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

Not Restricted

S ECI 2021 03065

Chief Municipal Inspector - Local Government — Plaintiff

v

Anab Mohamud — Defendant

JUDGE:	Quigley J
WHERE HELD:	Melbourne
DATE OF HEARING:	7 September 2021
DATE OF JUDGMENT:	29 November 2021
CASE MAY BE CITED AS:	Chief Municipal Inspector - Local Government v Mohamud
MEDIUM NEUTRAL CITATION:	[2021] VSC 787

Statutory interpretation – The 'golden rule' – Purposive approach to statutory construction – Question of law referred from VCAT to the Supreme Court under s 96(1) *Victorian Civil and Administrative Tribunal Act 1998* (Vic) – Whether VCAT has jurisdiction to hear application brought by Chief Municipal Inspector to suspend Councillor – Councillor charged with serious offences – Whether s 224 *Local Government Act 2020* (Vic) requires compliance as precondition to VCAT's jurisdiction to suspend a Councillor under s 229 – Whether to import words into s 224 *Local Government Act 2020* (Vic) – Whether obvious drafting error – Where applying the literal meaning of legislation leads to an absurd or unintended result – Whether clear identification of words omitted or to be added to meet legislative intent identified – *Taylor v The Owners - Strata Plan No. 11564* (2014) 253 CLR 531 applied – *Wentworth Securities Ltd v Jones* [1980] AC 74 [105] applied – *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 applied – *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms M Isobel	Victorian Government Solicitor's Office
For the Defendant	Mr A McBeth	Fitzgerald and Browne Lawyers

HER HONOUR:

1 The plaintiff in this proceeding is the Chief Municipal Inspector – Local Government Inspectorate. The defendant is Councillor Anab Mohamud, a Councillor for the City of Yarra.

2 On 3 May 2021, the defendant was charged with 19 criminal offences. The charges are serious and include multiple charges of intentionally causing injury to a person, theft and destruction of property. Each of these are punishable by up to 10 years' imprisonment.[1] On 15 July 2021, the plaintiff brought an application to the Victorian Civil and Administrative Tribunal (**VCAT**) under s 229 of the *Local Government Act 2020* (Vic) (**LGA**) seeking an order that the defendant be stood down until the criminal charges against her were determined. Serious criminal charges, that is for offences punishable by more than 12 months imprisonment or by two years' imprisonment,[2] enliven s 229 of the LGA which allows the Chief Municipal Inspector (**CMI**) to apply to VCAT for an order to stand down a Councillor until proceedings in respect of the charge or charges against the Councillor are finally determined.

3 On 4 August 2021 the defendant indicated that she planned to seek summary dismissal of the proceedings on the basis that VCAT had no jurisdiction.

4 The application came on before a Senior Member of VCAT on 20 August 2021. During the course of the hearing a question of law arose as to the interpretation of s 229 of the LGA which went to VCAT's jurisdiction to hear the application. Section 229 is new to the legislation and there are no cases previously brought under it. As such the parties agreed that an important question of law had been identified and they jointly requested VCAT to refer the question to the Supreme Court pursuant to s 96(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**).

5 On 24 August 2021, having been satisfied that the question was one appropriate to be determined by the Supreme Court of Victoria, I made orders exercising the powers

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1 *Crimes Act 1958* (Vic) ss 18, 74 and 197(1).

2 *Local Government Act 2020* (Vic) ss 34(2)(k)-(l); or if the Councillor has been disqualified under the *Corporations Act 2001* (Cth) Part 2D.6 pursuant to the *Local Government Act 2020* (Vic) s 34(2)(m) ('*LGA*').

as the President of VCAT, referring the question of law to the Supreme Court.

The Question of Law

6 The question of law before the Court raises a challenge to the jurisdiction of VCAT to hear an application to stand down a Councillor pursuant to s 229 of the LGA in the absence of the matters in s 224 being satisfied. The question was stated as follows:

> Must the criteria in s 224 of the LGA be satisfied before an application can be made under s 229 of the LGA?

7 The question is one of statutory construction. The defendant argued that a plain and literal reading of s 224 qualifies all of the provisions in that Division, including s 229. As none of the events set out in s 224 had occurred, there was no jurisdiction in the Tribunal to hear the application brought by the CMI to stand down the Councillor.

8 The plaintiff argues that the 'golden rule' is an important qualification to the literal approach to statutory construction and on a proper analysis there is an obvious error in the drafting of the LGA and the legislature could not have intended the criteria set out in s 224 to apply to the operation of s 229. The 'golden rule' can operate to modify the construction which would be open where the literal interpretation would result in an absurd or inconsistent result where the context of the provisions in question and the statute as a whole are considered.

Purposive approach to statutory construction

9 The starting point of statutory construction is well established. The process of statutory construction starts with the actual text of the statute, however it is to be considered in light of the context and purpose of the statute or particular provision.[3]

10 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (**Alcan**), the High Court summarised the principles as follows:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the

[3] *Verraty Pty Ltd v Richmond Football Club Ltd* [2020] VSCA 267 (Kyrou, Kaye and Sifris JJA) ('*Verraty*').

> text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[4]

11 In *CIC Insurance Ltd v Bankstown Football Club Ltd*, the High Court said:

> …inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.[5]

12 The need to look at what the statute says was emphasised by the High Court in *Certain Lloyd's Underwriters v Cross*:[6]

> The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is *taken to have intended* them to have' (emphasis added). And as the plurality went on to say in *Project Blue Sky*:
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> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require

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4 (2009) 239 CLR 27, 46–6 [47]; [2009] HCA 41 (Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted). See also *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39]; [2012] HCA 55 (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, 539–40 [47]; [2013] HCA 16 (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

5 (1997) 187 CLR 384, 408; [1997] HCA 2 [88] (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted) ('*CIC Insurance*').

6 (2012) 248 CLR 378, 389–90 [24]–[25]; [2012] HCA 56 (French CJ and Hayne J) ('*Certain Lloyd's Underwriters*').

> the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

13 In *Project Blue Sky Inc v Australian Broadcasting Authority*, the plurality said that the legal meaning is 'the meaning that the legislature is taken to have intended [the provision] to have'.[7] It may or may not be the same as the literal meaning.[8]

14 Difficulties may arise if the literal meaning conflicts with the legislative purpose. In such circumstances, a departure from the literal meaning may be justified if the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.[9]

15 As noted in *Verraty v Richmond Football Club*,[10] the Court of Appeal in *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd*[11] provided examples of conflicts between the literal meaning and the identified legislative purpose which have justified departure from the literal meaning. These include circumstances where:

(a) the literal meaning would conflict with other provisions of the statute;

(b) the literal meaning is inconsistent with the purposes of the statute;

(c) the literal meaning is incapable of practical application; or

(d) adoption of the literal meaning would lead to a result that is absurd, unreasonable or anomalous.[12]

16 Departure from the literal meaning will only be justified if the alternative construction is 'reasonably open'[13] and 'consistent with the language in fact used by the legislature'.[14] The purpose of legislation must be derived from what the

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7 (1998) 194 CLR 355, 384 [78]; [1998] HCA 28 (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

8 Ibid.

9 *Verraty* (n 3) [58], quoting Francis *Bennion, Statutory Interpretation: A Code* (Butterworths, 3rd ed, 1997) 344, referred to with approval in *Project Blue Sky* (n 7) [78].

