subsequent headings (bar one) that appear in the Standard, the Deputy President set out the applicable criteria from the Standard, the evidence and her analysis of the evidence.¹⁴ The heading missing was the last in Part 1 of the Standard, namely that which concerned "Height and weight". Those topics had

¹⁴ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [35]-[95].
 SC: RD

already been addressed under the heading "General appearance and characteristics".¹⁵ The Deputy President then said the following:¹⁶

Findings

96. I am satisfied that Kerser readily meets the description of a Pitbull in the Standard in the areas of his teeth, nose, ears, forechest, colour, eyes, tail and body.

97. I am satisfied that Kerser does *not* meet the Standard with respect to his lips, loin and feet.

98. I turn then to a consideration as to whether therefore Kerser substantially complies with the Standard with respect to his head, muzzle, skull, neck, forequarters, back and hindquarters. These are all very important aspects of the dog which go to the overall sense of strength and power of the dog.

99. I am satisfied that Kerser substantially complies with the Standard with respect to his head. I found the shape of his head complied with the Standard and although the stop was only moderately deep and the arches moderately well-defined, coupled with the shape of his head there was compliance to the requisite degree. Kerser's head may not be a perfect example of a Pitbull but the overall impression is that of compliance with the Standard to a substantial degree.

100. I found the skull substantially complied with the Standard. Although the cheek muscles were not particularly prominent, I found that in all other respects the skull did comply and that once again the overall impression was that of meeting the Standard.

101. I found the neck substantially complied with the Standard. Although there was *some* dewlap, it was very minimal and did not detract from the overall impression of compliance with the Standard.

102. I found that Kerser's hindquarters substantially complied with the Standard. His hindquarters were strong and muscular and the hock joint was well bent.

Although there was ambiguity around his rear pasterns which, depending on the stance of the dog, did appear from time to time to be slightly turned out, I was not satisfied that this lead to a conclusion that there was not substantial compliance.

103. I found that the forequarters did not substantially comply with the Standard. The important aspect of the forequarters in meeting the Standard must be of strength. Although he had muscularity of the forequarters, I was not comfortably satisfied overall to the requisite standard that Kerser complied with the Standard given the weakness indicated by the bowed appearance.

104. Although I found the back to be broad and strong, the incline was well behind the withers such that I was not satisfied that the back substantially complied with the Standard.

Conclusion

105. I am satisfied that Kerser substantially meets the Standard. The overall impression of Kerser is one of compliance. He may not be a perfect example of a Pitbull, however such a dog probably does not exist. Kerser meets the Standard in a significant number of areas to a substantial degree. Even in the areas where he does not meet the Standard to a substantial degree, he meets the Standard to some degree and importantly in the areas of musculature and strength.

106. The decision of the respondent to declare Kerser a restricted breed dog will be affirmed. (Underlining added. Emboldening and italics in the original.)

¹⁵ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [23]-[24] & [31].

¹⁶ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [96]-[106].

Grounds 1 & 2: "Overall impression" of compliance with the Standard

Grounds 1 & 2

28 Grounds 1 and 2 of the notice of appeal read as follows:

Ground 1: The Deputy President erred in law in determining that the dog, Kerser, was a restricted breed dog under the *Domestic Animals Act*, by reference to an overall impression she gained from observing the dog and without regard to the Standard for Restricted Breed Dogs in Victoria and whether there was in totality a high or substantial degree of correspondence between the dog in question and the restricted breed dog described in the Standard.

Ground 2: The Deputy President erred in finding that the Standard for Restricted Breed Dogs in Victoria had alternate ways of determining whether or not a dog was a restricted breed being:

- by forming an overall impression that the dog answered the general description set out in the Standard without regard to any criteria in the Standard;
- by considering each of the criteria set out in the Standard to determine whether or not the dog meets the description of a restricted breed dog.

Questions of law

29 The following three questions of law are identified in the notice of appeal as relating to Grounds 1 and 2:

Question 1: Is an "overall impression" that a dog complies with the Standard a sufficient basis for an opinion, under s 98A of the *Domestic Animals Act*, that the dog is a restricted breed dog?

Question 2: Is it permissible to form an "overall impression" that a dog complies with the Standard and then to "test" that impression by reference to the criteria in the Standard?

