IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION & PLANNING LIST

Not Restricted

S ECI 2018 00496

WATERFRONT PLACE PTY LTD (ACN 123 231 390) — Plaintiff

v

THE HONOURABLE RICHARD WYNNE, MINISTER FOR PLANNING & ORS (according to the Schedule attached) — Defendants

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JUDGE:	GARDE J
WHERE HELD:	Melbourne
DATE OF HEARING:	20 September 2018
DATE OF JUDGMENT:	22 October 2018
CASE MAY BE CITED AS:	Waterfront Place Pty Ltd v Minister for Planning
MEDIUM NEUTRAL CITATION:	[2018] VSC 621

PLANNING – Call in of proceedings in the Victorian Civil and Administrative Tribunal by the Minister for Planning – Calculation of time – Meaning of cl 58(3)(b) in sch 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) – Application of s 44(1)–(4) of the *Interpretation of Legislation Act 1984* (Vic).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Delany QC with Mr R Watters	Rigby Cooke Lawyers
For the First Defendant	Mr D Batt QC with Mr E Nekvapil	Victorian Government Solicitor's Office
For the Third Defendant	Ms E Porter	Minter Ellison

HIS HONOUR:

Introduction

1 Waterfront Place Pty Ltd (ACN 123 231 390) ('Waterfront') seeks a declaration that the call in notice given by the Minister for Planning ('the Minister') to the Principal Registrar of the Victorian Civil and Administrative Tribunal ('the Tribunal') on Monday 23 July 2018 in proceeding P2100/2017 ('the Tribunal proceeding') is of no effect. It brings the proceeding by way of judicial review under O 56 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

2 In the Tribunal proceeding, Waterfront applied for review of the refusal by Port Phillip Council to grant a permit for a 10 storey, mixed use development on the land at 1–7 Waterfront Place, Port Melbourne. Waterfront's application to the Tribunal was made on 12 September 2017 under s 77 of the *Planning and Environment Act 1987* (Vic) ('the PE Act').

3 A number of objectors to the proposed development were parties to the Tribunal proceeding, including the Victorian Ports Corporation (Melbourne) ('the Ports Corporation'). At the time of the call in, the Tribunal proceeding was listed for a seven-day hearing commencing on Monday 30 July 2018.

4 Following receipt of the call in notice, the Tribunal made an order to the effect that the Tribunal proceeding was finalised and the hearing listed for 30 July 2018 was vacated.

Court proceeding

5 The question for determination by the Court is whether the Minister gave the call in notice in time. Waterfront contends that the call in notice was out of time, as cl 58(3)(b) of sch 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the VCAT Act') requires it to be given 'no later than 7 days before the day fixed for the hearing of the proceeding'.

6 The Minister and the Ports Corporation both contend that the call in notice was given in time and is effective. The question raised in this proceeding involves the construction of the applicable legislation.

7 The parties rely on affidavits and exhibits filed in the proceeding. There is no dispute as to

the facts surrounding the Tribunal proceeding or the call in notice. The Principal Registrar of the Tribunal was named as a party, but has been excused by the Court from appearing or taking any step in this proceeding.

8 Notice of this proceeding was given by Waterfront to all of the parties to the Tribunal proceeding. Apart from Waterfront, the Ports Corporation is the only party to the Tribunal proceeding that appeared in this proceeding and made submissions.

Statutory framework

9 The Minister's call in powers in relation to Tribunal proceedings are found in cl 58 of sch 1 to the VCAT Act. Clause 58(3)(b) imposes a time limit on call in notices, after which they are ineffective.

