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# Victorian Civil and Administrative Tribunal

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## Terei v Banyule CC (General) [2012] VCAT 359 (30 March 2012)

Last Updated: 10 April 2012

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
ADMINISTRATIVE DIVISION

GENERAL LIST

VCAT REFERENCES: G40/2012

### CATCHWORDS

Where the dog is defined as a **restricted breed** dog under the [Domestic Animals Act 1994](#) and the Standard for **Restricted Breed** Dogs in Victoria - [Domestic Animals Act 1994 s 3](#)

<b>APPLICANT:</b>	Hayley Terei
<b>RESPONDENT:</b>	Banyule City Council
<b>WHERE HELD</b>	Melbourne
<b>BEFORE:</b>	Senior Member I. Proctor
<b>HEARING TYPE:</b>	Hearing
<b>DATE OF HEARING:</b>	6 March 2012
<b>DATE OF ORDER</b>	30 March 2012
<b>DATE OF REASONS</b>	30 March 2012
<b>CITATION</b>	Terei v Banyule CC (General) [2012] VCAT 359

### ORDERS

1. The respondent's decision is affirmed.
2. The above order is stayed for 28 days from the date of these orders, to allow the applicant to decide whether or not she wishes to appeal these orders to the Supreme Court of Victoria.
3. Order 2 above will cease to have effect, before 28 days have elapsed, if the applicant advises the respondent in writing that she does not intend to appeal these orders.

Ian Proctor  
Senior Member

## APPEARANCES

For Applicant	In person
For Respondent	Mr B. Stafford, Solicitor

## REASONS

### Introduction

1. On 19 December 2011, an unregistered male dog, now known as “Ace”, was found in Heidelberg West by Mr Paul Mitchell, a local laws and animal management officer employed by Banyule City Council<sup>[1]</sup> (the Council). He had received a complaint that the dog was roaming free. He formed a preliminary view that Ace could be classified as an American Pit Bull Terrier under the [Domestic Animals Act 1994](#) (the Act). Mr Mitchell seized the dog, under [section 80](#) of the Act.
2. Shortly after, Ace’s owner, Ms Terei, the applicant in this proceeding, contacted the Council and advised she is the owner. On 21 December 2011, Ms Terei re-registered Ace with the City of Whittlesea, where the dog was previously registered.
3. On 21 December 2011, Mr Mitchell consulted with two officers from the RSPCA, one being Dr Christopher Thurgood, veterinarian. The RSPCA officers formed the view that Ace can be classified as a Pit Bull Terrier.
4. On 21 December 2011, Mr Mitchell declared Ace to be **restricted breed** dog under [section 98A](#) of the Act. He made his decision by comparing Ace’s appearance to criteria set out in the “Standard for **Restricted Breed** Dogs in Victoria” (the Standard).
5. Mr Mitchell sent a copy of the declaration to Ms Terei by registered mail<sup>[2]</sup>.
6. On 19 January 2012, VCAT received an application from Ms Terei, under [section 98\(2AA\)](#) of the Act, challenging the declaration by applying for review of the decision by the authorised officer under [section 98A](#) of the Act to declare the dog a **restricted breed** dog.
7. VCAT must decide whether Ace is a **restricted breed** dog, as defined under the Act and so whether Mr Mitchell’s declaration should be affirmed or set aside.

### The VCAT hearing

8. On 6 March 2012, I heard the application. Ms Terei represented herself. The Council was legally represented. Given my responsibility to assist Ms Terei as an unrepresented party, I took an interventionist approach in terms of questioning the Council’s witnesses, Dr Thurgood and Mr Mitchell. I also questioned submissions put on behalf of the Council. Ms Terei gave brief evidence and made brief submissions, in what was a very difficult hearing for her.
9. Before either Dr Thurgood or Mr Mitchell gave evidence, Ms Terei provided, at the hearing, an analysis of the Standard with respect to Ace. It was said to be written by Ms Linda Watson who I understand takes an interest in the issue of classification of dogs as **restricted breed** dogs. Ms Watson was attempting to assist Ms Terei. Ms Watson did not appear at the hearing. Her view as expressed in her paper was that Ace should not be defined as a **restricted breed** dog.
10. I decided it was reasonable to put the views recorded in Ms Watson’s paper to both witnesses, as a way of allowing a counter view to that of the Council to be considered and to test the evidence of witnesses. This was by far the most time-consuming element of them giving evidence. Ms Watson’s views are summarised in the appendix to these reasons.