Question 3: Is a person forming an opinion under s 98A of the *Domestic Animals Act* or that a dog is a restricted breed dog within the Standard entitled to form such an opinion without first conducting an assessment to determine whether the material characteristics of the dog correspond to a high or substantial level with the criteria in the Standard?

Summary of the appellant's submissions on Grounds 1 & 2

30 The submissions of Mr Magee QC, who appeared with Mr Klotz and Ms Bailey for Ms Applebee, included the following:¹⁷ It was submitted that the Deputy President

¹⁷ I have had regard to all of the submissions of counsel for Ms Applebee, which are contained in *Appellant's Outline of Submissions* (7 October 2013), some of which had been developed orally earlier on the appeal against the decision of the Associate Judge. For the sake of brevity, only some of those

erred in basing her decision on an "overall impression" she gained from observing the dog rather than on an opinion that the dog is a restricted breed dog based on an assessment of whether there was a substantial, or high, level of correspondence between the characteristics of the dog and the description of those characteristics in the Standard.¹⁸

31 It was submitted that nothing said by Kaye J in *Dudas* suggested it is sufficient to form an "overall impression" that the dog complies with the Standard. Instead, the Tribunal, which has all the functions of the decision-maker under review, must be "of the opinion" (within the meaning of s 98A(1) of the DA Act) that the dog is a restricted breed dog. An "overall impression" of compliance with the Standard based on observing the dog, it was submitted, falls well short of an opinion based on an assessment of the dog against the criteria in the Standard.¹⁹

32 Mr Magee also submitted that the Deputy President did not form an opinion after assessing whether the characteristics of the dog had a substantial or high level of correspondence with the criteria in the Standard. Rather, her approach, which was not authorized by the DA Act, the Standard or anything said in *Dudas*, was to form an "overall impression" based on her own observation of the dog and then to go on and consider the criteria in the Standard in order to test whether her overall impression was correct.²⁰ It was submitted that this was apparent from the following passage in the Tribunal's reasons:²¹

34 The Standard provides a mechanism through which it is possible to also fragment a dog to ensure all aspects of the animal have been considered when reaching a conclusion as to whether or not the dog meets the description of a restricted breed dog. I turn now to a consideration of those fragments in order to test my general impression of Kerker. (Underlining added.)

33 As I see it, the foregoing points are really an amalgam of the complaints embodied in Grounds 1 and 2.

submissions on each of the three grounds of appeal are summarized in this judgment.

¹⁸ *Appellant's Outline of Submissions* (7 October 2013) at [5]-[8] & [12].

¹⁹ *Appellant's Outline of Submissions* (7 October 2013) at [9] & [12].

²⁰ *Appellant's Outline of Submissions* (7 October 2013) at [10] & [12].

²¹ *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394 at [34].

34 As to Ground 2 specifically, Mr Magee submitted that the remarks in paragraph [34] of the reasons also demonstrated that the Deputy President considered there were alternate ways for determining whether a dog is a restricted breed dog: either by forming an overall impression that the dog answers the general description set out in the Standard without regard to any other criteria in the Standard or by considering each of the criteria in the Standard to determine whether or not the dog meets the description of a restricted breed dog.²² Again, it was submitted that that approach is not supported by the DA Act, the Standard or the reasoning in *Dudas*.

Summary of the respondent's submissions on Grounds 1 & 2

35 The submissions of Mr Connor, who appeared for the Council, included the following:²³ As to Ground 1, he submitted that it could not be said that the Deputy President determined the dog was a restricted breed dog only on the basis of an "overall impression". On the contrary, the reasons disclose that she initially formed an "impression ... of broad compliance with the Standard" under the heading "General appearance and characteristics" and then went on to make findings in respect of all other criteria in the Standard before concluding that the dog substantially met the Standard. He submitted there was no error in that approach.²⁴

36 As to Ground 2, Mr Connor submitted that the Deputy President did not find that the Standard provided for alternate ways of determining whether a dog was a restricted breed dog. He submitted that the passage on which Mr Magee relied as demonstrating that bifurcated approach – i.e. paragraph [34] of the reasons – actually shows that the Deputy President was astute to the necessity of considering all of the criteria in the Standard before reaching a conclusion as to compliance with the Standard.²⁵ He also submitted that "[a] preliminary view must be formed before

²² *Appellant's Outline of Submissions* (7 October 2013) at [11] & [12].

