SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0101

GLEN DOUGLAS and ELLEN TORMEY — Applicants

v

HARNESS RACING VICTORIA — Respondent

JUDGES:	McLEISH, NIALL and KENNEDY JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 April 2021
DATE OF JUDGMENT:	13 May 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 128
JUDGMENT APPEALED FROM:	[2020] VSC 568 (Richards J)

STATUTORY INTERPRETATION – Accrued rights – Merits review – Applicants charged with racing offences – Legislative amendments commenced before disciplinary board hearing – Right to merits review expressly preserved for decisions made before commencement but not pending decisions – Whether 'accrued right' to merits review for purposes of *Interpretation of Legislation Act 1984* s 14(2)(e) – Right to review accrues where proceeding pending – *Colonial Sugar Refining Co, Ltd v Irving* [1905] AC 369, applied – *Esber v Commonwealth* (1992) 174 CLR 430, *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485, *In re An Appeal by Parekaiura Parekura* (1912) 31 NZLR 1074, *Sunskill Investments Pty Ltd v Townsville Office Service Pty Ltd* [1991] 2 Qd R 210, *Rocter Tanks Pty Ltd v Adam* (2001) 80 SASR 214, considered – Whether amending legislation disclosed contrary intention – Transitional provisions silent as to pending decisions – Amending legislation and *Interpretation of Legislation Act 1984* read together in single act of construction – Contrary intention would produce anomalous outcome discordant with context and purpose – *GF Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153, *Helmer v State Coroner of Victoria* [2011] VSC 25, *Spear v Hallenstein* [2018] VSC 169, *Thomas v Victorian Building Authority* [2020] VSC 150, distinguished – *Racing Act 1958* ss 83OH, 108, 109, 110 – Leave to appeal granted – Appeal allowed.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr D Sheales with Mr L Hogan	Guthrie & Associates
For the Respondent	Mr A Anderson	Minter Ellison

McLEISH JA
NIALL JA
KENNEDY JA:

1 On 1 August 2019, the Victorian Racing Tribunal, or 'VRT', replaced the three Racing Appeals and Disciplinary Boards, or 'RAD Boards', which had until that time been responsible for hearing charges for serious offences under the *Racing Act 1958*. The amending legislation, the *Racing Amendment (Integrity and Disciplinary Structures) Act 2018*, or 'RAIDS Act', also changed the regime for review of decisions made on serious offence charges. Whereas there had previously been a right of review by the Victorian Civil and Administrative Tribunal ('VCAT') of decisions made by RAD Boards, as to liability and penalty, the right of review in respect of decisions of the VRT was confined to questions of penalty.

2 The RAIDS Act made provision for cases that were, broadly speaking, within the disciplinary system but not yet determined. So, the RADS Boards could hear and determine pending charges, and VCAT could complete reviews already commenced. VCAT could also hear a review application if a RADS Board had made a decision at the date when the changes took effect, even if a review had not yet been sought. Critically for the present case, the provisions were silent as to VCAT review of decisions made by a RAD Board after the new regime commenced operation.

3 The applicants were licensed harness racing drivers and trainers who were subject to charges of serious offences against the Australian Harness Racing Rules. When the new regime was established, those charges were yet to be heard but were pending before the RAD Board for harness racing. Pursuant to the transitional provisions, they were duly heard on 24 and 25 September 2019. On 11 December 2019, the applicants were found guilty on certain charges and on 19 December 2019 the RAD Board made orders for their disqualification for specified periods.

4 The applicants applied to VCAT for a review of the findings of liability and penalty. Because the RAD Board decisions were made after the commencement of the RAIDS Act, as mentioned above, this was not a matter directly addressed by the

transitional provisions. However, the applicants contended that they had an accrued right to apply to VCAT for a review, which was preserved by s 14(2) of the *Interpretation of Legislation Act 1984* ('the ILA'). Both in VCAT and on appeal to a judge in the Trial Division, arguments to this effect were unsuccessful.

5 For the reasons that follow, the applicants in our view did have an accrued right to seek review in VCAT of the decisions of the RAD Board, as to both liability and penalty, within the meaning of s 14(2) of the ILA, and the RAIDS Act did not operate to deprive them of that right. Leave to appeal will therefore be granted and the appeal will be allowed.

Legislative provisions — before 1 August 2019

6 When the charges were laid against the applicants, pt IIA of the *Racing Act 1958* provided for the Racing Appeals and Disciplinary Board for Harness Racing Victoria. That Board was established by s 50B. Its functions, under s 50C, included to hear and determine charges made against persons for serious offences: s 50C(b). Section 50M(1) provided that, if a person had been charged with a serious offence, the Board must hear and determine that charge.

7 Section 50N provided for hearings of the Board. The Board could conduct the hearing in the presence of the parties or their representatives, or without some or all of those parties or representatives if the parties had been advised of the date, time and venue of the hearing. It could hear evidence by telephone, closed circuit television or video link, but was required to hold a hearing in public unless it considered it was in the public interest or the interests of justice to conduct it in private. The Board was required to give reasons for any decision it made and was bound by the laws of natural justice. Section 50Q provided for a penalty of 10 penalty units for acts done in contempt of the Board.

8 In pt IIIBA, provision was made for review by VCAT of decisions of the RAD Boards. The part contained only two provisions. Section 83OH provided as follows:

83OH Review by VCAT of decisions of [RAD Boards]

(1) A person whose interests are affected by a decision made by a [RAD Board] may apply to VCAT for review of that decision.

(2) A Steward may apply to VCAT for review of a decision made by a [RAD Board].

9 Another provision, s 83OI, provided for a time limit of 28 days for making an application for review. Any review was then governed by the provisions of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').

Legislative provisions — from 1 August 2019

10 As mentioned, the RAIDS Act amended the *Racing Act* with effect from 1 August 2019.

11 By s 1, the purposes of the RAIDS Act included, relevantly, to (a) replace the RAD Boards with a new body established under the *Racing Act* (the VRT), (b) provide for the powers of the VRT to hear and determine a matter, (c) limit the right of appeal to VCAT to decisions made by the VRT in respect of a penalty, and (d) make other consequential amendments to the *Racing Act* and the VCAT Act.

