VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NOS. Z996/2019 & Z997/2019

CATCHWORDS

Racing Act 1958 (Vic), sections 108, 109 and 110 – establishment of Victorian Racing Tribunal – removal of VCAT's power to review findings on liability – transitional provisions – whether they apply to persons who, as at the commencement date, had a matter before the Racing Appeals and Disciplinary Board but that matter was not completed and no decision had been given.

APPLICANT IN Z996/2019	Ellen Tormey
APPLICANT IN Z997/2019	Glenn Douglas
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	A Dea, Senior Member
HEARING TYPE	Jurisdictional hearing on the papers
DATE OF HEARING	29 April 2020
DATE OF ORDER	19 May 2020
CITATION	Tormey v Harness Racing Victoria (Review and Regulation) [2020] VCAT 572

ORDER

1 Having found the Tribunal has no jurisdiction to hear and determine the application, under section 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), these proceedings are dismissed.

2 The Tribunal's stay orders made on 23 December 2019 are set aside.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL VCAT

A Dea
Senior Member

REASONS

Overview

1 Ms Ellen Tormey has been a licensed harness racing trainer since 2011, having been licensed as a driver in 2005. Mr Glenn Douglas was licensed as a driver in around 1992 and as a trainer in around 1994.

2 On 22 May 2019, Harness Racing Victoria (HRV) charged Ms Tormey and Mr Douglas with offences relating to the alleged stomach tubing of *The Boss Man*, on 1 December 2018, in contravention of the Australian Harness Racing Rules (the Rules), Rules 193(1) and 193(7).

3 On 8 July 2019, Ms Tormey was charged with presenting *Fremarksgonzo* to race on 13 April 2019 while not free of alkalinising agents contrary to Rule 190. Ms Tormey pleaded guilty to that charge.

4 Ms Tormey and Mr Douglas contested the charges concerning *The Boss Man* at a hearing before the Racing Appeals and Disciplinary Board for Harness Racing Victoria (RADB) on 24 and 25 September 2019.

5 On 11 December 2019, the RADB found both applicants guilty of *The Boss Man* related charges.

6 On 19 December 2019, the RADB gave its decision on penalty in respect of both applicants on *The Boss Man* charges. On the same day, the RADB gave Ms Tormey its decision on penalty in respect of the *Fremarksgonzo* charge.

7 The effect of the RADB's decisions were that Ms Tormey and Mr Douglas were both disqualified for two years.[1]

8 On 23 December 2019, the applicants applied to VCAT for review of the findings and penalties imposed on each of them in respect of *The Boss Man*. Ms Tormey also applied for review of the penalty imposed in respect of the *Fremarksgonzo* charge.

9 A question has arisen as to whether VCAT has power to hear and determine the review applications.

The jurisdictional issue

10 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.

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[1] Ms Tormey was disqualified for 18 months on the Rule 193(7) charge and disqualified for 12 months on the Rule 190(1) charge with six months to be served concurrently with the penalty that was imposed on the Rule 193(7) charge, making a total penalty of two years disqualification. Mr Douglas was disqualified for two years for breach of Rule 193(1).

11 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.

12 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.

13 At the directions hearing on 2 March 2019, HRV said it did not intend to take the jurisdictional point in these proceedings. It reiterated in its written submissions that it did not oppose jurisdiction saying it had been advised by the Office of Racing that the relevant amendments to the Racing Act had not been intended to remove the entitlement to review which had previously existed for people like these applicants. It nevertheless made its submissions in order to assist VCAT. It concluded that the Racing Act in its current form is silent on the applicants' right to review at VCAT and it suggests legislative amendment may be required.

14 As discussed below, VCAT cannot assume it has jurisdiction in a proceeding or disregard a question about that, even if it might seem just and fair to do so.

15 Unfortunate as it is for these applicants, I have found VCAT does not have jurisdiction to hear and determine these review applications whether as to findings or penalty. In those circumstances, the applications must be struck out for want of jurisdiction. It is also appropriate for the stay orders made on 23 December 2019 to be set aside.