²³ As in the case of the appellant, I have had regard to all of the submissions of counsel for the respondent, which are contained in *Respondent's Outline of Submissions* (14 October 2013), some of which had been developed orally earlier on the appeal against the decision of the Associate Judge. For the sake of brevity, only some of those submissions on each of the three grounds of appeal are summarized in this judgment.

²⁴ *Respondent's Outline of Submissions* (14 October 2013) at [5]-[8].

²⁵ *Respondent's Outline of Submissions* (14 October 2013) at [9]-[12].

assessing the dog against all the criteria in the Standard ... [otherwise] the consequence would be that a dog that was clearly not a restricted breed dog could nevertheless, without question, be tested against the Standard".²⁶

Consideration of Grounds 1 & 2

- 37 I accept Mr Connor's submission that it could not be said that the Deputy President determined the dog was a restricted breed dog only on the basis of an "overall impression". It is plain that she went on to consider the other criteria in the Standard as well before concluding that the dog substantially met the Standard.
- 38 In my view, however, an amalgam of the complaints in Grounds 1 and 2 is made out. In particular, the Deputy President approached the matter first by forming an "overall impression" of the dog in view of the criteria under the headings "General appearance and characteristics" and "Height and weight" and then by going on to consider the other criteria in the Standard to test whether her overall impression was correct. So much is clear from the reasons at paragraph [34] and the structure of the reasons generally. In my respectful opinion, there are several reasons why that approach is in error:
- 39 First, nothing in the DA Act, the Standard or *Dudas* supports such an approach. As indicated above, the approach to be adopted was made clear by Kaye J in *Dudas*, and that is simply to determine whether there is "a substantial, or high, level of correspondence between the characteristics of the particular dog in question, and the description of those characteristics in the Standard".²⁷ There is no warrant for forming an "impression", an "overall impression" or a "general impression" that there is "broad compliance" with the criteria in the Standard under the headings of "General appearance and characteristics" and "Height and weight" and then separately testing whether that impression is correct by considering the remaining criteria in the Standard. Rather, an assessment must be made of the dog as against all of the criteria in the Standard, including those under the headings "General

²⁶ Respondent's Outline of Submissions (14 October 2013) at [10].

²⁷ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 at [99].

appearance and characteristics" and "Height and weight", and then a judgment must be made as to whether there is, in totality, the requisite substantial or high level of correspondence.²⁸ The Deputy President erroneously took the former approach, not the latter.

40 Secondly, I accept that it is not sufficient to form an "impression", an "overall impression" or a "general impression" that the dog complies with the Standard or any criterion within it. The Deputy President said that, because of what she perceived to be differences in measurements of the dog, she was "left to rely on [her] overall impression of the animal rather than being assisted with precise measurements", which, she said further, "is in keeping with the philosophy of the Standard". In support of that view, the Deputy President extracted a passage of Standard under the heading "Height and weight" which reads: "The disparity between height and weight is considerable and importance should be placed on the overall consideration of the assessment of the dog rather than adhering absolutely to the guidelines on height".²⁹ There are at least three difficulties with that view: First, the passage relied on appears to be confined the criterion for height (and, if read liberally, perhaps weight). It is not expressed to be the philosophy of the Standard as a whole. Secondly, even if the passage might be thought to apply more generally, it does not speak of an "overall *impression*" but, rather, "the overall consideration of the assessment of the dog". An impression is something different from and short of an assessment. Thirdly, in exercising its review jurisdiction pursuant to s 51(1)(a) of the VCAT Act, the Tribunal has all the functions of the decision-maker. Accordingly, the Tribunal must be "of the opinion" (within the meaning of s 98A(1) of the DA Act) that a dog is a restricted breed dog. In my view, an "overall impression" of compliance with the Standard, or any criterion therein, is something short of an opinion based on an assessment of a dog against the Standard or any criterion therein.

²⁸ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 at [99], [100] & [111].

²⁹ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [31].

