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

Not Restricted

S ECI 2020 02639

GLENN DOUGLAS and ELLEN TORMEY — Appellants

v

HARNESS RACING VICTORIA — Respondent

JUDGE:	Richards J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 August 2020
DATE OF JUDGMENT:	8 September 2020
CASE MAY BE CITED AS:	Douglas v Harness Racing Victoria
MEDIUM NEUTRAL CITATION:	[2020] VSC 568

ADMINISTRATIVE LAW – Appeal from decision of Victorian Civil and Administrative Tribunal – Tribunal determined that it lacked jurisdiction to review decision of Racing Appeals and Disciplinary Board made after commencement of *Racing Amendment (Integrity and Disciplinary Structures) Act 2018* (Vic) – Construction of transitional provisions – Tribunal had no jurisdiction – Appeal dismissed – *Racing Act 1958* (Vic), ss 83OH, 108, 109, 110 – *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 148.

STATUTES – Interpretation – Whether appellants accrued a right to apply to Tribunal for review under former s 83OH of *Racing Act 1958* (Vic) – No accrued right – Contrary intention expressly appears – *Interpretation of Legislation Act 1984* (Vic), s 14(2).

APPEARANCES:	Counsel	Solicitors
For the Appellants	Mr D Sheales	Cockburn & Co
For the Respondent	Mr A Anderson	Minter Ellison

HER HONOUR:

1 Glenn Douglas and Ellen Tormey are both licensed harness racing trainers. Harness Racing Victoria (**HRV**) is constituted under the ***Racing Act*** *1958* (Vic) to control the sport of harness racing in Victoria. Its functions include making the rules of harness racing[1] and, in accordance with those rules, registering trainers, and disqualifying or suspending any person from participating in harness races.[2]

2 On 22 May 2019, HRV charged Mr Douglas and Ms Tormey with serious offences related to the alleged stomach tubing of a horse trained by Ms Tormey, The Boss Man. Mr Douglas was charged with stomach tubing the horse within 48 hours of the commencement of a race or meeting for which he was nominated, and Ms Tormey was charged with allowing or permitting Mr Douglas to do so. The HRV Racing and Disciplinary **Board** described the background to the charges as follows:

> On the afternoon of 1 December 2018 Mr Neal Conder and Mr Russell Anderson, stewards of the HRV Integrity Department, carried out an inspection of Ms Ellen Tormey's licenced training establishment at 681 McIvor Highway, Junortoun.
>
> That evening a horse, The Boss Man, trained by Ms Tormey was scheduled to race in the first round of the qualifying heats of the TAB Inter Dominion Trotting Championship at the harness racing meeting at Melton in race 4 at 7.34pm.
>
> The act of stomach tubing a horse involves the passing of a rubber or plastic tube, of appropriate dimensions, through the nostril of a horse, through the oesophagus and into the stomach. A funnel is attached to the other end of the tube into which a prepared mixture, usually in a bucket, is poured so that the contents drain down the tube into the stomach of the horse.
>
> The act of stomach tubing a horse can be used for legitimate equine health reasons and is not prohibited under the Rules of Harness Racing unless it takes place within 48 hours of a race in which the horse is competing.

3 Mr Douglas and Ms Tormey pleaded not guilty to these charges, which were heard by the Board on 24 and 25 September 2019. The Board found the charges proved, for reasons published on 11 December 2019.

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1 ***Racing Act*** *1958* (Vic), s 49.

2 Racing Act, s 45(1)(a) and (c).

4 Separately, on 8 July 2019, Ms Tormey was charged with presenting another horse, Fremarksgonzo, to race on 13 April 2019 while not free of alkalinising agents. She pleaded guilty to that charge.

5 On 19 December 2019, the Board gave its decision on penalty in relation to all three charges. Both Mr Douglas and Ms Tormey were disqualified for two years. Each of them applied to the Victorian Civil and Administrative **Tribunal** for review of the findings and penalties imposed in relation to The Boss Man. Ms Tormey also sought review of the penalty imposed in respect of Fremarksgonzo.

6 In the meantime, amendments to the Racing Act made by the *Racing Amendment (Integrity and Disciplinary Structures) Act 2018* (Vic) (**Amendment Act**) had come into effect. The Amendment Act was assented to on 21 August 2018, and commenced on 1 August 2019. On that day, the Board was replaced by the Victorian Racing Tribunal (**VRT**), and review by the Tribunal was limited to reviewing the penalty imposed by the VRT.

7 On 19 May 2020, the Tribunal dismissed the applications by Mr Douglas and Ms Tormey, under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). Senior Member Dea published reasons for her conclusion that the effect of the amendments and the transitional provisions was that the Tribunal did not have jurisdiction to hear and determine the review applications, whether as to findings or penalty.[3]

8 In this proceeding, Mr Douglas and Ms Tormey apply for leave to appeal the Tribunal's orders, under s 148(1)(b) of the VCAT Act. Their notice of appeal raises a single question of law:

> Did Senior Member Dea err in determining that VCAT did not have jurisdiction to hear and determine the First and Second Appellants' applications to VCAT?

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3 *Tormey v Harness Racing Victoria (Review and Regulation)* [2020] VCAT 572 (**Reasons**).

They seek an order that the Tribunal's orders of 19 May 2020 be set aside, and a declaration that the Tribunal has jurisdiction to hear and determine their review applications. They also seek a short extension of time, under s 148(5) of the VCAT Act.