10 *Verraty* (n 3) [59].

11 [2016] VSCA 328 ('*Colonial Range Pty Ltd*').

12 Ibid [53] (Warren CJ, Whelan JA and Riordan AJA) (citations omitted).

13 *CIC Insurance* (n 5) [88].

14 *Taylor v The Owners - Strata Plan No. 11564* (2014) 253 CLR 531, 549 [39]; [2014] HCA 9 (French CJ, Crennan and Bell JJ) ('*Taylor*').

legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.[15]

17 The purposive approach to statutory construction is reinforced by s 35 of the *Interpretation of Legislation Act 1984* (Vic) which provides that the construction which supports the purpose or objects of the Act shall be preferred over a construction which would not.

18 The Plaintiff concedes that on a literal reading of s 224 of the LGA the preconditions apply to the whole of the Division, including s 229. The only way in which the proposed application under s 229 of the LGA may succeed, in a case where the criteria in s 224 have not been satisfied, is to read into the statute words which exclude the criteria from s 229.

Principles for reading words into or omitting words from a statute – *Taylor v The Owners - Strata Plan No. 11564*

19 The High Court considered in what circumstances a Court may construe a provision as if it contains additional words to give effect to its evident purpose in *Taylor v The Owners – Strata Plan No 11564*.[16]

20 Both parties identified the same principles but differed in their application in the circumstances which are before this Court.

21 The plurality stated that 'the task remains the construction of the words the legislature has enacted' and that whether additional words are justified involves a judgment of matters of degree.[17]

22 The plurality said that judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too

15 *Certain Lloyd's Underwriters* (n 6) [26] (French CJ and Hayne J).
16 *Taylor (*n 14).
17 Ibid 549 [39] (French CJ, Crennan and Bell JJ).

much at variance with the language in fact used by the legislature'.[18]

23 The High Court in *Taylor* followed the principles set out by Lord Diplock in *Wentworth Securities Ltd v Jones*[19] which require:

(a) identification of the precise purpose of the provision;

(b) satisfaction that the drafter and the Parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose; and

(c) the court must identify the words that the legislature would have included in the provision had the deficiency been detected before its enactment.

24 The High Court also considered a fourth condition was added by McColl JA in the NSW Court of Appeal decision (the decision from which the appeal before them came)[20] that was necessary, before a court is justified in reading words into a provision that the modification must be consistent with the wording otherwise adopted by the drafter.

25 In *Taylor*, the High Court considered the decision of the Victorian Court of Appeal in *DPP v Leys*[21] which had been critical of the reasoning in the earlier New South Wales decision of *R v Young*[22] which characterised the purposive construction as a process of construing 'the words actually used'. In *Leys* the Court said that the process requires the Court to determine whether the modified construction is reasonably open in light of the statutory scheme and against a background of the satisfaction of Lord Diplock's three conditions,[23] and that there was no utility in the distinction between 'reading up' and 'reading down'. A purposive construction may equally result in an expanded operation of a provision as well as limited operation.

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18 Ibid 548 [38] (citations omitted). A number of the authorities referred to in relation to departure from the literal meaning are helpfully collected by Riordan J in the recent judgment in *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570 [23]–[31].

19 [1980] AC 74 [105] (Lord Diplock).

20 2013 (83) NSWLR 1 [10].

21 [2012] VSCA 394 ('*Leys*').

22 (1995) A Crim R 70.

23 *Leys* (n 21) [96].

26 Applying those principles to the construction of s 229 of the LGA requires the Court to identify the precise purpose of the provision.

27 As identified at the outset, the LGA is relatively new legislation and s 229 and the provisions generally in Division 6 of Part 6 have not been the subject of judicial scrutiny in their current form.

Local Government Act 2020

28 The LGA was assented to on 24 March 2020 and became operative on 1 July 2020. This version of the Act replaced the *Local Government Act 1989* (Vic) (**1989 Act**).

29 The LGA was a rewrite of the earlier legislation where there was a similar provision permitting an application to VCAT to stand down a councillor charged with a serious offence.[24] In the consultative phase of the preparation of the legislation a Discussion Paper was published.[25] Key issues identified in that Discussion Paper included provisions which dealt with a Code of Conduct for Councillors, greater definition of the hierarchy of misconduct and the processes for the enforcement of Councillor integrity and conduct. The Discussion Paper did not raise as an issue nor make any recommendation relating to the provision which related to standing down a Councillor in circumstances where the Councillor had been charged with a serious offence. The legislation which eventuated had expanded processes for oversight and created a more extensive range of statutory obligations in relation to transparency and governance which apply to a Councillor and a Council's obligations under the LGA. It also set out more specific processes for the oversight of Councils and individual Councillors in respect of conflict of interest and misconduct. The qualifications for dis-entitlement to stand and be elected as a Councillor were not altered from the previous legislation.

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24 See the now repealed *Local Government Act 1989* (Vic) s 29(4).

25 The State of Victoria Department of Environment, Land, Water & Planning, *Review of the Local Government Act 1989 - Discussion Paper* (2015) ('*Review of the Local Government Act 1989*'). See at pages 138-152, Chapter 8 Councillor conduct, offences and enforcement, and at pages 153-161, Chapter 9 Ministerial Powers.

Relevant Provisions of the LGA

30 The stated purpose of the LGA, set out in s 1 is:

> …to give effect to s 74A(1) of the *Constitution Act 1975* (Vic) which provides that local government is a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.

31 Section 3 sets out the respective definitions of 'misconduct', 'gross misconduct' and 'serious misconduct':

> ***misconduct*** by a Councillor means any breach by a Councillor of the prescribed standards of conduct included in the Councillor Code of Conduct.
>
> ***serious misconduct*** by a Councillor means any of the following—
>
> (a) the failure by a Councillor to comply with the Council's internal arbitration process;
>
> (b) the failure by a Councillor to comply with a direction given to the Councillor by an arbiter under section 147;
>
> (c) the failure of a Councillor to attend a Councillor Conduct Panel hearing in respect of that Councillor;
>
> (d) the failure of a Councillor to comply with a direction of a Councillor Conduct Panel;
>
> (e) continued or repeated misconduct by a Councillor after a finding of misconduct has already been made in respect of the Councillor by an arbiter or by a Councillor Conduct Panel under section 167(1)(b);
>
> (f) bullying by a Councillor of another Councillor or a member of Council staff;
>
> (g) conduct by a Councillor that is conduct of the type that is sexual harassment of a Councillor or a member of Council staff;
>
> (h) the disclosure by a Councillor of information the Councillor knows, or should reasonably know, is confidential information;
>
> (i) conduct by a Councillor that contravenes the requirement that a Councillor must not direct, or seek to direct, a member of Council staff;
>
> (j) the failure by a Councillor to disclose a conflict of interest and to exclude themselves from the decision making process when required to do so in accordance with this Act;

> ***gross misconduct*** by a Councillor means behaviour that demonstrates that a Councillor –
>
> (a) is not of good character; or
>
> (b) is otherwise not a fit and proper person to hold the office of councillor, including behaviour that is sexual harassment and that is of an egregious nature.

