QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Valuers Registration Board of Queensland v Neil Patrick Murphy* [2020] QCATA 138
PARTIES:	**VALUERS REGISTRATION BOARD OF QUEENSLAND** (applicant/appellant) **v** **NEIL PATRICK MURPHY** (respondent)
APPLICATION NO/S:	APL073-19
ORIGINATING APPLICATION NO/S:	OCR252-18
MATTER TYPE:	Appeals
DELIVERED ON:	18 September 2020
HEARING DATE:	12 February 2020
HEARD AT:	Brisbane
DECISION OF:	Senior Member Aughterson, Presiding Member Browne
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – where disciplinary referral to Tribunal delayed – where refusal of extension of time to make a disciplinary referral – whether section 38(4) of the *Acts Interpretation Act* is applicable – whether referral must be made as soon as possible –whether an extension of time could and should have been allowed *Acts Interpretation Act* 1954 (Qld) ss 2,4, 14A, 24AA, 38(4), (5), 49A, *Acts Interpretation Act* 1915 (SA) s 27(3) *Building Units and Group Titles Act* 1980 (Qld) *Limitations of Actions Act* 1974 (Qld) *Magistrates Court Act* 1921 (Qld) r 291(1) *Queensland Civil and Administrative Tribunal Act* (2001) (Qld) ss 47, 34, 61(1), 142, 146, 147 *Road Traffic Act* 1961 (SA) ss 81D, 98BE(2a) *Valuers Registration Act* 1992 (Qld) ss 44, 50, 51, 52, *Weapons Act* 1990 (Qld)

Ashtrail Pty Ltd v Council of the City of Gold Coast [2020] QCA 82
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541
Bunnings Properties Pty Ltd v Valuer-General, The Trust Company Limited v Valuer-General [2016] QLC 63
Carruthers v Department of Agriculture and Fisheries [2017] QCATA 115
Commonwealth v Mewett (1997) 191 CLR 471
Conset Investments Pty Ltd (1992) 2 Qd R 244
Crowley v McKay [1999] QDC 281
Department of Child Safety, Youth and Women v PJC and the Public Guardian [2019] QCATA 109
Ericson v Queensland Building Services Authority [2013] QCA 391
Gallow v Dawson [1990] HCA 30
Harper Property Builders Pty Ltd v Queensland Building and Construction Commission [2018] QCATA 70
Harrison and Anor v Meehan [2016] QCATA 197 *QBCC v Crocker* [2018] QCATA 194
Herron v McGregor (1986) 6 NSWLR 246
House v The King (1936) 55 CLR 499
Lovell v Lovell (1950) 81 CLR 513
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Penev v County Court of Victoria [2013] VSC 143
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355
Racing Queensland Limited v Dixon [2013] QCATA 172
Registrar of Motor Vehicles v Vu and Anor (2013) 115 SASR 385
Valuers Registration Board v Murphy [2019] QCAT 41*Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73
Walter v Council of Queensland Law Society Incorporated [1988] HCA 8
Walton v Gardiner (1993) 177 CLR 378

APPEARANCES & REPRESENTATION:

Applicant/Appellant:	Mr C Templeton Counsel, instructed by RBG Lawyers
Respondent:	Mr R Traves QC, instructed by Colin Biggers and Paisley Lawyers

REASONS FOR DECISION

Separate reasons are provided below by Senior Member Aughterson and Member Browne, respectively. The final orders appear at paragraph 166.

Senior Member Aughterson:

[1] This is an appeal from a decision of the Tribunal refusing an extension of time to the appellant to make a disciplinary referral to the Tribunal, pursuant to the *Valuers Registration Act* 1992 (Qld) ('the VR Act'), in relation to the respondent.

[2] The grounds of appeal are set out below. They raise two questions. First, whether an extension of time was required at all. While no time limit for making a referral is specified in the Act, the question is whether s 38(4) of the *Acts Interpretation Act* 1954 (Qld) ('the AI Act') applied and, if so, whether in the context of the present matter that provision is merely aspirational or whether any referral must be made 'as soon as possible'. The subsection provides:

> If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens.

[3] On appeal, it was conceded by the appellant that the referral was not made 'as soon as possible'. Second, if s 38(4) of the AI Act did require the appellant to make a disciplinary referral as soon as possible, could and should the Tribunal have allowed an extension of time pursuant to s 61(1) of the *Queensland Civil and Administrative Tribunal Act* (2001) (Qld) ('the QCAT Act).

Background facts and legislative provisions

[4] The complaint underlying the referral was that the respondent represented a client in interlocutory proceedings before the Land Court in circumstances where the expert witness engaged by the client was a member of the same firm of valuers as the respondent.[1] In its decision in that matter delivered on 2 November 2016, the Land Court expressed concern, noting that the relevant Code of Conduct provides that a member of the Australian Property Institute must not 'act as an advocate in a matter where another member of the same firm as the Member has acted as an expert in the matter'.[2] The Court stated:[3]

> Such conduct by an appellant necessarily leads to a situation where the valuer conducted an appeal in reliance on the evidence of a valuer employed by the same firm becomes an advocate for the firm rather than the client. That equally compromises the independence of the valuer and the weight to be given to his or her evidence.

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1 *Valuers Registration Board v Murphy* [2019] QCAT 41, [39].

2 *Bunnings Properties Pty Ltd v Valuer-General, The Trust Company Limited v Valuer-General* [2016] QLC 63, [117]-[128].

