

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No S CI 2013 5064

JESSICA GRAY

Appellant

v

BRIMBANK CITY COUNCIL

Respondent

JUDGE: RUSH J
WHERE HELD: Melbourne
DATE OF HEARING: 4 December 2013
DATE OF JUDGMENT: 6 February 2014
CASE MAY BE CITED AS: Gray v Brimbank City Council
MEDIUM NEUTRAL CITATION: [2014] VSC 13

ADMINISTRATIVE LAW – Appeal from decision of Victorian Civil and Administrative Tribunal – Declaration by Council that the dog of the appellant is a “restricted breed dog” – Declaration upheld by VCAT – Adverse findings made by senior member against expert witness of the appellant – Apprehended bias – No evidence – Inadequate reasons – Admissibility of purported expert evidence at VCAT – Leave to appeal granted – Appeal allowed – Matter remitted for rehearing.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr R Kendall QC with Mr A Felkel	Turks Legal
For the Respondent	Mr R Appudurai (solicitor)	Russell Kennedy

HIS HONOUR:

Introduction

1 This matter has a protracted legal history. On 7 May 2012, the appellant’s unregistered dog, “Mylo”, was found wandering at large and was seized by Mr T. Christie, an Authorised Officer of the Brimbank City Council (“respondent”) pursuant to s 80 of the *Domestic Animals Act 1994* (“the Act”). The seizure occurred on the basis that Mr Christie believed Mylo was a restricted breed dog – an American pit bull terrier.

2 On 11 May 2012, the appellant signed an “animal surrender authorisation”.¹ On 12 June 2012, the appellant made application to the Victorian Civil and Administrative Tribunal (“VCAT”) for a review of Mr Christie’s decision to declare Mylo an American pit bull terrier.

3 On 17 May 2012, Mr Christie made a formal declaration that Mylo was a restricted breed dog.²

4 At the hearing of the application for review of the declaration at VCAT on 12 June 2012, the respondent contended as a consequence of the signing of the animal surrender authorisation, ownership of Mylo passed from the appellant to the respondent and VCAT had no jurisdiction to determine the application. This submission was accepted by VCAT.

5 The appellant appealed the VCAT decision to this Court. Kyrou J concluded VCAT misconstrued s 33A of the Act, and that VCAT did have jurisdiction to hear the application. The matter was remitted to VCAT for rehearing.³

6 The rehearing was heard at VCAT on 20 and 21 August 2013. The senior member delivered an *ex tempore* judgment on 21 August. At contest was the merits of the declaration by Mr Christie that Mylo was a restricted breed dog.

¹ Pursuant to s 33A of the *Domestic Animals Act 1994*.

² *Domestic Animals Act 1994* s 98A(1).

³ See *Gray v Brimbank City Council* [2013] VSC 281.

The Standard

7 Under s 3(1) of the Act, a restricted breed dog is any one of five breeds of dog, the fifth of which is an American pit bull terrier (or pit bull terrier). The Act 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”.⁴ The Standard “is a standard that has been approved by the Minister and published in the Government Gazette”.

8 The Standard for American pit bull terrier sets out the general appearance and characteristics of the American pit bull terrier. The Standard then describes specific anatomical aspects of this dog, ranging from the head, neck, forequarters, body, hind quarters, feet, tail, coat, colours, height and weight. The Standard provides a detailed description of each of the particular anatomical aspects that calls for experienced assessment in determining compliance with the Standard. For example, the Standard for the skull is described as follows:

Large, fairly flat, broad and deep, slightly tapering towards the stop. There is a deep median furrow reducing in depth from stop to occiput. Cheek muscles are prominent but free of wrinkles. When the dog is alerted, wrinkles will form on the forehead.

9 In *Dudas v Monash City Council*, Kaye J observed that:⁵

it is important to note that s 3(3) does not, expressly require that the particular dog comply with each and every criterion, specified in the approved standard, for it to be a restricted breed dog. Rather, s 3(3) requires the dog ‘falls within’ the appropriate Standard of the restricted breed dog.