32 An application may be made to VCAT by the CMI on the grounds of gross misconduct pursuant to s 171 of the LGA.[26] An application made under s 171 may only be made by the CMI. VCAT has certain powers in relation to a finding of gross misconduct including ordering Councillor disqualification for a period not exceeding eight years.[27]

33 Part 6 – 'Council Integrity' sets out the provisions in respect of Councillor behaviour including:

- provisions providing for offences for improper conduct in Division 1 (ss 123-125);
- conflict of interest in Division 2 (ss 126-131);
- personal interest returns in Division 3 (ss 132-136);
- gifts in Division 4 (ss 137-138);
- the development and processes in respect of a Councillor Code of Conduct in Division 5 (ss 139-147);
- the appointment and functions of a Principal Councillor Conduct Registrar and Councillor Conduct Officers in Division 6 (ss 148-152); and
- the establishment of Councillor Conduct Panels to hear applications that alleged serious misconduct by a Councillor by Division 7 (ss 153-174).

34 The person who is affected by a decision made by a Councillor Conduct Panel under Division 7 of Part 6 may apply to VCAT for a review of the decision.[28] The CMI may

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26 *LGA* (n 2) s 171 sits within Part 6 (Council Integrity), Division 7 (Councillor Conduct Panels and VCAT). The provisions under consideration here sit within Part 7 (Ministerial Oversight).

27 Noting that the CMI has not made an application pursuant to s 171 of the *LGA* (n 2) in respect of the defendant here. The CMI has made application pursuant to s 229 only.

28 *LGA* (n 2) s 170.

make an application under s 171 alleging gross misconduct by a Councillor and if VCAT makes a finding that a Councillor has engaged in conduct that constitutes gross misconduct it may order a Councillor be disqualified from continuing to be a Councillor for a period not exceeding eight years.[29]

35 Separately, the LGA includes Part 7 entitled 'Ministerial Oversight', which contains a series of provisions which provide for supervision or oversight of Councils and Councillors via the power granted to the Minister to give directions;[30] appoint Municipal Monitors;[31] appoint a CMI;[32] and appoint Commissions of Inquiry.[33] It also provides the mechanism to stand down a Councillor[34] or to suspend Councillors and to appoint a temporary administrator.[35]

36 Part 7 Division 3 provides that the Minister may appoint a person to be a Municipal Monitor to a Council. The functions of the Municipal Monitor are set out in s 180.

37 Part 7 Division 4 provides that the Minister may appoint a CMI who has the functions set out in s 182(2). These functions include to investigate any allegation of serious misconduct or gross misconduct by a Councillor. The CMI may make an application to VCAT for a finding of gross misconduct by a councillor: s 182(2)(f)

38 Part 7 Division 5 provides for the appointment of a Commission of Inquiry by the Minister.

39 Part 7 Division 6 sets out the provisions in relation to standing down of a Councillor. It is the provisions in this part of the legislation which are the focus of the referred question.

40 Despite the summary I have set out, it is preferable to set out the entirety of Division 6 of Part 7.

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29 Ibid s 172.
30 Ibid ss 175–6.
31 Ibid ss179–81.
32 Ibid ss 182–199.
33 Ibid ss 200–223.
34 Ibid ss 224–229.
35 Ibid ss 230–233.

Division 6—Standing down of Councillor

224 Application of Division

(1) This Division applies if—

(a) one of the following has been made in respect of a Councillor to which paragraph (b) applies—

(i) an application to a Councillor Conduct Panel to make a finding of serious misconduct against the Councillor;

(ii) an application to VCAT alleging gross misconduct by the Councillor;

(iii) the Minister has, by instrument, appointed a Commission of Inquiry into the Council of the Councillor;

(iv) an application has been made to the Supreme Court for the ouster from the office of Councillor of the Councillor; and

(b) the Minister has reason to believe that the Councillor—

(i) is creating a serious risk to the health and safety of Councillors or Council staff; or

(ii) in the Councillor's capacity as a Councillor, is creating a serious risk to the health and safety of other persons; or

(iii) is preventing the Council from performing its functions.

225 Referral of Councillor to the Chief Municipal Inspector or a Municipal Monitor

(1) The Minister may refer a Councillor to which section 224(1)(b) applies to—

(a) subject to subsection (2), the Chief Municipal Inspector; or

(b) a Municipal Monitor.

(2) The Minister must not refer the Councillor to the Chief Municipal Inspector if the Chief Municipal Inspector made the application under section 224(1)(a).

226 Chief Municipal Inspector or Municipal Monitor to conduct investigation and prepare a report

(1) The Chief Municipal Inspector or a Municipal Monitor who has received a referral under section 225 must conduct and complete an investigation into the referral in accordance with this section—

(a) within 10 days after the day that the Chief Municipal Inspector

or Municipal Monitor (as the case requires) received the referral; or

(b) within such other period agreed to by the Minister after receiving a request from the Chief Municipal Inspector or the Municipal Monitor (as the case requires) for an extension of time to conduct and complete the investigation.

(2) On receiving a referral from the Minister, the Chief Municipal Inspector or the Municipal Monitor (as the case requires) must give notice to the following persons—

(a) the Councillor who is the subject of the referral;

(b) the Mayor;

(c) the Chief Executive Officer.

(3) Notice under subsection (2) must—

(a) be in writing; and

(b) specify the period of time that will be taken to conduct and complete the investigation in accordance with subsection (1).

(4) Within the period specified in subsection (1)(a) or such other period agreed to by the Minister under subsection (1)(b), the Chief Municipal Inspector or the Municipal Monitor (as the case requires) must—

(a) investigate the referral; and

(b) prepare a report of the advice and findings of the Chief Municipal Inspector or Municipal Monitor specifying—

(i) whether the Chief Municipal Inspector or Municipal Monitor is satisfied that the Councillor the subject of the referral—

(A) is creating a serious risk to the health and safety of Councillors or Council staff; or

(B) in the Councillor's capacity as a Councillor, is creating a serious risk to the health and safety of other persons; or

(C) is preventing the Council from performing it's functions; and

(ii) the reasons for the advice and findings of the Chief Municipal Inspector or Municipal Monitor (as the case requires); and

(c) give a copy of the report prepared under paragraph (b) to—

(i) the Councillor the subject of the referral; and

(ii) the Minister.

(5) The copy of the report given to a Councillor under subsection (4)(c)(i) must specify the following—

(a) that the Councillor may give a response to the report to the Minister within 5 days of receiving the report;

(b) the manner in which any response to the report must be given to the Minister.

227 Councillor may respond to report

Within 5 days after receiving a copy of a report prepared by the Chief Municipal Inspector or Municipal Monitor (as the case requires) under section 226(4)(b), the Councillor who is the subject of the referral may give to the Minister a response to the report in accordance with section 226(5)(b).

228 Councillor may be ordered to stand down

(1) On the recommendation of the Minister, the Governor in Council may, by Order in Council, stand down a Councillor—

(a) for a specified period not exceeding 6 months; or

(b) until an outcome specified in subsection (5) has occurred.