10 Clause 58 states:

> **Minister's call in powers in [PE Act] matters**
>
> (1) This clause applies to a proceeding for review of a decision under the [PE Act] if the Minister administering the [PE Act] considers that—
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> (a) the proceeding raises a major issue of policy; and
>
> (b) the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives.
>
> (2) The Minister administering the [PE Act] may—
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> (a) by notice in writing to the principal registrar call in the proceeding; or
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> (b) invite the Tribunal—
>
> (i) to decline to hear or to continue to hear the proceeding and refer it to the Governor in Council for determination; or
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> (ii) to hear or to continue to hear the proceeding but, without determining it, refer it with recommendations to the Governor in Council for determination.
>
> (3) A notice or invitation under subclause (2) is of no effect unless it is given—
>
> (a) before the final determination of the proceeding; and
>
> (b) no later than 7 days before the day fixed for the hearing of the proceeding.
>
> …

11 The *Interpretation of Legislation Act 1984* (Vic) ('the Interpretation Act') provides assistance in the construction of legislation in Victoria. Section 4(1)(a) relevantly provides that the provisions of the Interpretation Act apply to an Act unless a contrary intention appears in the Act or the Interpretation Act.

12 Section 44 of the Interpretation Act deals with time, and provides:

> (1) Where in an Act or subordinate instrument a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.
>
> (2) Where in an Act or subordinate instrument a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.
>
> (3) Where the time limited by an Act or subordinate instrument for the doing of any act or thing expires or falls on a day that is a holiday, the time so limited shall extend to, and the act or thing may be done on, the day next following that is not a holiday.
>
> (4) In subsection (3) ***holiday*** means—
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> (a) a Saturday or Sunday;
>
> (b) a day appointed under the **Public Holidays Act 1993** as a public holiday in the place in which the act or thing is to be or may be done.

13 The parties made submissions as to whether s 44(1)–(4) applies to cl 58(3)(b) and, if so, to what effect.

Statutory construction

14 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*, the plurality of the High Court described the task of statutory construction in these terms:

> 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 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.[1]

15 When a provision of an interpretation enactment applies, or may apply to an Act, the task of statutory construction of the particular Act is to be understood in the light of the

[1] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 [47].

interpretation legislation. In *Attorney-General (Qld) v Australian Industrial Relations Commission*, Gleeson CJ said:

> Acts of Parliament are drafted, and are intended to be read and understood, in the light of the Acts Interpretation Act. A particular Act, and the Acts Interpretation Act, do not compete for attention, or rank in any order of priority. They work together. The meaning of the particular Act is to be understood in the light of the interpretation legislation. The scheme of that legislation is to state general principles that apply unless a contrary intention is manifested in a particular Act.[2]

16 In the present case, the task is to construe cl 58(3)(b), having regard to the Interpretation Act, particularly s 44.

Issues for determination

17 The question of whether the Minister gave the call in notice in time raises two issues.

18 The first issue is the construction of the expression 'no later than 7 days before the day fixed for the hearing of the proceeding', and whether this period includes or excludes the day when the call in notice was given, or the day fixed for the Tribunal hearing.

19 The second issue is whether time is extended to the next business day if the seven-day period expires on a weekend or public holiday.

20 In relation to the first issue, Waterfront and the Minister arrived at the same result but by different legal pathways. Ports Corporation submitted that a different interpretation, more favourable to the Minister's position, should be adopted.

21 It is the second issue that is decisive in this proceeding. The Minister and Ports Corporation submitted that s 44(3), as well as s 44(1) and (2), applied so that the Minister was able to give the call in notice on Monday 23 July 2018, the seven-day period having expired on Sunday 22 July 2018. Waterfront submitted that s 44(3) did not apply, with the consequence that the call in notice was out of time and of no effect.

The first issue

22 Waterfront submitted that:

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[2] *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485, 492-493 [8] ('*AIRC*'), citing *Acts Interpretation Act 1901* (Cth) ('Acts Interpretation Act').