- 41 Thirdly, the approach taken by the Deputy President tends to cast an onus on the dog owner to displace an "impression", an "overall impression" or a "general impression" that the dog complies with the criteria under the headings "General appearance and characteristics" and "Height and weight" in the Standard. There is no such onus. An approach of that type can only distort the process of reasoning towards a conclusion as to whether there is a substantial or high level of correspondence between the characteristics of the dog in question and the criteria in the Standard.
- 42 Fourthly, even if Mr Connor is correct (which I doubt, but need not decide) in submitting that "[a] preliminary view must be formed before assessing the dog against all the criteria in the Standard ... [otherwise] the consequence would be that a dog that was clearly not a restricted breed dog could nevertheless, without question, be tested against the Standard",³⁰ that does not avail the Council in this case. The Deputy President did not test her "overall impression" against all the criteria in the Standard. Rather, as I have said, she formed an overall impression based on the criteria found under the headings "General appearance and characteristics" and "Height and weight" and then tested that impression against the other criteria in the Standard.
- 43 In my view, the Deputy President's reliance on an "overall impression" of compliance with the Standard is likely to have been important to her ultimate decision. There are four reasons: First, the terms "impression", "general impression" or "overall impression" were used on several occasions in the reasons.³¹ The word "assessment" was used once, and only when quoting from the Standard and, even then, only erroneously to justify reliance on an overall impression.³² Secondly, as indicated above, the Deputy President said that, because of the difficulty involved in measuring the dog at the view, she was "left to rely on [her] overall impression of the animal rather than being assisted with precise

³⁰ *Respondent's Outline of Submissions* (14 October 2013) at [10].

³¹ *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394 at [30], [32], [34], [68], [99], [100], [101] & [105].

³² *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394 at [31].

measurements”.³³ More will be said about this issue below, when dealing with Ground 3. Thirdly, she used the term “overall impression” not just when considering the dog’s general appearance and characteristics and measurements but also when stating her conclusions in the penultimate paragraph of her reasons.³⁴ Fourthly, the Deputy President was not satisfied that several of the criteria in the Standard were met. Thus, had she applied the correct approach, her ultimate decision may well have been different.

Conclusion on questions of law

44 Whilst it is not necessary separately to do so in order to dispose of the appeal, it will be apparent from the foregoing reasons that my answers to the questions of law listed in the notice of appeal in relation to Grounds 1 and 2 are, in each case, “No”.

Conclusion on Grounds 1 & 2

45 Accordingly, I am satisfied that, in combination, Grounds 1 and 2 are made out.

46 Success on these grounds alone would be sufficient to cause the appeal to be allowed. However, I must also deal with Ground 3, to which I now turn.

Ground 3: Failure to take into account measurements of experts

Ground 3

47 Ground 3 of the notice of appeal reads as follows:

Ground 3: The Deputy President erred: (a) by failing to take into account a relevant consideration, namely the evidence of the two experts suggesting that the distances from withers to the elbow and the elbow to the ground were not equal; and (b) by substituting her own overall impression that those distances were “generally equal”.

Questions of law

48 The following two questions of law are identified in the notice of appeal as relating to Ground 3:

Question 1: Does the term “generally equal” in the Standard mean something like “nearly or approximately equal” rather than “usually equal”? If the former, is a ratio

³³ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [30].

³⁴ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [105].

of withers to elbow/elbow to ground of 22:30 or 24:30 “generally equal”? If the term means the latter, is a degree of inequality nevertheless to be regarded as a feature inconsistent with the Standard and, if so, what degree?

Question 2: Was the Deputy President entitled to ignore the evidence of measurements and substitute her own impression that “the distance[s] from withers to the elbow and elbow to the ground [are] generally equal”?

The relevant evidence

49 Whilst some of the evidence before the Tribunal relevant to this ground is mentioned by the Deputy President in the extracts from her reasons set out above, it is convenient to summarize the relevant evidence here:

50 Rebecca Graley, an Animal Management Officer with the Council, was called as an expert by the Council. In company with other officers, Ms Graley assessed Kerker on 5 December 2012. Kerker measured 22 centimetres (“cm”) from withers to elbow and 30 cm from elbow to ground. In her notes made on a document entitled “Restricted Breed Dog Identification and Declaration Process”, Ms Graley indicated that the “withers to elbow/elbow to ground” distances were not “generally equal” and noted the “approx[imately] 8 cm difference”, but added that the “[d]og is young [and] growing”.³⁵

51 Lynne Harwood, an International All-breeds Dog Judge, was called as an expert by Ms Applebee. Ms Harwood assessed Kerker on 24 January 2013. Kerker measured 24 cm from withers to elbow and 30 cm from elbow to ground. Ms Harwood commented in her report that Kerker did not comply with the relevant part of the Standard as “[h]e is longer in leg by 6 cm”.³⁶

52 Ms Graley measured Kerker’s height as 52 cm whereas Ms Harwood measured his height as 54 cm.³⁷ The Standard specified a height range of 43 to 53 cm.