10 His Honour concluded on this aspect:⁶

Taken in that context, the requirement that a dog ‘meet the description’ of the American pit bull terrier must contemplate, in my view, 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.

...

Obviously, in an individual case, the question whether there is the requisite

⁴ *Domestic Animals Act 1994* s 3(3).

⁵ [2012] VSC 578, [79].

⁶ *Ibid* [99]-[100].

or high 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 a 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 the 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.

Hearing and appeal

- 11 At the hearing, evidence was adduced from witnesses for both the appellant and the respondent as to whether Mylo conformed with the specified Standard for American pit bull terriers as published in the Victorian Government Gazette No. S283 on 1 September 2011 and amended by No. S32 on 10 February 2012 ("Standard").
- 12 The senior member of VCAT determined there was a "substantial and high level of correspondence between the Standard and the description of Mylo that I have found",⁷ and the declaration of Mr Christie was affirmed.
- 13 By summons dated 3 October 2013, the appellant applied for leave to appeal the decision of the senior member of VCAT. On return of the Summons on 28 October 2013, Derham AsJ ordered, pursuant to r 4.14(3) of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008*, that the application for leave to appeal be heard by the Court and, if leave be granted, the Court hear and determine the appeal.
- 14 In her second amended proposed notice of appeal, the appellant seeks to set aside the order of the senior member and to quash the declaration of Mr Christie of 17 May 2012 that Mylo is a restricted breed dog.
- 15 At VCAT, the appellant called two witnesses, Dr Ayerbe, a veterinarian with

⁷ *Gray v Brimbank City Council* (Unreported, Victorian Civil and Administrative Tribunal, Senior Member R Davis, 20 August 2013) ("VCAT decision"), [108].

experience in dog breeding and judging, and Dr D. Lowe, a person with experience in the breeding and judging of bull terrier dogs both in Australia and overseas. Both Dr Ayerbe and Dr Lowe provided the opinion that Mylo did not comply with the Standard for pit bull terriers.

16 The respondent called two witnesses, the aforementioned Mr Christie, animal management officer, and Mr S. Parker, a prosecutions officer, each employed by the respondent. Both gave evidence of experience in assessing and the declaration of restricted breed dogs. Both provided the opinion that there was a high level of compliance of Mylo with the Standard and that Mylo was a restricted breed dog.

17 In submissions, Mr R. Kendall QC, Senior Counsel for the appellant, developed four grounds of the second amended proposed notice of appeal:

- (a) the senior member, in assessing the evidence of Dr Ayerbe, demonstrated apprehended bias (ground 8);
- (b) the senior member made findings adverse to Dr Ayerbe when there was no evidence to support such findings (ground 5);⁸
- (c) the reasons of the senior member were deficient in that the senior member failed to provide proper or adequate reasons in his assessment of the individual criteria of the Standard as to why he accepted the evidence of Messrs Christie and Parker, and rejected the evidence of Dr Ayerbe (ground 6);
- (d) the senior member erred in accepting the evidence of the respondent's witnesses, Messrs Christie and Parker, as admissible expert evidence (grounds 1, 2, 3A, 4A).

18 It is convenient to deal with the grounds of appeal concerning the reasons of the

⁸ As to the availability of certiorari to quash a decision on the basis that the reasons for decision are inadequate, see *Wingfoot Australia v Kocak* (2013) 88 ALJR 52, 58-9 [28].

senior member together; ie, that there was no evidence to support the adverse findings concerning Dr Ayerbe and that the senior member failed to provide proper or adequate reasons as to why he accepted the evidence of the respondent's witnesses, Messrs Christie and Parker, and rejected Dr Ayerbe.