9 For the reasons that follow, the extension of time and leave to appeal will be granted, but the appeal must be dismissed.

Relevant provisions

10 Before 1 August 2019, s 50B of the Racing Act established 'a Board to be known as the Racing Appeals and Disciplinary Board for Harness Racing Victoria'. Part IIA of the Racing Act provided for the constitution, powers, and procedures of the Board. Its functions included hearing and determining charges made against persons for serious offences.[4] The Racing Act established an equivalent board, with similar disciplinary functions, for greyhound racing.[5] It also recognised the RV Racing Appeals and Disciplinary Appeals Board established under the rules of Racing Victoria, the controlling body for thoroughbred racing in Victoria.[6]

11 Pursuant to s 83OH, decisions of all three Racing Appeals and Disciplinary Boards could be reviewed by the Tribunal. The former s 83OH provided:

> **Review by VCAT of decisions of Racing Appeals and Disciplinary Boards**
>
> (1) A person whose interests are affected by a decision made by a Racing Appeals and Disciplinary Board may apply to VCAT for review of that decision.
>
> (2) A Steward[7] may apply to VCAT for review of a decision made by a Racing Appeals and Disciplinary Board.

12 Section 1 of the Amendment Act set out its purposes, relevantly:

> (a) to amend the **Racing Act 1958**—
>
> …

4 Racing Act, former s 50C(b).
5 Racing Act, former s 83B.
6 Racing Act, s 3(1) — former definition of 'RV Racing and Disciplinary Appeals Board' and definition of 'Racing Victoria'; s 5G.
7 Racing Act, s 3(1) defines 'Steward' to mean 'a person appointed as such in accordance with the rules of a controlling body or a person so appointed as a Deputy Steward'.

(ii) to replace the RV Racing Appeals and Disciplinary Board, the GRV Racing Appeals and Disciplinary Board and the HRV Racing Appeals and Disciplinary Board with the Victorian Racing Tribunal for all codes of racing; and

(iii) to provide for the powers of the Victorian Racing Tribunal to hear and determine a matter; and

(iv) to limit the right of appeal to VCAT to decisions made by the Victorian Racing Tribunal on a penalty imposed by the Victorian Racing Tribunal; and

…

(b) to make other operational and technical amendments to the **Racing Act 1958** and consequentially amend the **Victorian Civil and Administrative Tribunal Act 1998**.

13 The Amendment Act accordingly repealed the former Part IIA of the Racing Act, under which the Board had been established, and inserted a new Part IIA, establishing the VRT and providing for its constitution, powers, and procedures. It also replaced the former s 83OH with a new s 83OH, which now provides:

Review by VCAT of decisions of the Victorian Racing Tribunal

(1) A person whose interests are affected by a decision of the Victorian Racing Tribunal may apply to VCAT for review of that decision in relation to a penalty imposed on the person by the Victorian Racing Tribunal.

(2) A Steward may apply to VCAT for review of a decision made by the Victorian Racing Tribunal in relation to a penalty imposed by the Victorian Racing Tribunal.

Note

See clause 66N of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**.

14 Clause 66N of Schedule 1 to the VCAT Act now provides that, in determining a proceeding for review of a decision of the VRT under s 83OH of the Racing Act in relation to a penalty imposed by the VRT, the Tribunal is bound by the findings of fact that were made by the VRT. This is a variation from the usual position that, in exercising its review jurisdiction in respect of a decision, the Tribunal has all the functions of the decision-maker.[8]

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8 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**), s 51.

15 The Amendment Act made provision for the transition to the new disciplinary regime. The transitional provisions are found in Part X of the Racing Act.

16 Section 108 provides for the continuation of the Racing Appeals and Disciplinary Boards in certain circumstances, for specific purposes:

> **Transition of Racing Appeals and Disciplinary Boards to the Victorian Racing Tribunal**
>
> (1) This section applies if immediately before the commencement day –
>
> (a) a person is charged with a serious offence under the rules and the serious offence –
>
> (i) has been part heard by the GRV Racing Appeals and Disciplinary Board, the HRV Racing Appeals and Disciplinary Board or the RV Racing Appeals and Disciplinary Board and has not been determined by the relevant Board; or
>
> (ii) has not been heard or determined by the GRV Racing Appeals and Disciplinary Board, the HRV Racing Appeals and Disciplinary Board or the RV Racing Appeals and Disciplinary Board and has not been determined by the relevant Board; or
>
> (b) a person has lodged an appeal against a Steward's decision with the GRV Racing Appeals and Disciplinary Board, the HRV Racing Appeals and Disciplinary Board or the RV Racing Appeals and Disciplinary Board and the appeal has not been heard or determined by the relevant Board; or
>
> (c) any other proceeding has commenced with the GRV Racing Appeals and Disciplinary Board, the HRV Racing Appeals and Disciplinary Board or the RV Racing Appeals and Disciplinary Board and the proceeding has not been determined by the relevant Board.
>
> (2) Despite the repeal of section 5G by the 2018 Act, the substitution of Part IIA by the 2018 Act and the repeal of Part IIIA by the 2018 Act, section 5G, Part IIA and Part IIIA as in force immediately before the commencement day continue to apply until the hearing, the appeal or the proceeding is completed by the relevant Board.
>
> (3) For the purposes of this section, a member of the GRV Racing Appeals and Disciplinary Board, the HRV Racing Appeals and Disciplinary Board or the RV Racing Appeals and Disciplinary Board who held office as a member immediately before the commencement day continues in office as a member of the relevant Board on and after the commencement day until the hearing of the charge for the serious offence, the appeal or the proceeding is completed by the relevant

Board.