12 Section 14 of the RAIDS Act substituted a new pt IIA containing provisions dealing with the VRT. Section 50B established the VRT. Its functions include to hear and determine a charge made against a person for a serious offence: s 50C(c). The VRT must hear and determine the charge if a person has been charged with a serious offence: s 50O. Section 50Q deals with proceedings of the VRT. Like its predecessors, it may conduct the hearing in the presence of the parties or their representatives, or without some or all of them if they have been advised of the date, time and venue of the hearings. Again, the VRT may conduct a hearing in private if it considers it is in the public interest or the interests of justice to do so, but must otherwise hold its hearings in public. The VRT is bound by the rules of natural justice but is not bound by the rules of evidence except if it adopts those rules. It may inform itself on any matter as it sees fit and must conduct each hearing

expeditiously and with as little formality and technicality as is reasonably possible.

13 The new pt IIA contains significant powers which were not available to the RAD Boards. Section 50S permits the VRT to serve written notice on a person requiring that person to produce a specified document or attend a hearing. The Supreme Court may order a person who has failed to comply with such a notice without reasonable excuse to comply with it: s 50V. Section 50U provides for examples of reasonable excuses including legal professional privilege and public interest immunity. However, the fact that the information or document might tend to incriminate a person or make the person liable to a penalty is not a reasonable excuse: s 50ZJ. Failure to comply with a notice is an offence punishable by imprisonment for six months: s 50ZG.

14 Part IIA also provides for wider powers than its predecessor in relation to the conduct of hearings. Evidence may be given orally, in writing, by telephone or closed circuit television or video link and the VRT may require a person to give evidence or answer questions on oath or affirmation: s 50Y. A person who is served with a notice and refuses or fails to take an oath or make an affirmation when required to do so, or refuses or fails to answer questions when required by the VRT to do so, commits an offence punishable by imprisonment for six months: s 50ZH. It is also an offence to make a statement to the VRT that the person knows to be false or misleading in a material particular or to produce a document of that kind: s 50ZI. Finally, s 50ZK provides for contempt of the VRT in the same terms as former s 50Q, but the maximum penalty is now 240 penalty units or imprisonment for two years, or both.

15 Section 23 of the RAIDS Act also substituted a new s 83OH in pt IIIBA, in the following terms:

> **Review by VCAT of decisions of the [VRT]**
>
> (1) A person whose interests are affected by a decision made by the [VRT] may apply to VCAT for review of that decision in relation to a penalty imposed on the person by the [VRT].

(2) A Steward may apply to VCAT for review of a decision made by the [VRT] in relation to a penalty imposed by the [VRT].

16 Section 25 inserted pt X, containing transitional provisions. Section 108 of the *Racing Act* now provides for the transition to the VRT, in the following terms:

Transition of [RAD Boards] to the [VRT]

(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 [a RAD Board] and has not been determined by the relevant Board; or

(ii) has not been heard or determined by the [RAD Board]; or

(b) a person has lodged an appeal against a Steward's decision with [a RAD Board] and the appeal has not been heard or determined by the relevant Board; or

(c) any other proceeding has commenced with [a RAD Board] and the proceeding has not been determined by the relevant Board.

(2) Despite the repeal of section 5G by the [RAIDS Act], the substitution of Part IIA by the [RAIDS Act] and the repeal of Part IIIA by the [RAIDS 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.[1]

...

17 Section 109 addresses the review of decisions of the RAD Boards, as follows:

Review of decisions of [RAD Boards]

(1) This section applies if immediately before the commencement day—

(a) a person whose interests are affected by a decision of a [RAD 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 [RAD Board] under section 83OH(2).

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1 Section 5G provided for hearings of the RAD Board for horse racing, and pt IIIA provided for the RAD Board for greyhound racing.

(2) Despite the substitution of section 83OH by the [RAIDS 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 [RAIDS Act], VCAT may conduct the review under the [VCAT Act] on and after the commencement day as if—

(a) section 83OH had not been substituted by the [RAIDS Act]; and

(b) Part 16D of Schedule 1 to the [VCAT Act] had not been enacted.

18 Section 110 provides for existing reviews yet to be finalised by VCAT, as follows:

Review of decisions by VCAT

(1) This section applies if immediately before the commencement day—

(a) a person or a Steward has applied to VCAT for a review of a decision made by a [RAD Board] under section 83OH; and

(b) the review has not been finalised by VCAT.

(2) Despite the substitution of section 83OH by the [RAIDS Act], VCAT may continue to conduct the review under the [VCAT Act] on and after the commencement day as if—

(a) section 83OH had not been substituted by the [RAIDS Act]; and

(b) Part 16D of Schedule 1 to the [VCAT Act] had not been enacted.

19 Finally, s 35 of the RAIDS Act inserts a new pt 16D in the VCAT Act. The effect is to include a new cl 66N in sch 1 to that Act, in the following terms:

66N [VCAT] bound by findings of fact made by [the VRT]

Despite section 51, in determining a proceeding for review of a decision of the [VRT] under s 83OH of the **Racing Act 1958** in relation to a penalty imposed by the [VRT], [VCAT] is bound by the findings of fact which were made by the [VRT].

Legislative provisions — **ILA**

20 Section 14(2) of the ILA relevantly provides:

> Where an Act or a provision of an Act—
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> (a) is repealed or amended; or
>
> (b) expires, lapses or otherwise ceases to have effect—
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> 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;
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> ...
>
> (g) affect any investigation, legal proceeding or remedy in respect of anything mentioned in paragraphs (e) to (f)—
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> 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.

21 The first question which the proposed appeal presents is whether the applicants had an accrued right, when the RAIDS Act commenced, to seek review by VCAT of any adverse decision which the RAD Board might come to make in the hearing which was at that time yet to be held. If so, the second question is whether there is any intention expressly appearing in the RAIDS Act contrary to the preservation of that right as described in s 14(2).

