

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

Not Restricted

S CI 2012 05452

Jessica Gray

Appellant

v

Brimbank City Council

Respondent

JUDGE: KYROU J
WHERE HELD: Melbourne
DATE OF HEARING: 23 May 2013
DATE OF JUDGMENT: 30 May 2013
CASE MAY BE CITED AS: Gray v Brimbank City Council
MEDIUM NEUTRAL CITATION: [2013] VSC 281
JUDGMENT APPEALED FROM: *Gray v Brimbank CC* [2012] VCAT 1304 (Member Butcher)

ADMINISTRATIVE LAW – Appeal from a decision of the Victorian Civil and Administrative Tribunal dismissing an application for review for want of jurisdiction – Whether the appellant was the owner of a dog at the time it was declared to be a restricted breed dog – Tribunal misconstrued s 33A of the *Domestic Animals Act 1994* and erred in holding that it lacked jurisdiction to hear the appellant’s application for review – Appeal allowed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Ms M Loughnan SC with Mr R Watters	Michael Faltermaier Lawyers
For the Respondent	Mr A Halse	McNamaras

TABLE OF CONTENTS

Introduction and summary	1
Relevant provisions of the <i>Domestic Animals Act</i>	2
Facts	5
VCAT’s decision	7
Questions of law	9
Question 1: Scope of s 33A of the Act.....	9
Question 4: Whether s 33A of the Act can apply to a seized dog.....	11
Question 2: Is the passing of ownership under s 33A of the Act irrevocable?.....	15
Question 3: Did the Surrender Document transfer ownership to the Council?.....	16
Should VCAT’s decision be set aside and the proceeding remitted to VCAT?.....	17
Proposed order	18

HIS HONOUR:

Introduction and summary

1 On 7 May 2012 the appellant’s unregistered dog, Mylo, escaped from the appellant’s property. On the following day, Mylo was seized by Mr Tim Christie, an authorised officer of the Brimbank City Council (‘Council’), and taken to the Lost Dogs’ Home. The seizure was made pursuant to s 80 of the *Domestic Animals Act 1994* (‘Act’) on the basis that Mr Christie reasonably believed that Mylo was a ‘restricted breed dog’, namely, an ‘American Pit Bull Terrier (or Pit Bull Terrier)’.¹

2 On 11 May 2012, the appellant signed a document titled ‘Animal Surrender Authorisation’ (‘Surrender Document’)² which the Council contends had the effect of passing ownership in Mylo from the appellant³ to the Council in accordance with s 33A of the Act.

3 Section 33A of the Act provides as follows:

33A Council animal shelters and pounds must accept surrendered animals

- (1) A Council of a municipal district must accept any dog or cat kept in that municipal district which is given to the Council by the owner of the animal because the owner is no longer willing or able to care for that animal.
- (2) On the Council taking possession of a dog or cat under subsection (1)–
 - (a) ownership in the dog or cat passes from the owner to the Council; and
 - (b) the Council must deal with the dog or cat in accordance with this Act, the regulations and any relevant Code of Practice made under section 59.

4 On 17 May 2012, Mr Christie made a declaration that Mylo is a restricted breed dog. The declaration was contained in a document titled ‘Notice of Declaration – Dog of a Restricted Breed’ (‘Declaration’) and was made pursuant to s 98A(1) of the Act.

¹ See the definition of ‘restricted breed dog’ in s 3(1) of the Act.

² The Surrender Document is erroneously dated 10 May 2012.

³ At common law, Mylo was owned by the appellant’s daughter. As the daughter was under the age of 18 years, s 4 of the Act deemed the appellant to be the owner of Mylo for the purposes of the Act.

5 The Declaration referred to the seizure of Mylo but not to the Surrender Document. The Declaration did not assert that the Council was the owner of Mylo. Rather, it described the appellant as the ‘owner’ of Mylo and it was served on the appellant in that capacity. In accordance with s 98B(2)(a) of the Act, the Declaration contained a statement that the owner of Mylo had the right to apply to the Victorian Civil and Administrative Tribunal (‘VCAT’) for a review of the Council’s decision to make the Declaration.