16 I agree with HRV's suggestion that legislative amendment would be required if it was not intended for applicants in these circumstances to lose their entitlement to merits review at VCAT.

The nature of VCAT's jurisdiction

17 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.

18 The dilemma in this case was captured most acutely by Judge Bowman:

> [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 a 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* [my emphasis].[2]

19 The correct approach to statutory interpretation is well known. Its primary object is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of a provision must be determined by reference to the language of the instrument viewed as a whole. The process of construction must always begin by examining the context of the provision that is being construed. It is to be assumed that legislative provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. A court or tribunal construing a statutory provision must strive to give meaning to every word of the provision.[3]

20 I now turn to relevant provisions in the Racing Act.

The Racing Act

VCAT and the VRT's roles in disciplinary matters post 1 August 2019

21 Before 1 August 2019, section 83OH(1) said:

> 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.

22 After 1 August 2019, section 83OH(1) said:

> A person whose interests are affected by a decision made by 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.

23 The amendment to section 83OH(1) was made by section 23 of the *Racing Amendment (Integrity and Disciplinary Structures) Act 2018* (Vic) (Racing Amendment Act). Section 1(iv) of the Racing Amendment Act says one of its purposes is to limit the right of appeal to VCAT to decisions made by the VRT on a penalty imposed by the VRT.

24 Consistent with that intention, the Racing Amendment Act inserted into Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) a new Part 16D which contains section 66N. That section says, despite section 51 of the VCAT Act,[4] in determining a proceeding for review of a decision of the VRT under section 83OH of the

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2 *Wizardry Kennels v Semtech Animal Breeding Services* [2006] VCAT 2368 at paragraph 11.

3 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at paragraphs 69 to 70.

4 The effect of section 51 of the VCAT Act is that, on review, VCAT stands in the shoes of the decision maker and can exercise *all* of its powers and functions.

Racing Act *'in relation to a penalty'* imposed by the VRT, VCAT *'is bound by the findings of fact that were made by'* the VRT.

25 Section 50O of the Racing Act says that, if a person has been charged with a serious offence, the VRT must hear and determine that matter.[5] As I understand the offences in issue here are regarded as serious offences, if the charges had been laid after 1 August 2019, they would have been heard by the VRT rather than the RADB with a right of review to VCAT only on the question of penalty (section 83OH).

26 Section 50K of the Racing Act provides a person may appeal to the VRT against a decision made under the rules to impose a penalty on the person, if the penalty is a suspension, disqualification or warning off or a fine of more than $250. Before the establishment of the VRT, such matters would have been heard by the RADB with a right to apply to VCAT for review.

27 These provisions are consistent with the intention that jurisdiction to hear and determine racing matters would be transferred from the RADB to the VRT with limited review rights at VCAT.

Transitional arrangements

28 Transitional provisions were inserted into the Racing Act by the Racing Amendment Act.

29 There was no dispute the *'commencement day'* mentioned throughout was 1 August 2019.

30 Section 108 is headed *'Transition of Racing Appeals and Disciplinary Boards to the Victorian Racing Tribunal'*. Relevantly, it provides, if immediately before 1 August 2019:

- a person was charged with a serious offence under the Rules and the serious offence:
  - had been part heard by the RADB and had not been determined by the relevant Board (section 108(1)(a)(i)); or
  - had not been heard or determined by the RADB (section 108(1)(a)(ii)); or
- a person had lodged an appeal against a Steward's decision with the RADB and the appeal had not been heard or determined (section 108(1)(b)); or
- any other proceeding had been commenced with the RADB and the proceeding had not been heard or determined (section 108(1)(c)),

then, despite their repeal with effect from 1 August 2019, the provisions in force immediately before that date empowering the RADB to hear serious

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5 The term *'serious offence'* is defined in section as 83OD as an offence that is a serious offence within the meaning of the relevant rules.

charges, appeals and proceedings, would continue to apply until the hearing, the appeal or the proceeding is completed (section 108(2)).