17 Section 109 provides for review of certain decisions of the former Racing Appeals and Disciplinary Boards, despite the replacement of s 83OH by the Amendment Act:

> **Review of decisions of Racing Appeals and Disciplinary Boards**
>
> (1) This section applies if immediately before the commencement day –
>
> (a) a person whose interests are affected by a decision of a Racing Appeals and Disciplinary Board under section 83OH(1) proposes to apply to VCAT for a review of that decision; or
>
> (b) a Steward proposes to apply to VCAT for a review of a decision made by a Racing Appeals and Disciplinary Board under section 83OH(2).
>
> (2) Despite the substitution of section 83OH by the 2018 Act, the person or the Steward may apply to VCAT for review on and after the commencement day if the time limit for applying for a review under section 83OI as in force immediately before the commencement day has not expired.
>
> (3) Despite the substitution of section 83OH by the 2018 Act, VCAT may conduct the review under the **Victorian Civil and Administrative Tribunal Act 1998** on and after the commencement day as if –
>
> (a) section 83OH had not been substituted by the 2018 Act; and
>
> (b) Part 16D of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998** had not been enacted.

18 Applications for review by the Tribunal made under the former s 83OH that had been made but not finalised before 1 August 2019 are continued by s 110, as if s 83OH had not been substituted by the Amendment Act.

The Tribunal's decision

19 After setting out the background to the application for review, the Tribunal identified the jurisdictional issue for determination:[9]

> The jurisdictional issue arises from 2018 amendments made to the *Racing Act 1958* (Vic) (Racing Act) which established the Victoria Racing Tribunal (VRT) and gave it powers to hear certain matters which had previously been heard by VCAT. In particular, the amendments removed VCAT's power to review the merits of liability related decisions so it can now only review penalties imposed by the VRT.

[9] Reasons, [10]–[12].

> The jurisdictional issue arose at the first directions hearing in the proceedings. The parties were ordered to file and serve written submissions and agreed for the issue to be determined on the papers.
>
> It is fair to say that, through their legal representatives, the applicants have expressed dismay at the prospect of finding themselves with no right to have even the penalty decision reviewed by VCAT. At the time of writing these reasons, I understand Ms Tormey and Mr Douglas and perhaps three others find themselves in this position.

20 Although it had sympathy for the applicants'[10] position, and noted that HRV did not intend to take the jurisdictional point, the Tribunal was not prepared to assume it had jurisdiction or disregard the question.[11] As it explained, the Tribunal's jurisdiction is conferred by statute:[12]

> VCAT only has the jurisdiction granted to it through enabling enactments. Although extensive, that jurisdiction must be identified with precision. Once identified, a provision conferring review jurisdiction on VCAT should not be construed in a narrow or pedantic manner but should be construed beneficially, and as generously as the language of the section allows.
>
> The dilemma in this case was captured most accurately by Judge Bowman:[13]
>
> > [T]his Tribunal is a creature of statute and, whilst it has broad powers, its jurisdiction is limited to that conferred by the VCAT Act and by the enabling enactments… VCAT may be a decision-making body not bound by the rules of evidence, and with a statutory obligation to conduct proceedings with as little formality and technicality as proper consideration of matters permits. However, its essential jurisdiction must be established, and, *however tempting it might be to determine … a … matter in a prompt, economical and hopefully fair way, that cannot be done if the jurisdiction so to do does not exist*.[14]

21 Having set out the relevant provisions of the Racing Act, and referring to the extrinsic materials for the Amendment Act, the Tribunal turned to the applicants' contention that s 109 of the Racing Act could be interpreted as conferring on the applicants a right to merits review by the Tribunal:[15]

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10 Mr Douglas and Ms Tormey were referred to in the Tribunal as 'the applicants', and that term is used in recounting the Tribunal's Reasons. They are referred to as 'the appellants' elsewhere in these reasons for decision.

11 Reasons, [12]–[14].

12 Reasons, [17]–[18].

13 *Wizardry Kennels v Semtech Animal Breeding Services* [2006] VCAT 2368, [11].

14 Tribunal's emphasis.

15 Reasons, [40]–[44].

> The applicants contend that, in order for section 109 to be enlivened, the only preconditions are that:
>
> (i) a person's interests be affected by a RADB decision (requirement A); and
>
> (ii) the person proposes to apply to VCAT for a review of that decision (requirement B).
>
> The applicants say it is uncontroversial that they satisfy both requirement A and B. They then contend that the question of jurisdiction arises as a result of the chapeau to section 109(1), namely *'[t]his section applies if immediately before the commencement day'*.
>
> They submit the time limitation imposed by those words only requires that a person *'propose to apply to VCAT for review'* before 1 August 2019 (requirement B). They say it does not require that *'a person's interests be affected by a decision'* of the RADB (requirement A), before 1 August 2019.
>
> The applicants say that reading is correct because, if the intention was for the time limit to apply to requirement A, Parliament would have omitted the word *'whose'* from s 109(1)(a) and so it would have said instead:
>
> > (1) This section applies if immediately before [1 August 2019] —
> >
> > (a) A person's ~~whose~~ interests are affected by a decision of a [RADB] under section 83OH(1) . . .
>
> The applicants also contended that, if the intention was for the time limit to apply to requirement A and requirement B, then Parliament would have inserted the conjunction *'and'* into section 109(1)(a), to make clear that the time limit was to apply to both the time that the interests were affected and the time that the persons proposed to apply for review. So, it would have read:
>
> > (1) This section applies if immediately before [1 August 2019] —
> >
> > (a) A person's ~~whose~~ interests are affected by a decision of a [RADB] under section 83OH(1) and [that person] proposes to apply to VCAT for a review of that decision.

