

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 4733 of 2010

TERASOF PTY LTD (ACN 104 761 248) and
THE VAIS FAMILY INVESTMENT
COMPANY PTY LTD (ACN 102 377 766)

Plaintiffs

v

ROADS CORPORATION (VICROADS)

Defendant

JUDGE: ROBSON J
WHERE HELD: Melbourne
DATE OF HEARING: 14 April 2011
DATE OF JUDGMENT: 7 June 2011
CASE MAY BE CITED AS: Terasof v VicRoads
MEDIUM NEUTRAL CITATION: [2011] VSC 199

STATUTORY INTERPRETATION – Plaintiffs licensed tow truck operators - Plaintiffs found guilty of offences committed under regulations under *Transport Act 1983* – Offences committed before relevant part of *Transport Act 1983* repealed and replaced with *Accident Towing Services Act 2007* - Plaintiffs found guilty of offences after repeal – Whether demerit points could be incurred by plaintiffs, by reason of being found guilty, under repealed Act – Whether the current licences of tow truck operators should be suspended due to loss of demerit points under the repealed Act – Implied condition of new licence that liable to be suspended if old licence would have been suspended under old Act – Application of s 14 of *Interpretation of Legislation Act 1984*.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr P G Priest QC with Ms R Shann	Diakou Faigen Lawyers
For the Defendant	Mr P Billings with Ms B Armatys	Anthony Murdoch of VicRoads

HIS HONOUR:

SUMMARY

- 1 Under Victorian statutory law, tow trucks operators are required to be licensed. The relevant old Act was replaced on 1 January 2009 with a new Act. The plaintiffs were licensed under the old Act and under the new Act are taken to be the holders of a license under the new Act.
- 2 The plaintiffs were found guilty of offences concerning they way they operated as tow truck operators under the old Act. The offences were committed before the old Act was repealed but they were not found guilty of the offences until after the old Act was repealed. Under the old Act, the finding of guilt would have led to the plaintiffs incurring penalty points, to be recorded in the penalty register, that required VicRoads to suspend their licenses. The new Act contains transitional provisions, including that the new licence is taken to be subject to the same conditions as that that applied to the old licence immediately before the commencement of the new Act, and that penalty points recorded in the penalty register under the old Act immediately before new Act commenced are taken to be demerit points under the new Act.
- 3 VicRoads contends that the conditions applied to the new licences include the implied condition that the licence was liable to be suspended if the licence holder was found guilty of the offences that the plaintiffs were found guilty of. VicRoads argues that, as the plaintiffs have incurred points that would have required their old licences to be suspended, that to give effect to the condition applied to the new licence by the transitional provisions, the new licence should be likewise be liable to be suspended.
- 4 On the other hand, the plaintiffs argue that the new Act merely provides that penalty points incurred under the old Act and recorded in the penalty register immediately before the new Act commenced are to be taken to be demerit points under the new Act. The plaintiffs argue that the penalty points incurred by the plaintiffs were not incurred under the old Act until after it was repealed and therefore are not carried

over under the new Act. The plaintiffs argue that accordingly, VicRoads may not take those penalty points into account to suspend their licences under the new Act.

5 I find that it was an implied condition of the old licences that they would be suspended by VicRoads if the licence holder incurred the relevant penalty points for offences under the old Act. Upon a proper construction of the transitional provisions, I find it is likewise an implied condition applied to the new licences held by the plaintiffs under the new Act that the new licences are liable to be suspended if the plaintiffs incur the relevant penalty points under the old Act, as they have.

6 The plaintiffs apply to restrain VicRoads from suspending their licences for the reasons they have advanced. The plaintiffs' applications are dismissed.

THE PLAINTIFFS' APPLICATIONS

7 By an originating motion dated 30 August 2010, the plaintiffs, Terasof Pty Ltd ("Terasof") and Vais Family Investment Company Pty Ltd ("Vais"), have sought an injunction to restrain VicRoads from recording any demerit points against either Terasof or Vais, and suspending the tow truck licenses held by them, as a result of the findings of guilt as detailed below. The plaintiffs also seek a declaration that VicRoads has no power to record demerit points against either Terasof or Vais nor to suspend the tow truck licences held by them as a result of the findings of guilt.

8 The issue arises from the repeal as from 1 January 2009 of Part 8 of Division 4 of the *Transport Act 1983* ("the old Act") that provided for the regulation of tow truck operators and its replacement with the *Accident Towing Services Act 2007* ("the new Act") which relevantly commenced on 1 January 2009.¹

9 Section 181B of the old Act relevantly provided that VicRoads must immediately suspend for two years the tow truck licence of any person who incurs 18 or more demerit points within any three year period in its capacity as the holder of the licence. The section also relevantly provides that VicRoads must keep a Demerits

¹ Section 231 of the *Accident Towing Services Act 2007* repealed Division 8 of Part VI of the *Transport Act 1983*.

Register and must record in the Register the demerit points that each truck licence incurs.

10 The plaintiffs contend that the Demerits Register under the old Act ceased to exist at the end of 31 December 2008 and that accordingly the demerit points incurred by the plaintiffs could not be recorded and VicRoads could not suspend the plaintiffs' licences under s 181B(5) of the old Act.

11 The plaintiffs also contend that their licences can not be suspended under the new Act. Under s 164 of the new Act, VicRoads must keep an Accident Towing Demerits Register and must record in the Register the accident towing demerit points that an accredited person incurs. Relevantly, s 166 of the new Act provides that the period of suspension of accreditation under the new Act for incurring 18 or more accident towing demerit points within any three year period is two years. Section 224 of the new Act provides for transitional provisions for the "new accident towing services scheme." Clause 5 provides that:

"Demerit points

If, immediately before the commencement day, a person is recorded in the old demerits register as having incurred demerit points, the demerit points so recorded are taken to be accident towing demerit points within the meaning of this Act incurred by that person and, for the purposes of this Act, the point in time at which the demerit points have been incurred is to be taken to be the same point in time as that which applied under the old Act."