(a) Section 44(1) of the Interpretation Act did not apply to the construction of cl 58(3)(b) as the seven-day period was not expressed to begin on, or be reckoned from, a particular day;

(b) Section 44(2) did not apply, as the seven-day period is not expressed to end on a particular day. Rather, cl 58(3)(b) says that unless the seven-day period requirement is satisfied, the call in notice is of no effect;

(c) Clause 58(3)(b) required the elapse of seven clear days between the giving of the call in notice by the Minister and the date of the Tribunal hearing; and

(d) Clause 58(3)(b) was intended to give protection to parties to Tribunal proceedings who, like Waterfront, have expended time and effort preparing for a hearing, and to prevent 'last minute' or 'mid-hearing' call ins by the Minister. This was the reason given when s 41(3) of the *Planning Appeals Act 1980* (Vic), the predecessor provision to cl 58(3)(b), was introduced.[3]

23 Waterfront relied on the decision of the High Court in *Forster v Jododex,*[4] to the effect that the expression 'not later than' in a statute or instrument was indistinguishable in meaning in this context from 'at least' and 'not less than'. It also relied on the common law principle that the law does not recognise fractions of a day. A day means the period from midnight to midnight on a particular day.[5]

24 The Minister submitted that the requirement in s 44(1) that a stipulated period 'be reckoned from' a particular day, i.e. the day fixed for the hearing of the proceeding, was satisfied. Similarly, the requirement in s 44(2) that a stipulated period 'be reckoned to a particular day' was also satisfied by the reference in cl 58(3)(b) to the day 'no later than 7 days before the day fixed for the hearing of the proceeding'.

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3 Victoria, *Parliamentary Debates*, Legislative Council, 25 March 1987, 588 (A.J. Hunt); referred to at Victoria, *Parliamentary Debates*, Legislative Council, 27 May 2004, 1200 (J.M. Madden, Minister for Sport and Recreation).

4 (1972) 127 CLR 421, 445 (Gibbs J), 426 (McTiernan J), 429 (Walsh J), 448 (Stephen J), 451–2 (Mason J) ('*Jododex*'); cited in *Francis v Carmichael* [1976] VR 259, 263 (Dunn J); see *Associated Dominions Assurance Society Pty Ltd v Balmford* (1950) 81 CLR 161, 183.

5 Citing *Carnegie & Sons v Dunham* [1914] VLR 485, 489 (Hodges J); *Re Railway Sleepers Supply Co* (1885) 29 ChD 204, 207 (Chitty J).

25 The Ports Corporation supported the Minister's submission. However, it also said that as 23 July 2018 was the seventh day before the hearing on 30 July 2018 and the notice was given on that day, this was sufficient to satisfy cl 58(3)(b).

Common law principles

26 In *Jododex*, Gibbs J held as a matter of statutory construction that the phrase 'no later than' was indistinguishable from 'at least' or 'not less than'.[6] Although Gibbs J was in dissent, other members of the Court were also of the view that 'no later than' and like expressions required a clear or full period of time to expire between two events.[7]

27 The requirement that there be clear days when expressions like 'at least', 'not less than' or 'no later than' are used in statutes, unless the contrary intention appears, has been accepted on many occasions.[8]

28 Application of the meaning of 'no later than' adopted in *Jododex* leads to a requirement for seven clear days to elapse between the giving of the call in notice and the first day fixed for hearing. Again, this means that the last time for giving the call in notice was midnight on Sunday 22 July 2018.

29 In *Mordechai v Minister for Immigration and Citizenship*,[9] Bennett J considered a provision which required an applicant to give the Minister a written statement 'at least two business days' before a tribunal hearing. A statement was sent to the Minister on the Friday before a scheduled Tuesday hearing**.** Whether s 36(1) of the Acts Interpretation Act, or the interpretation adopted by Gibbs J in *Jododex*, was applied, the result was the same. Bennett J held that the requirement for 'at least two business days' meant that service had to be effected no later than the Thursday preceding the hearing.

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6 (1972) 127 CLR 421, 445 (Gibbs J).

7 Ibid 426 (McTiernan J), 429 (Walsh J), 448 (Stephen J), 451-2 (Mason J).

8 See *Ayres v Chacos* (1972) 19 FLR 468; *Bear v Official Receiver* (1941) 65 CLR 307; *Ex parte McCance*; *Re Hobbs* (1926) 27 SR (NSW) 35; *Re GK Pty Ltd (in liq)*; *ex parte Deputy Commissioner of Taxation* (1983) 7 ACLR 633; *Francis v Carmichael* [1976] VR 259, 263 (Dunn J); DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 299 [6.49].