22 Relying on the *Macquarie Dictionary* definition of the verb 'propose', the applicants submitted that 'any person who was the subject of an RADB decision, has at the very least 'considered' the possibility of an appeal to VCAT at the time the RADB proceedings are on foot'.

23 The Tribunal did not accept the applicants' proposed reading of s 109(1)(a):[16]

> On the applicants' reading, section 109 creates a right of review for a decision which has not been made, which may not be made or may even be entirely in

[16] Reasons, [48]–[55] (citations omitted).

the relevant person's favour. The VCAT Act does not support that reading. That is because, while section 4 of the VCAT Act casts a wide net of decisions which may be the subject of a review – including a failure to make a decision – it does not allow a person to make an application in anticipation of the making of a decision. Similarly, section 51, which contains VCAT's powers on review, assumes the existence of a decision and does not apply to decisions not yet made. Section 66N of Schedule 1 of the VCAT Act confines VCAT's powers on review. It does not widen them to include possible decisions.

The applicants' proposed reading gives insufficient weight to the chapeau to section 109(1) which identifies a certain point in time and then describes specific circumstances which must apply at that point in time.

The applicants' proposed reading also gives insufficient attention to the phrases '*a decision*' and '*apply to VCAT for a review of that decision*'. It does not give effect to the heading to section 109 which makes plain the section is directed to the review of '*decisions*' of the RADB, not possible decisions. The applicants' proposed reading is more closely aligned to the circumstances which are the subject of section 108(1)(a) – that is, matters at the RADB which are incomplete. There is nothing in section 109 which indicates it is intended to address those circumstances.

In order to read section 109(1) in the way proposed, it would be necessary to pay little to no regard to the context in which the word 'decision' is used. Section 109 says (underlining my emphasis):

> This section applies if immediately before [1 August 2019] —
>
> (a) a person whose interests are affected by a decision of a [RADB] under section 83OH(1) proposes to apply to VCAT for a review of that decision . . .

In my view, the qualifying requirement in section 109(1)(a) describes a definite state of affairs which exist immediately before 1 August 2019. That is, a person is <u>at that time</u> affected by <u>a</u> decision and, <u>at that time</u> they propose to seek review of <u>that</u> decision, not a future and as yet unmade decision.

Read in that context, the word '*proposes*' is to be understood as protecting the interests of those who have had an adverse RADB decision but have not yet made their application to VCAT or decided to do so.

The applicants' proposed reading does not accord with the interpretative principles set out earlier. This is not a case of a conflict between competing provisions where it is appropriate to seek to alleviate that conflict. Rather, when striving to give meaning to every word of the provision, one must give proper weight to the references to '*a decision*' of the RADB which may be the subject of merits review by VCAT. I find there is no need to re-write section 109 in the way the applicants propose.

I find the qualifying requirement in section 109(1)(a) requires that a RADB decision was made immediately before 1 August 2019 and that, at that point in time, the applicant proposes to apply to VCAT for merits review of that pre–1 August 2019 decision.

24 The Tribunal then considered the alternative submission of the applicants that 'the rules of statutory interpretation should be brought to bear' in deciding whether it had jurisdiction.[17] The senior member accepted that the legislature does not intend to limit access to the courts (and the Tribunal) other than to the extent expressly stated. She also accepted the contention that s 109 is a remedial provision that 'should be interpreted as broadly, beneficially and generously as the language allows'.[18]

25 Having regard to the explanatory memorandum, advice from the Office of Racing, the framing of ss 108 and 109, and the principle that Parliament does not intend to abrogate rights in the absence of express intention, the Tribunal was not satisfied that there was a basis to find it had jurisdiction.[19] The senior member accepted that there was a gap in the transitional provisions:[20]

> The '*gap*' not addressed expressly by the Explanatory Memorandum or by the transitional provisions is what is to happen to people like the applicants where the charges were laid before 1 August 2019 (and so could not be referred direct to the VRT under section 50O) but the RADB had not completed its task under section 108 by that date.
>
> I agree with the applicants that it seems unlikely that Parliament intended that those matters could proceed through the RADB but then not be able to be reviewed by anybody. I proceed on the basis the legislature ought not to be taken as having intended to abrogate rights of individuals to access courts or tribunals, other than to the extent expressly stated. I accept that the effect of the identified gap in the legislation is that the applicants' previously existing merits review rights appear to have been lost but not by express language.
>
> I agree the Tribunal is required to identify its jurisdiction and in doing so not read legislation too narrowly, paying appropriate attention to what may be discerned of Parliament's intention from the legislation itself and aids to interpretation such as explanatory memoranda. If there had been some uncertainty or ambiguity, those principles might have assisted the applicants. As the section 109(3) power for VCAT to hear and determine a review as if section 83OH had not been amended does not arise unless and until the requirements in section 109(1) are met, it of itself cannot be applied to create jurisdiction in VCAT.
>
> I have not identified uncertainty or ambiguity in the terms of section 109(1) or in the other available extrinsic aids. Rather, I have found silence on the issue. These circumstances may be contrasted with those considered in *JS and LS v*