6 On 12 June 2012, the appellant made such an application to the VCAT. When the application was heard on 17 August 2012, the Council submitted to the VCAT that it did not have jurisdiction because, by virtue of the Surrender Document and s 33A of the Act, the appellant ceased to be the owner of Mylo on 11 May 2012. The VCAT accepted the Council’s submission and made an order dismissing the appellant’s application for review ‘for lack of jurisdiction’ (‘VCAT’s decision’).⁴

7 The appellant has appealed to this Court, with leave, against the VCAT’s decision. Mylo has not been euthanised pending the outcome of this appeal.

8 The appeal raises four questions of law, including whether the VCAT misconstrued s 33A of the Act.

9 For the reasons that follow, I have concluded that the VCAT misconstrued s 33A of the Act and made other errors of law. Accordingly, the appeal will be allowed and the proceeding will be remitted to the VCAT for rehearing.

Relevant provisions of the *Domestic Animals Act*

10 Many of the provisions of the Act that are relevant to the appeal deal with both dogs and cats. For simplicity, where possible, I will omit references to cats.

11 Part 3 of the Act contains provisions for the control of dogs. Division 2 of pt 3 is titled ‘Particular provisions for the control of dogs and cats’. Section 33A is in div 2 of pt 3 and follows s 33, which creates an offence for an owner of a dog to abandon

⁴ *Gray v Brimbank CC* [2012] VCAT 1304 (23 August 2012) (‘Reasons’).

the dog. Division 3B of pt 3 is titled 'Particular provisions for the control of restricted breed dogs' and contains various restrictions relating to the keeping of such dogs.

12 Part 7A of the Act is titled 'Powers to Seize and Dispose of Dogs or Cats'. That Part comprises eight Divisions, forming a structured framework for the seizure of dogs and the steps to be taken following seizure.

13 Division 2 of pt 7A of the Act, which comprises ss 78 to 84D, deals with seizure of dogs. Section 80 empowers an authorised officer of a council to seize a dog that is in the municipal district of that council, if the authorised officer 'reasonably believes the dog is a restricted breed dog.'

14 Division 4 of pt 7A of the Act, which comprises ss 84H to 84L, deals with the steps that must be taken after a dog is seized. Section 84K(1) applies when an authorised officer has seized a dog under s 80, is able to identify the owner of the dog, and reasonably believes that the dog is a restricted breed dog. When these conditions are met, the authorised officer 'must serve a declaration made under section 98A on the owner of the dog within 7 days of seizure.' Section 84L provides that where service of a declaration is effected in accordance with s 84K, the council may retain custody of the dog until any review of the decision to make the declaration is determined by VCAT and the dog is recovered under div 5 or disposed of under div 6, as the case may be.

15 Part 7D of the Act is titled 'Review of Decisions by [VCAT]' and comprises ss 98 and 98AA. Section 98 provides as follows:

98 Review of decisions by [VCAT]

...

(2AA) The owner of a dog may apply to the [VCAT] for review of a decision by an authorised officer under section 98A to declare the dog a restricted breed dog.

(2A) An application for review under subsection ... (2AA) must be made within 28 days after ... –

(a) the day on which the decision is made;

...

(2B) For the purposes of subsection (2A), a decision referred to in subsection (2AA) is taken to be made when the notice of the declaration is served on the owner of the dog.

(3) A decision made under this Act by a Council or an authorised officer which is subject to review by the [VCAT] takes effect—

(a) if an application for a review of the decision is not made, at the end of the period within which such an application could have been made; or

(b) if such an application is made, in accordance with the determination of the Tribunal.

16 Part 7E of the Act is titled 'Identification of Restricted Breed Dogs' and comprises ss 98A to 98C. Section 98A(1) provides that if 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.' Pursuant to s 98A(3)(b), such a declaration cannot be revoked, amended or otherwise altered.

17 Section 98B provides as follows:

98B Service of notice of declaration

(1) An authorised officer who has made a declaration under section 98A must serve written notice of that declaration on the owner of the dog, either personally or by registered post, within 7 days of the making of the declaration.

(2) A notice under subsection (1) must—

(a) set out that the owner has a right to apply for a review of the decision to make the declaration under this Division; and

(b) set out how to make an application for such a review; and

(c) set out the requirements of the Act as to restricted breed dogs that must be complied with immediately.