The Tribunal’s reasons

53 The parts of the Tribunal’s reasons relevant to Ground 3 are included in the extracts

³⁵ See Ms Graley’s statement and her notes in the Appeal Book at pp 65 & 68.

³⁶ See Ms Harwood’s report in the Appeal Book at p 60.

³⁷ Appeal Book at pp 60 & 68.

set out above, particularly at paragraphs [18]-[34] of those reasons. It is convenient to reproduce paragraph [33] of those reasons again:³⁸

33. I observed a medium sized dog who appeared to me to be strongly built with well defined muscles with some strength in the hindquarters. He appeared to me to be slightly longer in length (point of shoulder to buttocks) than height (withers to ground) with the distance from withers to the elbow and elbow to the ground generally equal. (Underlining added.)

54 The underlined passage reflects the last criterion under the heading “General appearance and characteristics” in the Standard, which is also set out above in paragraph [18] of the Tribunal’s reasons and at paragraph [20] of these reasons.

Summary of the appellant’s submissions on Ground 3

55 Mr Magee’s submissions on Ground 3 included the following: He submitted that it was not open to the Deputy President to ignore the evidence of both experts that the “withers to elbow/elbow to ground” distances were not “generally equal” and instead to substitute her own impression that they were generally equal.³⁹

56 Mr Magee further submitted that the better view is that “generally equal”, where it appears in the relevant part of the Standard, means “nearly or approximately equal”. He noted that it is plain that both Ms Graley and Ms Harwood, who have a degree of expertise in this area, understood it that way, as did the Deputy President.⁴⁰

57 He accepted, however, that, if the word “generally” means “usually”, which construction he conceded was open, such a meaning would not require precise equality of distances between withers and elbow and elbow and ground. Rather, in this context, “generally equal” would mean “usually equal to a near or approximate degree”.⁴¹

58 Finally, Mr Magee submitted that whichever construction of “generally equal” was to be preferred, the Deputy President’s failure to have regard to the evidence of the relevant measurements and the substitution of her own impression was a significant

³⁸ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [33].

³⁹ *Appellant’s Outline of Submissions* (7 October 2013) at [22].

⁴⁰ *Appellant’s Outline of Submissions* (7 October 2013) at [20]-[21].

⁴¹ *Appellant’s Outline of Submissions* (7 October 2013) at [22].

error because the difference of six to eight centimetres meant, on the first construction, that the distances were not nearly or approximately equal and, on the second construction, the distances are usually equal to a near or approximate degree and in this dog they were not.⁴²

Summary of the respondent's submissions on Ground 3

59 Mr Connor's submissions on Ground 3 included the following: He submitted that the reasons do not reveal that the expert evidence was not considered or was otherwise rejected. He argued, in the alternative, that the Deputy President was entitled to reject the evidence of both experts because their measurements were not consistent with each other, they used different techniques and neither was able to measure the dog at the view. Further, nothing in *Dudas* requires the Tribunal to rely on expert evidence.⁴³

60 Instead, submitted Mr Connor, the Tribunal is entitled to inform itself in any way it thinks fit.⁴⁴ Further, having inspected the dog, the Deputy President was entitled to prefer her own observations of the dog's proportions – which were not an "overall impression". I also understood him to submit that, since s 54 of the *Evidence Act* 2008 (Vic) provides that what a court sees on an inspection (or view) can now be evidence, so too what a Tribunal sees on a view can be evidence. And if the inference that was drawn as to being "generally equal" was reasonably open, no error of law could be established. In that regard and in the alternative, Mr Connor submitted that Ms Harwood's measurements, at a ratio of 24:30, support a finding that the relevant distances were "generally equal".⁴⁵

61 Mr Connor submitted that the term "generally equal" means something like "usually equal" rather than "near[ly] or approximately equal". He noted that the word "generally" is used elsewhere in Part 1 and in other parts of the Standard apparently to mean "usually" and certainly in circumstances that could not be taken to mean

⁴² Appellant's Outline of Submissions (7 October 2013) at [23].

⁴³ Respondent's Outline of Submissions (14 October 2013) at [13]-[16].

⁴⁴ See s 98(1)(c) of the VCAT Act.