### *Evidence from Dr Thurgood*

11. Dr Christopher Thurgood is the Chief Veterinarian at the RSPCA. He has practised as a veterinarian for 40 years, with a substantial proportion of that in small animal practice. He is a

previous member of the previous **Restricted Breeds** Panel. One of his duties at the RSPCA is to determine that dogs in the care of the RSPCA are a **restricted breed** dog. **Restricted breed** dogs may not be rehoused.

12. On 21 December 2011, he and “Alice”, a colleague from the RSPCA inspected Ace and decided Ace is properly classified as a Pit Bull Terrier.
13. Dr Thurgood uses two methods to form his opinion.
14. First, without using the Standard in his professional opinion, based on Ace’s appearance, Ace is properly classified as a Pit Bull Terrier. In response to a question from me, he said he would not say that classification is beyond reasonable doubt. This is because there is a reasonable degree of variation within the Pit Bull Terrier classification, as understood by veterinary surgeons.
15. Second, in his opinion, Ace is also properly classified as a Pit Bull Terrier with reference to the Standard. He gave evidence on this point for at least an hour. His evidence is summarised in the appendix to these reasons. He spoke of seeing Ace on 21 December 2011 and with a colleague going through the Standards “line by line”.
16. In giving evidence, Dr Thurgood referred both to his recollection from inspecting Ace and photographs available at the hearing. In his view, a far more accurate opinion can be formed on a visual inspection of the dog rather than through photographs. A dog should be inspected when it is in a neutral relaxed position. The photographs available to VCAT did not show Ace in a neutral position. Dr Thurgood was careful to describe where the photographs assisted and where they could not be relied on.
17. An issue arose as to Ace’s height. Dr Thurgood gave evidence that some of the criteria in the Standard are more critical than others. For example, Pit Bull Terriers are relatively short dogs. Therefore, a dog that met the criteria apart from height may not fall within the Standard. The Standard specifies height of 43 to 53 cm. Dr Thurgood’s recollection was that Ace fell within the accepted height for a Pit Bull Terrier. He was surprised by Mr Mitchell recording Aces’ height as 55 to 60 cm on a checklist he filled out (see below). On the day of the hearing, the Council had the dog measured at 51 cm, which was within the range set in the Standard.
18. In giving evidence, Dr Thurgood agreed there was no evidence he was aware of to suggest Ace is an aggressive dog. He criticised the policy underlying the application of the Standards to define **restricted breed** dogs. In his view, dogs that need not be put down will be caught up by the classification process. I note this to observe Dr Thurgood’s evidence is apparently given from a position of scepticism rather than support for the classification process.

#### *Evidence from Mr Mitchell*

19. Mr Mitchell has 30 years experience in animal management. On first seeing Ace, he formed the view that the dog appeared to be an American Pit Bull Terrier. He was aware of the then relatively new Standard. After seizing Ace, he made careful enquiries about the classification process under the Standard, including searching the Department of Primary Industry website to download and print the Standard and the checklist. I understand he initiated the visit from Dr Thurgood and colleague, in order to get other opinions, this being the first time he had applied the Standard. He formed his view after learning Dr Thurgood’s view, but reached an independent opinion.
20. In his opinion, Ace is properly classified as a Pit Bull Terrier, with reference to the Standard. His views are set out in the appendix to these reasons. Mr Mitchell gave evidence for at least an hour. He gave clear reasoned evidence to support his view.
21. On the height issue, his recording of Ace’s height as being 55 to 60 cm was an initial estimate based on visual inspection, not on measuring Ace.

#### *Evidence from Ms Terei*

22. Ms Terei spoke of Ace not being an aggressive dog. This is the first time anyone has

described him as a as a Pit Bull Terrier. In particular, professionals, including those at the Lord Smith Animal Home, which cared for Ace during an illness, never raised concerns. She believes he is a “staffy”. Dr Thurgood was not surprised that prior to the Standard being in place, no one had raised concerns.

## Legislative background

23. In 2001, [section 98A](#) was inserted into the Act to provide for an *authorised officer* to declare a dog as a **restricted breed** dog<sup>[3]</sup>. An *authorised officer* was and is an *authorised officer* appointed under [section 72](#) of the Act.

24. The Act was further amended to repeal the panel process previously available to review **restricted breed** declarations and provide instead for review by the VCAT. It also amended the prohibition on keeping a **restricted breed** dog at section 41EA of the Act, allowing for a two year amnesty period within which to register **restricted breed** dogs. Concerning VCAT, the Act says,

### 98. Review of decisions by Victorian Civil and Administrative Tribunal

(2AA) The owner of a dog may apply to the Victorian Civil and Administrative Tribunal for review of a decision by an authorised officer under section 98A to declare the dog a **restricted breed** dog.