9 (2011) 196 FCR 509.

Decision

30 Consistently with the principles set out by the High Court in *AIRC*,[10] cl 58(3)(b) should be read in the light of the Interpretation Act, and on the basis that both provisions work together.

31 I reject Waterfront's submission that cl 58(3)(b) does not fix any period as it concerns the effect of a notice. This is a pedantic and technical reading of s 44(1) and (2), and deprives these provisions of their efficacy. It is artificial to say that s 44(1) and (2) do not apply because the Minister could still give the call in notice, but a nugatory and ineffective one.

32 I reject the Ports Corporation's submission that the giving of the notice on Monday 23 July 2018 was sufficient to satisfy the requirements of cl 58(3)(b) without needing to rely on s 44(3) of the Interpretation Act. This is incorrect because the first hearing day, Monday 30 July 2018, is included while Monday 23 July 2018 is excluded from the period. Clause 58(3)(b) requires that the notice be given 'no later than 7 days' before the first hearing day.

33 I accept the Minister's submission as to the application of s 44(1) and (2). As for s 44(1), cl 58(3)(b) provides for a period of seven days 'to be reckoned from' the day when the notice is given. In my view, the words used in s 44(1) plainly apply to a provision which requires a minimum period of time to exist between two events if the first event is to be effective. As for s 44(2), the period of seven days in cl 58(3)(b) is reckoned to the day fixed by the Tribunal for the hearing. As a result, s 44(2) applies.

34 The effect of s 44(1) is to exclude Monday 23 July 2018, when the call in notice was given, from the calculation of the seven-day period required by cl 58(3)(b). The effect of s 44(2) is to include Monday 30 July 2018, the day fixed for the Tribunal hearing, in the calculation of the same period. The result is that the last time by which the Minister could give notice under cl 58(2) was midnight on Sunday 22 July 2018.

Conclusion

35 In summary, application of s 44(1) and (2) of the Interpretation Act results in the same outcome as the application of common law principles. The last day for giving the call in

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10 (2002) 213 CLR 485, 492-494 (Gleeson CJ).

notice without resort to s 44(3) of the Interpretation Act was Sunday 22 July 2018.

The second issue

36 I now turn to the second and decisive issue, whether s 44(3) of the Interpretation Act applies to cl 58(3)(b) to permit the Minister to call in the Tribunal proceeding on Monday 23 July 2018, as he did.

37 Firstly, Waterfront submitted that s 44(3) could only apply if a provision in an Act limited the time for doing an act and that time expired on a holiday. Clause 58(3)(b) did not confine or limit the power of the Minister to do the act in question. The call in notice could still be sent by the Minister to the Tribunal, but it would not have had any legal effect. Section 44(3) did not deem a thing done on a later day to have been done on an earlier day, nor did it deem a state of affairs that came into existence on a later date to be in existence on an earlier date.

38 Secondly, Waterfront submitted that even if s 44(3) of the Interpretation Act would otherwise apply, it did not, as a contrary intention was to be found in cl 58.

39 The Minister submitted that cl 58(3)(b) limited the time by which the Minister could give a call in notice to no later than midnight on Sunday 22 July 2018. However, s 44(3) also applied, with the result that the call in notice was within time. There is no contrary intention to be found in cl 58.

40 The Ports Corporation supported the Minister's submissions as to the operation of s 44(3) of the Interpretation Act, and the absence of a contrary intention in cl 58. It also relied on r 4.32(4) of the *Victorian Civil and Administrative Tribunal Rules 2018* (Vic) ('the VCAT Rules'). This provides:

> When the last day for doing any act at the Tribunal is a day on which the Tribunal registry is closed, the act may be done on the next day the Tribunal registry is open.