⁴⁵ Respondent's Outline of Submissions (14 October 2013) at [16] & [19]-[20].

"near or approximate".⁴⁶

62 Mr Connor submitted that, since the Standard is intended to apply to cross-breeds and also recognizes that not all American Pit Bull Terriers will fall within the height guidelines, a degree of inequality of distances between withers and elbow and elbow and ground cannot be regarded as inconsistent with the Standard. Accordingly, as I understood his submission, there could be no error in the present case in failing to have regard to the inequality of distances.⁴⁷

Consideration of Ground 3

63 Whilst it is plain that both experts and the Deputy President acted on the basis that the words "generally equal" mean something like "nearly or approximately equal",⁴⁸ and whilst one would expect that the experts would come to the task with an appreciation of what is important in assessing whether a dog is an American Pit Bull Terrier, nevertheless, not without some hesitation, I accept Mr Connor's submission that the better view is that "generally equal" means something like "usually equal".

64 There are three reasons. First, in the *Oxford English Dictionary*, two of the four meanings of "generally" given are "[u]niversally; with few or no exceptions; with respect to every (or almost every) individual or case concerned" and "[a]s a general rule; in most instances, usually, commonly". In the *Macquarie Dictionary*, two of the three meanings given are "with respect to the larger part, or for the most part" and "usually; commonly; ordinarily". It is reasonable to act on the assumption that words are used by the legislature in their more commonly understood sense. Secondly, as Mr Connor rightly pointed out, the word "generally" is used elsewhere in the Standard apparently to mean "usually". Thirdly, whilst the sentence in which the words "generally equal" appear provides a context that admits of the meanings

⁴⁶ *Respondent's Outline of Submissions* (14 October 2013) at [17]. See the use of the word "generally" on pp 6, 12, 13, 15, 16 and 17 of the Standard.

⁴⁷ *Respondent's Outline of Submissions* (14 October 2013) at [18] & [21].

⁴⁸ See also the Deputy President's use of the words "generally equal" in the passage "Ms Harwood gave his height as 54 cm ... [and] the length as 55 cm and stated that this would make the dog generally equal which makes it square": *Applebee v Monash CC* (Review and Regulation) [2013] VCAT 394 at [24]-[25].

"approximately equal" and "usually equal", I think that "usually equal" is the construction that sits more happily in that sentence.

65 Further, whilst it is perhaps notable that the diagram of a dog under the heading "General appearance and characteristics" in the Standard depicts the distances from the withers to elbow and from elbow to ground as precisely equal,⁴⁹ I also accept Mr Magee's concession that, in the present context, the word "equal" does not necessarily require precise equality. Rather, read together, the words "generally equal" mean "usually approximately equal".

66 If there is any deviation from approximate equality, then, depending upon the extent of the deviation, this may be a factor telling against a finding that the dog meets the description of an American Pit Bull Terrier. Ordinarily, whether the deviation is significant or not would be a matter of expert evidence. An untrained council officer, and less still a Tribunal member, ordinarily, could not reasonably make such a judgment without expert opinion of both measurements and as to the significance of such measurements. It is not for a Tribunal member to estimate the distances simply by looking the dog. That is guesswork. Thus, whilst, ultimately, it will be for the relevant council officer in the first instance or for the Tribunal on review to determine whether there is "a substantial, or high, level of correspondence between the characteristics of the particular dog in question, and the description of those characteristics in the Standard", usually, an untrained officer or a Tribunal member could not say whether there is a difference between the relevant measurements and what significance, if any, a particular difference may have without first hearing from an expert or experts.

67 I should add that, whilst I accept that the Standard should not be construed as if it were a will or a statute and it is instead intended to be a guide to assist those whose task it is to apply the relevant provisions of the DA Act, the drafting of passages of the type under consideration might be reconsidered by the legislature in order that the Standard might be made easier to understand and apply.

⁴⁹ See Figure 1 in the Standard, at p 3.
SC: RD

68 However, my conclusions as to the proper construction of “generally equal” do not defeat Ground 3. On the contrary, for reasons that follow, in my respectful opinion, whichever is the correct construction, the Deputy President erred in failing to have regard to the expert evidence on the matter and in substituting her own impression that the relevant distances were “generally equal”.