22 The primary judge decided both those issues adversely to the applicants.[2] The proposed appeal relies on two grounds, addressing each of the questions.

23 It is tempting, faced with such an issue, to turn directly to the specific transitional provisions and construe them to see whether they cover the case, turning then to the ILA only if the party asserting the accrued right has not already

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2 *Douglas v Harness Racing Victoria* [2020] VSC 568 ('Reasons').

succeeded in establishing its case without resort to the ILA. The respondent, Harness Racing Victoria, invited the Court to proceed on this basis.[3] Obviously, if the transitional provisions specifically preserve the right in question, the ILA has no work to do. But otherwise, the formation of a view as to the proper construction of the statute in isolation may have the effect of overlooking the role and undermining the potential significance of the ILA.

24 More fundamentally, in principle what is taking place is a single act of statutory construction. Gleeson CJ explained the correct approach in *Attorney-General (Qld) v Australian Industrial Relations Commission*:[4]

> Acts of Parliament are drafted, and are intended to be read and understood, in the light of the *Acts Interpretation Act*. A particular Act, and the *Acts Interpretation Act*, do not compete for attention, or rank in any order of priority. They work together. The meaning of the particular Act is to be understood in the light of the interpretation legislation. The scheme of that legislation is to state general principles that apply unless a contrary intention is manifested in a particular Act.[5]

25 Applying this understanding to the present kind of issue, Gleeson CJ stated:

> When a statute changes the law, the effect of the change upon existing rights, liabilities, claims, or proceedings is determined by the meaning of the statute. The common law developed rules of statutory construction as an aid to discovering that meaning. Such rules involved presumptions; but, being rules of construction, they were subject to any contrary intention evinced with sufficient clarity in the statute. ...
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> The *Acts Interpretation Act 1901* (Cth) is, according to its long title, an Act for the interpretation of Acts of Parliament and for shortening their language. It shortens the language of Acts of Parliament by making it unnecessary for Parliament to enact elaborate and repetitive provisions anticipating possible uncertainties and declaring the legislative intention on those points. Naturally, the *Acts Interpretation Act* makes repeated reference to the concept, central to statutory construction, of intention. Parliament, having expressed its intention as to the way in which its enactments are to be interpreted, frames its legislation accordingly. But its general expressions of intention are subject to anything that appears in the particular legislation.[6]

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3 The respondent, while not actively opposing VCAT's jurisdiction, acted as contradictor in this Court.

4 (2002) 213 CLR 485 ('*AIRC*').

5 Ibid 492–3 [8].

6 Ibid 492 [6]–[7] (citation omitted). See also *Waterfront Place Pty Ltd v Minister for Planning* (2019) 59 VR 556, 565–6 [36]–[37] (Maxwell ACJ, T Forrest and Emerton JJA) ('*Waterfront*').

26 It follows that the RAIDS Act is taken to have been drafted on the basis that s 14(2) would operate to assist in identifying its meaning. The question is therefore, not what the RAIDS Act by its own terms provides in respect of the ability of the applicants to seek a review in VCAT, but what it provides when read with s 14(2). The answer to that question involves, first, identifying whether the applicants had an accrued right of the kind to which s 14(2) applies, and secondly, if they did, determining whether the RAIDS Act expressly provides to the contrary of s 14(2)(e) when it says that the right is unaffected by the RAIDS Act. In the absence of such contrary provision, the default position is that an accrued right is preserved.

Was there an accrued right? — proposed ground 1

27 The applicants placed emphasis on the decision of the Privy Council in *Colonial Sugar Refining Co, Ltd v Irving*.[7] In that case, the appellant company brought an action in the Supreme Court of Queensland against the Collector of Customs. After the proceeding was commenced, but before argument was heard, the *Judiciary Act 1903 (Cth)* commenced. It provided that every decision of a Court of a State, from which an appeal formerly lay to the Privy Council, was final and conclusive except so far as an appeal may be brought to the High Court. After judgment was subsequently given in the Supreme Court, the company successfully applied to the Supreme Court for leave to appeal to the Privy Council.[8] The Collector petitioned the Privy Council for an order that the appeal be dismissed for want of jurisdiction as a result of the passing of the *Judiciary Act*.

28 The Privy Council dismissed the petition. Lord Macnaghten, delivering the judgment, stated:

> As regards the general principle applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a

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7 [1905] AC 369 ('*Colonial Sugar*').

8 *Colonial Sugar Refining Co, Ltd v Irving* [1904] St R Qd 18, 24–6 (Cooper CJ); cf 32–4 (Real J, dissenting).

> long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. *To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights* contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.[9]

29 The facts of *Colonial Sugar* bear a close similarity to the present case. In each case, the appeal or review right was replaced while the underlying proceeding was pending. The opportunity to pursue that right had not arisen, being contingent on the pending decision being made and proving adverse to the putative appellant or applicant for review. In some respects the present is a stronger case: one distinction is that under the amendment in issue in *Colonial Sugar* a right of appeal still existed, but it was exercisable to a different tribunal (the High Court, rather than the Privy Council). Here, the new right of review lies to the same tribunal, namely VCAT, but it is significantly attenuated because it extends only to the question of penalty, and VCAT is bound by the factual findings of the VRT. Moreover, the new right of review in this case is not available to the applicants at all because they have no proceeding before the VRT.