(2) The Minister may make a recommendation under subsection (1) if—

(a) any of the following applies in respect of the Councillor—

(i) an application has been made to a Councillor Conduct Panel or VCAT alleging serious misconduct or gross misconduct (as the case requires) by the Councillor;

(ii) the Minister has appointed a Commission of Inquiry into the Council of the Councillor;

(iii) an application has been made to the Supreme Court for the ouster from the office of Councillor of the Councillor; and

(b) the Chief Municipal Inspector or a Municipal Monitor has given the Minister a report under section 226 advising the Minister that the Councillor in respect of whom circumstances specified in paragraph (a) apply—

(i) is creating a serious risk to the health and safety of Councillors or Council staff; or

(ii) in the Councillor's capacity as a Councillor, is creating a serious risk to the health and safety of other persons; or

(iii) is preventing the Council from performing its functions; and

(c) the Minister is satisfied that the Councillor—

(i) is creating a serious risk to the health and safety of Councillors or Council staff; or

(ii) in the Councillor's capacity as a Councillor, is creating a serious risk to the health and safety of persons other than Councillors or Council staff; or

(iii) is behaving in a manner that is preventing the Council from performing its functions.

(3) If an Order in Council is made under subsection (1), the Minister must give a written notification to—

(a) the Councillor, who by Order in Council, must stand down;

(b) the Chief Executive Officer.

(4) If an Order in Council is made under subsection (1), for the duration of the Order—

(a) the allowance of the Councillor ordered to stand down is to be withheld; and

(b) the Councillor ordered to stand down must not perform the functions and duties of, or exercise the powers of, a Councillor including—

(i) attend any meetings of the Council; and

(ii) attend any delegated committee meetings; and

(iii) attend Council premises.

(5) The following outcomes are specified for the purposes of subsection (1)(b)—

(a) on the making of a determination by a Councillor Conduct Panel or VCAT in respect of the application;

(b) on the withdrawal of the application to the Councillor Conduct Panel or VCAT;

(c) on the dismissal of the application by the Councillor Conduct Panel or VCAT;

(d) on the tabling of the report of a Commission of Inquiry under section 223;

(e) the Supreme Court has made a decision in respect of an application for the ouster from the office of Councillor of the Councillor that has been stood down;

(f) an application to the Supreme Court for the ouster from the office of Councillor of the Councillor that has been stood down

is withdrawn.

(6) Unless one of the following applies in respect of a Councillor that has been stood down under this section, the Councillor's allowance must be returned to the Councillor when the Councillor is no longer stood down—

(a) the Councillor Conduct Panel makes a finding of serious misconduct in respect of the Councillor;

(b) VCAT makes a finding of gross misconduct in respect of the Councillor;

(c) the Commission of Inquiry has made an adverse finding in its report;

(d) the Councillor is ousted from the office of Councillor by the Supreme Court.

229 Standing down of Councillor by VCAT

(1) If a Councillor is charged with an offence specified in section 34(2)(k), (l) or (m), the Chief Municipal Inspector may apply to VCAT for an order to stand down the Councillor until proceedings in respect of the charge are finally determined.

(2) Before VCAT makes an order under subsection (1), VCAT must have regard to the nature and circumstances of the charge.

(3) An order made under subsection (1) ceases to have effect if—

(a) the relevant charge is withdrawn; or

(b) the Councillor is not convicted of the offence.

(4) If a Councillor is ordered to stand down under subsection (1), the Councillor must not perform the functions and duties of, or exercise the powers of, a Councillor including—

(a) attend any meetings of the Council; and

(b) attend any delegated committee meetings; and

(c) attend Council premises.

(5) If a person who is stood down from the office of Councillor under subsection (1) is convicted of the offence and the person lodges an appeal in respect of the conviction, the person remains stood down and their allowance must be withheld until the appeal is determined or withdrawn.

(6) If the conviction referred to in subsection (5) is quashed or set aside following the appeal the Councillor is entitled to receive any allowances that were withheld during the period the Councillor was stood down.

41 The other provision which is of note is s 34. Section 34(1) sets out the prerequisite qualifications to be a Councillor and s 34(2)(a)–(m) specifies the matters which disqualify a person from being a Councillor.

42 In particular, s 34(2)(l) provides disqualification where a person:

> has been convicted of an offence in the preceding eight years, committed when the person was of or over 18 years of age, which is punishable upon first conviction for a term of imprisonment of two years or more under the law of Victoria, or the law of any other State, or a Territory of the Commonwealth, or the law of the Commonwealth.

43 A Councillor ceases to hold office if, inter alia, he or she ceases to be qualified or is ousted from office.[36] The Minister, the CMI or the Council of which a particular Councillor is a member may apply to the Supreme Court for ouster from office where the Councillor is declared to have been elected, or to hold the office of Councillor, contrary to the LGA.[37]

The question of law

44 As stated above, the referred question of law asks whether the criteria in s 224 of the LGA must be satisfied before an application can be made under s 229.

45 As noted, the plaintiff concedes that on a literal construction of Division 6 of the LGA the interpretation urged by the defendant is open and that the criteria set out in s 224 are on their face necessary to be met before an application by the CMI pursuant to s 229 can be made.

46 However, as the plaintiff argued, in statutory construction the 'golden rule' is an important qualification to the literal approach.

47 This principle is not in dispute.

48 What is in dispute is whether it is open to the Court in the context here to form the view that there is a drafting error and whether the circumstances would permit the reading in to the text additional words so as to achieve the construction urged by the

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36 Ibid s 35.
37 Ibid s 36.

plaintiff.

49 The plaintiff argues the 'golden rule' of statutory interpretation should be applied and consistent with the approach endorsed by the High Court in *Taylor*, four additional words should be read into s 224(1) of the LGA to fix an identified error. The plaintiff argues the drafting error is that the opening words of s 224 were erroneously extended to the operation of s 229. The correction to the text which would reflect the intention of the legislature is to read the opening words of s 224(1) to say, 'Sections 225–228 of this Division apply if…', instead of the text which as published says, 'This Division applies if…'.

The plaintiff's construction

50 The plaintiff argued that anything more than a superficial review of s 229 leads to a conclusion that the literal interpretation cannot be correct. If the satisfaction of the criterion in s 224 was required before VCAT had jurisdiction under s 229 it would lead to a patently unintended or absurd result. It was argued that this would make s 229 unworkable, and would remove a long held power directly exercisable by VCAT to stand down a Councillor charged with a serious offence. This power was in the 1989 Act and it which was not the legislature's intention to alter that direct power.

51 The plaintiff raised six reasons in support of this position:

(a) the criteria in s 224(1)(b) of the LGA would be practically and operationally impossible to meet;

(b) the criteria in s 224(1)(b) are unrelated to and not properly construed as confining VCAT's role under the LGA;

(c) the actions in s 224(1)(a) of the LGA are inappropriate when dealing with a Councillor charged with a serious criminal offence;

(d) requiring Ministerial involvement prior to making an application to VCAT would be absurd and contrary to the purpose of s 229 of the LGA;

(e) an historical view of s 229 suggests Parliament did not intend to import additional criteria through the placement of s 229 into Division 6 of the LGA; and

(f) the text of the Division 6 suggests that s 229 was intended to be a standalone provision.

52 The plaintiff argued that the power in s 229 being located as it is within Division 6 is a drafting error in that when the previous power of the Inspector to bring an application to VCAT (under s 29 of the 1989 Act) was moved across to the LGA the drafters of the legislation did not foresee that its placement within Division 6 of the LGA would have the consequence of importing a new set of criteria limiting the powers as suggested by the defendant.