17 Reasons, [56].
18 Reasons, [59]–[60].
19 Reasons, [63]–[64].
20 Reasons, [71]–[78] (citations omitted).

> *Patient Review Panel*. In that case, the relevant Second Reading Speech said, '*All decisions of the panel are reviewable by VCAT*'. There is no such clear statement available here.
>
> Avoiding the loss of a previously existing review right without express words is a strong argument in the applicants' favour. However, that is not enough to support VCAT filling the gap where there is nothing in the legislation itself or in the Explanatory Memorandum which addresses that matter.
>
> In order to find the jurisdiction the applicants seek, it would be necessary for me to create a new transitional provision.
>
> That new provision would need to replicate elements of section 108 and 109 with the qualifying requirement being an applicant who had a matter before the RADB immediately before 1 August 2019 (which had not been completed – like section 108(1)(a)) and for the powers of VCAT on review to apply to liability and penalty as if section 83OH of the Racing Act had not been amended (like section 109(3) and also 110(2)).
>
> Even if I found there was an implied intention to maintain the applicants' review rights, I do not accept that in resolving a jurisdictional issue it is open to VCAT, a body which only has the powers conferred on it by Parliament under its enabling enactments, to do so by, in effect, writing an entirely new provision.

26 The Tribunal concluded by observing that statutory amendment would be required to resolve the apparent anomaly.[21]

Construction of transitional provisions

27 The appellants submitted that, in accordance with the principles of statutory construction, the Court should find that it was not the intention of Parliament to create a lacuna in the transitional provisions, and that Parliament intended to preserve the accrued right of review of any Board decision to the Tribunal after 1 August 2019. They argued that s 109(1) could be interpreted consistently with that intention by reading the words 'a person whose interests are affected by a decision of a Racing Appeals and Disciplinary Board' to include any person whose interests will be affected by a decision of the Board.

28 They acknowledged that it is only in very limited circumstances that words will be read into legislation,[22] and did not urge me to read words in to s 109 of the Racing Act.

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21 Reasons, [79].

22 Citing ***R v Young*** (1999) 46 NSWLR 681, [6]–[12] (Spigelman CJ).

Rather, they submitted that the intention of Parliament must have been that racing industry participants in their situation should have a right of review in the Tribunal. The purpose of the Amendment Act was to limit review by the Tribunal, not to eliminate it. They argued that it would be absurd if the small group of people with charges pending before a Racing Appeals and Disciplinary Board should have no right of review, while every other group had some right of review. The absurdity of that outcome was a clear indication that it was not what Parliament intended.

29 HRV's position was that, on their plain and ordinary meaning, ss 108, 109, and 110 of the Racing Act do not confer ongoing review jurisdiction on the Tribunal to review a decision of a Racing Appeals and Disciplinary Board made after 1 August 2019. It submitted that, even if there was an unintended gap in the transitional provisions, it was not open to the Court to fill that gap, because it could not be said with any certainty what words Parliament would have used if its attention had been drawn to the omission.[23]

Consideration

30 Statutory construction begins and ends with the text of the relevant statute.[24] The primary object is to construe the relevant provisions so that their legal meaning is consistent with the language used and the legislative purpose of the statute. Legislative purpose is determined by considering the text of the relevant provisions in the context of the entire statute, as well as the existing state of the law, the mischief that the statute was intended to remedy, the history of the legislative scheme, and the extrinsic materials.[25]

31 If the literal meaning of a provision is consistent with the legislative purpose, the literal meaning and the legal meaning are one and the same.[26] If more than one literal

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23 Citing ***Taylor*** *v Owners – Strata Plan No 11564* (2014) 253 CLR 531, [38]–[40] (French CJ, Crennan and Bell JJ).

24 ***Alcan*** *(NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [47]; *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39].

25 ***Colonial Range*** *Pty Ltd v CES-Queen (Vic) Pty Ltd* [2016] VSCA 328, [47]–[48].

26 *Colonial Range*, [50].

meaning is available, the meaning to be preferred is the meaning that best achieves the legislative purpose.[27] Legislation with a beneficial or remedial purpose should be construed so as to give the fullest possible effect to that purpose.[28]

32 A departure from the literal meaning may be justified if that meaning conflicts with the identified legislative purpose.[29] One circumstance in which that might occur is where adoption of the literal meaning would lead to a result which is 'absurd, unreasonable or anomalous'.[30]

33 However, 'the text of legislation is the surest guide to legislative intention'[31] and 'any modified meaning must be consistent with the language in fact used by the legislature'.[32] There are limited circumstances in which words may be read in to a provision. It may be done in the case of 'simple, grammatical, drafting errors'[33] which would defeat the object of the provision if not corrected. It may not be done in order to fill gaps in legislation.[34] The task remains statutory construction, not judicial legislation.[35]

34 Here, the text of the transitional provisions leaves no room for constructional choice. Parliament addressed three different circumstances:

(a) Section 108 applies where a charge for a serious offence, an appeal, or another proceeding was pending before a Racing Appeals and Disciplinary Board but had not been determined by 1 August 2019. In that circumstance, the former provisions of the Racing Act continue to apply and the Board continues in office

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27 *Interpretation of Legislation Act 1984* (Vic), s 35(a); *Colonial Range*, [51].

28 *Waugh v Kippen* (1986) 160 CLR 156, 164 (Gibbs CJ, Mason, Wilson and Dawson JJ), citing *Bull v Attorney-General (NSW)* (1913) 17 CLR 370, 384 (Isaacs J).

29 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [70] (McHugh, Gummow, Kirby and Hayne JJ).