Adverse findings concerning Dr Ayerbe

19 The senior member was critical of the manner in which Dr Ayerbe gave his evidence. The senior member found that Dr Ayerbe did not conduct his assessment of Mylo in accordance with the Standard:⁹

Dr Ayerbe, a veterinary surgeon, was the first witness to be called by the applicant. He attempted to give his evidence in the best way he could. However, unfortunately, when he was giving his evidence rather than sticking to the Standard which is required by the legislation, he frequently diverted into giving evidence as to what he would normally expect of a pure pit bull terrier. That is not the way that an assessment should be conducted.

20 The appellant contends there was no diversion in the evidence of Dr Ayerbe and that this finding of the senior member had no basis in evidence. The appellant pointed to evidence that demonstrated the opposite, that Dr Ayerbe appreciated the importance of his assessment of Mylo being conducted in accordance with the Standard. When, in cross-examination, Dr Ayerbe was asked questions about whether one pit bull terrier would vary from another, he in fact complained:

I can't really answer that. I'm asked by the Tribunal to look at a dog and do a description according to a gazetted description. I make no judgment. I make no – all I do is give you a summary of what I found. So to answer you I don't think I can answer your question sir.

21 Similarly, later in cross-examination, when asked questions as to "variations" or "degrees" of conformity, Dr Ayerbe again emphasised that he was required to provide his opinion based on the Standard:

Well yes, but I mean I'm giving the Standard. I'm not asked to say this is a little degree or a big degree. I mean how far do we go? I'm asked by the Tribunal to give my opinion on a certain standard and I have done that.

⁹ VCAT reasons, [11].
SC: KS

22 The report of Dr Ayerbe dated 20 July 2013 addresses, individually, each criteria of the Standard and could not be said to have diverted from the Standard in its commentary.

23 Mr Appudurai, who appeared for the respondent, was not able to direct me to any aspect of the evidence that supported this criticism made by the senior member of Dr Ayerbe. He could only offer the possible explanation that the senior member had confused Dr Ayerbe with the other witness for the appellant, Dr Lowe.

24 There is no evidence to support this criticism of Dr Ayerbe by the senior member, that he did not conduct his assessment of Mylo in accordance with each indicia of the Standard. It is an unfounded criticism of the fundamental task Dr Ayerbe was required to undertake.

25 Mr Kendall submitted that the finding of the senior member that Dr Ayerbe “attempted to give his evidence in the best way he could”, that he “unfortunately” and “frequently” diverted from “sticking to the Standard” and that his assessment was not conducted in accordance with the Standard provided a basis for the senior member to discount or disregard the evidence of Dr Ayerbe when there was no basis for doing so. I agree. These comments of the senior member are unsupported by any reference to or analysis of evidence.

26 The force of the appellant’s submission is highlighted by a comparison of the comments and assessment made by the senior member of the witnesses for the respondent.

27 The senior member observed that Mr Christie:

did not give a great deal of detail in expressing his opinion ... he just noted whether there was compliance. In fact, he said there was compliance in relation to every category in the Standard. It is desirable that there be some explanation as to why there is compliance. Having said that I nonetheless formed the opinion that Mr Christie genuinely believed, after comparing Mylo with the standard, that there was compliance with each criteria as was written in his statement.

The senior member here identified what was a valid criticism of the evidence of Mr Christie, but excused the deficiency on the basis that Mr Christie appeared to “genuinely believe” Mylo complied with the Standard.

28 The senior member commented that he was “particularly impressed” with Mr Parker’s evidence. Mr Parker “gave me the impression that he had carried out a thorough examination of Mylo”, that he was “au fait with this Standard” and his answers in cross-examination showed him to be an honest witness.

29 The senior member, in his assessment of Dr Ayerbe, made the additional comment:¹⁰

Further, I gained the impression that he was concerned that dogs should not endure euthanasia if they are found to be an unregistered pit bull terrier.