12 The plaintiffs contend that as the demerit points incurred by them were not on the old demerits registers immediately before the commencement day (1 January 2009) then the demerit points are not taken to be "accident demerit points" within the meaning of the new Act. Accordingly, the plaintiffs say that VicRoads cannot suspend their accreditation under the new Act.

THE OFFENCES

13 The first plaintiff, Terasof, is the holder of Accident Towing Licenses TOW 109, TOW 450 and TOW 916.² Each licence was subject to three express conditions.

² Tow Truck Licences: 91-96 of Court Book.

- 14 Terasof is a tow truck operator conducting business as Armstrongs Towing, and is authorised to operate as Depot 398 for an authorised depot address at 12-14 Enterprise Avenue, Berwick.³
- 15 The second plaintiff, Vais, is the holder of Accident Towing Licences TOW 172, TOW 193, TOW, 156 and TOW 157.⁴ Vais is a tow truck operator conducting business as Capital Towing and is authorised to operate as Depot 699 for an authorised depot address at 393-395 Princess Highway, Officer.⁵ Vais is also the holder of shelved licenses TOW 156 and TOW 157, which are presently not attached to any vehicles.
- 16 VicRoads alleges that inquiries by one of its officers on 23 December 2008 revealed that both businesses were operating from 407 Princes Highway, Officer, and not from their respective authorised depots, in contravention of the *Transport (Tow Truck) Regulations 2005* (“the old regulations”) made under the old Act. More breaches were subsequently revealed. As a consequence, by one set of charges and summons filed at Dandenong Magistrates’ Court on 30 June 2009 against Terasof and Vais respectively, the informant Wayne Brown brought a number of charges alleging breaches of the old Regulations. Some 29 charges were laid against Terasof and 24 against Vais.
- 17 On 2 August 2010, at the Dandenong Magistrates’ Court, both Terasof and Vais respectively pleaded guilty to certain charges under the old regulations.
- 18 Terasof pleaded guilty to one count of failing to keep authority to tow forms under reg 8(b)(i) of the old regulations, and twelve counts of failing to ensure that a specified tow truck was operated from the authorised depot pursuant to reg 33(1) of the old regulations.
- 19 Vais pleaded guilty to one count of failing to keep authority to tow forms under regulation 8(b)(i) of the old regulations, and seven counts of failing to ensure that a specified tow truck was operated from the authorised depot pursuant to regulation

³ Ibid.

⁴ Tow Truck Licences: 161-168 of Court Book.

⁵ Ibid.

33(1).

20 All other charges were withdrawn by the prosecution on the plea. The plaintiffs, without conviction, were fined \$3,000 each and Terasof was ordered to pay costs of \$3,390.⁶

RELEVANT PROVISIONS OF THE OLD ACT AND REGULATIONS

21 Section 181B provides:

“181B Demerits Register

(1) The Corporation must keep a Demerits Register and must record in the Register the demerit points –

- (a) that each tow truck licence holder incurs; and
- (b) that each holder of an accident towing driver authority incurs; and
- (c) that each person who does not hold a tow truck licence would have incurred if the person had held a tow truck licence; and
- (d) that each person who does not hold an accident towing driver authority would have incurred if the person had held such an authority.

(2) The circumstances in which demerit points are incurred, and the number of demerit points that are to be incurred in any particular circumstance, are as set out in the regulations.

(3) The Corporation must immediately suspend for 1 month –

- (a) the tow truck licence of any person who incurs 6 or more demerit points within any 3 year period in his, her or its capacity as the holder of the licence;
- (b) the accident towing driver authority of any person who incurs 6 or more demerit points within any 3 year period in his or her capacity as the holder of an accident towing driver authority.

(4) The Corporation must immediately suspend for 3 months –

- (a) the tow truck licence of any person who incurs 12 or more demerit points within any 3 year period in his, her or its capacity as the holder of the licence;
- (b) the accident towing driver authority of any person who incurs 12 or more demerit points within any 3 year period in his or her capacity as the holder of an accident towing driver authority.

⁶ Affidavit of Dimitrios Jimmy Diakou sworn 30 August 2010 [4].

- (5) The Corporation must immediately suspend for 2 years –
- (a) the tow truck licence of any person who incurs 18 or more demerit points within any 3 year period in his, her or its capacity as the holder of the licence;
 - (b) the accident towing driver authority of any person who incurs 18 or more demerit points within any 3 year period in his or her capacity as the holder of an accident towing driver authority.
- (5A) A reference in subsections (3), (4) and (5) to demerit points incurred in a person’s capacity as the holder of a licence includes a reference to demerit points that have been recorded in respect of the person under subsection (1)(c).
- (5B) A reference in subsections (3), (4) and (5) to demerit points incurred in a person’s capacity as the holder of an accident towing driver authority includes a reference to demerit points that have been recorded in respect of the person under subsection (1)(d).
- (6) The regulations may set out circumstances in which the Corporation may cancel demerit points.
- (7) The Corporation must notify in writing any person who incurs any demerit points that the demerit points have been recorded against the person in the Register and must do this as soon as is reasonably possible after the recording occurs.
- (8) The fact that demerit points are recorded against a person is not admissible in evidence in any court proceedings.
- (9) Nothing in this section prevents the Corporation from separating the Register into 2 or more parts and from separately administering each part.
- (10) On the transfer of a tow truck licence, any demerit points that have been recorded against the holder of the licence under this section are automatically transferred to the new holder of the licence (regardless of whether or not the points were recorded against the person while he, she or it held the licence).
- (11) If an accident towing driver authority expires while it is suspended under this section, the person who held the authority is not eligible to hold another accident towing driver authority until the expiry of the period of suspension that applied to the expired authority.”