The Defendant's construction

53 The defendant argued that s 224 of the LGA, being the first section in Division 6 Part 7, provides the criteria that must be satisfied before the stand down provision could be exercised by VCAT. There are accordingly two criteria that must be satisfied before Division 6 applies – at least one of the four alternative criteria in s 224(1)(a) as well as at least one of three alternative criteria in s 224(1)(b). The satisfaction of those criteria is a jurisdictional fact required for VCAT to have any jurisdiction under Division 6 of Part 7, including s 229.

54 The defendant relies on the Explanatory Memorandum to the LGA to assist this interpretation which she says is, in any case, clear from the statutory text.

55 The Explanatory Memorandum says the following about Division 6 of Part 7:

> This Division enables a councillor to be stood down if two conditions are met in relation to that councillor –
>
> > (a) an application has been made alleging serious or gross misconduct or for an ouster from office, or a commission of enquiry has been established; and
> >
> > (b) a complaint has been received by the Minister alleging that the Councillor poses a health and safety risk or is preventing the council

from performing its functions.

56 As these conditions have not been met the jurisdiction under Division 6 of Part 7 of the LGA is not established. There has been no application to a Councillor Conduct Panel in relation to the respondent, there has been no application to VCAT under s 171 of the LGA alleging gross misconduct of the respondent, the Minister has not appointed a Commission of Inquiry into the City of Yarra and no application has been made to the Supreme Court to ouster the respondent from office.

57 Further, the particulars provided by the applicant in its application (attachment B to its application) do not provide the requisite precondition. There is no allegation anywhere in the particulars provided by the plaintiff that any of the four prerequisites under s 224(1)(a) have been met.

58 The defendant says that the particulars to the application wrongly allege that the requirements for an application by the CMI for an order under s 229(1) of the LGA are satisfied merely by the fact that one or more charges that meet the description in s 34(2)(l) of the LGA have been laid against the respondent.

59 The absence of any of the prerequisites under s 224(1)(a) of the LGA means that Division 6 of Part 7 is not enlivened and VCAT lacks jurisdiction to make the order sought by the plaintiff under s 229 of the LGA.

60 The defendant also submits that the additional criterion in s 224(1)(b) has not been met and could not be met in relation to the allegations against the defendant. The defendant argues that she denies the charges against her and she is entitled to the presumption of innocence and as the charges are unrelated to her role as a Councillor and have no connection with any other Councillor or staff the s 224(1)(b) criteria is also not met.

61 Consequently, it is argued that the criteria in s 224(1) are not met and VCAT has no jurisdiction to make the orders sought and would commit jurisdictional error if the matter were to proceed.

62 The defendant also sought to support her construction of the legislation on aspects of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

Charter of Human Rights and Responsibilities Act 2006 (Vic)

63 Section 32 of the Charter is a rule of construction which requires as far as it is possible that statutory provisions be interpreted in a way that is compatible with human rights.[38]

64 The defendant argued that the plaintiff's interpretation was not the construction which did least offence to the Charter rights. In particular, the defendant relied upon ss 18 and 25.

65 Section 18 of the Charter provides for 'the opportunity, without discrimination, to participate in the conduct of public affairs directly or through freely chosen representative.' There were two arguments raised in respect of this section.

66 Firstly, the right of a duly elected councillor to serve on the Council to which she was elected. It was argued that it was self-evident that this right is infringed by standing down a councillor who is charged but not convicted.

67 The question is whether a stand down provision is a reasonable limitation of the right under the limitations provision in s 7(2) of the Charter. It was argued the broader scope contended by the plaintiff does not protect the integrity and functioning of local government in relation to human rights. The applying of s 32 of the Charter to how the LGA is drafted is said to be more consistent with human rights than reading in the words proposed by the plaintiff.

68 The construction task before the Court is to determine whether the question, "ought the Councillor be stood down?", is within VCAT's jurisdiction. It is not the Court's role here to determine the substantive question of standing down itself. There is a theme in the argument of the defendant which has a tendency to conflate the question of actually standing down the Councillor and the consideration by VCAT of

38 *Momcilovic v The Queen* (2011) 245 CLR 1.

whether that ought to occur or otherwise.

69 The second argument was not about the rights of the defendant but rather, a right of each elector within the City of Yarra under s 18(1) of the Charter to be represented by their democratically chosen representative. It was argued that the broad construction of ss 224 and 229 of the LGA as urged by the plaintiff would remove a Councillor or at least expose a Councillor to the prospect of being removed without replacement. This would skew the balance of a Council and impact the principle that local government decision-making should be exercised by those who are chosen by the people. This would effectively disenfranchise those electors who are represented by the stood down Councillor.

70 I am of the view that this overstates the impact of the construction which would allow the very question which might lead to the standing down of a Councillor to be determined by VCAT. If this argument were correct the logical extension of it would be that no Councillor would ever be stood down and this is plainly inconsistent with the scheme and intent of the legislation which specifically provides for the standing down of a Councillor in certain circumstances.

71 In respect of s 25 (the presumption of innocence), the defendant argued that the construction urged by the plaintiff would impinge on the presumption of innocence in every case involving charges above the level set in s 34 of the LGA.

72 I am not persuaded that the construction for which the plaintiff contends would infringe s 25 of the Charter. The question before this Court is that of jurisdiction and not one which makes any assumption contrary to the presumption of innocence. I am not persuaded that a construction urged by the defendant is more consistent with the presumption of innocence than the construction urged by the plaintiff.

73 Additionally, it is an artificial importation into the analysis that any charge must be directly related only to the Councillor's conduct as a Councillor. This flies in the face of the purpose of the LGA which is to provide for peace, order and good government.

74 I am not persuaded that the jurisdiction should only be enlivened where there is a direct connection between the charge and the Councillor's role on Council in the manner suggested by the defendant.

75 As s 34 of the LGA has identified a range of offences which would disqualify a person from holding office as a Councillor, in that respect the legislature has identified the line over which any person who is convicted of such an offence is not assumed to be a person of sufficient good character to undertake this role.

76 A charge is more than just a rumour and a charge in respect of an offence which falls within the category set out in s 34 is a serious charge. In my view, it would be inconsistent with peace, order and good government for a person facing such a serious charge no matter whether it directly affected their work as a Councillor or otherwise, to remain insulated from any consideration of whether he or she should be required to stand down until the charge was resolved. Such a charge has the potential to undermine community confidence in the Councillor, and thus the integrity of the Council's decision making and governance of the Council of which that Councillor is part. To require the steps in s 224 as a prerequisite to any application being made pursuant to s 229 in these circumstances does not add anything to the preservation of the objectives of peace, order and good government and removing those prerequisite steps would not be an interpretation which unreasonably interfered with the Charter rights of the individual, or the voters of the municipality in these circumstances.

What is the legislative purpose of s 229?

77 The power to stand down a councillor which had been exercisable by VCAT prior to the LGA was previously found in the part of the 1989 Act relating to qualifications and disqualification of councillors. The 1989 Act contained s 29(4)–(8) which are substantially replicated in s 229 of the LGA. The 1989 Act did not contain the additional criteria now found in s 224 of the LGA. An Inspector could bring an application to VCAT under s 29(4) of the 1989 Act without any Ministerial

involvement, nor any connection or link between the charges and the Councillor's role as a Councillor. There was no need for action, such as sending the Councillor before a Councillor Conduct Panel, Commission of Inquiry or any other action now found in s 224(1)(a) of the LGA.