30 *Colonial Range*, [53], citing *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

31 *Alcan*, [47] (Hayne, Heydon, Crennan and Kiefel JJ).

32 *Taylor*, [39] (French CJ, Crennan and Bell JJ).

33 *Taylor*, [38] (French CJ, Crennan and Bell JJ).

34 *Marshall v Watson (*1972) 124 CLR 640, 649 (Stephen J); *Taylor*, [38] (French CJ, Crennan and Bell JJ).

35 *Taylor*, [38]–[40] (French CJ, Crennan and Bell JJ), citing Lord Diplock's speech in *Wentworth Securities Ltd v Jones* [1980] AC 74, 105–106. See also *R v Young*, [5]–[12] (Spigelman CJ).

'until the hearing, the appeal or the proceeding is completed by the relevant Board'.[36] No provision is made for review by the Tribunal of the Board's decision.

(b) Section 109 applies if, immediately before 1 August 2019, a person whose interests were affected by a decision of a Racing Appeals and Disciplinary Board or a Steward, proposed to apply to the Tribunal for review under s 83OH. In that circumstance, the person or the steward may apply to the Tribunal for review under the former s 83OH. The section is expressed in the present tense, as applying to a state of affairs existing immediately before 1 August 2019. Its application does not extend to decisions that might be made by a Racing Appeals and Disciplinary Board after that date.

(c) Section 110 applies if, immediately before 1 August 2019, a person or Steward had applied to the Tribunal for review of a decision of a Racing Appeals and Disciplinary Board under s 83OH. In that circumstance, the Tribunal may continue to conduct the review under the former s 83OH.

35 The text of the provisions suggests that Parliament intended that the transitional arrangements for people with a matter pending before a Racing Appeals and Disciplinary Board should end with the completion of the hearing by the Board. Two of the three transitional provisions — ss 109 and 110 — enable a review to be commenced or continued under the former s 83OH, despite its substitution by the Amendment Act. The transitional provision that applies to people in the appellants' situation — s 108 — does not. The clear implication is that a right of review by the Tribunal under the former s 83OH was deliberately omitted from s 108.

36 The statutory context gives no real indication that Parliament intended some other transitional arrangement. The expressed purposes of the Amendment Act do not descend to transitional detail.[37]

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[36] Racing Act, s 108(2) and (3).
[37] Amendment Act, s 1, extracted at [12] above.

37 The extrinsic materials provide no further insight into Parliament's intention. The Explanatory Memorandum for the Amendment Act said the following in relation to the transitional arrangements:[38]

> The objective of the transitional arrangements is to ensure that any hearing or appeal to a Racing Appeals and Disciplinary Board that has been sought, part heard, or is awaiting a determination immediately prior to the commencement day will continue to be dealt with under the arrangements in place prior to the commencement day.
>
> It is also intended a person who proposes to or has sought a review of a decision of a Racing Appeals and Disciplinary Board with the Victorian Civil and Administrative Tribunal immediately prior to the commencement day will continue to be dealt with under the arrangements in place prior to the commencement day. The Victorian Civil and Administrative Tribunal may conduct a review of these matters as if section 83OH has not been substituted by this Bill and Part 16D of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998** had not been enacted.

This does no more than summarise what is said in ss 108, 109, and 110. Neither the second reading speech for the Amendment Act, or the report of the Bittar Review that informed it,[39] say anything about the transitional arrangements.

38 The strongest indication that there is a gap in the transitional provisions is the lack of an obvious policy rationale for providing no right of review by the Tribunal for those people who had matters pending before a Racing Appeals and Disciplinary Board as at 1 August 2019. The appellants argued that, while Parliament intended to limit review by the Tribunal to questions of penalty, there was no intent to exclude it altogether.

39 The Minister's second reading speech for the Amendment Act explained why the Tribunal was to have a more limited role in the new disciplinary structure. The Bittar Review had found that the Tribunal was 'not well suited to deal with the demands of the racing codes due to a lack of racing expertise … and issues of timeliness and cost to participants'.[40] There were 'concerns across the industry about the suitability of

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38 Racing Amendment (Integrity and Disciplinary Structures) Bill 2018, Explanatory Memorandum, cl 25.

39 Paul Bittar, *Review of the Integrity Structures of the Victorian Racing Industry*, April 2016.

40 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 2018, 2091 (Mr Pakula, Minister for Racing).

VCAT to hear racing appeals, especially on a merits review basis'.[41] The new framework was to 'both strengthen and simplify the appeals and disciplinary structure of the Victorian racing industry'.[42]

40 I am not persuaded that the plain meaning of the transitional provisions conflicts with the legislative purpose of the Amendment Act. If anything, their plain meaning accords with the overall legislative purpose of limiting the role of the Tribunal, and leaving the merits of disciplinary matters to a specialist racing industry body. For those who, like the appellants, had charges pending as at 1 August 2019, the final word on the merits, including penalty, would be had by the relevant Racing Appeals and Disciplinary Board, rather than by the Tribunal.

41 Even if I had accepted the appellants' characterisation of Parliament's intention, they could have no right of review by the Tribunal unless I was also prepared to read words into the Racing Act beyond those actually used. That would go a great deal further than correcting 'simple, grammatical, drafting errors' in order to give effect to Parliament's intention.[43] It would, impermissibly, require judicial legislation in order to fill an apparent gap in the legislation.