(2A) An application for review under subsection (1), (2) or (2AA) must be made within 28 days after the later of—

(a) the day on which the decision is made;

(2B) For the purposes of subsection (2A), a decision referred to in subsection (2AA) is taken to be made when the notice of the declaration is served on the owner of the dog.

25. A **restricted breed** dog is now defined in section 3(1) of the Act as:

**restricted breed** dog means a dog that is any one of the following breeds-

Japanese Tosa;

fila Brasileiro

Dogo Argentino

Perro de Presa Canario (or Presa Canario)

American Pit Bull Terrier (or Pit Bull Terrier)

26. Sections 3(3) and 3(4) of the Act provide for a Gazettal of an approved Standard describing a **restricted breed** dog:

(3) a dog that falls within an approved Standard for a breed of dog specified in a paragraph of the definition of **restricted breed** dog is taken to be a dog of that breed.

(4) for the purposes of subsection (3) an approved Standard is a Standard that has been approved by the Minister and published in the Government Gazette.









27. The approved, “Standard for **Restricted Breed** Dogs in Victoria” was published in Special Gazette S283, 1 September 2011.



28. Part 1 of the Standard relevantly provides:

1. A dog that meets the description of a dog in this Part is an American Pit Bull Terrier; except a dog in respect of which the owner has one of the following certificates stating that the dog is an American Staffordshire Terrier-

- (a) a pedigree certificate from the Australian National Kennel Council
- (b) a pedigree certificate from a member body of the Australian National Kennel Council
- (c) a pedigree certificate from a national breed council registered with the Australian National Kennel Council
- (d) a certificate signed by veterinary practitioner

## Decision

29. Under [section 51\(2\)](#) of the [Victorian Civil and Administrative Tribunal Act 1998](#), in determining this application for review, VCAT may
- (a) affirm the decision under review;
  - (b) vary the decision under review;
  - (c) set aside the decision under review and make another decision in substitution for it; or
  - (d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.
30. VCAT must determine whether the decision under review (the Declaration) was the correct one by making an independent assessment and an independent determination of the question (*Bausch v Transport Accident Commission* [11 VAR 117](#) at 137).
31. I affirm Mr Mitchell's decision to declare Ace a  **restricted breed**  dog.
32. I agree with the Council's submission that a dog may be classified as a  **restricted breed**  dog by taking either of two approaches.
33. First, a dog may fall within the definition of  **restricted breed**  dog as defined in [section 3\(1\)](#) of the Act, if it is classified as an American Pit Bull Terrier, or Pit Bull Terrier without reference to the Standard.
34. Second, a dog may fall within the definition of  **restricted breed**  dog because it is taken to be a dog of that breed because it falls within the Standard.
35. Taking the first approach, the only expert evidence before me with respect to deciding whether Ace is a Pit Bull Terrier, without reference to the Standard, is Dr Thurgood's evidence as a very well qualified veterinary surgeon that Ace is a Pit Bull Terrier.
36. I accept his evidence and find Ace is a Pit Bull Terrier.
37. Taking the second approach, Dr Thurgood and Mr Mitchell have given considered careful evidence that Ace falls within the Standard. They do not say his appearance is a 100% match with the Standard. Dr Thurgood said this would rarely be the case.
38. In my view, for a dog to fall within the Standard, its appearance must achieve a high level of compliance with the Standard.
39. It may be that VCAT will in the future hear applications where there is real debate as to whether a dog falls within the Standard in terms of whether it meets critical criteria or meets sufficient criteria as a whole.
40. However, this is not such an application. I accept Dr Thurgood's and Mr Mitchell's evidence taken as a whole that Ace meets the Standard to a high degree, as summarised in the appendix to this decision.
41. I prefer their evidence to the views put in the paper by Ms Watson. I am unaware whether Ms Watson has professional qualifications, which may lead VCAT to regard her as an expert in the field. She was not available for cross-examination and so her views must be given little weight. Understandably, she has not seen Ace and so is forced to rely on the photographs, which in Dr Thurgood's opinion do not assist in a variety of respects.

42. For completeness, I note no certificate, as defined in [Part 1](#) of the Standard, exists with respect to Ace.
43. Therefore, in my view, Ace is defined as a  **restricted breed**  dog under the Act and so I affirm the Council's decision.