30 The appellant contends there was no evidence to support this “impression” the senior member formed of Dr Ayerbe.

31 This finding carries with it the implication that the evidence of Dr Ayerbe was potentially tainted because of a concern “dogs should not endure euthanasia if they are found to be an unregistered pit bull terrier”.

32 Dr Ayerbe was not cross-examined to suggest he held such a view. He was not questioned by the senior member in relation to such a view. The senior member did not refer to any aspect of the evidence of Dr Ayerbe that could in any way support the “impression” he formed. Upon my reading of the transcript of the VCAT proceedings, the comment of the senior member concerning the potential motivation for the opinions formed by Dr Ayerbe has no basis in evidence. Mr Appudurai, for the respondent, during submissions agreed with this assessment.

33 That there was no evidentiary basis for the criticism by the senior member of the evidence of Dr Ayerbe is not contested. Applying the comments that the senior member used to describe the respondent’s witnesses, there was no suggestion

¹⁰ Ibid [11].
SC: KS

Dr Ayerbe was not an “honest” witness or that he did not “genuinely believe” that Mylo did not comply with the Standard. In fact, Dr Ayerbe was the most highly qualified witness called at the hearing, holding a Bachelor of Veterinary Science from Melbourne University.

34 The senior member subsequently rejected every assessment of the specified criteria under the Standard made by Dr Ayerbe where it differed from the respondent’s witnesses. As is demonstrated below, the senior member failed to provide proper or adequate reasons for his findings that the dog complied with the Standard. In particular, the senior member failed to provide any proper reasons for the rejection of the evidence of Dr Ayerbe. These circumstances carry with them at least the significant risk that the unjustified findings concerning Dr Ayerbe have infected the senior member’s proper consideration of his evidence.

Inadequate reasons

35 The appellant contended that the senior member failed to provide proper or adequate reasons in finding there was a high level of compliance between the dog Mylo and the Standard. On the other hand, the respondent contended the senior member had carefully considered each of the criteria of the Standard, the reasons were adequate. Further, the respondent submitted that, in considering the reasons of the senior member, regard should be had to the role and function of VCAT to conduct itself with as little formality as possible¹¹ and that VCAT was only required, in written reasons, to provide findings concerning material facts.¹²

36 Kyrou J, in *Caruso v Kite*,¹³ had cause to consider the content and extent of reasons that should be provided by VCAT. His Honour stated:¹⁴

Section 117(5) of the VCAT Act provides that, where the Tribunal gives written reasons, it must include in those reasons its findings on material questions of fact. The reasons of the Tribunal do not need to be as detailed

¹¹ *Victorian Civil and Administrative Tribunal Act 1998* s 98.

¹² *Victorian Civil and Administrative Tribunal Act 1998* s 117.

¹³ [2008] VSC 207.

¹⁴ *Ibid* [32].

as judgments of this Court and should not be scrutinised over-zealously. However, the Tribunal's reasons must allow the logic of its decision and the process of reasoning to be followed, especially in relation to important points and conclusions, and must set out the legal basis for the Tribunal's decision. The Tribunal must comply with the above requirements in the context of its statutory obligation to determine each proceeding with as much speed as the requirements of the VCAT Act and the enabling enactment and a proper consideration of the matters before it permit. Whilst it is acknowledged that reconciling the above may sometimes prove difficult, the Tribunal should bear in mind that inadequate reasons for decision may lead, as in this case, to an appeal to this Court and cause additional delay and expense for the parties.

37 I do not underestimate the task before the senior member here; to assess and deal with evidence of four witnesses providing opinion in connection with the detailed criteria of 11 anatomical aspects set out in the Standard. Nevertheless, it is not enough to merely set out evidence and state conclusions. There is a requirement – “to analyse the evidence and to explain why some parts of it do and others do not lead to the ultimate conclusion. And that analysis must be recorded in the reasons”.¹⁵

38 In *Pollard v RRR Corporation Pty Ltd*,¹⁶ McColl JA summarised key requirements of adequate reasons for a judgment:

The reasons must do justice to the issues posed by the parties' cases. See *Moylan v Nutrasweet Co* [2000] NSWCA 337 (at [61]) per Sheller JA (Beazley and Giles JJA agreeing). Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted: *Soulemezis* (at 279) per McHugh JA. As Santow JA (with whom Meagher and Beazley JJA agreed) explained in *Jones v Bradley* [2003] NSWCA 81 (at [129]) it is necessary that the primary judge 'enter into the issues canvassed and explain why one case is preferred over another'; ...