Relevant authority

41 The High Court recently considered the effect of s 36(2) of the Acts Interpretation Act in *Minister for Immigration and Border Protection v Kumar*.[11] Section 36(2) is similar in

[11] (2017) 260 CLR 367 ('*Kumar*').

content to s 44(3) of the Interpretation Act.

42 In this decision, the last day on which the visa applicant was qualified for the granting of a visa fell on a Sunday. The applicant contended that he could validly make the application on the following Monday. A plurality of the High Court held that s 36(2) did not apply. While the applicant could make a visa application on the following Monday, this did not alter the position that he no longer satisfied the requirement that had to be satisfied if his visa application were to be successful.

43 Gageler J took the opportunity to give examples of the operation of s 36(2). They included issuing a proceeding for damages in a court on a Monday where the limitation period expired on the previous Sunday. His Honour observed that s 36(2) operates when an Act expressly or by implication requires or allows something to be done within a period of time and that period expires on a Saturday, Sunday or holiday.[12] It gave an act, if done on that next day, the same legal effect as that act would have had if it had been done within the period required or allowed by the Act.[13]

44 Nettle J dissented. He held that s 36(2) was remedial in nature and was aptly described as a safeguard. It should be construed in a manner which gave effect to the remedy and served the purpose the legislature intended to achieve.[14]

45 In *Thomson v Les Harrison Contracting Co*,[15] Harris J had the task of construing s 31A of the *Acts Interpretation Act 1958* (Vic), the precursor to s 44(3) of the Interpretation Act. The three-year limitation period in which an action could be brought expired on a Sunday. The plaintiff sought to issue the proceeding on the following Monday.

46 The issue before Harris J was whether s 31A operated as an extension of time of the limitation period, or whether it operated in a more restricted fashion. This required an examination of the words in s 31A and to assess whether, upon a fair reading of those words, they applied to the limitation provision.

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12 Ibid 379 [27].
13 Ibid 379 [29].
14 Ibid 395 [72].
15 [1976] VR 238 ('*Thomson*').

47 Harris J held:

> What s 31A speaks of is 'the time limited by any Act for the doing of any act or thing'. The expression 'for the doing of any act or thing' is a very wide one. In my opinion, the inclusion of the word 'for' in the phrase in s 31A(1) even having regard to the words 'is to be or may be done' in s 31A(2), is insufficient to lead to construing the section as only applying to cases where the provisions of an Act positively require a person to do an act or thing within a limited time. In my opinion, the language is just as apt to cover cases where the time which is limited for the doing of the act or thing is a time within which a person has to do the act or thing, if he is going to do it at all.
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> …
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> In my opinion, it would be altogether artificial to construe s 31A as only applying to an Act in which there was a provision which used the very expression 'the time limited'. In my opinion, it applies wherever the provision in the other Act can properly be regarded as limiting a time and this is, in substance, what s 5(6) does even though the language of that provision does not continue the style of language used in the title to the Act and in the heading to the Part in which it is to be found.
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> Therefore, I have come to the conclusion that s 5(6) of the Limitation of Actions Act 1958 does limit a time for the doing of an act or thing. It follows that, when that time expires on a holiday (which includes a Sunday) the act or thing may be done on the day next following that is not a holiday…[16]

48 The process of reasoning is significant. First, his Honour observed that the expression 'for the doing of any act or thing' is a very wide one. I note that the same expression is to be found in s 44(3). Second, the issue of a writ in the Supreme Court is considered to be 'the doing of an act or thing'. Third, while the limitation provision used negative language, specifying that no action for damages shall be brought after the expiration of three years, it was still a limitation period or the limitation of a time. Fourth, s 31A should not be construed in an artificial way. It applied whenever the provision of the other Act can properly be regarded as limiting a time. This was, in substance, what the limitation provision did.

49 Harris J's reasoning in *Thomson* was cited with approval by the High Court in *Kumar*.[17]

50 In *De Angelis v De Angelis*,[18] Mandie J considered whether a testator's family maintenance application could be issued on the Monday following the expiration of a six-month period on a Sunday after the grant of probate.