78 The parties submitted that the extrinsic material including the Explanatory Memorandum and the Second Reading speech did not provide any useful assistance in ascertaining the rationale for the structure of Division 6 of Part 7 nor for any intention to require ministerial intervention before an application could be made to VCAT to stand down a Councillor in the circumstances where one was facing serious criminal charges. There is no suggestion that s 224 was intended to attach to, or limit applications made under s 229 which can be found in the extrinsic material.

79 The Statement of Compatibility with the Charter does provide some illumination, however, if only by omission.[39] In reference to s 18(1) of the Charter,[40] it was noted that clause 34 of the Bill outlined a number of grounds upon which a person will be disqualified from standing as a Councillor. The Statement of Compatibility recognised that this may limit the right to take part in public life, which is a right identified under s 18 of the Charter, but that any limitation is demonstrably justified in accordance with s 7(2) of the Charter. Although the right to take part in public life is a significant right and is fundamental to a democratic system of government, the right is not absolute, and it may be subject to reasonable limitations. In this case, the purpose of limitation is to ensure the integrity and good governance of the sector and public trust and confidence in those elected or appointed to relevant positions. Clause 34 does not go any further than is necessary to achieve this purpose and therefore the limitation imposed on the right to take part in public life is demonstrably justified under the Charter.[41]

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39 Explanatory Memorandum, Local Government Bill 2018

40 *Charter of Human Rights and Responsibilities 2006 Act* (Vic) s 18(1) provides that every person has the right to participate in the conduct of public affairs, directly or through freely chosen representatives.

41 Victoria, *Parliamentary Debates,* Legislative Council, 28 November 2019, 4487 (Gavin Jennings, Leader of the Government, Special Minister of State, Minister for Priority Precincts, Minister for Aboriginal Affairs). This is where the Statement of Compatibility was given.

80 In respect of standing down of a Councillor,[42] the Statement of Compatibility made reference to the provision that the Governor-in-Council may only order a Councillor be stood down under s 228 where there has been an application to a Councillor Conduct Panel or VCAT alleging serious or gross misconduct, the CMI or Municipal Monitor has given the Minister a report about the Councillor advising the Minister of certain findings and the Minister is satisfied in respect of those findings. A Councillor may only be stood down for a period specified or until a specified outcome relevant has occurred.

81 What is notable about the Statement of Compatibility is it makes no reference at all to the power in s 229 for the CMI to make an application to VCAT in the circumstances where a Councillor is charged with a serious offence.

82 The Second Reading Speech[43] discusses the rationale for the Bill, which was to set clear standards to address and improve conduct of Councillors. This included mandatory standards of conduct, defining what communities expect from their Councillors and providing a greater understanding of acceptable behaviour, with a consistent framework against which to determine complaints of alleged breaches of the Councillor Code of Conduct. It recognised that the then-complicated and varied internal resolution procedures would be replaced by a clear, concise and consistent internal arbitration processes. Where a finding of misconduct is made determinations would be tabled at Council meetings to ensure greater transparency of processes and outcomes. Specialised training was to be introduced to improve the competency and skills of Councillors and candidates to improve Councillors' understanding of their role and to give the community confidence. Allegations of serious misconduct would be heard by a Councillor Conduct Panel and any egregious allegations which may constitute gross misconduct would be investigated by the CMI and be heard and determined by VCAT.

83 Again there is no reference to the circumstances where a Councillor is charged with a

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42 Ibid 4488.
43 Ibid 4497.

serious criminal offence.

84 There is some considerable force in the proposition that when reading Division 6 as a whole that the text of the Division itself suggests that s 229 of the LGA was intended to be a standalone provision. In this regard, the sixth reason given above at [51](f) is compelling.

85 Turning to Division 6 itself, save for s 229 the provisions of Division 6 are interrelated. They form part of a cohesive and interrelated scheme for the processes of enforcement and integrity oversight by the Minister consistent with the scheme of the Act overall in respect of integrity in the performance of duties as a Councillor.

86 Each section of this Division is internally consistent and contains an express internal link back to s 224, except for s 229.

87 Section 229 instead requires a consideration of the application of s 34 to specific circumstances involving criminal charges. This is not a consideration in respect of the other sections within this Division. Section 34 considers misconduct and criminal convictions which are separate and distinct matters for disqualification for office.

88 Reading Part 7 Division 6 as a whole it is open to construe it as intending to create two separate pathways to a Councillor being stood down. The first pathway is through Ministerial action or oversight which leads to the Minister seeking an order from the Governor-in-Council to stand down the Councillor.

89 This pathway is directed to the behaviour of a Councillor who is subject to an application to a Councillor Conduct Panel based on an allegation of serious misconduct;[44] an application to VCAT for a finding of gross misconduct;[45] where the Minister has appointed a Commission of Inquiry;[46] or where there is an application

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44 *LGA* (n 2) s 224(1)(a)(i).

45 Ibid s 224(1)(a)(ii); noting this application may only be brought by the Chief Municipal Inspector pursuant to s 171.

46 Ibid s 224(1)(a)(iii). This appointment may be enacted by the Minister pursuant to s 200. The Commission of Inquiry provides a written report to the Minister.

made to the Supreme Court for ouster from office.[47]

90 Misconduct can lead to a standdown order by Order in Council (ss 224-228). However, the process set out in ss 224-228 requires the CMI to be notified and for a report to be undertaken for the Minister as to whether the conduct is creating a serious risk to the health and safety of Councillors or Council staff, to other persons, or preventing the Council from performing its functions. The report must also contain reasons for the advice and findings of the CMI. It is with this report to hand that the Minister (after giving the Councillor the subject of the report an opportunity to respond) may make a recommendation to the Governor-in-Council to stand down that Councillor for a period of 6 months or until such time as one of the outcomes specified in s 228(5) has occurred. These outcomes include the determination of the respective investigations by a Councillor Conduct Panel, the report of the Commission of Inquiry or the decision of the Supreme Court as to ouster.[48]

91 This analysis is consistent with the explanation given in the Discussion Paper[49] and in the Statement of Compatibility.

92 The second pathway is through an application to VCAT. This pathway, by my analysis does not require a connection with the Councillor's behaviour in his or her role as a Councillor. The connection to behaviour and reputation is to s 34 of the LGA. It would seem inconsistent with the expectations of the community in respect of reputational standing that a person charged with a serious offence was immune from any consideration that they might be stood down until the charges were considered. It is to be noted that this provision does not require a finding of guilt, nor is the standing down automatic. There is a process and part of that process is for VCAT to consider the nature and circumstances of the offence. In this consideration, the effect that continuation of the Councillor remaining in active duty as a Councillor can be considered in a similar manner and with similar checks and balances as to natural justice as the first pathway provides.

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47 Ibid s 224(1)(a)(iv).

48 Ibid s 228(5) also has the options of dismissal or withdrawal of the relevant application.

49 *Review of the Local Government Act 1989* (n 25) 102-110 (Chapter 9, concerning Ministerial powers).

