

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. G1143/2012

CATCHWORDS

Review and Regulation List – Restricted breed dogs – *Domestic Animals Act 1994* (Vic) ss 1, 3(1) – (4), 10(1) – (3), 11, 14, 15, 17, 98 (2AA) and 98A – *Interpretation of Legislation Act 1984* (Vic) s 28(2)(e) and (g) – Whether New Standard for restricted breed dogs applies to application for review of a decision to declare a dog a restricted breed dog made under the Old Standard – New Standard applies to proceeding in Tribunal after 31 January 2014.

APPLICANT: Jade Applebee
RESPONDENT: Monash City Council
INTERVENER: Minister for Agriculture and Food Security
WHERE HELD: 55 King Street, Melbourne
BEFORE: Justice Greg Garde AO RFD, President
HEARING TYPE: Hearing
DATE OF HEARING: 11 March 2014
DATE OF ORDER: 26 March 2014
DATE OF REASONS: 26 March 2014
CITATION: Applebee v Monash CC (Review and Regulation)
[2014] VCAT 257

ORDER

Declaration

- 1 Pursuant to s 124(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal declares that the Standard for Restricted Breed Dogs in Victoria approved pursuant to section 3(3) and section 3(4) of the *Domestic Animals Act 1994* (Vic) and published in Victoria Government Gazette No. S 22 on Friday 31 January 2014, applies to the rehearing of the application.

Orders

- 2 The applicant and respondent file and serve any witness statements and expert witness reports upon which they intend to rely upon on or before 4:00pm on 2 April 2014.

- 3 **This matter is listed for hearing at 10:30am on Monday 14 April 2014 at 55 King Street, Melbourne VIC 3000, before the President for 2 days. A third day is to be allowed for the purpose of conducting an on-site inspection.**
- 4 Costs reserved.



Justice Greg Garde AO RFD
President



APPEARANCES:

For the Applicant:	Mr R Kendall QC and Mr A Felkel of Counsel
For the Monash City Council:	Mr P Connor of Counsel
For the Minister for Agriculture and Food Security:	Mr S Mukerjea of Counsel

REASONS

Introduction

- 1 On 4 December 2012, Monash City Council ('the Council') impounded a dog named Kerser owned by the applicant Ms Jade Applebee ('Ms Applebee'). Kerser was about ten months old at the time.
- 2 On 11 December 2012, an authorised officer of the Council declared Kerser to be a restricted breed dog ('the declaration') namely an American Pit Bull Terrier under s 98A of the *Domestic Animals Act 1994* (Vic) ('the Act'). Kerser is not registered under the Act. Kerser was declared to be a restricted breed dog as a result of an assessment under the Standard for Restricted Breed Dogs in Victoria approved under s 3(3) and (4) of the Act and published in Victoria Government Gazette No S. 283 on 1 September 2011 and amended by notice published in Victoria Government Gazette No. S 32 on 10 February 2012 ('the Old Standard').
- 3 By a decision dated 3 April 2013, Deputy President Lambrick determined to affirm the declaration following a hearing on 20 February 2013 and 18 March 2013 ('the previous Tribunal decision').¹
- 4 On 10 December 2013, Croucher J allowed an appeal from the previous Tribunal decision, setting aside the order of the Tribunal and remitting the matter to the Tribunal, differently constituted, to be heard and decided afresh ('the Court decision').²
- 5 On 31 January 2014, a new Standard for Restricted Breed Dogs in Victoria was approved under s 3(3) and (4) of the Act and published in Victorian Government Gazette No. S 22 ('New Standard'). The Old Standard was revoked.
- 6 The issue which has arisen is whether the rehearing to be conducted by the Tribunal is to be conducted under the New Standard or the Old Standard. This depends on whether Ms Applebee has an accrued right to have the application for review determined on the basis of the Old Standard.
- 7 Following a directions hearing conducted on 11 February 2014, the Minister for Agriculture and Food Security ('the Minister') was granted leave to make written and oral submissions to the Tribunal. The parties have made written and oral submissions and submissions in reply.