22 Section 181C provides:

“181C Appeals concerning Demerits Register

- (1) A person may apply to the Tribunal for review of a decision of the Corporation to suspend a licence or authority under section 181B on either or both of the following grounds –
- (a) that demerit points have been recorded against the person in error or because of wrongful or mistaken identity;

- (b) that a miscalculation has been made in assessing the total number of demerit points incurred by the person.
- (2) An application for review must be made within 28 days after the later of –
 - (a) the day on which the decision is made;
 - (b) if, under the Victorian Civil and Administrative Tribunal Act 1998, the person requests a statement of reasons for the decision, the day on which the statement of reasons is given to the person or the person is informed under section 46(5) of that Act that a statement of reasons will not be given.
- (3) The lodging of an application for review stays the suspension of the licence or authority until the application is withdrawn or the Tribunal affirms the suspension after the review.
- (4) After reviewing a decision, the Tribunal may –
 - (a) direct the Corporation to amend the Demerits Register in the way specified by the Tribunal; or
 - (b) affirm the suspension.”

23 Regulation 37, 38 and 39 of the old Regulations provided:

“37 How demerit points are incurred

- (1) In this regulation –

appropriate number of demerit points for a relevant offence means the number of demerit points set out in Column 3 of Schedule 2 for that offence;

relevant offence means an offence described in Columns 1 and 2 of Schedule 2 or a corresponding offence against the law of another State or Territory.
- (2) For the purposes of section 181B(2) of the Act, a person incurs demerit points if the person –
 - (a) is convicted or found guilty of a relevant offence; or
 - (b) pays the penalty specified in an infringement notice issued for a relevant offence.
- (3) The licensing authority must maintain the Register in a manner that records points incurred by tow truck licence holders separately from points incurred by the holders of accident towing driver authorities.
- (4) For the purpose of ascertaining the total number of demerit points against any person, points recorded against a person as the holder of an accident towing driver authority are not to be added to points recorded against that person as the licence holder.
- (5) For the purpose of working out the total number of demerit points for

any licence holder, the demerit points are to be accumulated individually against the licence applicable to the vehicle used in the commission of each offence.

- (6) Demerit points are incurred for a relevant offence on—
- (a) the date on which the amount of the penalty specified in an infringement notice is paid; or
 - (b) if the amount of the penalty specified in an infringement notice is not paid and notice of objection is not given within the time specified in the notice, the date on which the period specified in the notice as the time for payment expires; or
 - (c) in any other case, the date on which the person was convicted or found guilty.

38 Notice of recording of demerit points

A notice under section 181B(7) of the Act must contain—

- (a) details of the tow truck licence or registration number;
- (b) details of any accident towing driver authority and driver's licence held by the person;
- (c) particulars of the offence including the date of the offence and the number of demerit points recorded in respect of the offence;
- (d) particulars of any demerit points previously recorded against the person.

Part 8—General

39 Expiry

These Regulations cease to have any force or effect on 14 November 2008.”

RELEVANT PROVISIONS OF THE NEW ACT AND REGULATIONS

24 Section 3 and 164 relevantly provide:

“S 3 Definitions

(1) In this Act—

...

accident towing demerit point means a demerit point incurred in accordance with regulations made under this Act;

...

S 164 Demerits Register

VicRoads must keep an Accident Towing Demerits Register and must record in the Register the accident towing demerit points that a person incurs.

S 231 Repeal of Division 8 of Part VI, Tow Trucks

Division 8 of Part VI of the Transport Act 1983 is repealed.

Schedule 3

Transitional provisions for new accident towing services scheme

1 Definitions

In this Schedule—

commencement day means the day on which Part 9 of this Act commences;

disqualified person, in respect of—

(a) tow truck driver accreditation, means a person in respect of whom, if the person were to be an applicant for tow truck driver accreditation, VicRoads would be required to refuse accreditation under section 107; or

(b) towing operator accreditation, means a person in respect of whom, if the person were to be an applicant for a towing operator accreditation, VicRoads would be required to refuse the accreditation under section 66(1);

old Act means the **Transport Act 1983** as in force immediately before the commencement day;

old accident towing licence means an accident towing licence, within the meaning of Part VI of the old Act, being a licence that is in force immediately before the commencement day;

old demerits register means the register of demerit points kept by the Secretary under section 181B of the old Act as in force immediately before the commencement day;

old driver authority means an accident towing driver authority that has been issued under section 182B of the old Act and that is in force immediately before the commencement day;

old heavy accident tow truck towing licence means a heavy accident tow truck towing licence, within the meaning of Part VI of the old Act, that is in force immediately before the commencement day;

old limited tow truck licence means—

(a) a heavy accident towing licence within the meaning of Part VI of the old Act; or

(b) an accident towing licence within the meaning of Part VI of the old Act—

that is in force immediately before the commencement day and that is held by a relevant agency;

Secretary means the person who is, for the time being, the Department Head (within the meaning of the **Public Administration Act 2004**) of the Department.

2 Tow Truck Driver Authorities

Sch. 3

A person who was, immediately before the commencement day, the holder of an old driver authority—

- (a) who is not a disqualified person; or
- (b) who is a disqualified person who has been determined to be eligible by VicRoads under clause 10(1)(a)—

is taken to be the holder of a tow truck driver accreditation that is taken to—

- (c) continue in force for the remainder of the period of the old driver authority; and
- (d) be subject to the same conditions as those that applied to the old driver authority immediately before the commencement day, to the extent that those conditions are not inconsistent with this Act.

3 Accident towing licences

(1) A person who was, immediately before the commencement day, the holder of an old heavy accident tow truck towing licence is taken to be the holder of a heavy tow truck licence—

(a) for which the tow truck, to which the licence applied immediately before the commencement day, is taken to be the specified tow truck for the licence; and

(b) that—

(i) is taken to continue in force for the remainder of the period of the old licence; and

(ii) is taken to be subject to the same conditions as those that applied to the old licence immediately before the commencement day, to the extent that those conditions are not inconsistent with this Act or regulations made under this Act; and

(iii) in the case of such a licence that is an old limited tow truck licence, is taken to be a limited tow truck licence.