30 The respondent noted a distinction said to distinguish the present case, namely that *Colonial Sugar* concerned a judicial proceeding, whereas here we are concerned with administrative merits review of a disciplinary hearing conducted by a tribunal. The submission went further, and contended that the applicants would not have had an accrued right to review in VCAT even if, at the time the RAIDS Act commenced, they had commenced an application for review. On this argument, the transitional provisions went further than would otherwise have been the case, by preserving the position of an applicant who had sought review in VCAT before the

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9 Ibid 372–3 (emphasis added).

new regime commenced.[10]

31 In support of this argument, the respondent referred to decisions in which a party had sought review of a decision refusing to grant or confer a right, as distinct from a decision whether or not to recognise a pre-existing right. In particular, in his dissenting reasons in *Esber v Commonwealth*,[11] Brennan J drew a 'critical' distinction between a judicial proceeding to enforce an accrued right and an administrative proceeding to determine whether a right should be granted.[12] The respondent submitted that the present case was of the latter kind. The distinction was supported by the Privy Council's decision in *Director of Public Works v Ho Po Sang*,[13] where it was said that, under a provision equivalent to s 14(2) of the ILA, the former kind of proceeding is preserved but the latter is not.[14] The respondent submitted that the majority decision in *Esber* depended on the construction of the transitional provisions in that case and that this had been confirmed by the later High Court decision in *AIRC*. The observations of the majority contrary to the reasoning of Brennan J were therefore not part of the ratio of the case and (it seemed to be said implicitly) need not be followed.

32 *Esber* concerned an application to redeem weekly compensation payments by way of a lump sum. After the responsible officer refused the appellant's application, the appellant sought review in the Administrative Appeals Tribunal ('AAT'). Before the matter was heard, the legislation was amended so that payments of the amount received by the appellant could not be redeemed. The majority decided in the appellant's favour without having recourse to s 8 of the *Acts Interpretation Act 1901 (Cth)*, which is relevantly in the same terms as s 14(2) of the ILA. However, they went on to address that provision.

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10 See [18] above; *Racing Act* s 110.

11 (1992) 174 CLR 430 ('*Esber*').

12 Ibid 449.

13 [1961] AC 901 ('*Ho Po Sang*').

14 Ibid 922 (Lord Morris of Borth-y-Gest for the Court).

33 The majority first stated that the equivalent of s 14(2)(g) operates in relation to a 'right' acquired or accrued as described in s 14(2)(e), and not independently of such a right.[15] This was a point also emphasised by the Privy Council in *Ho Po Sang*.[16] They went on to identify two bases on which the appellant had advanced this aspect of his case. By the first, the relevant right was a right to redemption of weekly payments. The majority identified difficulties with this approach and did not decide the point. By the second basis, the right was a right to review of the original decision. The majority stated that the appellant had a right to have his claim accepted if the decision-maker had wrongly refused it. They explained:

> Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely 'a power to take advantage of an enactment'. Nor was it a mere matter of procedure; it was a substantive right. Section 8 of the *Acts Interpretation Act* protects anything that may truly be described as a right, 'although that right might fairly be called inchoate or contingent'. This was such a right. It was a right in existence at the time the 1971 Act was repealed. That being so, and in the absence of a contrary intention, the right was protected by s 8 of the *Acts Interpretation Act* and was not affected by the repeal of the 1971 Act.[17]

One of the authorities relied on in this passage, 'by way of analogy', was *Colonial Sugar*.

34 In *AIRC*, the High Court distinguished judicial functions from the exercise of arbitral functions. In that case, a 'right' to have an arbitration conducted was not an accrued right of the kind protected by the interpretation legislation, being a 'right', not to have existing legal rights and liabilities determined, but to have future conditions decided which would then become legal rights according to statute.[18] The plurality distinguished *Esber* on two bases. First, the majority had allowed the appeal by reference to the specific transitional provisions in that case. Secondly, the 'accrued right' which they had considered concerned the continuation of an

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15 *Esber* (1992) 174 CLR 430, 439 (Mason CJ, Deane, Toohey and Gaudron JJ).

16 [1961] AC 901, 922.

17 (1992) 174 CLR 430, 440–1 (citations omitted).

18 (2002) 213 CLR 485, 503–5 [44]–[45] (Gaudron, McHugh, Gummow and Hayne JJ).

application for review by the AAT which had already been lodged.[19]

35 We are unpersuaded that the majority reasons in *Esber* should be left out of account in the manner for which the respondent contended. *Esber* was not disapproved in *AIRC*.[20] Moreover, the majority referred to the 'accrued right' analysis without disapproval. The reasoning of the majority on this matter is plainly 'seriously considered dicta of a majority' of the High Court based on 'long-established authority'.[21] It was examined without disapproval in a later High Court decision. As such, this Court should follow it.

36 We acknowledge, however, that the reasoning of the majority in *Esber* is capable of being read as depending on the fact that an application for review had already been lodged when the amending legislation took effect in that case.[22] To that extent, *Esber* is distinguishable. At the same time, the majority reasoning plainly recognises that a right, including a right to administrative review, may be 'inchoate or contingent' and still constitute an accrued right for the purposes of the interpretation legislation.

37 Beyond these conclusions, we need not decide the respondent's submission that, even if the present applicants had lodged an application for VCAT review before the new regime commenced, they would not have had an accrued right to have that review completed within the meaning of s 14(2)(e) of the ILA. The arguments can be considered more conveniently by reference to the facts of this case, in which no such application had been made, nor could have been made, given that the RAD Board had not made its decisions.

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19 Ibid 504–5 [50]; see also 528–9 [127]–[128], 531 [139] (Kirby J), 537 [157] (Callinan J).

20 The Court appears to have been invited to do so: ibid 531 [137] (Kirby J).

21 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [134], 155 [147] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

22 See, eg, *Re Ross; Ex parte Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 FCR 399, 414–15 [52]–[53], 416–17 [59] (Gray, Lee and Stone JJ); *Yao v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 583, 590 (Black CJ and Sundberg J). But see also *Repatriation Commission v Keeley* (2000) 98 FCR 108, 131–2 [80] (Kiefel J).

38 The decision in *Colonial Sugar* plainly accepts that a right of appeal may exist in respect of a pending but incomplete proceeding, to which the common law presumption against retrospective operation of legislation applies. In the language of s 14(2), which replicates the common law,[23] a right may 'accrue' or be 'acquired' in these circumstances.