Relevant Law

- 8 Section 3(1) of the Act defines 'restricted breed dog' to mean:

restricted breed dog means a dog that is any one of the following breeds—

...

- (e) American Pit Bull Terrier (or Pit Bull Terrier);

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

² *Applebee v Monash City Council (No 2)* [2013] VSC 680.

9 Section 3(3) and (4) of the Act make provision for there to be an approved standard for a breed of dog specified to be a restricted breed dog to be approved by the Minister and published in the Government Gazette:

- (3) 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) For the purposes of subsection (3) an approved standard is a standard that has been approved by the Minister and published in the Government Gazette.

10 Part 2 of the Act makes provision for an annual registration system for dogs and cats in Victoria. Relevant provisions include:

10 Requirement to apply for registration

- (1) The owner of a dog or cat must apply to register that dog or cat with the Council of the municipal district in which the dog or cat is kept, if the animal is over 3 months old.

Penalty: 20 penalty units.

- (2) The owner of a dog or cat which is registered must apply for renewal of the registration of that dog or cat with the Council of the municipal district in which the dog or cat is kept, before the expiration of the current registration.

Penalty: 20 penalty units.

- (3) If a person is making an application under subsection (1) in relation to a dog, that person must include with the application a declaration as to whether or not the dog in respect of which the application is made is a restricted breed dog.

Penalty: 10 penalty units.

...

11 Period of registration

The registration of a dog or cat or renewal of such registration remains in force until 10 April of the year following the registration or renewal.

...

17 Registration of dangerous and restricted breed dogs

(1) ...

(1AA) Subject to subsection (1A), a Council must not register a restricted breed dog.

(1A) A Council may register a dog as a restricted breed dog if—

- (a) the dog was in Victoria immediately before the commencement of the **Domestic Animals Amendment (Dangerous Dogs) Act 2010**; and
- (b) the dog was registered in Victoria immediately before the commencement of the **Domestic Animals Amendment (Restricted Breeds) Act 2011**.

Note

Under sections 10A(4) and 10C(6), a Council cannot register a restricted breed dog unless the dog is desexed (subject to the exception under section 10B(1)(e)) and the dog has been implanted with a prescribed permanent identification device.

...

11 Section 98A of the Act empowers authorised officers to make declarations as to the breed of dogs. It provides:

- (1) 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.
 - (2) In this section *authorised officer* means an authorised officer appointed under section 72.
 - (3) A declaration under this section—
 - (a) has effect throughout Victoria; and
 - (b) cannot be revoked, amended or otherwise altered.
- 12 Section 98(2AA) of the Act empowers the owner of a dog to apply to the Tribunal for review of a decision by an authorised officer under s 98A to declare a dog a restricted breed dog.
- 13 Section 28(2) of the *Interpretation of Legislation Act 1984* (Vic) ('the Interpretation Act') applies to subordinate instruments such as the Old Standard and the New Standard. It provides:
- (2) Where a subordinate instrument or a provision of a subordinate instrument—
 - (a) is repealed or amended; or
 - (b) expires, lapses or otherwise ceases to have effect—

the repeal, amendment, expiry, lapsing or ceasing to have effect of that subordinate instrument or provision shall not, unless the contrary intention expressly appears—

...

 - (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision;

...

 - (g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (e) and (f)—

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if that subordinate instrument or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.

The New Standard

- 14 The New Standard creates a two step regime for determining whether a dog is to be classified as an American Pit Bull Terrier, and therefore as a restricted breed dog. First, the dog is assessed to see whether the dog is exempt under any of the Categories of Exemption. If the dog is not exempt, the inquiry moves to a second step. This is to determine whether or not the dog satisfies the Cumulative Requirements. They are met if the dog meets:
- (a) not less than three of the Conformation Criteria;
 - (b) not less than ten of the Physical Characteristics Criteria; and
 - (c) not less than ten of the Supplementary Physical Characteristics Criteria.