51 Mandie J applied s 44(3) of the Interpretation Act. The period of six months was a 'time

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16 Ibid 242.
17 (2017) 260 CLR 367, 379 [29] (Gageler J); 390-391 [61] (Nettle J in dissent).
18 [2003] VSC 83 ('*De Angelis*').

limited by an Act for the doing of any act or thing' despite the fact that the operative provision restricting the issue of proceedings was negatively expressed, providing that 'no application shall be heard by the court … unless the application is made within six months after the grant of probate'.[19]

52 Mandie J saw no reason, as a matter of plain and reasonable construction of the words, or in policy, to exclude the application of s 44(3) as one of the general provisions of the Interpretation Act. Section 44(3) is a remedial provision to protect people who are affected by statutory time limits which expire on holidays or weekends, and is for the benefit of those people. Even though the principal provision was framed in terms which prevented the court from hearing an application not made within a specified period, there were no deleterious consequences if s 44(3) were applied.[20]

Does s 44(3) of the Interpretation Act apply to cl 58(3)(b)?

53 Waterfront submitted that cl 58(3)(b) rendered the giving of a call in notice ineffective, but not unlawful.

54 Clause 58(3)(b) provides that a notice under cl 58(2) is of no effect unless it is given 'no later than 7 days before the day fixed for the hearing of the proceeding'. Two dates have fundamental significance. They are the date when the notice is given, and the date when the proceeding is fixed for hearing.

55 The clause takes effect by requiring that the first date be 'no later than 7 days' before the second date. In the words of s 44(3), there is 'a time limited by an Act', 'for the doing of any act or thing'. The act is the calling in of the Tribunal proceeding by notice in writing. Plainly, the giving of a notice is 'the doing of an act'.

56 Clause 58(3)(b) uses negative language and provides that a call in notice is 'of no effect' unless it complies with that provision. However, the use of negative language does not provide any barrier to the operation of s 44(3). Both of the provisions under consideration in *Thomson* and *De Angelis* used negative language. In each case, the court held that s 44(3) or

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19 Ibid [5].
20 Ibid.

its predecessor applied.

57 As Harris J said in *Thomson*, the words 'the doing of an act or thing' are wide, simple words, and the draftsman has not sought to specify with particularity what they cover.[21] In *Thomson*, a writ could have been issued, or in *De Angelis*, an application could have been issued by the court registry.

58 So, in my view, does the giving of a call in notice by the Minister to the Tribunal. If out of time, they would have been legally nugatory, unless saved by an interpretation provision. While the act physically could have been done later than the permitted date, it would have been lacking in any legal efficacy or utility. Such a narrow construction of s 44(3) is artificial, pedantic and unreasonable.

59 As Mandie J held in *De Angelis*, s 44(3) is a remedial provision to protect people who are affected by statutory time limits which expire on public holidays or weekends.

60 Section 44(3) operates to extend the time limited by cl 58(3)(b) to the day following a weekend or public holiday. Waterfront undertook an analysis of long weekends and public holidays over the current calendar in Victoria. Waterfront contended that the application of s 44(3) to the time limit in cl 58(3)(b) would reduce the call in notice period to VCAT proceedings in some cases to less than seven days, which it submitted was the minimum when the predecessors of cl 58(3)(b) were introduced into Parliament.[22]

61 It is true that a consequence of the application of s 44(3) to cl 58(3)(b) will be the effective reduction of the minimum period below seven days, over long weekends and public holidays, so reducing the minimum notice period to applicants and other parties to VCAT proceedings.

62 The VCAT Act and the Interpretation Act bind the Crown in right of the State of Victoria.[23] There is no reason why the Minister cannot rely on the provision.