31 It was section 108(1)(a)(ii) which allowed the charges against the applicants (laid before 1 August 2019 but not heard or determined) to be dealt with by the RADB. The provisions indicate an intention that the previous arrangements would apply to serious charges - that is they would be heard and determined by the relevant Appeals and Disciplinary Board rather than being placed before the new VRT.

32 The jurisdictional issue before me arises due to the way section 109 is worded. The section is headed *'Review of decisions of Racing Appeals and Disciplinary Boards'* and says:

> (1) 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; or
>
> (b) a Steward proposes to apply to VCAT for a review of a decision made by a [RADB] under section 83OH(2).
>
> (2) Despite the substitution of section 83OH by the [Racing Amending Act], the person or the Steward may apply to VCAT for review on and after [1 August 2019] if the time limit for applying for a review under section 83OI as in force immediately before [1 August 2019] has not expired.
>
> (3) Despite the substitution of section 83OH by the 2018 Act, VCAT may conduct the review under the [VCAT Act] on and after [1 August 2019] as if—
>
> (a) section 83OH had not been substituted by the 2018 Act; and
>
> (b) [section 66N of the VCAT Act] had not been enacted.

33 Like section 108, section 109 provides for the previous arrangements to apply to matters which had been dealt with by the RADB and so preserves the right of both individual applicants and Stewards of the various racing codes to apply to VCAT for review of RADB decisions, both as to factual findings and penalty.

34 Section 110(1) provides VCAT can hear and determine an application for review of a RADB decision if the application for review had been made before 1 August 2019 and the review had not been finalised. Section 110(2) is in the same terms as section 109(3) above and so VCAT's power to hear and determine liability and penalty are preserved.

35 Both parties drew my attention to clause 25 of the Racing Amendment Act's *Explanatory Memorandum* which included the following:

> The objective of the transitional arrangements is to ensure that any hearing or appeal to a [RADB] that has been sought, part heard, or is awaiting a determination immediately prior to [1 August 2019] will

> continue to be dealt with under the arrangements in place prior to [1 August 2019].
>
> It is also intended a person who proposes to or has sought a review of a decision of a [RADB] with the [VCAT] immediately prior to [1 August 2019] will continue to be dealt with under the arrangements in place prior to [1 August 2019]. [VCAT] 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 [VCAT Act] had not been enacted.

36 The applicants submitted it was self-evident that paragraph 1 above is intended to address matters not yet finalised before the RADB and is given effect in section 108. They also submitted that paragraph 2 is intended to address matters already finalised before the RADB and that is done via section 109.

37 For completeness I record the Second Reading Speech did not assist in clarifying the application of the transitional provisions.

The applicant's position

38 In summary, the applicants contend section 109 of the Racing Act can be interpreted to confer on the applicants a right to merits review by VCAT.

39 Alternatively, if VCAT agrees that the purpose of the Racing Amendment Act was to include a right of merits review for people in the applicants' circumstances, it has the power to effect the intention of the legislators by applying the principles of statutory interpretation to find jurisdiction to review both the liability and penalty decisions of the RADB.

Interpretation of section 109(1)

40 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).

41 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'*.

42 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.

43 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 s109 (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) . . .

44 The applicant's 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.

45 The applicants referred me to the Macquarie Dictionary for definitions of the word *'propose'*:

> Propose *verb*
>
> (proposed, proposing)
>
> -verb (t) 1. to put forward (a matter, subject, case , etc.) for consideration.
>
> acceptance, or action: to propose a new method; to propose a toast.
>
> to put forward or suggest as something to be done: *he proposed that a messenger be sent.*
>
> to present (a person) for some position, office, membership, etc.
>
> to put before oneself as something to be done; to design; to intend.
>
> to present to the mind or attention; state.
>
> to propound (a question, riddle, etc.).
>
> -verb (i) 7. to make a proposal, especially of marriage.
>
> 8. to form or entertain a purpose or design.

46 It was submitted that any person who is the subject of a RADB decision, has at the very least '*considered'* the possibility of an appeal to VCAT at the time the RADB proceedings are on foot.