93 Section 229 states that certain serious criminal charges can lead to an order to stand down the Councillor on application by the CMI to VCAT. It would be superfluous for s 229 to remain within the legislation if it had no work to do. Each of the applications which are set out in the process mentioned above (in ss 224-228) relate directly to the actions of a Councillor as a Councillor and take into account the health and safety of those who are directly affected by the Councillor's actions. Where a Councillor is charged with a serious offence it is the connection back to good character embodied in s 34 which is carried through to s 229.

94 The opposite view would lead to a scenario of the following process to be followed which is cumbersome and convoluted and demonstrates that s 229 would be of no practical utility.

95 The process would be this: a charge of the requisite severity is laid, the CMI brings an application to VCAT for gross misconduct, or a Councillor Conduct Panel is set up, or one of the other actions identified in s 224 is commenced. The Minister forms the belief required under s 224(1)(b) and refers the Councillor to the CMI or Municipal Monitor (except where the CMI has made the application under s 224(1)(a)). The CMI or Municipal Monitor who received the referral would then undertake an investigation into the referral. As it is only the CMI who may make an application pursuant to s 229 it is difficult to see what utility there is in the requirement for a report to be made to the Minister which leads to the Minister making a decision to request the Governor-in-Council stand down the Councillor. There would be no work for the application pursuant to s 229 to VCAT to do. There would be two separate pathways to standing down a Councillor where the Councillor was charged with a criminal offence making the utility and operation of s 229 redundant.

96 The structure of the LGA as a whole contains very detailed provisions in respect of Councillor behaviour and integrity in Part 6 before the Ministerial oversight provisions in Part 7. The provisions in Part 7 provide for a detailed scheme of intervention and functions by the appointment by the Minister of a Municipal

Monitor, a CMI, and Commissions of Inquiry. This Part (Part 6) also provides for the standing down of a Councillor and Council as a consequence of the findings of one of these oversight bodies as appointed by the Minister. None of the actions and conduct which are set out in this Part (Part 6) accounts specifically for the situation where a Councillor is charged with a serious criminal offence.

97 This scheme of oversight in ss 224-228 to promote Councillor integrity in behaviour as a Councillor is consistent with the stated purpose of the LGA.[50] It is consistent with peace, order and good government that there be a pathway to being stood down where there is a breach of the standards expected of a Councillor or a Council after one of the methods of preliminary enquiry set out in Part 6 or Part 7 are followed.

98 However, there is a clear and bright line of contrast when s 229 is plainly read. It reads as a standalone provision bearing no reference back by comparison to the earlier provisions in the Division (ss 224-228), all of which reference and rely on earlier integrity processes. A plain reading of s 229 indicates that a charge of the nature specified in s 34(2)(k), (l) or (m) provides a discretion in the CMI to bring an application before VCAT for an order standing down the Councillor until the charge is finally determined. It is then the role of VCAT to determine whether the Councillor should be stood down, taking into account the nature and circumstances of the charge.

99 It is notable that the provisions for the payment of the Councillor's allowance when suspended as a consequence of stand down in s 229 are replicated in s 228. If s 229 were not intended to be a standalone provision the provision for the payment of a Councillor's allowance in s 229 would be repetitious and superfluous.

100 I consider s 229 is intended to be read as a standalone provision. It would be inoperable if it were read to be contingent on the preconditions which apply to the other stand down provisions in Division 6.

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50 *LGA* (n 2) s 1.

101 I have concluded that the clear legislative intent is that there be two pathways to suspension from office. The first allows for a new process of oversight by which the Minister intervenes after a report has been prepared by the CMI or Municipal Monitor, an opportunity to respond is given to the Councillor under investigation and the Minister may then decide to make a recommendation to the Governor-in-Council to stand the Councillor down. The second pathway is for the CMI to apply to VCAT and after VCAT has considered the nature and circumstances of the charge it may order the standing down of the Councillor.

102 Both processes provide for the application of the rules of natural justice, the former method, by providing the Councillor with the report and an opportunity to respond before the Minister seeks an order from the Governor-in-Council, the latter by VCAT taking into account the circumstances and nature of the charge when dealing with the application.

103 In both methods, the CMI has a role, but is not the final arbiter.

104 Both parties debated the practical application of s 229 and the likelihood that there could be a circumstance which leads to a Councillor being charged with a serious offence which also amounted to conduct which might be caught by the preconditions in s 224.

105 I am not persuaded that there is a realistic scenario which can be conjured to illustrate that the intention was to include s 229 in the preconditions caught by s 224.

106 If the stand down provisions were directed only to the conduct of a Councillor in the context of the Councillor's actions and behaviour as a Councillor and not as a private citizen one might wonder why there is a disqualification from standing for office in the first place as set out in s 34.

107 This interpretation is reinforced when the historical context of the legislation is considered. There is no mischief identified which the current version of the LGA seeks to remedy in respect of the situation where a Councillor is charged with a

serious criminal offence. The same cannot be said for the expanded processes in respect of integrity and governance which are the subject of the processes which sit behind ss 224-228.

108 Finally, I observe that the formatting of s 224 appears to be incomplete. There is no subsection (2) yet the provision commences enumerated with the subsection number (1). This is a formulation which does not occur otherwise.

109 In my view, the legislative purpose of s 229 is to ensure that public confidence in the standing and the reputation of a Councillor is preserved. It is a commonplace expectation that a person in authority and who has a public role will stand aside where there is a cloud over them, such as a serious charge of the nature as identified in s 34. The public confidence in the office of a Councillor will be diminished if there is a question as to the reputation of the Councillor, which inevitably will occur while there are extant serious charges unresolved. The effect of this section is to preserve the reputation of a Council by providing for a process for the temporary standing down of a Councillor until the charges are resolved. It is not a peremptory removal from office for all time. All the provision does is to provide for an opportunity for the CMI to make an application to VCAT. The merits of the decision to stand down the Councillor will be determined by VCAT taking into account the matters set out in s 229.

110 The governance and integrity provisions in the LGA which empower the investigations by a Councillor Conduct Panel, Municipal Monitor, Commission of Inquiry or the CMI in respect of charges of misconduct, serious misconduct or gross misconduct arise in the context of the behaviour of a Councillor in their role as a Councillor.

111 I consider that the intended purpose of Ministerial oversight and the creation of a pathway to standing down of a Councillor by the Governor-in-Council order was to improve the transparency and independence of the process for enforcing the integrity and good governance provisions as well as to substantively improve the

expectations of behaviour of those involved in government at the local council tier. I reach this conclusion having considered:

- the integrity and governance provisions of the LGA and the role of the Municipal Monitors, the CMI, the Councillor Conduct Panels and the Code of Conduct provisions;
- the enforcement regime, including the hierarchy of conduct (misconduct, serious misconduct and gross misconduct) and;
- the stated purpose of the LGA set out in s 1 and from the Discussion Paper which informed the drafting of the LGA, in particular Chapters 8 and 9 and from the Statement of Compatibility.

112 To find that the criteria set out in s 224 are required to be satisfied before the CMI may make an application to stand down a Councillor pursuant to s 229 is inconsistent with the structure and scheme of the legislation. The misconduct provisions are directed to the behaviour of a person as a Councillor. To this end, it is internally logical and consistent with the mischief sought to be addressed (that is of improved Councillor integrity and conduct as a Councillor) that the LGA now includes extensive provisions in relation to integrity and behaviour expected from a person acting as a Councillor in their role as a Councillor and in the exercise of their duties as such. These provisions are intended to strengthen the integrity, good governance and public confidence in this tier of government. In this context, applying the opening words of s 224 to qualify the operation of s 229 would conflict with other provisions of the statute, the governance and integrity improvements made to the scheme of the legislation and would be inconsistent with the integrity and governance purposes of the statute.