- 15 The New Standard differs from the Old Standard which left the authorised officer, and, on review, the Tribunal, to determine whether there was a high or substantial level of correspondence between the dog and the approved standard.³ The New Standard provides that a dog that has none of the stated Categories of Exemption, and meets the Cumulative Requirements is a dog that falls within the standard. There are:
- (a) 5 Conformation Criteria of which a dog must meet not less than 3 to fall within the New Standard;
 - (b) 18 Physical Characteristics Criteria of which a dog must meet not less than 10 to fall within the New Standard; and
 - (c) 19 Supplementary Physical Characteristics Criteria of which a dog must meet not less than 10 to fall within the New Standard.

Applicant's submissions

- 16 Mr Kendall QC's principal submission was that s 28(2)(e) and (g) of the Interpretation Act operated to protect Ms Applebee's right to have Keiser assessed under the Old Standard. Regarding Kerser as personal property, Ms Applebee had a common law right as owner not to have Kerser impounded, or put down, or interfered with in any way without her consent. He said that this right existed under the Old Standard, and that the New Standard affected Ms Applebee's rights in relation to her dog. Kerser had been assessed under the Old Standard. Mr Kendall QC said it was Ms Applebee's right to have the application for review heard and determined under the Old Standard.
- 17 Mr Kendall QC submitted that the Act and the Old Standard together set out a prohibition on owning an unregistered restricted breed dog, the mechanism for determining whether a dog is a restrictive breed dog, and the characteristics of a dog said to be a restricted breed dog. On 11 December 2012, Ms Applebee had a right to own a dog that did not fall within the physical characteristics set out in the Old Standard. As the New Standard changed the way in which the physical characteristics of a dog are said to fall within the standard, making it significantly easier for a dog to fall within the standard, the New Standard will only apply to the rehearing where there is evinced a clear intention for the New Standard to apply retrospectively. He contended that neither the Act nor the New Standard revealed anything that would indicate that the New Standard is to apply retrospectively referring to *Maxwell v Murphy*,⁴ *Fisher v Hebburn Ltd*,⁵ and *Carr v Finance Corporation of Australia Ltd (No 2)*.⁶
- 18 Other submissions made by Mr Kendall QC on behalf of Ms Applebee were:

³ *Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council* [2012] VSC 578 (Kaye J); *Applebee v Monash City Council (No 2)* [2013] VSC 680 (Croucher J); *Gray v Brimbank City Council* [2014] VSC 13 (Rush J).

⁴ (1957) 96 CLR 261, 267 (Dixon CJ).

⁵ (1960) 105 CLR 188, 194 (Fullagar J).

⁶ (1982) 150 CLR 139, 151 (Mason, Murphy and Wilson JJ).

- (a) he disagreed with the assertion that the cases of *Ungar v City of Malvern*⁷ and *The Sisters Wind Farm Pty Ltd v Moyne Shire Council*⁸ were analogous to the current inquiry; and
 - (b) the relevant provisions of the Act contain no temporal element and there is no fixed time at which the characteristics of the dog are to be assessed.
- 19 Finally, Mr Kendall QC relied on s 98A(3) of the Act. As the declaration applied throughout Victoria, and could not be revoked, amended or otherwise altered, it followed as a matter of statutory construction that the Old Standard must be applied on the rehearing.