39 The reasons of the senior member in this matter do not meet the necessary requirements. I set out three examples from the reasons of the senior member.

40 The senior member considered the various criteria in the Standard for assessment of the head. Part of that assessment required examination of evidence concerning the

¹⁵ *Hunter v Transport Accident Commission* [2005] VSCA 1, [28] (Nettle JA).

¹⁶ [2009] NSWCA 110, [59].

skull and muzzle. The senior member set out in his reasons the appropriate part of the Standard:¹⁷

Viewed from the side, the skull and muzzle are on parallel plains separated by a moderately deep stop. Arches over the eyes are well defined but not pronounced.

41 The senior member referred to the evidence of Dr Ayerbe:¹⁸ “The muzzle and skull are not on parallel plains. The stop is long and marginally elevated without arches”. He also referred to the evidence of Dr Lowe,¹⁹ who had provided the opinion the skull and muzzle were not on parallel plains and that the arches over the eye were not pronounced.

42 The respondent’s witnesses’ evidence was summarised by the senior member as follows:²⁰

Both Mr Christie and Mr Parker have a different view from the other two witnesses about this matter. Both of them say that the skull complies and in particular, Mr Parker says that ‘The skull and muzzle are on parallel plains with the stop being moderately deep’ but not overly deep and certainly not shallow”. He said there are arches over the eyes but whilst well defined they are not pronounced.

43 The senior member then concluded his reasoning on this aspect:²¹

I have inspected the numerous photographs that have been put before me in this proceeding and have concluded that I prefer the evidence of Mr Parker. In my view he has properly summed up the situation. Thus I find compliance in relation to this part of the Standard.

44 Why the senior member preferred the evidence of Mr Parker, why Mr Parker had properly summed up the situation, what it was about the photographs that led the senior member to a conclusion different to that of Dr Ayerbe in particular and also Dr Lowe is unexplained.

45 Similarly, in assessing the evidence concerning the muzzle, the senior member

¹⁷ VCAT reasons, [33].

¹⁸ Ibid [34].

¹⁹ Ibid [35].

²⁰ Ibid [36].

²¹ Ibid [37].

referred to the Standard that the muzzle should be:²²

... slightly shorter in length to the skull, (a ratio of 2:3 for muzzle: skull). It is broad, deep and powerful with a slight taper to the nose and falls away slightly under the eyes.

46 The senior member then referred to the evidence of Dr Ayerbe that the muzzle is longer than the skull, and referred to his measurement 8.5/17cm and Dr Ayerbe's conclusion:²³ "that as such this muzzle could not be described as powerful".

47 The senior member then referred to the evidence of Mr Parker and his measurements:²⁴ "Muzzle 8cm, skull 14cm, the muzzle is shorter than the skull with a resulting ratio of 2:3:5. He also said the head profile is compliant."

48 Thus, the senior member had two differing opinions concerning this aspect of Mylo's head. The senior member concluded:²⁵

Looking at all these matters, and having looked at the pictures which were tendered, I have taken the view that I prefer the evidence of Mr Parker. I accept that evidence. Thus I find Mylo is substantially compliant in this regard.

49 Again, the reasons are deficient. What was it about the photographs that persuaded the senior member to accept the measurements of Mr Parker over those of Dr Ayerbe? How were the differing measurements explained? The senior member, in his reasons, made no reference to the evidence of Dr Ayerbe that the muzzle could not be described as powerful - a requirement of the Standard.