18 It will be noticed that ss 98A(1) and 84K(1) refer to the making and the service of a declaration, whereas ss 98(2B) and 98B refer to the service of a notice (or a written

notice) of a declaration that contains the information set out in s 98B(2).⁵ It appears that these provisions contemplate that a notice of a declaration can be distinct from the declaration itself. However, the provisions do not require this bifurcation. That is, a single document can constitute both the declaration and the notice of the declaration. That was the position in the present case.

Facts

19 On 10 May 2012, the appellant became aware that Mylo had been seized by the Council. She had an initial meeting with Mr Christie on 11 May 2012 and this was followed by a second meeting on the same day with Mr Christie and his superior, Mr John Petrero ('11 May 2012 Meetings').

20 The appellant signed the Surrender Document at the second 11 May 2012 Meeting. Mr Christie witnessed the appellant's signature. The Surrender Document provided as follows:

Owner's name: Jessica Lee Gray

...

Animal description

Name: [Mylo]⁶

...

Breed: Pitbull (Red Nose)

...

Reason animal is being surrendered/seized:

as per legislation (restricted Breed Dog)

I the above named, give the Brimbank City Council permission to remove the above animal from my property and hereby declare as follows:

That I am the owner/owner agent of the above mentioned animal and hereby declare that no other person has any proprietary interest

⁵ Section 84K(2) states that s 84K(1) applies 'despite anything to the contrary in section 98B'. Apart from the inconsistency about whether a declaration or a notice of the declaration is to be served, s 84K(1) refers to service within seven days of the seizure whereas s 98B(1) refers to service within seven days of the making of the declaration.

⁶ The Surrender Document misspelt Mylo's name as 'Mylow'.

I relinquish all claims to the above animal

I am aware that the animal will be transported to the Lost Dogs' Home

I am aware that the decision on whether the animal will be placed for adoption will be made by the Lost Dogs' Home Veterinarian on the day of arrival

Animals that are not suitable for adoption will be euthanised.

21 In an undated handwritten statement, the appellant described what occurred at the 11 May 2012 Meetings and the circumstances in which she signed the Surrender Document as follows:

- My mum and I met with Tim Christie (Ranger). Tim informed us that Mylo was a restricted breed, we were both very upset.

...

- At 1.30pm the same day, my mum and I went to meet with Tim and John.
- Tim had pictures of a dog, he asked if it was Mylo, mum and I agreed it was.
- Tim said with his experience that Mylo was a restricted breed.
- Tim or John explained that in this situation Mylo would have to be euthanised or we could take the matter further and go to VCAT.
- Not fully knowing what VCAT was and entailed, and being very very upset, I agreed to sign Mylo over to the council to be euthanised.

22 Mr Christie completed an undated document titled 'Restricted breed interview: Officer's Summary' in which he stated the following about the 11 May 2012 Meetings:

I introduced myself as the council's Animal Management officer Tim Christie and then further had a discussion with a female now known to me as Ms Jessica Gray.

[I said:] Are you aware that your dog is a red nose pitbull Terrier.

[She said:] Yes.

[I said:] Why have you not registered the dog?

[She said:] Because we were scared that we would lose the dog.

[I said:] Why did you not comply with the restricted breed legislation for the keeping of a restricted breed dog.

[She said:] Scared that we would lose my daughter's dog.

[I said:] How long has the dog been on the property.

[She said:] Have had about two years.

...

Mr John Petrero Team Leader ... discussed the dog's relationship with the daughter, where a letter was produced asking council not to put her pit bull down.

Mr Petrero again spoke with [the appellant] about the legal system, and showed her the restricted breed [flow] chart and explained the VCAT system.

Ms Gray then decided to surrender the dog to the council for euthanasia.

The council form was completed and an agreement was made for the family to visit the lost dogs' home over the weekend, before the dog was put to sleep on Monday morning as per our agreement.

Ms Gray didn't at any time dispute that her daughter's dog was a red nose pit bull and had failed to register their dog.