(2) A person who was, immediately before the commencement day, the holder of an old accident towing licence is taken to be the holder of a regular tow truck licence—

- (a) for which the tow truck, to which the licence applied immediately before the commencement day, is taken to be the specified tow truck for the licence; and
- (b) that—
 - (i) is taken to continue in force for the remainder of the period of the old licence; and
 - (ii) is taken to be subject to the same conditions as those that applied to the old licence immediately before the commencement day, to the extent that those conditions are not inconsistent with this Act or regulations made under this Act; and
 - (iii) in the case of such a licence that is an old limited tow truck licence, is taken to be a limited tow truck licence.

4 Operator accreditations

A person who was, immediately before the commencement day, the holder of an old heavy accident tow truck towing licence or the holder of an old accident towing licence—

- (a) who is not a disqualified person; or
- (b) who is a disqualified person who has been determined to be eligible by VicRoads under clause 10(1)(b) or 10(1)(c)—

is taken to be the holder of a towing operator accreditation that is to be taken to remain in force for a period of 12 months from the commencement day, unless sooner cancelled or suspended under this Act.

5 Demerit points

If, immediately before the commencement day, a person is recorded in the old demerits register as having incurred demerit points, the demerit points so recorded are taken to be accident towing demerit points within the meaning of this Act incurred by that person and, for the purposes of this Act, the point in time at which the demerit points have been incurred is to be taken to be the same point in time as that which applied under the old Act.

6 Determination of tow truck charges

A determination of the Minister that has been made under section 184A of the old Act, and that is in force immediately before the commencement day, is taken to be a determination made under section 211 and may be amended or revoked accordingly.

7 Continuation of operation of regulations

If Part 9 of this Act commences before 14 November 2008, despite that commencement, Part 4 of the Transport (Tow Truck) Regulations 2005, as in force immediately before that commencement is to be taken to continue in force until 14 November 2008, as if the Regulations were made under this Act, and the following provisions apply—

- (a) the Regulations may be amended or revoked as if they were made under this Act;
- (b) in the Regulations –

licensing authority is to be taken to mean VicRoads.

10 Determinations of eligibility

- (1) VicRoads may determine that –
 - (a) the holder of an old driver authority who is a disqualified person in respect of tow truck driver accreditation is eligible to be taken to be the holder of a tow truck driver accreditation; or
 - (b) the holder of an old heavy accident tow truck towing licence who is a disqualified person in respect of towing operator accreditation is eligible to be taken to be the holder of a towing operator accreditation; or
 - (c) the holder of an old accident towing licence who is a disqualified person in respect of towing operator accreditation is eligible to be taken to be the holder of a towing operator accreditation.
- (2) VicRoads must –
 - (a) refuse an application for a determination under subclause (1)(a) unless VicRoads is satisfied that the applicant has demonstrated that there are exceptional circumstances that make the determination appropriate having regard to the driver accreditation objective.
 - (b) refuse an application for a determination under subclause (1)(b) or (c) unless VicRoads is satisfied that the applicant has demonstrated that there are exceptional circumstances that make the determination appropriate having regard to the industry accreditation objective.
- (3) In making a determination under subclause (1) VicRoads may have regard to all or any of the following matters –
 - (a) the nature and gravity of any relevant offence or alleged offence and its relevance to the activities in respect of which accreditation is sought; and
 - (b) the period of time since the offence or alleged offence was committed or was alleged to have been committed; and
 - (c) if there has been a finding of guilt or a conviction, whether the finding of guilt or the conviction was recorded; and
 - (d) if there has been a finding of guilt or a conviction, the sentence (if any) imposed for the offence; and
 - (e) the age of the applicant or nominated person or relevant person when the offence or alleged offence was committed or was alleged to have been committed; and

- (f) if there has been a finding of guilt or a conviction, whether or not the conduct that constituted the offence has been decriminalised since the offence was committed; and
- (g) the behaviour of the applicant or nominated person or relevant person since committing the offence or since the offence was alleged to have been committed; and
- (h) the likelihood of the applicant or nominated person or relevant person committing an offence in the future, in particular, any future threat to persons involved in accidents or the owners of accident damaged motor vehicles; and
- (i) any information given by the applicant, nominated person or relevant person; and
- (j) any other matter that VicRoads considers relevant.

(4) A person who is the holder of an old driver authority, an old heavy accident tow truck towing licence or an old accident towing licence may apply to VicRoads for a determination under subclause (1).

(5) An application under this clause must be made before the commencement day.

(6) So far as is necessary to give effect to this clause before the commencement day, words and phrases used in this clause have the same meaning as they would have if the remaining provisions of the Act were in operation."

25 Regulation 41 of the *Accident Towing Regulations 2008* provides:

"Part 8 – Accident Towing Demerit Points

41 How accident towing demerit points are incurred

(1) In this Part –

relevant offence means an offence specified in column 3 of the Table in Schedule 3.

(2) For the purposes of section 165(1) of the Act, a person incurs accident towing demerit points if –

- (a) the penalty specified in an infringement notice issued for a relevant offence is paid; or
- (b) the penalty specified in an infringement notice issued for a relevant offence is not paid and notice of objection is not given within the time specified in the notice; or
- (c) the person is convicted or found guilty of a relevant offence.

Note

Section 3(2) of the Act provides that a reference to a person who has been found guilty of an offence must be construed in accordance with that section.

(3) For the purposes of section 165(1) of the Act, accident towing demerit points are incurred for a relevant offence –

(a) on the date on which the amount of the penalty specified in an infringement notice is paid; or

(b) if the amount of the penalty specified in an infringement notice is not paid and notice of objection is not given within the time specified in the notice, on the date on which the period specified in the notice as the time for payment expires; or

(c) on the date on which the person is found to have committed the offence.

(4) For the purposes of section 165(2) of the Act, the number of accident towing demerit points that are incurred for a relevant offence is the number of accident towing demerit points set out in column 4 of the Table in Schedule 3 opposite the reference to the relevant provision that sets out the offence in column 3 of the Table.