42 I agree with the conclusion reached by the Tribunal[44] that, if there is an anomaly in the transitional arrangements made by the Amendment Act, the only cure is legislative amendment.

Section 14(2), ***Interpretation of Legislation Act***

43 The appellants also relied on s 14(2) of the *Interpretation of Legislation Act 1984* (Vic) (**Interpretation Act**), to argue that the former s 83OH continued to have effect in their cases, despite its repeal by the Amendment Act. They submitted that, on being charged with a serious offence, they accrued the right to have the charges heard and determined under the provisions of the Racing Act at the time of the charge, including

41 Ibid, 2093.
42 Ibid.
43 *Taylor*, [38] (French CJ, Crennan and Bell JJ).
44 Reasons, [79].

a right of review by the Tribunal under the former s 83OH, which was not affected by the substitution of s 83OH.

44 Section 14(2) of the Interpretation Act provides, relevantly:

> Where an Act or a provision of an Act—
>
> (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 Act or provision shall not, unless the contrary intention expressly appears—
>
> …
>
> (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision;
>
> …
>
> (g) affect any investigation, legal proceeding or remedy in respect of anything mentioned in paragraphs (e) to (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 Act or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.

45 This section could only have operation in this case if, upon being charged, the appellants had acquired or accrued a right of review by the Tribunal that could continue as if s 83OH had not been substituted, and the Amendment Act did not provide to the contrary.

Is there an accrued right?

46 Writing about provisions such as s 14(2) of the Interpretation Act, Dennis Pearce, the author of *Interpretation Acts in Australia*, has observed:[45]

> There are a very large number of cases that have applied this provision. The cases have usually been concerned with the question whether, in the particular circumstances, a right, etc. has been acquired or a liability incurred under the relevant legislation. A study of these cases in detail is therefore not warranted as they are rarely of assistance to a court that has to consider different legislation …

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45 Dennis Pearce, *Interpretation Acts in Australia,* 2018, LexisNexis Butterworths, [2.53].

47 Consistent with this observation, many of the numerous authorities canvassed by counsel in their submissions were not of great assistance to me in determining whether the appellants had an accrued right for the purposes of s 14(2) of the Interpretation Act. Some of the authorities concerned whether there was an accrued right to some benefit at the time of the amendment or repeal.[46] Others concerned whether there was an accrued right of appeal from a proceeding commenced or decided before the relevant amendment.[47] In each case, the answer turned on the particular statutory scheme. The analysis in these cases did not translate readily to the disciplinary context of this case, or answer the question whether persons charged with a disciplinary offence acquire or accrue any 'right' for the purposes of s 14(2).

48 The authority most directly on point is *Felman v Law Institute of Victoria*,[48] which involved a Supreme Court proceeding brought by the Law Institute of Victoria and its secretary under the *Legal Profession Practice Act 1958* (Vic), for orders restraining the defendant from practising as a solicitor. While the proceeding was still pending, the *Legal Practice Act 1996* (Vic) repealed the former legislation, abolished the Law Institute, and established a new body in its place. The Court of Appeal held that, by commencing the proceeding, the Law Institute had acquired a right to have the Court determine it.[49] It would follow that the HRV Stewards had an acquired or accrued right to have the Board hear and determine the charges laid against the appellants, absent any contrary intention. The right of a regulator to the determination of disciplinary charges is not a private right; it is held in the public interest, for the

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46 For example, *Director of Public Works v Ho Po Sang* [1961] AC 902 (application for rebuilding certificate); *Robertson v City of Nunawading* [1973] VR 819 (application to subdivide land); *Esber v Commonwealth of Australia* (1992) 147 CLR 430 (application for review of refusal to redeem weekly compensation payments as a lump sum); *Lee v Secretary, Department of Social Security* (1996) 68 FCR 491 (application for review of refusal to waive social security debt); *Repatriation Commission v Keeley* (2000) 98 FCR 108 (application for review of refusal of claim for widow's pension).

47 For example, *Colonial Sugar Refining Company Ltd v Irving* [1905] AC 369 (right of appeal to Privy Council from judgment in pending proceeding under *Excise Act 1901* (Cth)); ***R v Hamra*** [2016] SASCFC 130 (right of appeal in respect of pending criminal proceeding); ***Spear v Hallenstein*** [2018] VSC (application for review of findings of coroner).

48 [1998] 4 VR 324 (***Felman***).

49 *Felman*, 332–335 (Kenny JA, Winneke P and Brooking JA agreeing).

protection of the public.[50]

49 It does not necessarily follow that, upon being charged, the appellants had an accrued right to have the charges against them determined in accordance with the procedures in force at the time they were charged. Even less does it follow that the applicants also had an accrued right to apply to the Tribunal for review of any decision the Board might make.

50 There is authority to support the proposition that parties to a proceeding in a court have an accrued right of appeal from the time the action is commenced, whether judgment is given before or after the relevant amendment or repeal. In *Colonial Sugar Refining Co Ltd v Irving*,[51] the Privy Council held that an applicant in a proceeding pending before the Supreme Court of Queensland had an accrued right of appeal to the Privy Council on the commencement of the *Judiciary Act 1903* (Cth), although the Supreme Court had not yet given judgment. More recently, in *R v Hamra*[52] the Full Court of the Supreme Court of South Australia applied that principle to a criminal proceeding initiated before the commencement of an amendment that enlarged prosecution rights of appeal.[53]

51 However, the authorities do not extend to supporting the proposition that a person facing disciplinary charges before an administrative body has an accrued right to seek merits review before the charges have been determined. In that situation, there would be no 'right' of review reflected by a duty of the appellate tribunal to hear and determine the review.