23 On 14 May 2012, the appellant contacted the Council to advise that she wished to revoke the Surrender Document. On 15 May 2012 the appellant wrote to the Council to confirm that intention, stating: 'I Jessica Gray the owner of Mylo, revoke my signatures'.

24 As stated at [4] and [6] above, on 17 May 2012 the Council made the Declaration and on 12 June 2012 the appellant applied to the VCAT for a review of the Council's decision to make the Declaration.

VCAT's decision

25 At the outset of the VCAT hearing on 17 August 2012, the Council submitted that the VCAT did not have jurisdiction. The Council contended that the right of review was confined to an owner of a dog that was the subject of a declaration under s 98A(1) of the Act and that, in the present case, the appellant had ceased to be the owner of Mylo prior to the making of the Declaration by virtue of the Surrender Document and s 33A of the Act.

26 The VCAT accepted the Council's submission and held that it did not have jurisdiction for the following reasons:

Whilst the question of whether Mylo is of a restricted breed is still undetermined by this Tribunal, the threshold question is whether the Tribunal has the jurisdiction to entertain the review. There has been a declaration made on 17 May and, in the normal course of events, an owner of an animal has a statutory period within which to make an application to this Tribunal for a review of that decision. So the question is whether at the time the review was applied for by Ms Gray, was she the owner of the animal? This may be answered by reference to section 33A. The statutory provision is clearly that the council is the owner of the animal. It is sought effectively for this Tribunal to find that the surrender of the animal can be revoked. In surrendering Mylo to the council, one might say that the parties are of a common mind, that is, they agreed that Mylo be surrendered. I am unable to find any statutory provision which allows the council to give the animal back by effectively allowing the revocation of the surrender.

Section 33A(2)(b) states that the council must deal with the dog ... in accordance with this Act. Having made the declaration on 17 May that the dog is a restricted breed, that is where the matter goes. It must act in accordance with that declaration. I am not satisfied that there is a statutory ability on the part of the council to revoke the surrender nor, on the basis of material before the Tribunal, am I satisfied that the Tribunal indeed has jurisdiction to declare the surrender invalid or revoked. The Tribunal's statutory powers are set out in the Act and they do not include that power.

...

If it had been the intention of Parliament to allow the revocation of a surrender then, in my view, the Act would have contained a cooling off period. No such provision exists. In any case, the purpose of this hearing following the application made by the Brimbank City Council is to determine whether the Tribunal has jurisdiction to carry out a review of the declaration made by the council on 17 May 2012.

The provisions of the Act are quite clear. Section 98(2AA) states that the owner may apply to VCAT. Section 3 of the Act defines 'owner' as an inclusive definition –

... includes a person who keeps or harbours the animal or has the animal in his or her care for the time being whether the animal is at large or in confinement.

I am satisfied that as at 12 June 2012, when the application was made by Ms Gray, she was not the owner of the dog. Ownership devolved to the Brimbank City Council on the date on which the surrender authorisation was signed by Ms Gray. The only conclusion I can therefore come to is that Ms Gray was unable to instigate this review as a matter of law. Accordingly, the Tribunal has no jurisdiction to entertain the review. The order of the Tribunal is that the application is dismissed due to lack of jurisdiction.⁷

⁷ Reasons [13]-[14], [16]-[18].

Questions of law

27 The appellant relies on the following questions of law:

- (a) whether the learned member erred in holding that the [appellant] was not the owner of Mylo for the purposes of s 98 of the [Act]:
 - (i) notwithstanding that the [appellant] was at all times willing and able to care for Mylo; and
 - (ii) surrender under s 33A(1) of the Act was not invoked as that section only applies to situations where the owner is no longer willing or able to care for the animal;
- (b) whether, if it is determined that s 33A(1) of the [Act] was invoked, the learned member erred by:
 - (i) failing to consider properly, or at all, how the section ought properly be construed so that it is interpreted in accordance with the purpose for which it was intended; and
 - (ii) failing to hold that the purpose of s 33A permitted revocation and/or reversal of a surrender of an animal;
- (c) whether, if it is determined that s 33A(1) of the Act is irrevocable, the learned member erred by failing to hold that by reason of the [appellant's] signature on the said document having been procured by the respondent in circumstances where the respondent had provided inaccurate and/or inadequate information, the informed consent of the [appellant] had not been given and therefore the Animal Surrender Authorisation was of no force and effect and that property in Mylo had not passed to the respondent; and
- (d) whether the learned member erred in failing to hold that, having invoked s 80 of the Act, the respondent could not, in all the circumstances, rely on s 33A to obtain property in Mylo and thereby avoid the requirement of serving on the [appellant] a declaration pursuant to s 98A of the Act and/or depriving her of the right to review pursuant to s 98 of the Act.