50 The senior member set out the Standard as it refers to eyes. The eyes are required to be:²⁶

Medium in size, round in shape and set low in the head - not prominent. Eyes can be all colours except blue. The eye rims are the same colour as the skin colour.

22 Ibid [38].

23 Ibid [39].

24 Ibid [40].

25 Ibid [41].

26 Ibid [49].

51 The evidence referred to in the reasons concerning the shape of the dog's eyes was as follows:²⁷

Then there is the question of whether the eyes are round or almond shaped and whether they are set low in the head and not prominent. Dr Ayerbe said that they were almond shaped.

52 No other evidence concerning the shape of the eyes was referred to. Nevertheless, the senior member rejected the evidence of Dr Ayerbe:²⁸

Having looked at the eyes in the photographs, while they are not completely round, in my view they are close to being round – more round than what one normally sees in these matters. Further, the eyes are set low in the head - not prominent. Therefore, I find that there is medium compliance in relation to the eyes.

53 Croucher J, in *Applebee v Monash City Council*, considered an appeal by the owner of a dog against the declaration of the Monash City Council that the dog was an American pit bull terrier. In considering the reasons of the Deputy President of VCAT confirming the Council's decision, his Honour made the following observation:²⁹

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 at 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.

54 Whilst the comment of his Honour did not apply to the Standard as it concerns "eyes", in my opinion, the comments are apposite to the matter before me. It is not the role of the senior member to look at photographs and form his own opinion in

²⁷ Ibid [50].

²⁸ Ibid [51].

²⁹ [2013] VSC 282, [66].

circumstances where the Tribunal had the benefit of expert evidence. The statement of the senior member that the eyes “were more round than what one normally sees in these matters” indicates the senior member had regard to an irrelevancy, to evidence not raised or discussed in the hearing before him, a matter not put to witnesses called. What “other matters”, one asks rhetorically? The finding is meaningless, it is impossible to know just what the senior member was referring to because of an apparent unexplained reliance on extraneous, irrelevant previous experience. Finally, why the senior member would substitute his own untrained opinion to that of a qualified vet is unexplained in the reasons.

55 I have set out examples of the unsatisfactory manner in which the senior member approached the assessment of the evidence that generally pervades his reasons.³⁰ Upon a complete reading of the reasons, it is apparent the senior member has rejected the evidence of witnesses for the appellant, particularly Dr Ayerbe, without proper explanation. As was stated by Gray J (with whom Fullager and Tadgell JJ agreed) in *Sun Alliance Insurance Ltd v Massoud*,³¹ a litigant is entitled to have evidence weighed and, if rejected, have the rejection expressed in reasoned terms:

To have a strong body of evidence put aside without explanation is likely to give rise to a feeling of injustice in the mind of the most reasonable litigant.

56 It follows that, in making the unsupported findings against Dr Ayerbe and rejecting his evidence without proper reasons, the senior member fell into error.

Apprehended bias

57 The appellant contends the unfounded criticisms of Dr Ayerbe by the senior member in his reasons justify an allegation of apprehended bias. The appellant submits the statements:

(a) demean Dr Ayerbe’s professional standing;

³⁰ See also VCAT reasons, [27]-[32], [55]-[57], [58]-[61], [62]-[66], [67]-[71], [91]-[96].
³¹ [1989] VR 8, 18.

- (b) contain unjustified assumptions about the evidence he provided;
- (c) unjustifiably placed Dr Ayerbe in a position where his evidence should be treated less favourably than the witnesses for the respondent;
- (d) carry with them a reasonable apprehension the senior member did not bring an impartial, unprejudiced mind to the assessment of the evidence of Dr Ayerbe.