(5) The description of a relevant offence set out in column 3 of the Table in Schedule 3 is provided for convenience of reference only and is not to be taken to affect the nature or elements of the relevant offence to which the description refers or the operation of these Regulations.”

LICENCES

26 Under the old Act, a tow truck operator was required to hold a licence to operate a specific vehicle from a specific depot within a specified area. As mentioned above, Terasof holds Accident Towing Licences TOW 109, TOW 450 and TOW 916. Each licence authorised Terasof to operate one truck with registration numbers respectively TWO 109, TOW 450 and TOW 916.⁷ Each licence was subject to three express conditions. The first dealt with the authorised depot it was to operate from. The second dealt with areas of accident scenes. The third dealt with permitted use anywhere else other than at an accident scene. All licences were stated to be current from 1 January 2008. The licence did not mention an expiration date.

27 As mentioned above, Vais holds Accident Towing Licences TOW 172, TOW 193, TOW 157 and TOW 156. The latter two were not attached to a vehicle.

28 Under the new Act, an accident towing licence under Part VI of the old Act, being a

⁷ See 172C of the old Act.

licence that is in force immediately before the commencement day, is defined as an “old accident towing licence.” Under clause 3(2) of schedule 3 to the new Act, a person who was immediately before the commencement day, the holder of an old accident towing licence is taken to be the holder of a regular tow truck licence. Both Terasof and Vais were the holder of old accident towing licences immediately before the commencement day, being 1 January 2009. Accordingly, Terasof and Vais are taken to be the holder of a “regular tow truck licence.” Under clause 3(2)(b)(i) of the new Act, the licence is taken to continue in force for the remainder of the period of the old licence and under (ii) is subject to the same conditions as those that applied to the old licence immediately before the commencement date.

SUBMISSIONS OF THE PLAINTIFFS

29 Mr Priest QC, who appeared with Ms Shann for the plaintiffs, contends that s 181B of the old Act provided that VicRoads must keep a demerits register and record in the register the demerit points that each truck licence holder *incurs* (his emphasis). He submits that the old regulation 37 provides how demerit points were incurred. In particular, the demerit points were *incurred* when the plaintiffs were found guilty in August 2010 (his emphasis).

30 Mr Priest contends that regulation 37(2) of the old Regulations relevantly provided that for the purposes of s 181B(2) of the old Act a person incurs demerit points if the person is found guilty of an offence. Regulation 37(3) provided:

“The licensing authority must maintain the Register in a manner that records points incurred by two truck licence holders separately from points incurred by the holders of accident towing driver authorities.”

31 Regulation 37(6) relevantly provided that demerit points are incurred for a relevant offence on the date on which the person was found guilty.

32 He submits that the demerit points could no longer be recorded in the Demerits Registrar, as required by s 181B, as the Demerits Registrar under the old Act and old Regulations had simply ceased to exist on 31 December 2008.⁸ Mr Priest relies on

⁸ Transcript 7.

regulation 39 of the old Regulations, which provided that the regulations cease to have force and effect on 31 December 2008. He also relies on s 231 of the new Act, which repealed the old Act when the new Act came into effect on 1 January 2009.

33 Mr Priest refers to the new Act and the definition of “accident towing demerit point” which provides that it means a demerit point incurred in accordance with the regulations made under the new Act. He refers to s 164 of the new Act, which provides for VicRoads to keep an “Accident Towing Demerits Register” and record in the register the accident towing demerit points (as defined in s 3) that an accredited person incurs.

34 Mr Priest contends that the offences for which the plaintiffs were found guilty on 2 August 2010 did not fall to be recorded in the Accident Towing Demerits Register under the new Act. He argues that under regulation 41 of the new Regulations, an accredited person incurs accident towing demerit points if the person is found guilty of a relevant offence. He points out that the relevant offences are to be found in column 2 of schedule 3 to the new Regulations and that they do not include any of the offences of which the plaintiffs were found guilty.

35 Mr Priest contends that the transitional provision in clause 5 of schedule 3 of the new Act, set out above, does not apply to the demerit points that would have been attracted by the plaintiffs being found guilty on 2 August. He says that under clause 5, the demerit points under the old Act that are taken to be accident towing demerit points under the new Act are only those that immediately before the “commencement day” were recorded in the “old demerits register.” The commencement day is defined to mean the day on which Part 9 of the new Act commences, which was 1 January 2009. The “old demerits register” is defined to mean the register of demerit points kept by the Secretary under s 181B of the old Act as in force immediately before the commencement day.⁹

36 In other words, he argues that under the old Act relevant demerit points were not

⁹ Section 1 schedule 3 of new Act under the heading “Transitional Provisions for New Accident Towing Services Scheme”.

incurred until the person was found guilty and accordingly, would not have been recorded on the old demerits register in the register immediately before the commencement day on 1 January 2009.

37 Mr Priest argues that the demerit points were not caught by the transitional provisions and there was simply no power to record them under the old Act because it had been repealed.¹⁰

SUBMISSIONS OF VICROADS

38 VicRoads contends that s 14(2) of the *Interpretation of Legislation Act* 1984 preserves the Demerits Register under the old Act, and preserves the act of recording demerit points in that Register. VicRoads further submits that as a result of the operation of s 14(2) of the *Interpretation of Legislation Act* 1984, the demerit points incurred by the plaintiffs on 2 August 2010 would be recorded in the Demerits Register under the old Act and furthermore be subject to the suspension provisions under s 181B.

39 Further, VicRoads submits that the terms of ss 181B(3), (4) and (5) of the old Act, concerning suspension periods, do not rely on recording the demerit points in the Demerits Register.

40 VicRoads also contend that the Demerits Register under the old Act are saved by the principle of reasonable and necessary implication referred to in *Sutton v Bradshaw*.¹¹

41 VicRoads rely on the new Act. In particular, VicRoads submits that Parliament intended that there would be a continuance of demerit points from the old Act to the new Act by virtue of the legislation and by the plain words of paragraph 5, Schedule 3 of the new Act.