28 As Questions 1 and 4 are related, I will discuss them prior to discussing Questions 2 and 3.

Question 1: Scope of s 33A of the Act

29 The appellant submitted that, in order for s 33A of the Act to apply, the owner must be unwilling or unable to care for the dog. According to the appellant, there was no evidence from which an inference could be drawn that she was unwilling or unable to care for Mylo. It followed, so it was said, that s 33A did not apply to Mylo.

30 The Council submitted that s 33A applied to Mylo because the appellant's act of signing the Surrender Document and thereby surrendering Mylo amounted to a clear indicator of her unwillingness and inability to care for him.

31 In my opinion, in order for a council to be obliged to accept a dog under s 33A(1), the following cumulative requirements must be met:

- (a) the dog must be kept in the municipal district of the council;
- (b) the dog must be given to the council by its owner; and
- (c) the reason why the owner gives the dog to the council is that he or she is no longer willing or able to care for the dog.

32 If one of the above requirements is not satisfied, then s 33A(1) of the Act cannot apply. And, if s 33A(1) does not apply, then s 33A(2) can have no application. This is because s 33A(2) only applies '[o]n the Council taking possession of a dog ... under subsection (1)'. Accordingly, the change in ownership provisions of s 33A(2) cannot be engaged by a surrender of a dog that falls outside s 33A(1). For example, if a dog were surrendered to a council because of a mutual mistake by the council and the owner that the owner – who is willing and able to care for the dog – was legally required to surrender the dog, s 33A(1) would not apply and ownership in the dog would not pass to the council by virtue of s 33A(2).

33 In the present case, the evidence before the VCAT raised a factual dispute about some aspects of what was said by the parties at the 11 May 2012 Meetings. That dispute, however, did not extend to the reason why the appellant signed the Surrender Document. The contemporaneous documents of both parties indicate that the appellant signed the Surrender Document following discussion about the status of Mylo as a restricted breed dog and about the possibility of an application for review by the VCAT. The Surrender Document itself records the reason for the surrender of Mylo as 'as per legislation (restricted Breed Dog)'. The Surrender

Document does not refer to s 33A of the Act and nowhere mentions that the appellant was unwilling or unable to care for Mylo.

34 There was simply no evidence before the VCAT from which it could conclude that the reason for the appellant's surrender of Mylo to the Council was 'because [the appellant] is no longer willing or able to care for [Mylo].'

35 Accordingly, s 33A of the Act was never engaged in the present case. Irrespective of the legal effect, if any, of the Surrender Document under the general law, it did not have any effect under s 33A. The VCAT refused to hear the appellant's application for review on the basis that s 33A had the effect of passing ownership in Mylo from the appellant to the Council upon the signing of the Surrender Document. In doing so, the VCAT made a jurisdictional error.

36 It follows that Question 1 must be answered in favour of the appellant.

37 My conclusion in respect of Question 1 means that Questions 2 and 4 do not arise. However, as the parties made detailed submissions on those questions, I will set out my reasons in relation to them.

Question 4: Whether s 33A of the Act can apply to a seized dog

38 The appellant submitted that s 33A of the Act cannot apply where a dog has been seized under s 80 of the Act. This is because, so it was said, pt 7A creates a detailed 'code' for dealing with dogs believed to be restricted breed dogs, and regulates each step of the process to be followed by a council from seizure to recovery or disposal of the dog. According to the appellant, this code, by necessary implication, excludes the application of s 33A to a dog that has been seized under s 80.

39 The Council submitted that there is no reason why a dog seized under s 80 of the Act could not subsequently be dealt with under s 33A. According to the Council, the Act does not preclude the owner of a restricted breed dog or a dog suspected of being a restricted breed dog, from surrendering the dog under s 33A.