Ian Proctor  
Senior Member

### Appendix – Comparison of evidence about Ace and the Standard

Item from Standard	Dr Thurgood	Mr Mitchell	Ms Watson	VCAT Finding
<p><b>Head :</b> The head is proportionate to the dog. Viewed from above, the general shape of the head is that of a blunt wedge, large and broad. Viewed from the side, the skull and muzzle are on parallel plains separated by a moderately deep stop. Arches over the eyes are well defined but not pronounced (refer figure 3)</p>	<p>Complies on the basis of physical inspection. Difficult to judge from the photographs.</p>	<p>Complies. He did not tick the 'yes box' on the checklist due to mistake. In his view, the head is wedge shaped as required. This was the first characteristic that led him to first think this dog was probably a Pit Bull Terrier. Profile consistent with Standard.</p>	<p>Does not comply with reference to Mr Mitchell's estimates of length of notice to stop the length stopped the back of head. He does not look particularly like a large or broad blunt wedge.</p>	<p>Complies.</p>
<p><b>Muzzle:</b> Slightly shorter in length to the skull (i.e. 2:3 ratio for muzzle:skull). It is broad, deep and powerful with a slight taper to the nose and falls away slightly under the eyes</p>	<p>On the basis of the photos it included the ratio was approximately 2:2.5. you describe this as conforming reasonably well. He agreed this is very important and he was not concerned (in terms of not meeting Standard) about this criterion at the inspection.</p>	<p>Complies. First written measurements on the checklist were an estimate</p>	<p>On basis of Paul Mitchell's measurements and the photos ratio appears 1:1.</p>	<p>Complies.</p>

<p><b>Skull:</b> Large, fairly flat, broad and deep, slightly tapering towards the stop. There is a deep</p>	<p>Complies. Cheek muscles are pronounced. Difficult to comment from</p>		<p>Cheek muscles do not appear very pronounced. All subjective. Large, fairly flat,</p>	<p>Complies.</p>
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median furrow reducing in depth from stop to occiput. Cheek muscles are prominent but free of wrinkles. When the dog is alerted wrinkles will form on the forehead.	the photographs.		broad and deep slightly tapering towards the stop? Looks more than slightly tapering to stop. Cheek muscles are not prominent.	
<b>Lips:</b> Clean and tight	Would have considered it complied at the inspection No distinct recollection Hard to tell from photos	Consistent with Standard both on inspection and with reference to photos.	Clearly not tight. If clean means close-fitting these lips are not close-fitting.	Complies.
<b>Teeth:</b> Large and a complete scissor bite i.e. upper teeth closely overlapping the lower teeth and set square to the jaws.	Dr Thurgood's colleague, Alice inspected the dog's teeth and judged they complied. Dr Thurgood did not do so. It is not possible to form an opinion on this from the photographs.	On the basis of a quick look at the visual inspection, complies, but this judgement takes Mr Mitchell to start to move beyond his expertise.	May or may not comply	Complies
<b>Nose:</b> Large with wide open nostrils and may be of any colour.	Complies.	Complies.		Complies

<b>Eyes:</b> Medium in size, round in shape and set low in the head – not prominent. Eyes can be all colours except blue. The eye rims are the same colour as the skin colour	Conforms "fairly nicely". Medium size, not prominent reasonably in line with the Standard	Complies. Almond coloured eyes the same colour as a skin colour.	Does not comply	Complies
<b>Ears:</b> The shape and carriage of the ears will vary from dog to dog. Generally they are set fairly high on the skull, not large and may be half pricked or rose shaped (i.e. folding backwards and exposing the inner burr of the ear).	Agreed ears not rose shaped. However, complies due to meeting other points.	Complies with all aspects, including rose shaped.	Large, pendulous, ending in round V shape. Not pricked, set high but definitely not rose shaped. – Does not comply	Complies
<b>Neck :</b> Moderate length and with great strength,	Complies on basis of inspection. The	Complies, on the basis of	A formal with little tapering. Appears to	Complies