42 VicRoads contends that paragraph 5 should be construed to be referring not only to demerit points existing prior to the commencement day, but including those demerit points which would be incurred after the commencement day, in order to give paragraph 5 a proper meaning and scope. That is, the paragraph should be read

¹⁰ Transcript 9.

¹¹ [1988] VR 920 and see *Commissioner of State Revenue v Bulzomi* [2009] VSCA 99.

broadly to give it the scope that Parliament intended, taking into account the effect of the *Interpretation of Legislation Act 1984*.¹²

43 VicRoads submits that the term ‘immediately prior to the commencement day’ in paragraph 5 of Schedule 3 is to be read as including, by reasonable and necessary intendment, those demerit points which would be incurred after the commencement day, or in the alternative, paragraph 5, read as a whole, should be given that interpretation.

44 VicRoads argues that the reference to the point in time that penalty points have been incurred under the old regime supports that interpretation, because it suggests the intention of continuity from the old regime to the new regime for the purposes of the three year period mentioned in both Statutes.¹³

THE INTERPRETATION OF LEGISLATION ACT 1984

45 Section 14(2) of the *Interpretation of Legislation Act 1984* provides:

“Where an Act or a provision of an Act –

- (a) is repealed or amended; or
- (b) expires, lapses or otherwise ceases to have effect –

the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears –

- (c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;
- (d) affect the previous operation of that Act or provision or anything duly done or suffered under that Act or provision;
- (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision;
- (f) affect any penalty, forfeiture or punishment incurred in respect of an offence committed against that Act or provision; or
- (g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or

¹² *Project Blue Sky Inc v ABC* (1998) 194 CLR 355; See also Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, (Lexis Nexis, Sydney, 2006).

¹³ Section 181B of the old Act and s 166 of the new Act.

punishment as is mentioned in paragraphs (e) and (f) –

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if that Act or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.”

46 Section 28(2) provides:

“Where a subordinate instrument or a provision of a subordinate instrument –

- (a) is repealed or amended; or
- (b) expires, lapses or otherwise ceases to have effect –

the repeal, amendment, expiry, lapsing or ceasing to have effect of that subordinate instrument or provision shall not, unless the contrary intention expressly appears –

- (c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;
- (d) affect the previous operation of that subordinate instrument or provision or anything duly done or suffered under that subordinate instrument or provision;
- (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision;
- (f) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that subordinate instrument or provision; or
- (g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (e) and (f) –

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if that subordinate instrument or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.”

DISCUSSION

47 Before the enactment of the provisions which now appear in s 14(2) of the *Interpretation of Legislation Act 1984* and apart from any special saving clause in a repealing statute, a liability to punishment for contravention of a penal statute did not continue after the repeal of the enactment which imposed it.¹⁴ Dixon J in the

¹⁴ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan; Meakes v Dignan* (1931) 46 CLR 73 at 105-106 per Dixon J; *Byrne v Garrison* [1965] VR 523 at 525 per Gowans J; *Sutton v Bradshaw* [1988] VR

High Court of Australia decision in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*, examined the effect of the repeal of a statute or subordinate legislation. He said:¹⁵

Before the introduction of the provisions which stand in the Commonwealth statutes as sec. 8 of the *Acts Interpretation Act 1901-1930*, the repeal of an Act of Parliament put an end to it as a source of liability, whether arising out of acts or omissions, before or after its repeal.

“The general rule of law is that a repealed statute cannot be acted upon after its repeal, although all matters that have taken place under it before its repeal are valid and cannot be called in question” (per Lord Campbell C.J., *R. v Inhabitants of Denton*). “What has been perfected under operation of the statute is not to be disturbed; but if the statute be necessary for any farther step, it must be in force at the time of taking that farther step” (per Coleridge J.). “I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law” (per Tindal C.J., *Kay v Goodwin*). “It has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed” (per Lord Tenterden C.J., *Surtees v Ellison*).

Thus a liability to punishment for contravention of a penal statute did not continue after the repeal of the enactment which imposed it unless expressly saved by the repealing statute.

“The offences committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal” (*Hale, History of the Pleas of the Crown*, vol. i., p. 291). The doctrine of the common law is that a right conferred and a duty imposed by statute subsisted only while the statute remained in operation as a law. This doctrine appears to be applicable to subordinate legislation. When the regulation “ceases to have effect” how can a liability which arises under it, and depends upon it alike for its origin and continuance remain enforceable? It is only because the regulation had “effect” as a law that the liability could continue. The power to make regulations is not a mere discretionary authority to determine when and how the statute itself shall operate. It is not as if the Act of Parliament alone imposed a liability for failure to conform to an executive or administrative direction. The regulation is a real exercise of subordinate legislative authority. In my opinion, the result is that upon the disallowance of the regulation it can no longer be relied upon as a source of liability. Thus, after a regulation has been disallowed, no one is liable to conviction for an offence committed while it was in force. His liability ceases when the law is revoked that imposed it. But if he has already been convicted, then because his liability has merged in the conviction, it no longer depends upon the law under which it arose, and it does not lapse with the revocation of the law. The conviction has become the source of his

920 at 927 per Brooking J.
(1931) 46 CLR 73.

liability for his offence, and the conviction continues in force because its operation does not depend upon the law creating the offence, but upon the authority belonging to a judgment or sentence of a competent Court.