39 We were not taken to any authority to the contrary of *Colonial Sugar*. As noted above, it was cited with approval by the majority in *Esber*.[24] It is consistent with the observation that rights may be inchoate or contingent for these purposes.

40 That suffices to establish that, if the 'right' to seek review in VCAT was a right within the meaning of s 14(2) of the ILA, then that right was accrued, or acquired, by the applicants in the present case notwithstanding that the RAD Board had not made a decision when the RAIDS Act commenced. Indeed, there are other cases where a 'right' to pursue an appeal or review mechanism was preserved, on the basis that it had accrued or been acquired, notwithstanding that the underlying decision had not yet been made, or the appeal or review had not been commenced, when the relevant legislative change took effect. It is convenient to refer to those cases, which will bear on the question whether the 'right' of review with which this case is concerned is, as the respondent contended, distinct from those rights that have been found to be preserved in the authorities.

41 The first case, *Hyde v Lindsay*,[25] is a decision of the Supreme Court of Canada which predates *Colonial Sugar* but is on all fours with it. The Court held that a provision abolishing a right of appeal, which commenced after a trial judgment was reserved but before judgment was given, was inapplicable to deprive the unsuccessful party of the right to appeal the eventual judgment. The Court relied on

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23 *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, 15 [27] (French CJ, Crennan, Kiefel and Keane JJ) ('*ADCO*'); *Waterfront* (2019) 59 VR 556, 564 [30] (Maxwell ACJ, T Forrest and Emerton JJA).

24 See also *Willmott v Kaufline* (1909) 9 CLR 36, 45 (O'Connor J, Isaacs J relevantly agreeing at 47); *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co, Ltd* (1942) 66 CLR 161, 185 (Starke J), 194 (Williams J).

25 (1898) 29 SCR 99 (Taschereau J for the Court).

previous authority without referring to any interpretation legislation.

42 A somewhat different situation arose in the New Zealand case *In re An Appeal by Parekaiura Parekura*.[26] This case concerned an application to a Native Land Court to determine the amount of compensation payable in respect of 'Native land' taken for public works. An appeal lay from that court to a Native Appellate Court upon any ground of law or fact, including the inadequacy of any compensation awarded. While a claim was pending in the Native Land Court, legislation was passed stating that the award of that court was final as regards the amount awarded. Cooper J, constituting the Supreme Court of New Zealand (as it was in 1912), applied *Colonial Sugar* to hold that the parties in the Native Land Court had a vested right of appeal to the Native Appellate Court, which could only be taken away by express language or necessary intendment. This was correlative to the duty of the Native Land Court 'as a judicial tribunal of ascertaining the amount of compensation payable by the Crown to the appellants, and of making an award to that effect'.[27] In this way, the right in question resulted from the fact that the appellants had engaged the duty of the lower court to perform its statutory function. It is not entirely clear whether *Parekaiura Parekura* involved proceedings to acquire rights, or proceedings to recognise existing rights. Nor is it apparent whether the specialist 'courts' in question were exercising judicial power or were tribunals acting in a judicial manner. These distinctions were not drawn in the judgment.

43 *Parekaiura Parekura* was applied by the New Zealand Court of Appeal in *Accolade Autohire Ltd v Aeromax Ltd*,[28] a case about judicial appeals in which the relevant appeal had, again, not been instituted when the relevant amendment commenced.

44 Another case involving judicial proceedings is *Sunskill Investments Pty Ltd v*

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26 (1912) 31 NZLR 1074 ('*Parekaiura Parekura*').

27 Ibid 1077.

28 [1998] 2 NZLR 15, 18 (Keith J for the Court).

Townsville Office Service Pty Ltd.[29] That case concerned the introduction of a jurisdictional limit on appeals, which commenced after an appeal had been commenced, but before it was heard. McPherson J applied *Colonial Sugar* and stated:

> A right of appeal that exists when the proceedings are instituted is considered as inhering in the proceedings from commencement of the action, and so will not be affected by subsequent statutory restriction unless it is plain that the restriction is intended to have retrospective operation.[30]

This case again concerned an appeal to a court. The above reasoning appears not to depend on the fact that an appeal had been commenced.

45 A case closer to the present is *Dolphin v Workers Rehabilitation and Compensation Corporation.*[31] *Dolphin* is significant because it concerned a right of administrative appeal to a statutory tribunal rather than an appeal to a court as part of a judicial proceeding. The appellant had sought workers' compensation from the relevant statutory corporation and initially obtained a favourable amount. A subsequent ruling reducing the amount was overturned by a review officer's determination. The corporation sought to appeal to the statutory tribunal. Before it did so, but after the determination was made, the legislation was amended to replace the appeal procedure with a different system of review. Cox J referred to *Colonial Sugar* and *Esber* in holding that there was an accrued right of appeal to the statutory tribunal which was preserved in the absence of a contrary intention.[32] The relevant passages of his reasons were quoted with approval by Kourakis CJ in *R v Hamra.*[33]

46 Finally, in *Rocter Tanks Pty Ltd v Adam,*[34] the Full Court of the South Australian Supreme Court again applied *Colonial Sugar*, albeit with misgivings, to

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29 [1991] 2 Qd R 210 ('*Sunskill*').

30 Ibid 218 (Demack J agreeing at 211). See also *Holts Hill Quarries Pty Ltd v Gold Coast City Council* [2001] 1 Qd R 372, 376 (de Jersey CJ, Thomas JA and Helman J).

31 (Full Court of the Supreme Court of South Australia, Cox, Lander and Bleby JJ, 9 December 1997) ('*Dolphin*').

32 The separate reasons of Lander J and Bleby J were to similar effect.

33 (2016) 126 SASR 374, 381–2.

34 (2001) 80 SASR 214, 227 [98]–[99] (Perry J, Doyle CJ agreeing at 215 [1], Bleby J agreeing at 228 [110]).

hold that a right of appeal from the Magistrates' Court to the Supreme Court accrued before judgment in the lower court proceedings was given.