47 I do not accept the applicants' proposed reading of section 109(1)(a) for the following reasons.

48 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 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.[6] 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.[7] Section 66N of Schedule 1 of the VCAT Act confines VCAT's powers on review. It does not widen them to include possible decisions.

49 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.

50 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.[8] 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.

51 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 . . .

52 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 at that time affected by a decision and, at that time they

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6 Section 4 of the VCAT Act says relevantly:

> (1) For the purposes of this Act or an enabling enactment, a person makes a decision if the person -
>
> (a) makes, suspends, revokes or refuses to make a decision, order, determination or assessment (including a decision not to make a decision, order, determination or assessment);
>
> . . .
>
> (h) does or refuses to do any other act or thing.
>
> (2) For the purposes of this Act or an enabling enactment—
>
> . . .
>
> (c) a refusal by a decision-maker to make a decision under an enactment because the decision-maker considers that the decision cannot lawfully be made is deemed to be a decision made under that enactment to refuse to make the decision;
>
> (d) a failure by a decision-maker to make a decision under an enactment within the period specified by that enactment is deemed to be a decision by the decision-maker at the end of that period to refuse to make the decision.

7 See *Rein v Nurses Board of Victoria* [2004] VCAT 979 at paragraph 20; and *Chapman v Victoria State Emergency Service* [2015] VCAT 1402 at paragraph 55.

8 Section 36(2A) of the *Interpretation of Legislation Act 1984* (Vic) says headings to sections form part of the Act.

propose to seek review of that decision, not a future and as yet unmade decision.

53 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.

54 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.

55 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.

Application of the rules of statutory interpretation

56 The applicants' alternative submission was that the rules of statutory interpretation ought to be brought to bear for me to find VCAT has jurisdiction in these matters.

57 The applicants set out the range of reasons why they say the position these applicants find themselves in is unfair and difficult to understand, if it was Parliament's intentions that, matters on foot prior to 1 August 2019 be completed under the then existing arrangements. They explained the consequences of a narrow interpretation of jurisdiction being taken and said it defies common sense for the provisions to be read in a way that extinguishes the applicants' previously existing right to merits review. I have some sympathy with those matters but, as indicated by Judge Bowman, they are an insufficient basis to find jurisdiction. I leave those submissions which are personal to the applicants to one side.

58 The applicants contended that, as a general rule, in deciding whether or not it has jurisdiction, VCAT should:

- not be bound by mechanical analysis;
- apply common sense;
- look at the words, context, and purpose of the legislation;
- apply the law in a way that is 'fair and workable'; and
- be mindful of the effect of the interpretation on other cases.

59 The applicants referred to the principle that the legislature will not intend to abrogate rights of individuals to access the Courts (in this case the Tribunal) other than to the extent expressly stated, relying on *Public Service*

Association (SA) v Federated Clerk's Union.[9] They contended that remedial or beneficial provisions such as section 109 should not be construed narrowly, rather, they should be interpreted as broadly, beneficially, and generously as the language allows.[10]

60 I accept those contentions.

61 The applicants referred me to the following paragraphs from Bell J's decision in *Director of Housing v Sudi*:[11]

> 116 VCAT is a tribunal not a court and has no inherent jurisdiction. Although it has certain obligations under the Charter as a public authority, and can determine certain issues under the Charter when they legitimately arise in proceedings within its jurisdiction, it has no express jurisdiction with respect to the question of whether a public authority has breached human rights.
>
> 117 On the other hand, the tribunal has both the jurisdiction and the obligation to determine whether it has jurisdiction . . . It also has the jurisdiction to determine legal issues which legitimately arise in a proceeding within its jurisdiction, including issues concerning the interpretation and application of the Charter. Such determinations are subject to the supervisory jurisdiction of the Supreme Court [the applicants' emphasis].

62 The applicants submitted that the decision in *Sudi* is authority for the proposition that VCAT has jurisdiction, and indeed an obligation, to resolve the jurisdiction issue. They then said that, if VCAT agrees that the purpose of the legislation was to include a right of appeal to the applicants, then it has the power to effect the intention of the legislators by finding that it has jurisdiction to hear the appeal pursuant to section 109.