48 It has long been accepted that s 14(2)(e) of the *Interpretation of Legislation Act* 1984 and in particular the reference to “liability acquired, accrued or incurred” does away with the common law rule and preserves the liability of a person for a breach of a criminal offence that occurred prior to the repeal of the offence to prosecution after the repeal.¹⁶ Further, it has been expressly held that the liability preserved includes the remedies and penalties.¹⁷ Section 14(2)(f) expressly provides that the repeal of the relevant Act shall not, unless the contrary intention expressly appears, “affect any penalty, forfeiture or punishment incurred in respect of an offence committed against that Act or provision;”

49 The plaintiffs submit that after 31 December 2008, the Demerits Register under the old Act simply ceased to exist. I do not agree. The penalties that were imposed for a breach of the Part VI included, where applicable, the suspension of a the tow truck licence. The plaintiffs do not dispute that liability for an offence for a breach of the offences the plaintiffs were found guilty of survived the repeal of the old Act. As discussed above, the authorities establish and s 14(2)(f) make clear the relevant penalties also survive. Section 28(2) applies in similar terms to subordinate legislation. The incurring of demerit points and the consequential suspension of the tow truck licences under the old Act and old Regulations are penalties within the meaning of ss 14(2)(f) and 28(2)(f). The imposition of the penalties necessarily requires the Demerits Register to be maintained to enable the prescribe penalties to be imposed.

50 In the Supreme Court of Victoria decision in *Commissioner of State Revenue v Bulzomi*¹⁸ the Court of Appeal considered the issue of whether a “show cause” provision under

¹⁶ *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228 at 245 per Gibbs J with whom Menzies, Windeyer and Walsh JJ agreed; *Commissioner of State Revenue v Bulzomi* (2009) 24 VR 643 at [86] per Dodds-Streeton JA with whom Redlich JA and Hargrave AJA agreed; *Byrne v Garrison* [1965] VR 523 ; *Sutton v Bradshaw* [1988] VR 920.

¹⁷ Ibid.

¹⁸ (2009) 24 VR 643.

the *Stamps Act* survived the repeal of the provision where the Commissioner sought to use it in respect of stamp duty received by the defendant and due to the Commissioner under the repealed Act. The Court considered whether the “show cause” procedure was merely procedural. The Court held that the provisions created or constituted a proceeding and remedies preserved under s 14(2)(g) of the Act in respect of the accrued substantive right to recover a debt preserved under s 14(2)(e) of the Act.

51 Similarly, in this case, s 14(2)(g) provides the repeal shall not, unless the contrary intention expressly appears, affect any remedy in respect of any such liability, penalty, forfeiture or penalty as in mentioned in paragraphs (e) to (f).

52 In my opinion, the Demerits register should be maintained insofar as it is necessary to do so, to enable imposition of the penalty involved in the suspension of the Towing Licence.

53 The repeal of the old Act and its replacement with the new Act indicates a Parliamentary intention to maintain and continue the system of licensing tow truck operators and subjecting to them to regulation, the breach of which exposes them to suspension of their tow truck licences.

IMPLIED SAVING

54 The authorities also establish that the principle of statutory construction described as the doctrine of implied saving may apply where the *Interpretation of Legislation Act* 1984 may not cover the position. The principle was explained by the Full Court of the Supreme Court of Victoria in *Sutton v Bradshaw*¹⁹ and by the Court of Appeal of the Supreme Court of Victoria in *Commissioner of State Revenue v Bulzomi*.²⁰ The Full Court dealt with a drink driving prosecution in *Sutton v Bradshaw*. The defendant was charged under a provision that had been repealed by the time of the hearing. The prosecution sought to use a certificate as to the blood alcohol reading where the certificate provision had also been repealed. Brooking and Kaye JJ held that the then

¹⁹ [1988] VR 920.

²⁰ (2009) 24 VR 643.

equivalent provisions of the *Interpretation of Legislation Act 1984* did not save the certificate provision as it was procedural in accordance with the decision of the High Court of Australia in *Yrttiaho v Public Curator (Qld)*.²¹ Nevertheless, Brooking and Kaye JJ held that a necessary implication of the repealing legislation was that it did not do away with the use of the certificate provision in respect of an offence being prosecuted under the repealed act. Gray J held that the provisions of the *Interpretation of Legislation Act 1984* did apply and distinguished *Yrttiaho v Public Curator (Qld)* for reasons it is unnecessary to explore here.

55 Dodds-Streeton JA (with whom Redlich JA and Hargrave AJA agreed) of the Court of Appeal held in *Commissioner of State Revenue v Bulzomi*²² that the common law principle of implied saving applied if a provision was necessary for the effective operation of the legislative scheme of which it was a part which was otherwise not preserved by the *Interpretation of Legislation Act 1984*.

56 In my opinion, the maintenance of the Demerit Register after 31 December 2008 was necessary for the effective operation of the legislative scheme under the old Act in dealing with offences by tow truck operators under the old Act committed before the old Act was repealed. As discussed above, the legislative scheme of the new Act sought to maintain the system of suspension of tow truck licences where sufficient demerit points were incurred for breaches of the new Regulations.

57 Unless the implied saving was inferred, the plaintiffs would avoid the suspension that the scheme of both the old and new Act seek to impose.

58 The old accident towing licences held by the plaintiffs have been superseded by the new regular tow truck licences. What effect, if any, does the enlivening of the requirement to suspend the old accident towing licenses have on the new regular tow truck licences held by the plaintiffs?

DID THE NEW ACT APPLY TO THE PLAINTIFFS?

²¹ (1971) 125 CLR 228.

²² (2009) 24 VR 643.

59 In my opinion, clause 5 of the transitional provisions does not apply to the points recorded on the register after the repeal of the old Act. The scheme of the new Act is not frustrated if the old Act is applied as I have found it should above.

60 VicRoads seeks to rely on the decision of the High Court of Australia in *Project Blue Sky Inc v ABC*.²³ There, the High Court dealt with conflicting statutory provisions and held that they should be construed so that they reconciled so far as was possible. In the case at hand, there are no conflicting provisions. There is a legislative intention to adopt a scheme that seeks to maintain a seamless transfer of licences and demerit points from one statutory scheme to another.

61 VicRoads argues that clause 5 should be construed to apply to points registered on the Demerits Register after the commencement of the new Act as the transfer of existing points indicates an intention that existing points will be included in the new register. This submission assumes that points incurred under the old Act and Regulations, after the commencement of the new Act, in respect of offences committed under the old Act before it was repealed, would be recorded on the Demerits Register maintained under the old Act, after the old Act was repealed. The submission then seeks to go a step further and argues that the points recorded on the old Demerits Register, after the commencement of the new Act, should be taken to be accident towing demerit points under the new Act by force of clause 5.