47 The primary judge in the present case held that the applicants did not have an accrued right to apply to VCAT under the old s 83OH. She relied in part on the decision of Niall JA in *Spear v Hallenstein*.[35] The plaintiff in that case sought to rely on a statutory provision which had permitted a person to seek review of a coroner's findings, but which had been repealed before the plaintiff sought any review. This was held not to have created any right, but an ability to take advantage of an enactment. The case is distinguishable because the provision in question enabled any person to seek the review. In those circumstances, it would have been highly artificial to regard persons as having accrued rights under the legislation if they had taken no step to invoke the section before its repeal. Unlike the present case, the plaintiff in *Spear* could not be said to have an 'inchoate' or 'contingent' right.

48 Similarly, in *Thomas v Victorian Building Authority*,[36] upon which the judge and the respondent also relied, no inquiry had been commenced when the relevant review provision was repealed. Again, the plaintiff had taken no step, and none had been taken against him, under the relevant regime before it was amended. Any question of review was therefore remote and entirely hypothetical.

49 In both these cases, there was simply no foundation upon which to found the suggested right of review. Here, there was a matter pending in the RAD Board. As *Esber* confirms, the right may be inchoate or contingent – here, contingent on the pending proceeding yielding an adverse result. *Colonial Sugar* and like cases show that the right need not be available for exercise at the time of the relevant amendment or repeal in order to fall within the protection of s 14(2) or its common law equivalent.

50 These cases clearly establish that a right of appeal to a court accrues when the

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35 [2018] VSC 169 [56] ('*Spear*'); Reasons [53]–[54].

36 [2020] VSC 150 ('*Thomas*').

matter is pending in the lower court or tribunal, and not when that body delivers judgment or makes its decision.

51 The same logic would suggest that rights of appeal or review to bodies other than courts likewise accrue when a matter is before the primary decision-maker. Although the majority in *Esber* stated that the right to AAT review accrued once an application had been lodged, we do not take that statement to have overruled the above line of authority or to have suggested it operates differently in respect of administrative review. To the contrary, as noted, *Colonial Sugar* was one of the cases cited by the majority.

52 That raises the question whether such other rights, and particularly the 'right' in the present case to seek VCAT review of a RAD Board decision, lie within the 'rights' to which s 14(2)(e) of the ILA applies. On that question, considerations of principle and authority point to an affirmative answer.

53 The respondent sought to distinguish between appeals as part of an existing judicial proceeding, as in *Colonial Sugar*, and administrative rehearings such as that in *Esber*. It was submitted that disciplinary hearings stood apart from judicial proceedings and were administrative in nature.

54 In our opinion, these distinctions are not especially helpful in this case. A hearing, or rehearing, to decide upon and impose liability for a penalty is not entirely dissimilar to a proceeding for the judicial determination of rights, at first instance or on appeal. But in any event, the majority in *Esber* considered the right of AAT review in that case to be a right to which the interpretation legislation was capable of applying.[37] It involved no judicial proceeding, but a rehearing of an application for the exercise of a statutory power to redeem compensation payments. That case is not unlike *Dolphin*, which concerned tribunal review of an assessment of compensation, and *Parekaiura Parekura*, where compensation was determined by

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37 *Esber* (1992) 174 CLR 430, 440 (Mason CJ, Deane, Toohey and Gaudron JJ); cf *Repatriation Commission v Keeley* (2000) 98 FCR 108, 131–2 [80] (Kiefel J).

specialist 'courts'. Even if the right of VCAT review is characterised as 'administrative', therefore, we can see no principled basis for distinguishing appeals to courts and other rights of appeal or review on the suggested basis.

55 The applicants submitted that the more relevant distinction was that drawn in the cases between an action to recognise an existing right and an ability to take advantage of an enactment so as to have a right created. The present case was said to be of the former kind because the issue was how to characterise past events and what consequences should attach to that characterisation. The 'right' to seek VCAT review, being a right to pursue a rehearing, was said to be of the same character. Again, this distinction is not especially helpful in the present context. As in *Esber* and the related cases, the right here is the very right of review itself, not any right that may be recognised or acquired in that process. But if the distinction is to be drawn, a disciplinary case is closer to the former than the latter category.

56 In our view there is therefore no basis, in the distinctions which have been drawn in the authorities, for treating this case any differently to *Colonial Sugar*.

57 Finally, the primary judge referred to this Court's decision in *Felman v Law Institute of Victoria*,[38] in which it was held that the Law Institute of Victoria had, after commencing a proceeding for orders restraining the defendant from practising as a solicitor, a right to have the Court determine that proceeding. The judge accepted that it would follow that the stewards had a right to have the RAD Board hear and determine the charges against the applicants in this case. We agree. It likewise follows, in our view, on the authority of the *Colonial Sugar* line of cases, that the parties to the proceeding before the RAD Board had a right to engage the former review procedure in VCAT in respect of the decision of that Board once it was made.

58 In summary, principle and authority support the application of *Colonial Sugar* to this case. Accordingly, when the RAIDS Act commenced, the applicants had an accrued right, within the meaning of s 14(2)(e) of the ILA, to seek review in VCAT of

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38 [1998] 4 VR 324; Reasons [48].

any decision adverse to their interests that the RAD Board might make in the proceeding then pending.

59 The question then is whether that right was preserved by operation of s 14(2) or whether the RAIDS Act provided to the contrary.

Was there a contrary intention in the RAIDS Act? — proposed ground 2

60 Section 14(2) provides for the preservation of rights to which it applies 'unless the contrary intention expressly appears'. In the context of comparable legislation where the word 'expressly' does not feature, the contrary intention must appear 'with reasonable certainty'.[39] That will be so if it appears 'clearly' or 'plainly' from the text and context of the provisions in question that they are intended to operate inconsistently with the preservation of the relevant right.[40] The word 'expressly', which features in s 14(2), does not mean to exclude a contrary intention that appears only by necessary implication. To the contrary, 'expressly' means 'plainly', 'clearly', or 'by necessary implication'.[41]

61 The applicants submitted that the transitional provisions were silent as to the availability of VCAT review of RAD Board decisions made after 1 August 2019. It was submitted that this silence could not be construed as evincing the requisite intention to deny review, especially when regard is had to extrinsic materials. In particular, the statement of compatibility under s 28(2) of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') made no reference to the denial of rights of review; it spoke only of 'narrowing' rights of appeal.[42]

62 The reason for doing this, as articulated in the Second Reading Speech, was

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39 *ADCO* (2014) 254 CLR 1, 15 [27] (French CJ, Crennan, Kiefel and Keane JJ), 22 [52] (Gageler J).