40 In my opinion, the provisions of the Act dealing with restricted breed dogs, including their identification and disposal, are part of a specific, integrated scheme which is not intended to be undermined by other provisions of the Act which have general application. That does not mean that other provisions of the Act cannot apply to dogs that are restricted breed dogs. Rather, general provisions can only apply to the extent that they are not inconsistent with any specific provisions applying to restricted breed dogs.

41 The specific provisions of the Act applying to restricted breed dogs that were engaged in the present case were ss 80, 84K, 98, 98A and 98B. As Mr Christie reasonably believed that Mylo was a restricted breed dog, he was authorised by s 80 to seize Mylo. At the time that the appellant was identified as Mylo's owner, Mr Christie continued to reasonably believe that Mylo was a restricted breed dog. Accordingly, s 84K(1) required Mr Christie to make a declaration under s 98A(1) to the effect that Mylo was a restricted breed dog, and to serve that declaration on the appellant. Section 98B(2) required Mr Christie to set out the appellant's right to apply for a review of the decision to make a declaration.

42 On the appeal, the Council submitted that, although s 84K(1) of the Act uses the imperative 'must', an authorised officer who has seized a dog pursuant to s 80 retains a discretion whether to make a declaration under s 98A(1). This was because, so it was said, s 98A(1) states that an authorised officer 'may make a declaration'. The Council also submitted that, in the present case, the Declaration was made in error.

43 I reject the Council's submissions. Even if an authorised officer has a discretion under s 98A(1) of the Act whether to make a declaration, that discretion does not apply in the circumstances set out in s 84K(1). This is because the Act establishes a detailed regime for external review of a decision to declare a dog seized under s 80 as a restricted breed dog. In order to give effect to that regime, s 84K(1) must be read purposefully. If the words 'must serve a declaration made under section 98A' in s 84K(1) are not read as requiring the making and the service of a declaration under

s 98A(1), the regime would be frustrated and the purposes of the Act would be undermined. Accordingly, in the present case, the Council was obliged to make the Declaration.

44 Mr Christie acted in accordance with s 84K(1) of the Act in making the Declaration and serving it upon the appellant. Service of the Declaration conferred upon the appellant a right of review by the VCAT in accordance with s 98(2AA). Pursuant to ss 84L(1) and 98(3), the powers of the Council to deal with Mylo as a restricted breed dog could not be exercised until such time as the appellant's right of review lapsed or any application for review commenced by her was resolved in the Council's favour.

45 An issue arises as to whether the appellant's signing of the Surrender Document – in the period between the seizure of Mylo and the making of the Declaration – had the effect of depriving the appellant of the right to review by the VCAT and immediately empowered the Council to deal with Mylo as a restricted breed dog. In my opinion the Surrender Document did not have this effect.

46 For the purposes of analysis, I will assume without deciding that, once the legislative scheme is invoked by a seizure under s 80 of the Act, an owner who is served with a declaration made under s 98A(1) and who, by virtue of that declaration, becomes aware of his or her right of review, might make an informed decision to waive that right.⁸ Such a waiver, however, did not occur in the present case.

47 As stated at [33] above, the evidence of both parties about the 11 May 2012 Meetings indicates: that Mr Christie and/or Mr Petrero expressed a belief that Mylo was a restricted breed dog and mentioned that the appellant could go to the VCAT; and that, following these statements, the appellant signed the Surrender Document.

48 One interpretation of these events is that the appellant was informed that she had a choice either to go to the VCAT or to sign the Surrender Document. If this

⁸ Whether the assumption is correct will require consideration of the effect of ss 84L and 98(3) of the Act.

interpretation is correct, the appellant was given a false choice. As at 11 May 2012, the appellant did not have a right to apply to the VCAT; that right arose later, upon the service of the Declaration. More significantly, the belief of the Council that Mylo was a restricted breed dog was just that, a belief. Until a declaration was made under s 98A(1) of the Act and the appellant exhausted her right of review, Mylo's status as a restricted breed dog remained uncertain.