Respondent's submissions

- 20 Both the Council and the Minister submitted that Ms Applebee had no accrued right to have the application for review heard and determined under the Old Standard. Both also submitted that there was no utility in the Tribunal assessing Kerser under the Old Standard.
- 21 Mr Connor for the Council said that s 28(2) of the Interpretation Act governed Ms Applebee's rights referring to authority concerning that provision.⁹ It was critical to consider whether a right had been acquired under the Old Standard. He submitted that s 28(2)(e) and s 28(2)(g) were not applicable as no right arose under the Old Standard. The Old Standard established criteria by which a dog was to be assessed and considered. It did not create rights.
- 22 He submitted that it was the Act that limited Ms Applebee's common law right of ownership of Kerser – not the Old Standard. The Old Standard was an approved standard under s 3(3) of the Act, and did no more than outline the basis on which a dog was to be assessed or evaluated to see whether a dog was a restricted breed dog. Insofar as an owner's common law right might be affected, the effect resulted from the operation of the provisions of the Act – not the standard applied under the Act. An owner's rights in relation to a dog were unaffected by a change in the method of evaluation set out in the New Standard.
- 23 Mr Connor said that the rights enjoyed by an applicant under the Act are limited. The institution of an application for review gives an applicant no more than a hope or expectation that the declaration will be set aside. By instituting review proceedings, Ms Applebee accrued a right to have the decision reviewed, but not a right to have the application for review heard and determined in accordance with the substantive law or facts which applied when the application for review was commenced unless s 28(2) of the Interpretation Act was engaged.
- 24 If the New Standard is applied, Mr Connor said that Ms Applebee will not lose her right to have the Tribunal reconsider and determine whether Kerser is a restricted breed dog.

⁷ [1979] VR 259.

⁸ [2012] VSC 374.

⁹ *Esber v Commonwealth* (1992) 174 CLR 430; *HA v Patient Review Panel* [2013] VCAT 1628; *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VSC 324; *Ungar v City of Malvern* [1979] VR 259; *Robertson v City of Nunawading* [1973] VR 819; and *Hicks v Aboriginal Legal Service of Western Australia (Inc)* (2001) 108 FCR 589.

The application of the New Standard is consistent with the Tribunal's function as an administrative decision maker. The Tribunal stands in the shoes of the decision maker, and has the functions conferred on the authorised officer by s 98A of the Act.¹⁰ In exercising its review jurisdiction, the Tribunal acts on the basis of the facts and the law at the time the review decision is made.¹¹ The Tribunal does not review the propriety or legality of the decision made by the initial decision maker.¹²

- 25 Similar submissions were made on behalf of the Minister. The usual rule is that unless the statutory context otherwise requires, in its review jurisdiction, the Tribunal applies the law as it stands at the time of the Tribunal's decision, and not the law as it stands at the time of the original decision.¹³ The usual rule is subject to the operation of s 28(2) of the Interpretation Act. Section 28(2) was not engaged in this case, as no right or privilege accrued to Ms Applebee under the Old Standard which was affected by the Old Standard's revocation. Ms Applebee's right under the Act could be described as a right to have her dog assessed under the approved standard operative under s 3(3) and 3(4) of the Act from time to time. In any event, Counsel for the Minister submitted that the terms of the Act, and the Old Standard evinced a 'contrary intention' which excluded the operation of s 28(2). The Tribunal's decisions of *Persson v Knox City Council*,¹⁴ and *Laffan v Moira Shire Council*,¹⁵ held that in cases concerning the review jurisdiction conferred on the Tribunal with respect to a declaration by an authorised officer under s 98A of the Act, the Tribunal should ordinarily apply the Act and any relevant subordinate instrument as they stand at the time of making its decision.

Common law rights of ownership

- 26 Ms Applebee is the owner of Kerser. Under the common law, her ownership of Kerser would give her the right to keep her dog free from impoundment, interference or the risk of being put down. However, in the case of a restricted breed dog, an owner's common law rights have been removed or modified by the Act. In terms of the evaluation of whether or not a dog is a restricted breed dog, s 3(3) and 3(4) provide for the dog to be assessed under the standard approved by the Minister in force at the time of evaluation whether by an authorised officer under s 98A(1) or the Tribunal under s 98(2AA).
- 27 In my opinion, section 28(2)(e) and (g) of the Interpretation Act do not require the Tribunal to conduct a review under s 98(2AA) on the facts or under the standard

¹⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 51; *Esber v Commonwealth* (1992) 174 CLR 430, 440; *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VSC 324 [40]; and *Drake v Minister for Immigration* (1979) 24 ALR 577.