69 First, the Deputy President proceeded on a misunderstanding. Contrary to her reasons, the only meaningful “differences between the parties relating to measurements” were as to the height, as Ms Graley’s measurement meant that the dog complied with the Standard in this regard whereas Ms Harwood’s measurement meant that the dog did not comply. The other point of difference between the parties relating to measurement (namely, the distance from withers to elbow – 22 cm compared with 24 cm) was not important and did not require resolution. Rather, what was important was the unchallenged evidence of the two experts that, on either view, the distance from withers to elbow (22 or 24 cm) was less than the distance from elbow to ground (which the experts agreed was 30 cm).

70 Secondly, there was no reasonable basis for ignoring or rejecting the evidence of the experts. Whilst one of their two measurements differed and they used different techniques, the experts agreed on one measurement (the 30 cm from elbow to ground) and, on the other, both arrived at figures substantially less than the first (22 or 24 cm from withers to elbow), which meant they were unified in the view that the relevant distances were not equal. It is true that neither was able to measure the dog at the view, but that did not alter the fact they were both able to measure the dog on the parts of the anatomy in question on earlier occasions. Thus, the Deputy President was wrong to proceed on the basis that she was “left to rely on [her] overall impression of the animal rather than being assisted with precise measurements”.⁵⁰

71 Thirdly, it was not for the Deputy President to substitute her own impression that the relevant distances were “generally equal”. She was not able to measure the dog.

⁵⁰ *Applebee v Monash CC (Review and Regulation)* [2013] VCAT 394 at [30].
SC: RD

All she could do was look at him and form an impression. In truth, her conclusion – whether it be described as being based on her own observation or an impression – could be no more than speculation. The Tribunal’s ability to inform itself in any way it sees fit does not extend to engaging in guesswork.

72 Finally, the fact that both the experts, and in turn the Deputy President, proceeded on what I regard as an erroneous construction of the term “generally equal” means that the whole case has miscarried. The right question was never addressed by the experts or by the Deputy President.

73 In my view, there is a real risk that these errors were important to the Tribunal’s ultimate decision. Had the Deputy President correctly considered the evidence of measurements, refrained from substituting her own impression of those measurements and/or applied the correct construction of “generally equal”, she may not have even come to an overall impression of compliance, which in turn may have affected her ultimate decision. Equally, given the Deputy President was not satisfied that several of the criteria in the Standard were met, a conclusion that the relevant measurements were not generally equal may have been a factor that tipped the balance in favour of non-compliance with the Standard.

Questions of law

74 Again, whilst it is not strictly necessary separately to do so in order to dispose of the appeal, it will be apparent from the foregoing reasons that my answers to the questions of law listed in the notice of appeal in relation to Ground 3 are as follows:

75 Question 1: Does the term “generally equal” in the Standard mean something like “nearly or approximately equal” rather than “usually equal”? Answer: It means “usually approximately equal”. If the former, is a ratio of withers to elbow/elbow to ground of 22:30 or 24:30 “generally equal”? Answer: Unnecessary to answer. If the term means the latter, is a degree of inequality nevertheless to be regarded as a feature inconsistent with the Standard and, if so, what degree? Answer: A degree of inequality may be inconsistent with the Standard but, ordinarily, the answer will

depend upon expert evidence.

76 Question 2: Was the Deputy President entitled to ignore the evidence of
measurements and substitute her own impression that "the distance[s] from withers
to the elbow and elbow to the ground [are] generally equal"? Answer: No.

Conclusion on Ground 3

77 Accordingly, I am satisfied that Ground 3 is made out.

78 Success on this ground alone, like Grounds 1 and 2, would be sufficient to cause the
appeal to be allowed.

Proposed orders

79 Mr Magee did not submit that, if the appeal were allowed and the order of the
Tribunal were set aside, I should substitute a decision setting aside the declaration of
the Council. Instead, the order sought was that the matter should be remitted to the
Tribunal, differently constituted, to be heard and decided afresh. I agree that that is
the appropriate course.

80 Accordingly, subject to hearing further from counsel, I propose to make orders:

- a) allowing the appeal against the order of the Tribunal;
- b) setting aside the order of the Tribunal; and
- c) remitting the matter to the Tribunal, differently constituted, to be heard and
decided afresh.

81 I shall hear counsel on the question of costs.

CERTIFICATE

I certify that this and the 23 preceding pages are a true copy of the reasons for judgment of Justice Croucher of the Supreme Court of Victoria delivered on 10 December 2013.

DATED this tenth day of December 2013.