tapering from the head into the shoulders. A slight arch over the crest. The neck must be free from loose skin or dewlap (loose, pendulous skin under the throat).	photos do not assist in making a judgement on this issue.	inspection. Photographs not helpful.	be no arch over the crest. Jawline is not well above the backline. In a family photo there is clearly loose skin under the throat.	
<b>Forequarters :</b> Strong forelegs, well boned and muscular with elbows fitting close to the body. Viewed from the front the forelegs are set moderately well apart and in a straight line to the ground. The pasterns are short and fairly straight but with flexibility. Viewed from the side, the legs are straight with some flexibility in the pasterns.	Complies. While none of the photos show the dog completely square on, it is evident from them that Ace meets the Standard and that its strength and posture comply.	Agrees with Dr Thurgood.	Dogs legs must carry its weight. Most will not appear light or overdone. Subjective per dog. Forelegs not particularly well apart. Looks the same as would a Labrador (a similar size).	Complies
<b>Body :</b> Powerfully built with a deep chest of moderate width.	Complies. The photo shows the dog having a reasonably deep chest.	A photograph of the dog from the front "says it all", complies.	Again subjective. Ace does not have a particularly deep chest.	Complies
<b>Forechest:</b> Should not extend far beyond the point of shoulder or below the elbow. Well ribbed back with moderate tuck up (concave underline of the body curving upwards from end of the ribs to waist).	On basis of visual inspection complies. Not possible to judge this from the photographs.	Complies. Appearance of a large chest and prominent body.	Dog does not appear to have a large chest and he does not appear to extend it all passed the point of the shoulder.	Complies
<b>Back:</b> Broad, strong, firm and level and with a slight incline at the withers.	On basis of visual inspection complies. Not possible to judge this from the photographs.	Complies, back years broad strong and level.	Back is not look particularly broad or level, strong or firm. Subjective. There appears to be a slight incline to the withers.	Complies
<b>Loin:</b> Short and deep with a slight slope to the croup.	As above.	Complies.	The loin is long and is not deep. The slope to the croup maybe more than slight, again very subjective.	Complies



<p><b>Hindquarters:</b> Strong and muscular hindquarters that are in balance with the forequarters. Thighs are well developed and muscular. The hock joint should be well bent and the rear pasterns close to the ground, perpendicular and parallel to each other.</p>	As above.	Complies. One of the photographs shows the dog has strong muscular hindquarters.	Thighs do not look particularly well-developed or muscular nor the hindquarters. Again, subjective, muscular thighs are partly genetic but related to activity and exercise.	Complies
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<p><b>Feet</b> The feet are round and in balance with the size of the dog, well arched and tight. The pads are hard and well cushioned. Nails are strong. Dewclaws may be removed.</p>	Complies. The feet are tight as is evident in some of the photos.	Complies.	With reference to one photo of the dogs foot where the dog is stepping forward and putting weight on it, “this foot does not appear tight”	Complies
<p><b>Tail</b> The tail is set in line with the back and tapers to a point. At rest the tail is carried low and when excited may be carried raised but never curled over the back. The length of the tail should reach approximately to the hock joint.</p>	Complies.	Complies.	Refers to Mr Mitchell’s notes where he only circled, “slightly curved upwards” to say only one of three points in the definition is met. Does not comment on the fact Mr Mitchell ticked the “yes” box Most dogs tails taper – fineness of point is related to fitness and strength of the tail. Most breeds also have a pendant tail in repose and the average length is to the hock. Many tail carriages are related to the moods of the dog.	Complies
<p><b>Coat</b> The coat is short, smooth, glossy and of a harsh texture, free of undercoat.</p>	Based on visual observation, complies. Single policy coat with no undercoat.	Based on visual observation, complies	Short hair only. One of three points only – overall does not comply Many breeds have short coats.	complies

<b>Colours</b> All colours and combination of colours are acceptable, with the exception of blue merle and pure white. White feet and a splash of white on the chest are not uncommon on solid coloured dogs.	complies	complies	complies	complies
<b>Height at withers:</b> 43 cm – 53 cm (Note at end of Standard) The disparity between height and weight is considerable and importance should be placed on the overall consideration of the assessment of the dog rather than adhering absolutely to the guidelines on height.	Complies. Dr Thurgood said he would be surprised if ace measured 60 cm. On his inspection he concluded ace complied to the height criteria. Had he thought this criteria was not met it would have been very significant.	The 55 to 60 cm figure was from inspection but not measured. On the day of the hearing the Council had the dog measured at 51 cm	Relying on Mr Mitchell's estimate of 55 to 60 cm, says does not comply.	Complies
<b>Weight:</b> 14 kgs – 36 kgs	Complies	Complies	Complies	Complies

[1] Mr Mitchell is an authorised officer appointed under [section 72](#) of the Act.

[2] As required under section 98B(1) of the Act.

[3] By *Animals Legislation (Responsible Ownership) Act 2001*

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