- 49 If the above interpretation is correct, there are a number of reasons why the Council acted contrary to the scheme of the Act in seeking to obtain ownership of Mylo through the appellant's execution of the Surrender Document.
- 50 First, the Council's actions would have the impermissible effect of making its belief about the status of Mylo as a restricted breed dog final and binding in circumstances where the Act has designated the VCAT as the final arbiter of that issue, subject to any appeal to this Court.
- 51 Secondly, the Council's actions would have impermissibly deprived the appellant of her statutory right to seek external merits review of the Council's decision to make the Declaration.
- 52 Thirdly, the Council's actions would have impermissibly resulted in the appellant being compelled to make a rushed decision as to whether to seek review by the VCAT in advance of the right to do so accruing, rather than having a period of 28 days from the accrual of the right within which to exercise it, as provided for by ss 98(2AA) to (2B) of the Act.
- 53 On the appeal, the appellant submitted that the Council engaged in misleading conduct and acted in bad faith in its dealings with her at the 11 May 2012 Meetings. In particular, she contended that the Council falsely induced her to sign the Surrender Document. It is not necessary – or indeed possible – for me to make findings on these allegations. It suffices for me to say that, on the undisputed facts, the appellant's signing of the Surrender Document could not lawfully transfer ownership of Mylo to the Council so as to deprive the appellant of the status of

owner for the purpose of the right of review by the VCAT conferred by the operation of ss 80, 84K, 98 and 98A of the Act.

Question 2: Is the passing of ownership under s 33A of the Act irrevocable?

54 The appellant submitted that, while the Act does not contain an express provision for the return of a surrendered dog to its former owner, equally, the Act does not expressly prohibit councils from doing so. According to the appellant, all s 33A of the Act requires is that councils accept surrendered dogs. The appellant pointed to the broad powers conferred on councils by the *Local Government Act 1989*, including the power to deal with property. It was also submitted by the appellant that returning a dog to its former owner, when the owner is willing and able to care for it, is consistent with the purpose of s 33A and of the Act as a whole.

55 The Council submitted that to suggest that a transfer of ownership under s 33A of the Act could be revoked is contrary to the clear language of that section. However, the Council accepted that there may be circumstances in which a council could agree to transfer ownership in a dog back to its former owner. This type of situation was said to be distinguishable from a unilateral revocation of a surrender by that former owner.

56 The Council's submissions on appeal differed from those it made at the VCAT hearing. At that hearing, the Council contended that the Act does not permit councils to return a dog to its former owner following a surrender under s 33A of the Act.

57 In my opinion, the parties' submissions in relation to Question 2 at times confused two separate questions. The first question is whether, once ownership in a dog passes from an owner to a council in accordance with s 33A(2)(a) of the Act, the owner can unilaterally revoke the surrender which gave rise to the change in ownership. The second question is whether a council that acquires ownership in a dog by virtue of s 33A(2)(a) has power to transfer ownership to the former owner if it is satisfied that the former owner becomes willing and able to care for the dog.

58 The answer to the first question is that the former owner does not have a right to unilaterally revoke a surrender once ownership in a dog passes to a council under s 33A(2)(a) of the Act. The owner may seek to argue that a change in ownership was not effected under s 33A(2)(a) because the requirements of s 33A(1) were not satisfied or because of other vitiating circumstances such as fraud. However, such an argument is different from the proposition that, notwithstanding that a change in ownership took effect under s 33A(2)(a), the former owner has a unilateral right to reverse the change in ownership for reasons such as a change of heart.

59 The answer to the second question depends on s 33A(2)(b) of the Act, which provides that, upon a council taking possession of a dog under s 33A(1), it must deal with the dog 'in accordance with this Act, the regulations and any relevant Code of Practice made under section 59.' If there is nothing in those provisions which would prohibit the council from acceding to a request from the former owner of a dog to transfer ownership in the dog to him or her, the council could do so provided it was satisfied that the former owner is willing and able to care for the dog and that the transfer is otherwise appropriate.

60 The VCAT concluded that, once an owner of a dog surrenders ownership in the dog to a council in accordance with s 33A of the Act, the council did not have any statutory power to reverse the ownership and return the dog to the former owner.⁹ For the reasons set out above, the VCAT's reasoning is demonstrative of legal error.