62 In my view, it is not appropriate to construe the words “immediately before the commencement day” in clause 5 to mean “immediately before and after the commencement date”. There is no ambiguity in clause 5. The only argument in support of that construction is that clause 5 may not achieve the statutory scheme of providing for the suspension of a tow truck operator’s licence where points are incurred under the old Act after the commencement of the new Act. It is not, however, the function of statutory interpretation to make what is actually remedial legislation under the guise of statutory interpretation.

²³ (1998) 194 CLR 355.

63 I do not accept VicRoads submissions on the construction of clause 5.

THE TRANSITIONAL PROVISIONS AND LICENCES

64 These are set out above. Generally speaking, it is apparent that Parliament intended there to be a scheme for the continued regulation of tow truck drivers and operators. The transitional provisions sought to maintain the licenses of drivers and operators from the old scheme to the new scheme. The transitional provisions also sought to maintain existing demerit points against drivers and operators.

65 The question arises, however, as to what is the consequence of an old accident towing licence being liable to be suspended under the old Act pursuant to the duty on VicRoads under s 181B. The rights under the new Act only devolve on the holder of a new regular tow truck licence under the new Act. Does the enlivening of the obligation to suspend the old accident towing licence under the old Act have any effect on the new regular tow truck licence held under the new Act? It is clear that Parliament intended there to be a scheme whereby licence holders under the old Act became licence holders under the new Act. They also provided for the transfer of demerit points.

66 VicRoads contends that the enlivening of the obligation to suspend the old accident towing licence under the old Act (or if it be appropriate, the suspension of the old accident towing licences) also operates to enliven the obligation to suspend the new regular tow truck licence under the new Act. VicRoads argues that by virtue of transitional clause 3(2)(b)(ii) in schedule 3 of the new Act, the new regular tow truck licence, taken to be held by the plaintiffs, is taken to be subject to the same conditions as those that applied to the old accident towing licence immediately before the commencement day. VicRoads rely on the fact that the new regular tow truck licence is taken to be subject to the old conditions to the extent that those conditions are not inconsistent with the new Act or new regulations made under the new Act.

67 VicRoads argues that these conditions included the liability of the old accident

towing licence to be suspended under s 181B of the old Act.

68 Section 174 of the old Act provided that an old accident towing licence should “contain such conditions as the Corporation considers appropriate to impose at the time of the grant of the licence.” The old Act expressly recognised both express and implied conditions that attached to an old accident towing licence. Section 174A makes provision for the altering or cancelling of any of the conditions that attach to an old accident towing licence (other than implied conditions). Section 175A provided for the imposition of other conditions to be applied to an old accident towing licence.

WAS THE SUSPENSION AN IMPLIED CONDITION?

69 VicRoads contends that the susceptibility or liability of the old accident towing licence to be suspended under s 181B was an implied condition attached to the old accident towing licence. Under its ordinary meaning, a condition of the licence would encompass terms that limit or define the nature and extent of the actions that are permitted or not permitted by the licence. An implied condition encompasses a condition that is not expressed to be a condition by the Act or under the regulations but is otherwise implied. In my opinion, an implied condition includes a statutory liability that attaches to the licence that it be suspended if the licence holders incurs a specified number of demerit points. The licence is not absolute and unfettered but the licence it gives is subject to the condition that it is not suspended.

70 VicRoads says the reference to “conditions” in schedule 3, clause 3(2) encompasses the implied condition that the old accident towing licence is liable to be suspended under s 181B of the old Act. VicRoads submits that the condition that the old accident towing licence may be suspended is, by force of schedule 3 clause 3(2), applied to the new regular tow truck licence so that the enlivening of the liability of the old accident towing licence to be suspended also enlivens a liability to suspension of the new regular tow truck licence.

71 In other words, VicRoads contends that the enlivening of the circumstances that

would have led to the suspension of the old accident towing licence under s 181B would by reason of the condition applied to the new regular tow truck licence require the suspension of the new regular tow truck licence. If the new regular tow truck licence was not suspended then the applied condition would be of no effect on the new regular tow truck licence.

72 VicRoads invokes s 35 of the *Interpretation of Legislation Act*, which in substance provides that in the interpretation of a provision of an Act a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. VicRoads contends that its construction would better promote the purpose or object of the transitional provisions in schedule 3 than not adopting its construction. VicRoads also contends such a construction is not inconsistent with this Act or regulations made under this Act.

73 The plaintiffs reject VicRoads' construction of schedule 3 clause 3(2), and rely on the fact that the transitional provisions expressly deal with the carry over of points and expressly do not provide for the carry over of points incurred under the old act after it was repealed.

CONCLUSION

74 It might be said that if there is any doubt the doubt should be resolved in favour of recognising the common law right of a citizen to be free from restraint unless clearly proscribed by law. On the other hand, it is apparent that Parliament intended the new Act to continue the regulation of the tow truck industry and sought to subject the new licences to the conditions applied to the old unless inconsistent with the new Act.

75 I consider that on a proper construction of Schedule 3, the conditions applying to the new regular tow truck licence by reason of the transitional provisions in clause 3 include the condition that the new regular tow truck licence, taken to exist by reason of clause 3, must be suspended in circumstances where the old towing licences were

liable to be suspended. Such a suspension would not be inconsistent with the new Act but will avoid the lacuna created by clause 5. Such a construction would promote the purpose of schedule 3 to achieve a seamless transition to the new Act.

76 Accordingly, as the old accident towing licence were liable to be suspended on the incurring of the demerit points under the old Act, the new regular tow truck licence should likewise be liable to be suspended. It follows, that VicRoads should not be restrained from suspending the relevant licences of the plaintiffs.

77 For these reasons, the plaintiffs' application is dismissed with costs.