63 Reliance was placed on the:

- Explanatory Memorandum;
- advice from the Office of Racing;
- framing of sections 108 and 109; and
- principle that the lack of an express intention to extinguish rights supports a finding that Parliament did not intend to abrogate those rights,

to conclude that the legislation should be construed as conferring jurisdiction on VCAT to hear these applications. The applicants further contended that, if VCAT had jurisdiction, it extended to review both liability and penalty.

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9 (1991) HCA 33.

10 Referring to *JS and LS v Patient Review Panel* [2010] VCAT 1813 and section 6 of the *Interpretation of Legislation Act 1984* (Vic).

11 [2010] VCAT 328 (footnotes omitted).

64 For the following reasons, I am not satisfied there is a basis for me to find VCAT has jurisdiction in these matters.

65 The parties agreed that there are indicators that Parliament intended for matters before the RADB as at 1 August 2019 to be dealt with in the same way as they would have had the VRT not been established.

66 While the applicants suggest HRV agreed there was an intention to allow a right of review to VCAT for these applicants, on my reading, HRV's submissions did not go that far. HRV's submissions identified the gap in the legislation and noted the Office of Racing comments but concluded that it was difficult to discern from the Racing Amendment Act *any* conferral of review jurisdiction on VCAT for people in the position of the applicants.

67 I accept clause 25 of the Explanatory Memorandum (see paragraph 35 above) indicates Parliament intended that some matters proceed under the old arrangements, including a right to merits review at VCAT on both liability and penalty.

68 When considering the terms of the Explanatory Memorandum, I agree with the applicants' proposition that it refers to two groups of people: first, those captured by section 108 whose matters are yet to be completed at the RADB and second, those who fall within section 109 who have a decision from the RADB and propose to seek review by VCAT. As noted earlier, those who have both a decision and an application before VCAT fall within section 110.

69 I also agree with HRV's conclusion that the second paragraph of clause 25 of the Explanatory Memorandum does not describe the applicants' circumstances. That is because, when it refers to review rights at VCAT, it is in the context of a RADB decision being the subject of the review.

70 While I give weight to the advice from the Office of Racing, that is all it is, and cannot amount to a definitive indication of Parliament's intention.

71 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.

72 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.

73 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.[12] 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.

74 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 Patient Review Panel*.[13] In that case, the relevant Second Reading Speech said, *'All decisions of the panel are reviewable by VCAT'*.[14] There is no such clear statement available here.

75 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.

76 In order to find the jurisdiction the applicants seek, it would be necessary for me to create a new transitional provision.

77 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)).

78 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.

79 I can only agree with HRV that statutory amendment would be required to resolve what appears to be an anomaly.

Orders

80 Section 75 of the VCAT Act empowers the Tribunal to, at any time, on its own motion or on an application, summarily dismiss or strike out a proceeding if it falls within certain descriptors.

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12 Consistent with section 35 of the *Interpretation of Legislation Act 1984* (Vic).
13 [2010] VCAT 1813.
14 See paragraph 37.

81 There have been many cases about section 75 and the law about how to approach the section is clear.[15] The Tribunal is required to exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless or unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. One of the bases for summarily dismissing or striking out a proceeding under section 75(1)(a) is when the proceeding is misconceived. That descriptor may apply to a proceeding over which the Tribunal has no jurisdiction.

82 As I have found VCAT has no jurisdiction in this proceeding, it is appropriate that the application be dismissed under section 75(1)(a) of the VCAT Act. It is also appropriate for the stay orders made on 23 December 2019 to be set aside.

A Dea
Senior Member

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL VCAT

15 The cases include the following: *State Electricity Commission of Victoria v Rabel & Ors* [1998] 1 VR 102; *Norman v Australian Red Cross Society* (1998) 14 VAR 243; *Towie v State of Victoria & Ors* [2002] VCAT 1395; *Forrester v AIMS Corporation* [2004] VSC 506; *Naylor v Oakley Thompson & Co Pty Ltd & Ors* [2008] VCAT 2074.