¹¹ *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VCAT 591 [40]; *Persson v Knox CC* [2012] VCAT 273 [17].

¹² *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VSC 324 [40] citing *Victorian WorkCover Authority v AB Oxford Cold Storage Co Pty Ltd* (Unreported, Victorian Court of Appeal, Nettle and Ashley JJA, 1 September 2006) [29].

¹³ *Esber v Commonwealth* (1992) 174 CLR 430, 448-9 (Brennan J); *Branbeau Pty Ltd v Victorian Commission of Gambling Regulation* [2005] VCAT 2606 [38] (Justice Morris P); *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 297-9 [32]-[37] (Kirby J), 314-5 [97]-[100] (Hayne and Heydon JJ).

¹⁴ [2012] VCAT 273 [17] (DP Lambrick).

¹⁵ [2012] VCAT 591 [28] (SM Proctor and Member French).

operative at the time when the authorised officer made the declaration under s 98A(1). This is because the Old Standard confers no right or privilege on a dog owner.

- 28 Like the New Standard, the Old Standard simply sets out criteria. It is an evaluation or assessment instrument. It does not, and does not purport to confer rights or privileges. It does not affect Ms Applebee's rights as owner of a dog. It is the Act itself that modifies her common law right of ownership. For s 28(2)(e) and (g) of the Interpretation Act to be engaged, it is necessary that the right or privilege be *accrued* or *incurred* under the subordinate instrument. Here the right of ownership that Ms Applebee seeks to protect was conferred by the common law – not by the Old Standard. Section 28(2)(e) and (g) do not affect the ordinary operation of the New Standard on and from its approval and publication in the Government Gazette.
- 29 Section 98A(3) does not take effect so as to deny the New Standard efficacy if the declaration made under s 98A(1) was made under the Old Standard. Section 98A(3) gives a declaration made under s 98A(1) by an authorised officer effect throughout Victoria. As individual Councils may and do appoint authorised officers,¹⁶ in the absence of a provision such as s 98A(3)(b), the legal effect of a decision of an authorised officer might be confined to a single municipal district. Clearly, this would be unsatisfactory as different consequences might result if a dog was removed from one municipality to another.
- 30 Section 98A(3)(b) of the Act has the effect that an authorised officer cannot revoke, amend or alter a declaration previously made. It also has the effect that an authorised officer cannot revoke, amend or alter a declaration made by another authorised officer whether from the same or a different municipality. In this way, decisions of authorised officers are final and binding throughout the State, subject to the Tribunal's powers of review under s 98(2AA).
- 31 In my view, s 98A(3) is not germane to the issue under consideration viz whether the Tribunal exercising its review jurisdiction under s 98(2AA) should apply the New Standard or the Old Standard.

The owner's position

- 32 This proceeding is a proceeding in the Tribunal's review jurisdiction and not in its original jurisdiction. The decision under review is that made by the authorised officer under s 98A(1) of the Act. The right conferred by s 98(2AA) on the owner of a dog declared to be a restricted breed dog is the right to apply to the Tribunal for review of the decision of the authorised officer. This is a right to obtain a de novo review of the decision of the authorised officer. Section 3(1) defines 'ownership' in an expansive way to include a person who keeps or harbours an animal or has the animal in his or her care for the time being whether the animal is at large or in confinement.
- 33 In *Esber v Commonwealth* the majority of the High Court said of the Administrative Appeals Tribunal that:¹⁷

And in the end it does not matter because, at the least, the appellant had, at the time of the repeal of the 1971 Act, a right to have his application to the Tribunal

¹⁶ Section 72 of the Act.

¹⁷ (1992) 174 CLR 430, 440 (Mason CJ, Deane, Toohey and Gaudron JJ) (citation omitted).

determined pursuant to Pt V of the 1971 Act. It may not be possible to say of a person in the position of the appellant that he had a right to a favourable determination from the Tribunal. The Tribunal was required to stand in the shoes of the decision-maker (the delegate) and arrive at its own decision. In *Drake*, Bowen C.J and Dean J. said of the Tribunal:

“ The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.”