40 Ibid 22 [52] (Gageler J).

41 *Mitchell v Latrobe Regional Hospital* (2016) 51 VR 581, 593–6 [51]–[64] (Osborn and Beach JJA and J Forrest AJA).

42 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 2018, 2087, 2090 (Martin Pakula, Minister for Racing).

that VCAT was not well equipped with the necessary expertise to deal with matters under the racing codes.[43] Instead, the VRT, a specialised racing tribunal, was being given powers previously available to VCAT but not the RAD Boards. As the VRT would now conduct hearings, merits review by VCAT was no longer appropriate

63 It was submitted that, in those circumstances, it would be anomalous to deprive those with matters pending in a RAD Board of VCAT review, especially by taking away even the right to a review on penalty, which right was available in the case of decisions of the VRT (albeit that VCAT would be bound by the findings of fact made by the VRT).

64 The applicants also submitted that s 32 of the Charter, which requires the Court to interpret statutory provisions, so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights, tells against identifying a contrary intention. Reliance was placed on the right to a fair hearing (being the VCAT hearing) in s 24(1) of the Charter.

65 The respondent contended that a sufficiently clear contrary intention was evinced. The transitional provisions in the RAIDS Act were said to identify exhaustively the circumstances in which review under the former s 83OH would continue to lie. Reference was made to a number of cases in which transitional provisions were held to have such an operation. The respondent submitted that the transitional provisions in this case were to be construed having regard to the purpose stated in s 1(a)(iv) of the RAIDS Act, namely 'to limit the right of appeal to VCAT' to decisions of the VRT on a penalty imposed by the VRT.

66 The respondent conceded that it might seem 'incongruous' that persons in the applicants' circumstances were to have no right of merits review, but submitted that the incongruity diminished once it was appreciated that the applicants had a 'fair and comprehensive' first instance disciplinary hearing chaired by a judicial officer

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43 Ibid 2091.

and retained the right to appeal on a point of law to the Supreme Court,[44] and that, even under the new regime, parties were entitled only to very limited VCAT review.

67 The respondent submitted that the extrinsic materials were no substitute for the statutory text, which had comprehensively addressed the position regarding cases that were not completed when the new regime took effect. It was said that if Parliament had wanted to go further and provide for persons in the applicants' position to have VCAT review rights, it would have been a simple matter to say so.[45]

68 In our opinion, the RAIDS Act does not clearly or plainly provide that the right to VCAT review which had accrued to the applicants was not to be preserved by operation of s 14(2) of the ILA. It is true that new ss 108–110 of the *Racing Act* contain provisions dealing with the position of certain classes of person whose cases had yet to be completed when the new regime commenced, and that persons with matters pending in a RAD Board were among those persons. It is also true that the latter class of cases was expressly addressed by providing (in s 108) for the RAD Board to finish hearing and determining the matter, and that no provision was then made for VCAT review of the resulting determination. Instead, pt IIIBA is conspicuously absent from the provisions whose operation is preserved by s 108(2).

69 If that outcome sat comfortably with the context and purpose of the RAIDS Act, then it may be that it could be said to emerge with sufficient plainness and clarity that the accrued right to review was not preserved. But it does not. Instead, the outcome is anomalous. It is anomalous because the result would be that persons in the applicants' position, and the stewards in such cases, would never have their cases heard by a body having full powers of inquiry (VCAT under the former regime or now the VRT), despite it being the policy of the *Racing Act*, before and after the RAIDS Act, to provide for such hearings to occur. It is even more anomalous because VCAT review would be denied altogether, rather than merely narrowed or

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44 This submission appeared to allude to judicial review.

45 *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143, [82] (Maxwell P, Beach JA and McMillan AJA).

limited, in cases such as the present, which would be the only ones in which no VCAT review in respect of penalty was available. These anomalies are not lessened by the fact that, in common with all other persons whose interests are affected by decisions of a RAD Board or the VRT, the applicants are entitled to seek judicial review in the Supreme Court; merits review is a different avenue of relief entirely.

70 Viewed in this light, the irresistible conclusion is that, far from being intended to be exhaustive, ss 108-110 are simply silent as to the class of case of which the present is an example. In that situation, the 'gap' is filled by s 14(2). It is not a matter of Parliament having not articulated its intention. It has done so, through s 14(2).

71 The cases on which the respondent relied are distinguishable because, in each of them, the context pointed to the opposite conclusion. First, in *GF Heublein and Bro Inc v Continental Liqueurs Pty Ltd*,[46] an application was made to have a trade mark removed from the register for non-user. Before the application was determined, the legislation was repealed. The new statute provided that trade marks registered under the repealed statute were deemed to be registered under the new one. The new statute made 'somewhat different provision' for removal of trade marks for non-user, which provision would have been available in respect of the trade mark in question, such that it would have been an 'anomaly' for the previous regime to have been applicable as well. Ultimately, the High Court held that it was 'conclusive' that there were 'exhaustive' transitional provisions by which pending applications for registration of a trade mark or of a person as the registered user of a trade mark were preserved under the former statute.[47]

72 This case dealt with a statutory register which was replaced with a new regime under which different provision was made for removal from the new register. The only pending applications which were preserved were applications for entry onto the register. Otherwise, trade marks on the former register were deemed

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46 (1962) 109 CLR 153 ('*Continental Liqueurs*').