113 As identified above, I am not persuaded that there is a scenario which would not be fanciful and thus give rise to a circumstance which means the provision is capable of practical application. Section 229 would be redundant. There is no reason for it to remain, as it has no work to do. All it would do is duplicate, on the reasoning of the defendant, the other options in respect of Councillor conduct provided for in the

LGA.

114 The adoption of the literal meaning of the words would lead to a result that is absurd, unreasonable or anomalous.[51]

***Taylor* principles**

115 Both parties identified the leading case of *Taylor* as the relevant authority and agreed that authority provides the principles which I must apply in order to read words into a statute. The relevant principles are outlined above at [19]-[25].

116 Applying *Taylor*, what the Court is to do is to identify the purpose of the statutory scheme, be satisfied of clear error and be satisfied that the error can be corrected as part of the legitimate test of construction without crossing the line from exercise of judicial power into the realm of the legislature.

What is the identified legislative purpose?

117 As already outlined above, the legislative purpose of Division 6 was to provide a mechanism for Ministerial oversight over the conduct of a Councillor or a Council in the governance and integrity performance in these governance roles. The section provided for of standing down of a Councillor via the Ministerial intervention or oversight pathway which requires the prerequisites set out in s 224 and the processes set out in the following provisions of the Division (ss 225-228). The Minister was empowered to seek an order from the Governor-in-Council to stand down a Councillor. The process was one which is consistent with the stated legislative purposes set out in s 1 of the LGA being to secure the peace, order and good government of this tier of government.

118 Implying words into a statute may be permissible in certain circumstances as discussed above with regard to the conditions from *Taylor*. These include circumstances which the plaintiff says can be met in this case. The conditions are in turn applied to the present circumstances, below.

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51 *Colonial Range Pty Ltd* (n 11) [53].

The precise purpose of the precision can be identified

119 The 'mischief' sought to be remedied by the new provision in respect of Councillor conduct and integrity is found within the provisions of ss 224-228. These provisions follow the scheme of the improved integrity provisions which provide for a Councillor Code of Conduct, the Councillor Conduct Panels, the Municipal Monitor and CMI powers and procedures. These provisions read as a whole demonstrate an improved oversight and integrity scheme in the legislation.

120 As indicated above, there are two pathways to the standing down of a Councillor identified. Both are consistent with the objectives of good governance and confidence in the reputation and behaviour of councillors.

Is there an obvious error ?

121 The second principle is the identification of an identifiable error in the drafting of the statute. This principle requires acceptance that it is apparent that the drafters and Parliament had by inadvertence overlooked and so omitted to deal with an eventuality that is required to be dealt with if the purposes of the legislation were to be achieved.

122 It is apparent that the drafters overlooked the possible impact of moving the substance of s 29(4)–(8) of the 1989 Act to within Division 6 of the LGA and failing to differentiate between the process of standing down a Councillor through ministerial oversight by Governor-in-Council order and standing down by VCAT order. The different routes achieve the same intention of preserving the reputation, standing and character expectations of the community.

123 The convoluted and tortuous pathway to a decision to stand down a Councillor who is charged with a serious criminal offence which would result from the interpretation urged by the defendant ought not be preferred. This is particularly so when a clear and reasonable pathway to standing down a Councillor is achieved by the alternative interpretation.

124 In my view, there is an obvious error in the drafting of Division 6. The scheme of the

legislation overall, the context including the history of the provision, the lack of any guidance in the extraneous materials to support a change which would require the preconditions set out in s 224 in the interpretation of s 229, the impractical operability of the scheme as would result if the construction urged upon the court by the defendant were to be adopted leads me to the conclusion that there is a clear error. In addition, the numbering of the text itself is incomplete.

Identification of the words omitted

125 It follows that here it is possible to state with certainty what additional words would have been inserted by the drafters and approved by Parliament had their attention been drawn to the omission before the Bill was passed into law.

126 Those words are to qualify the opening words of s 224 by rephrasing it to read, 'sections 225–228 of this Division apply if…' in s 224(1) of the LGA instead of the words, 'This Division applies if….'.

Is the language consistent with that of the statute?

127 The modification is consistent with the wording otherwise adopted by the drafters. It upholds the purpose of the LGA, ensures the continuity of a long-standing process of bringing an application to VCAT from the 1989 Act into the current LGA and provides a clear pathway and process to standing down a Councillor in very limited circumstances after consideration of the nature and circumstances of the charge by an independent body, VCAT. It does no violence to the words or operation of the Ministerial oversight provisions in ss 224-228 which provide a separate pathway for the standing down of a Councillor by order of the Governor-in-Council.

Conclusion

128 I am satisfied that s 229 ought to be construed in effect as a standalone provision by reading the provision as if it were excluded from the s 224 criteria.

129 While there is a presumption that Parliament intended to draft the legislation in the terms that it did, it is subject to the 'golden rule'.

130 The location of what is now s 229 within Division 6 into this part of the legislation is an awkward and isolated fit. When compared with ss 224 through to 228 which all interrelate, s 229 stands alone. It appears very much as an afterthought collected into Division 6, bundled into the Division which deals with oversight of Councillor behaviour but of a different calibre and operation bearing no connection to the Division, unlike the earlier ss 224-228.

131 The only way in which s 229 achieves what I have formed the view is its purpose is to read in the words as suggested by the plaintiff.

132 This is consistent with the overall intention and purpose of the LGA to provide for peace, order and good governance and in particular to the oversight of Councillor behaviour across a range of circumstances.

133 Division 6 provides for a range of processes for oversight of Councillors and Council behaviour. Each of the parts of Division 6 provide for a particular type of action.

134 It is a requirement that a Councillor be of good reputation. Section 34 of the LGA sets out a range of matters which disqualify a person from the role of a Councillor under the LGA.

135 In my view it is not inconsistent with the Charter for a process to be put in place for a determination on the merits as to whether a particular person who is charged with a serious offence ought not be stood down. This is a reasonable and proportionate interference with Charter rights as provided in s 7(2).

136 There are two pathways to potential standing down of a Councillor. One which is based on Councillor conduct as a Councillor which allows a Minister to seek an order from the Governor-in-Council. The other pathway is by an order of VCAT on application by the CMI where a Councillor is charged with a serious criminal offence.

137 Taking account of the purpose of the legislation, the context including the statute as a whole, its history, the relevant extraneous material and the scheme of the Act as I

have set out, it is clear that s 229 ought be construed in effect as a standalone provision and that the opening words of the Division ought be read to limit the preconditions set out in s 224 to the provisions other than to s 229.

138 The answer to the referred question of law is that the criteria in s 224 of the LGA do not need to be satisfied before an application can be made under s 229.

139 The words of section 224(1) ought be read as if to say, "Sections 224-228 of this Division apply if…", at the commencement of s 224.

CERTIFICATE

I certify that this and the thirty-six preceding pages are a true copy of the reasons for judgment of Justice Quigley of the Supreme Court of Victoria delivered on 29 November 2021.

DATED this twenty-ninth day of November 2021.

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Associate