34 In *Ungar v City of Malvern*,¹⁸ the Full Court said:

In the present case the institution of the appeal by the appellant gave him no more than a hope or expectation that his appeal would succeed and that he would be granted a permit. But, as the Appeals Tribunal had a discretion as to whether or not it would grant a permit, the question was open and unresolved. No right or privilege had been acquired by the appellant nor had any right or privilege accrued to him. The investigation by the Appeals Tribunal was not in respect of some right of the appellant but was to decide whether some right should or should not be given.

35 In *The Sisters Wind Farm Pty Ltd v Moyne Shire Council*, Emerton J considered whether an amendment of the Moyne Planning Scheme adopting a new acoustic standard for wind farms and new guidelines applied to a review proceeding before the Tribunal. Emerton J said:¹⁹

Section 51 of the VCAT Act provides that when exercising its review jurisdiction, the Tribunal has all the functions of the original decision-maker, and has other functions conferred upon it by or under the enabling enactment, as well as by or under the VCAT Act and Regulations. In determining an application for review, it may affirm or vary the decision under review, or set it aside and make another decision in substitution for it.

It is trite law that in exercising its review jurisdiction, the Tribunal does not review the propriety or legality of the decision made by the initial decision-maker. Its task is to ‘stand in the shoes’ of the original decision-maker and make the correct or preferable decision, having regard to the material before it. The review therefore takes place without any presumption as to the correctness of the decision under review. It is carried out on the basis of the facts and the law at the time the review decision is made.

36 Her Honour concluded:²⁰

The right to have the decision of the original decision-maker reconsidered and determined by the Tribunal is not a right that accrued under the Moyne Planning Scheme *per se* or was lost by reason of the amendment of the Moyne Planning Scheme. On its face, s 28(2) of the *Interpretation of Legislation Act* requires the right in question to have accrued *under* the subordinate instrument that has been repealed or amended. The instrument that has been amended is the Moyne Planning Scheme, which contains policies for the development and use of land for wind farms. Neither those policies, nor the P&E Act as a whole, confer any right on a permit applicant to a planning permit.

¹⁸ [1979] VR 259, 265-6.

¹⁹ [2012] VSC 324 [39]-[40] (footnotes omitted).

²⁰ [2012] VSC 324 [80].

37 The reasoning of Emerton J applies to the present case. The right to have the decision of the authorised officer reconsidered by the Tribunal is not a right that accrued under the Old Standard of itself or was lost by reason of the introduction of the New Standard. On its face, s 28(2) of the Interpretation Act requires the right in question to have accrued *under* the subordinate instrument that has been repealed or amended. In the present case, neither the Old Standard nor the New Standard confer any right on the owner of a dog that has been, or may be declared a restricted breed dog.

The scheme of the Act

38 Section 1 of the Act sets out the purpose of the Act:

The purpose of this Act is to promote animal welfare, the responsible ownership of dogs and cats and the protection of the environment by providing for—

...

(b) a registration and identification scheme for dogs and cats which recognises and promotes responsible ownership; and

(c) the identification and control of dangerous dogs, menacing dogs and restricted breed dogs; and

...

39 Section 3(1) of the Act defines the expression ‘restricted breed dog’ to include five different breeds including the ‘American Pit Bull Terrier (or Pit Bull Terrier)’. Section 3(3) and 3(4) provides for dogs to be assessed under standards approved by the Minister and published in the Victorian Government Gazette.

40 The Act also provides for a registration system for dogs and cats. It is an offence for an owner not to apply to register a dog with the Council of the municipal district in which the dog is kept if the animal is over 3 months old.²¹ Section 10(2) of the Act requires the owner of a dog to apply for renewal of the registration of the dog to the Council before the expiration of the current registration. Section 10(3) requires an applicant to make a declaration as to whether or not the dog in respect of which the application is made is a restricted breed dog.