Question 3: Did the Surrender Document transfer ownership to the Council?

61 The appellant submitted that the Surrender Document was not effective to transfer ownership in Mylo to the Council because she did not intend to surrender Mylo to the Council. The appellant contended that she was very upset at the 11 May 2012 Meetings, that she did not understand what the VCAT was, and that she was told that her signature on the Surrender Document could be revoked within 48 hours.

⁹ Reasons [13]-[14].

62 The Council submitted that the Surrender Document was clear and effective, and
that the appellant's signature was documentary proof of her intention to surrender
Mylo.

63 The issues raised by Question 3 involve disputed questions of fact which were not
the subject of any findings by the VCAT. Accordingly, Question 3 cannot be
determined on this appeal.

Should VCAT's decision be set aside and the proceeding remitted to VCAT?

64 I have concluded that the VCAT made a jurisdictional error in dismissing the
appellant's application for review on the basis that it lacked jurisdiction.

65 Where this Court finds that the VCAT has made a jurisdictional error, it will
ordinarily set aside the decision of the VCAT and remit the proceeding to the VCAT.
In the present case, the Council submitted that, if the appeal were allowed, the
proceeding should not be remitted to the VCAT because it is inevitable that the
VCAT will dismiss the application for review.

66 It is well established that an error of law by the VCAT will not result in the setting
aside of the VCAT's decision if the error could not possibly have affected the
outcome of the VCAT proceeding or if it would otherwise be futile to set aside the
VCAT's decision.¹⁰ That principle, however, cannot have any possible application in
the present case.

67 As a result of its erroneous view of its jurisdiction, the VCAT has not embarked upon
a consideration of the merits of the Council's decision to make the Declaration. In
order to perform this task, the VCAT will need to apply the provisions of the Act and
determine whether Mylo is a restricted breed dog. In considering this issue, it will
be relevant for the VCAT to consider whether the appellant made any admissions
that Mylo is a restricted breed dog, and, if so, what weight to give to any such
admissions.

¹⁰ *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145; *Dona Homes (Vic) Pty Ltd v Stevens* [2005] VSC 499 (21 December 2005) [4]; *Towie v Victoria* (2008) 19 VR 640, 653 [49]-[52].

68 Of course, the VCAT will bear in mind that the question whether a dog is a restricted breed dog is an objective one that depends on the application of highly complex and specialised criteria.¹¹ The question does not depend on the subjective opinion of the owner, which may be based on conjecture, views expressed by neighbours and friends or inaccurate information from the supplier of the dog.

69 It follows from the above that there is nothing inevitable about the ultimate decision by the VCAT in relation to the appellant's application for review. Accordingly, it is appropriate that the VCAT's decision be set aside and that the proceeding be remitted to the VCAT for rehearing and redetermination.

70 At the rehearing of the proceeding, the VCAT must not entertain any submission as to its jurisdiction based on the Surrender Document or s 33A of the Act. That is because I have determined that neither the Surrender Document nor s 33A had the effect of depriving the appellant of her status as the owner of Mylo such as to extinguish her right to seek a review of the Council's decision to make the Declaration.

71 Subject to any jurisdictional issue that the Council may raise on any ground that has not been considered by me, the role of the VCAT at the rehearing of the application for review will be to determine whether the decision of the Council to make the Declaration was the correct or preferable decision. That determination must be made on the evidence that the parties present to the VCAT and the submissions that they make on that evidence and on the applicable law. The parties will not be confined to the evidence that they have already presented to the VCAT or to the submissions that they have already made.

Proposed order

72 The VCAT's decision will be set aside and the proceeding will be remitted to the VCAT to be heard and decided again according to law.

¹¹ See the 'Standard for Restricted Breed Dogs in Victoria' dated 31 August 2011 published in Victoria, *Victoria Government Gazette*, No S 283, 1 September 2011. An amendment dated 9 January 2012 was published in Victoria, *Victoria Government Gazette*, No S 32, 10 February 2012.

73 I will hear from the parties on the precise form of the orders to be made by this Court, including whether the proceeding should be reheard by a different member of the VCAT. I will also hear from the parties on the question of costs.