52 In *Attorney-General (Queensland) v Australian Industrial Relations Commission*,[54] there was a question whether applicant unions had an 'accrued right' to have their

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50 See ***Thomas*** *v Victorian Building Authority* [2020] VSC 150, [60].
51 [1905] AC 369.
52 [2016] SASCFC 130, [22]–[23] (Kourakis CJ, Kelly, Peek, Nicholson and Lovell JJ agreeing).
53 In *R v Hamra*, but for the contrary intention expressed in the amending legislation, the accused had an accrued right *not* to face an appeal against a verdict of not guilty.
54 (2002) 213 CLR 485 (***Attorney-General (Qld)***).

industrial disputes arbitrated by the Commission at the time certain amendments took effect. The plurality described the claimed right as 'a public law right to require the Commission to observe its duty to comply with the law as it exists from time to time',[55] and distinguished it from pre-existing rights and liabilities that may be the subject of judicial determination.[56] The requirement, enforceable by mandamus, that the Commission hear and determine a matter according to law allowed for changes in the content of that law; 'the content of the public duty and correlative right to its discharge was fluid rather than fixed and notions of "accrued" rights in the law as it stood at any particular stage in the arbitral processes had no place'.[57] The unions therefore had no accrued right to have their applications determined in accordance with the pre-amendment law.

53 In *Spear v Hallenstein*,[58] Niall JA rejected the proposition that a mere right to commence a proceeding was a right protected by s 14(2) of the Interpretation Act. The applicant in that case wished to apply to have a finding of the inquest into her brother's death declared void, under s 59 of the repealed *Coroners Act 1985* (Vic). Her only 'right' was a right to commence a proceeding under s 59. Because she did not exercise that right before the provision was repealed, the right was not accrued or acquired, and s 14(2) did not apply.

54 In this case, immediately prior to 1 August 2019, the appellants did not even have a right to apply to the Tribunal under the former s 83OH, because their interests were not affected by a decision made by the Board. There was no complete or 'crystallised' right to apply for review, when the Board was yet to determine the charges.[59] Equally, the Tribunal had no duty, compellable by an order in the nature of mandamus or under s 148(7)(c) of the VCAT Act, to hear and determine an application for review of a decision that had not been made. For those reasons, I do not consider that the

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55 *Attorney-General (Qld)*, [40] (Gaudron, McHugh, Gummow and Hayne JJ).
56 *Attorney-General (Qld)*, [44] (Gaudron, McHugh, Gummow and Hayne JJ).
57 *Attorney-General (Qld)*, [46] (Gaudron, McHugh, Gummow and Hayne JJ).
58 [2018] VSC 169, [80]–[84].
59 *Spear v Hallenstein*, [56]; *Thomas*, [110], [118]. See also *Colley v Futurebrand FHA Pty Ltd* (2005) 63 NSWLR 291, [31]–[33] (Handley JA, Giles JA agreeing).

appellants had an accrued right of review under the former s 83OH before its substitution by the Amendment Act.

Does a contrary intention expressly appear?

55 Even if the appellants did have an accrued right under the former s 83OH, that right would not be saved by s 14(2) of the Interpretation Act if 'the contrary intention expressly appears' from the Amendment Act. Section 14(2) does not apply if it appears 'plainly', 'clearly', or 'by necessary implication' from the text and context of the relevant provisions that they are inconsistent with the preservation of existing rights or liabilities.[60]

56 I consider that it appears clearly from the Amendment Act that there is no right of review under the former s 83OH of a decision made by a Racing Appeals and Disciplinary Board after 1 August 2019. As discussed above,[61] the transitional arrangements for people with pending disciplinary charges end with determination of those charges by the relevant Board.

57 It follows that I do not accept the appellants' submission that, by operation of s 14(2) of the Interpretation Act, they had a right of review under the former s 83OH, despite its substitution by the Amendment Act.

Disposition

58 The appellants filed their notice of appeal on 18 June 2020, two days after the expiry of the 28 day time limit set by s 148(2) of the VCAT Act, and seek an extension of time under s 148(5). The factors that are usually relevant to the discretion to extend time include the length of the delay, any explanation for the delay, any prejudice due to the delay, and whether there is an arguable case on appeal.[62]

59 Here, the explanation for the appellants' short delay was that their solicitor erroneously assumed that the anomaly identified in the Tribunal's decision would be

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60 *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [52] (Gageler J); *Mitchell v Latrobe Regional Hospital* [2016] VSCA 342, [64].

61 See [34]–[40] above.

62 *Muto v Secretary to the Department of Planning and Community Development* (2013) 38 VR 293, [13].

addressed by legislative amendment, and only realised her error as the time limit was expiring. HRV did not claim to have suffered any prejudice by reason of the delay. The appellants submitted, and HRV accepted, that an early answer to the question of law raised in the notice appeal would be of benefit to both the appellants and to a number of other racing industry participants who are in the same position.

60 In the circumstances of this case, I consider it would do justice between the parties to grant the extension of time sought.

61 The appellants had an arguable case, on a question of some importance to the Victorian racing industry, and so leave to appeal will be granted. However, the Tribunal was correct to conclude that it had no jurisdiction, and the appeal must be dismissed.

62 I will hear the parties on the question of the costs of the appeal.

CERTIFICATE

I certify that this and the 21 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 8 September 2020.

DATED this eighth day of September 2020.

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Associate