41 Section 11 of the Act provides for an annual system of registration with the registration or renewal of registration of a dog or cat remaining in force until 10 April of each year.

42 Sections 14 and 15 of the Act deal with the procedures and fees payable on the registration or renewal of registration of a dog or cat. Sections 16 and 17 prohibit a Council from registering or renewing the registration of a dog that is a restricted breed dog (subject to an exception not here relevant).

43 The effect of the statutory registration scheme is that the Council must annually renew the registration of dogs, but cannot register a restricted breed dog (again subject to an exception not here relevant).

44 The result is that under the Act the question whether a dog is a restricted breed dog is required to be considered by the Council on an annual basis, and may in cases of doubt involve the reassessment of the dog under the approved standard applicable at the time

²¹ Section 10(1) of the Act.

of registration. The need for the exercise of the council's powers to be considered afresh at the time of each registration on the basis of the then approved standard suggests that it is unlikely that the legislature intended an owner to have an accrued right to have a dog assessed under a previous standard. In the present case, the annual renewal date of 10 April 2014 will pass before the present proceeding is heard or concluded. It would be inappropriate to apply the facts or standard applicable in 2012 to a dog that was then only 10 months old and is now significantly older and much more mature.²²

The New Standard has prospective effect

45 In *Robertson v City of Nunawading*,²³ the Full Court said of the presumption against construing a statute retrospectively:

[The] principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that.

46 The New Standard applies prospectively. It does not have any retrospective effect. The application of the New Standard in review hearings after the New Standard is in effect is the prospective application of the New Standard just as is commonly done in the case of planning scheme amendments and planning policy changes.²⁴ I reject the submission that to apply the New Standard at the rehearing is to give the New Standard retrospective effect.

The Remitter

47 The terms of the order of Croucher J remitting this proceeding to the Tribunal do not require the proceeding to be determined in accordance with the Old Standard. There is nothing in the remitter that limits or restricts the nature of the hearing to be conducted by the Tribunal, other than that the hearing is to be conducted by a freshly constituted Tribunal. The terms of the remitter require the Tribunal to exercise its review jurisdiction in the proceeding. This requires the Tribunal to make a de novo decision on the basis of the facts and law operative at the time of the review.

Previous decisions of the Tribunal

48 The conclusions that I have reached concerning the New Standard are consistent with the decision of the Tribunal at the time when the Old Standard was introduced.²⁵ In *Persson v Knox City Council*, Deputy President Lambrick said:²⁶

I am not satisfied that the legislative amendments have affected any accrued rights of ownership. The amendments set out a standard by which restricted breed dogs can be better and perhaps more fairly and consistently identified. This does not interfere with a "right" – the rights surrounding ownership of restricted breed dogs

²² See the discussion of the United Kingdom annual rating system in *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301 [58].

²³ [1973] VR 819, 824. See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011), 324 [10.4], citing *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27, 31.

²⁴ *Ungar v City of Malvern* [1979] VR 259; *Robertson v City of Nunawading* [1973] VR 819; *The Sisters Wind Farm Pty Ltd v Moyne Shire Council* [2012] VSC 324.

²⁵ *Persson v Knox City Council* [2012] VCAT 273; *Laffan v Moira City Council* [2012] VCAT 591.

²⁶ [2012] VCAT 272 [29].

have not changed retrospectively; nor have the types of dogs covered by the legislation. The means of *identifying* which dogs fall within the definition of a restricted breed dog have been *clarified*. The applicant still has a right to have his application for review determined in accordance with the law and that too has not changed.

Conclusion

49 The New Standard applies to the rehearing to be conducted by the Tribunal. Ms Applebee does not have any accrued right under s 28(2) of the Interpretation Act or otherwise to have the application for review determined under the Old Standard.



Justice Greg Garde AO RFD
President