63 There is, in my view, good reason why s 44(3) of the Interpretation Act should apply to cl 58(3)(b). Section 44 (1), (2) and (3) should be construed to work with cl 58(3)(b). They

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21 [1976] VR 238, 242.
22 Above n 7.
23 VCAT Act s 7; Interpretation Act s 5.

operate in aid of cl 58(3)(b) to clarify its operation and effect just as they do in the case of other statutory provisions.

Is there a contrary intention in cl 58 to the operation of s 44(3)?

64 Waterfront submitted that a contrary intention to the application of s 44(3) was to be found in cl 58. It relied on the phrase 'no later than 7 days', the legislative history of cl 58(3)(b) and the observations of the Hon A.J. Hunt in Parliament that people who have gone to the time and effort of preparing for a hearing should be protected, and not deprived of a hearing at the last minute.[24]

65 It also submitted that the call in power is not the only pathway to the Governor-in-Council in the case of a proceeding involving a major question of policy.

66 These submissions must be rejected.

67 First, the observations made in Parliament were not directed to the application of s 44(3) to cl 58(3)(b). There is no consideration in Parliament of the issue that arises in this proceeding as to how the seven-day period is to be calculated if it concludes on a weekend or public holiday. There is no reason to suppose that Parliament intended anything other than that the Interpretation Act would apply to cl 58(3)(b).

68 Second, while it is true that there are other pathways to the Governor in Council found in cl 58 and elsewhere, this is not a reason why s 44(3) should not apply.

69 Apart from call in, the Minister can invite the Tribunal to decline to hear, or to continue to hear a proceeding and refer it to the Governor in Council.[25] The Minister can invite the Tribunal to continue to hear a proceeding, and refer the proceeding with recommendations to the Governor in Council for determination.[26] However, each of these provisions is subject to cl 58(3), and to the same restrictions as to time. There is good reason why the provisions of the Interpretation Act should also apply to cl 58(3)(b).

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24 Above n 7.
25 VCAT Act sch 1, cl 58(2)(b)(i).
26 Ibid cl 58(2)(b)(ii).

70 In *Buttigieg v Melton Shire Council No 3*,[27] a number of purposes underlying cl 58(3)(b) were identified. They included the protection for parties who have gone to the time and effort of preparing for a hearing by retaining counsel and expert witnesses, and the need to maintain the independence and authority of VCAT.[28] As Morris P noted, counsel are usually engaged several weeks ahead, and expert witness statements must be filed at least 10 business days before the hearing in accordance with standard Tribunal directions.[29]

71 The reduction of the seven-day period for weekends or public holidays would not significantly affect or undermine the purposes in question. In any event, the VCAT Registry is closed on weekends and public holidays. A call in notice could be sent to the Registry electronically, but no action could follow until the next available business day.

72 In my view, the application of s 44(3) of the Interpretation Act to the time period in cl 58(3)(b) is of little consequence to these purposes.

73 Ports Corporation additionally relied on r 4.32 of the VCAT Rules, which is of similar effect to s 44(3). Neither Waterfront nor the Minister did so. In my view, a provision of the VCAT Rules, as subordinate legislation made by the VCAT Rules Committee, cannot affect the construction of a provision dealing with the call in power of the Minister in the VCAT Act.

Conclusion

74 For the reasons given, the call in notice was in time and effective. The submissions made by Waterfront fail.

75 The result achieves an interpretation of cl 58(3)(b) and the temporal boundaries of the call in power that are simple and clear. The provisions of s 44 of the Interpretation Act operate in aid of cl 58(3)(b). They are applicable where there is doubt whether a call in notice has been given in time.

76 The proceeding will be dismissed.

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27 (2005) 23 VAR 326; [2005] VCAT 1867 (Morris P).
28 Ibid [28].
29 Ibid.

SCHEDULE OF PARTIES

WATERFRONT PLACE PTY LTD (ACN 123 231 390)	Plaintiff
THE HONOURABLE RICHARD WYNNE, MINISTER FOR PLANNING	First Defendant
THE PRINCIPAL REGISTRAR, VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL	Second Defendant
VICTORIAN PORTS CORPORATION (MELBOURNE)	Third Defendant