58 It is unnecessary for me, in the light of my findings concerning the inadequacy of the senior member's reasons, to make any finding on the ground of apprehended bias. Nevertheless, it can be said that the criticisms made by the senior member of Dr Ayerbe could be interpreted as containing unjustified assumptions about the evidence he provided and that the impression of Dr Ayerbe referred to by the senior member, that Dr Ayerbe "was concerned that dogs should not endure euthanasia if they are found to be an unregistered pit bull terrier" carries the implication that the evidence of Dr Ayerbe was potentially tainted with such concern and thereby his independence and professional standing as an expert witness was demeaned.

Conclusion

59 In the light of the comments of the senior member concerning Dr Ayerbe, I think it inappropriate for me to refer this matter back to the senior member with directions. I have found the adverse findings of the senior member concerning Dr Ayerbe are without any basis in evidence. As stated above, there is at least the significant risk these findings have infected the reasons of the senior member, in particular the inadequacy of the reasons concerning the rejection of Dr Ayerbe's evidence as it concerns the Standard. In the circumstances, it is appropriate to order:

- (a) grant leave to appeal against the order of the Tribunal;
- (b) allow the appeal against the order of the Tribunal;
- (c) set aside the order of the Tribunal;

(d) remit the matter to the Tribunal, differently constituted, to be heard and decided afresh.

Expert evidence

60 The parties made detailed submissions concerning the admissibility of expert evidence. In the light of my findings concerning the inadequacy of reasons of the senior member, it is not necessary for me to address this issue, but in deference to the submissions of the parties and in the hope of providing some guidance, I briefly refer to the relevant grounds of appeal in those submissions.

61 The appellant contended that the evidence of Messrs Christie and Parker was not put forward as admissible expert evidence and, as a consequence, their opinions as to whether Mylo complied with the Standard were inadmissible and ought not to have been accepted by the senior member.³²

62 No submission was made to the senior member in the terms now put on appeal. For this reason alone, the submissions of the appellant concerning this point should be rejected.³³

63 It was submitted on behalf of the appellant that as these witnesses gave evidence in their capacity as authorised officers, rather than as expert witnesses,³⁴ and had not been qualified by reason of specialised training or experience, their opinion evidence was inadmissible by virtue of ss 76(1) and 79(1) of the *Evidence Act 2008*.

64 In fact, what the evidence before the senior member disclosed was both Messrs Christie and Parker had significant experience with dogs of various breeds, including restricted breeds, and the assessment of such dogs according to the Standard. Even if a submission had been made that the evidence of Messrs Christie and Parker was inadmissible because of a lack of experience or qualifications, it was,

³² See second amended proposed grounds of appeal 1, 2, 3A, 4A.

³³ See eg *Coulton v Holcombe* (1986) 162 CLR 1, 7; *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013] VSCA 24, [74]-[77] (Warren CJ and Davies AJA, with whom Redlich JA relevantly agreed).

³⁴ See affidavit of Mr Marcus Heath, solicitor for the respondent, 23 October 2013 at [10]-[11].

it seems to me, unlikely to have succeeded.

65 In a jurisdiction such as VCAT, the question of expert evidence may be approached with less stringency than in other jurisdictions. VCAT is not bound by the rules of evidence.³⁵ Although VCAT has adopted by practice note a procedure based on O 44 of the *Supreme Court (General Civil Procedure) Rules 2005* for expert evidence, proceedings at VCAT allow for a practical and flexible approach in cases such as the present. Whilst admissibility of opinion evidence in the case of an obviously inexperienced witness may be in issue, in the present case the issue was the weight that may be given to the background qualifications, experience and presentation of individual witnesses.

66 I note in his reasons the senior member did not attempt to analyse or comment on the respective qualifications, experience and independence of the witnesses who provided opinion evidence as to whether Mylo complied with the Standard. In providing reasons as to why the evidence of the Council officers was preferred over the evidence of the qualified vet, Dr Ayerbe, such an assessment would have assisted in understanding the reasons of the senior member.

³⁵ *Victorian Civil and Administrative Tribunal Act 1998* s 98(1)(b).