47 Ibid 161 (Dixon CJ, Taylor and Windeyer JJ).

to be on the new register. In circumstances where the possibility of removal from that new register for non-user was specifically addressed, without preserving pending applications for such removal under the repealed legislation, the transitional provisions could more readily be seen to be exhaustive and to exclude any accrued right to seek removal under the former statute. Here, in contrast, the anomaly arises on the opposite construction. The present case also lacks any provision equating to the deeming provision in *Continental Liqueurs*.

73 The respondent also relied on *Helmer v State Coroner of Victoria*.[48] The question in that case was whether an application for the reopening of an inquest under s 59 of the *Coroners Act 1985* could proceed after the repeal of that Act. The repealing Act provided that, if the hearing of an application under s 59 had begun, the repealed Act continued to apply to that hearing. Habersberger J held that an intention contrary to s 14(2) expressly appeared from that transitional provision, because, in effect, it addressed the issue and made provision in terms more limited than s 14(2) would have done.[49]

74 Again, that case differs from the present. The repealing statute provided for continuation of applications where a hearing had been commenced and it would have been contrary to that provision to allow for the continuation of hearings where no hearing had been commenced. There is no equivalent in the RAIDS Act, where nothing at all is said about VCAT review of decisions pending in the RAD Boards. The identification of a contrary intention in *Helmer* also involved no anomaly of the kinds identified earlier in the present case. It was open to the plaintiff to pursue an application under provisions of the new legislation.

75 *Helmer* was followed in *Spear*.[50] Again, a plaintiff sought to rely on s 59 of the *Coroners Act 1985* to reopen an inquest. Here, however, not only had there been no hearing, but no application had been made before the repeal of that Act. Niall JA

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48 [2011] VSC 25 (*'Helmer'*).

49 Ibid [41] (Habersberger J).

50 [2018] VSC 169.

decided the case on the basis that no relevant right had accrued. He went on to hold that, in any event, to preserve the ability to commence an application would completely undermine the repeal of s 59. As such, the repeal of s 59 itself manifested the necessary clear or plain intention to abrogate any right to commence a proceeding under that provision.[51] Moreover, the transitional provision applied, consistently with *Helmer*, so as to be exhaustive and to manifest an intention contrary to the application of s 14(2) to any such right.[52] Niall JA pointed out that it would be anomalous if a person whose proceeding was awaiting hearing at the time of the repeal could not have that proceeding heard, but a person who had not commenced a proceeding before the repeal could still do so and have their matter heard.[53] This case is again different, because in the present case the anomalous or incongruous outcome is produced by reading the transitional provisions as exhaustive, rather than the reverse.

76 Finally, the respondent relied on *Thomas*.[54] In that case, a builder subject to a disciplinary proceeding argued that he had an 'accrued liability' to disciplinary action under the form of legislation as it stood before the commencement of provisions amending the *Building Act 1993*. Kennedy J held that there was no 'liability' of the kind asserted. But in any event, an express contrary intention under s 14(2) was disclosed by the amending legislation. In particular, transitional provisions permitted an abolished tribunal to continue and determine an inquiry that had already been commenced and this was to be taken as an exhaustive statement as to the circumstances in which that tribunal could continue to function.[55] The case is similar to those involving the coroner. To have held otherwise would have produced the result that the abolished tribunal could have heard disciplinary cases involving all past conduct, even though the transitional provision referred only

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51 Ibid [92]–[93].

52 Ibid [97]–[119].

53 Ibid [108]–[109].

54 [2020] VSC 150.

55 Ibid [119]–[126].

to inquiries already commenced. The case is likewise distinguishable from the present one.

77 The respondent drew attention in oral submissions to a passage in *AIRC* in which the plurality drew attention to an 'express transitional provision' and said it was 'properly to be regarded as exhaustive in respect of the transitional application of the repealed provisions to existing proceedings.[56] The judgment went on to say that an 'exhaustive transitional provision of this nature leaves no room' for provisions such as s 14(2) to operate. However, the High Court is not to be taken as laying down any rule that transitional provisions are invariably 'exhaustive' in this way. Where they are, by definition, a contrary intention is manifested. But the anterior question, whether the transitional provisions leave room for the preservation of accrued rights not expressly preserved, is the critical one. That is the question of statutory construction, decided in the ordinary way by reference to text, context and purpose. Again, in *AIRC*, the plurality pointed to the anomalous result which would have arisen had the transitional provision in question not been construed as exhaustive.[57]

78 The anomalies which would ensue from treating the transitional provisions in the present case as exhaustive also tell against relying on the purpose provision in s 1(a)(iv) of the RAIDS Act as the respondent contended. That provision is in terms too general to warrant it governing the construction of the more specific transitional provisions: the provision says nothing as to review of decisions made, or yet to be made, by RAD Boards.

79 Contrary to the submissions of the respondent and, to some extent, the reasons of the primary judge, this result does not give the extrinsic materials precedence over the statutory text. Nor does it impermissibly fill a 'gap' in that text. As mentioned at the outset, the text must be construed having regard to s 14(2). The

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56 (2002) 213 CLR 485, 509-10 [65] (Gaudron, McHugh, Gummow and Hayne JJ).

57 Ibid 510 [67].

question is whether the text, properly construed, excludes the operation of s 14(2). That question of construction cannot proceed without reference to statutory context and purpose.

80 In the circumstances, it is not necessary to consider the arguments based on the Charter.

81 We note finally an argument to the effect that the above construction leaves out of account the need for a provision conferring jurisdiction on VCAT. The short answer to that submission is that s 14(2) addresses that matter by providing that the 'investigation, legal proceeding or remedy', which includes the review, may be 'instituted, continued or enforced' as if the repealing provisions of the RAIDS Act had not been enacted.

Conclusion

82 Leave to appeal should be granted and the appeal allowed. In place of the orders of the primary judge, the appeal to the Trial Division should be allowed and the decision of VCAT that it lacked jurisdiction should be set aside. We will hear the parties as to costs.