3 Ibid, [126].

[5] As is noted below, a question was raised by the respondent in the hearing before the Tribunal at first instance as to whether that aspect of the Code of Conduct applied to interlocutory proceedings.[4]

[6] In any event, following an investigation, the Board initiated disciplinary proceedings in relation to the respondent under the VR Act. Where, by s 50(1) of the VR Act, the Board reasonably considers that a valuer has engaged in professional misconduct, the steps that 'may' be taken by the Board are set out in s 50(2), which provides:

> The board may as it considers appropriate in the circumstances –
> (a) refer the matter to QCAT to decide; or
> (b) if it considers the matter does not warrant referral to QCAT –
> (i) take disciplinary action against the valuer under section 51; or
> (ii) take no further action.

By s 50(3) of the VR Act, a referral made under s 50(2)(a) must be made as provided under the QCAT Act.

[7] Where the Board determines to take disciplinary action, rather than refer the matter to QCAT, s 51 of the VR Act limits the available sanctions. Section 51 provides:

> (1) Subject to section 52, the board may do 1 or more of the following—
> (a) admonish or reprimand the valuer;
> (b) order the valuer to give an undertaking to abstain from particular conduct;
> (c) order the valuer to pay to the board a penalty of an amount equal to not more than 20 penalty units.
> (2) The board must give a valuer an information notice for its decision to take action against the valuer under subsection (1).
> (3) The board may publish, in the newspaper or on its website, notice of any action taken under subsection (1).

By s 52(1) of the VR Act, before taking action against the valuer under s 51, the Board must give the valuer written notice of its intention to take action, while by s 52(2)(c) the notice must state:

> a day, at least 14 days after the day the notice is given, by which the valuer may, in relation to the allegations stated in the notice—
> (i) make written representations to the board; or
> (ii) request the board to hear him or her; or
> (iii) require the board to refer the matter to QCAT.[5]

Subsection 52(5) then provides:

> If the valuer requires the Board to refer the matter to QCAT, the board can not proceed to take action against the valuer under section 51.

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4 *Valuers Registration Board v Murphy* [2019] QCAT 41, [40].

5 As noted in the decision at first instance, there is no other express provision under the VR Act conferring jurisdiction on QCAT. However, reference was made to s 49A of the AI Act, which provides: 'If a provision of an Act, whether expressly or by implication, authorises a proceeding to be instituted in a particular court or tribunal in relation to a matter, the provision is taken to confer jurisdiction in the matter on the court or tribunal.' See *Valuers Registration Board v Murphy* [2019] QCAT 41, [7].

[8] On 20 March 2018 the Board wrote to the respondent's lawyers giving notice pursuant to s 52(1) of the VR Act that it proposed to take disciplinary action against him and invited a response by 11 April 2018.[6] On 10 April, the respondent's lawyers wrote to the Board advising that the respondent required the Board to refer the matter to QCAT pursuant to s 52(2)(c)(iii) of the VR Act.[7] In the decision at first instance it is stated:[8]

> Over the following months, there was further correspondence between lawyers for the parties, focusing increasingly on why the Board had not yet referred the matter to QCAT. On 19 September 2018 the Board referred the matter to QCAT.

[9] On 12 October 2018, the respondent filed an application in QCAT to strike out the referral by way of an application for miscellaneous matters.[9] It was argued that the Tribunal lacked jurisdiction because of the delay of the Board in referring the matter to QCAT.[10] A hearing of the strike out application was conducted on 5 February 2019. In addition to written submissions by the parties, various documents were admitted as exhibits and the Secretary to the Board gave oral evidence.[11]

[10] At the hearing at first instance it was noted that the VR Act does not itself specify a time limit within which the Board is required to refer the matter to QCAT and reference was made to s 38(4) of the AI Act, which, as noted above, provides: 'If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens'.

[11] At first instance, the respondent submitted that the referral was not made 'as soon as possible' and consequently the Tribunal lacked jurisdiction.[12] On the other hand, the Board submitted that the referral was made as soon as possible and, in the alternative, if it was not made as soon as possible the Tribunal could and should grant an extension of time.[13]

[12] The Tribunal at first instance held that the referral was not made 'as soon as possible' and that while an extension of time could be granted pursuant to s 61(1)(a) of the QCAT Act, in the circumstances an extension of time should be refused.

Grounds of appeal

[13] At the oral hearing of the appeal, the appellant Board abandoned grounds 1 and 4 of the grounds of appeal; that is, that the Tribunal erred in finding that the Board did not refer the matter to QCAT 'as soon as possible' and in finding that there was no satisfactory explanation for the delay in filing the referral. At the hearing of the

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6 *Valuers Registration Board v Murphy* [2019] QCAT 41, [4].
7 Ibid, [5].
8 Ibid.
9 Ibid, [6].
10 Ibid, [2].
11 Ibid.
12 Ibid, [10].
13 Ibid, [11]. As is noted at [2], above, on appeal it was conceded that the referral was not made 'as soon as possible'.

appeal it was conceded that the referral had not be filed 'as soon as possible'. The remaining grounds of appeal are:[14]

> Ground 2: The Tribunal erred in holding that it had jurisdiction to determine the referral only if an extension of time was granted.
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> Ground 3: The Tribunal erred in failing to hold that it had jurisdiction to determine the referral even if the referral was not filed 'as soon as possible'.
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> Ground 5: The Tribunal erred by taking into account an irrelevant consideration with respect to the exercise of the discretion to extend the time for filing the referral, namely the gravity of the misconduct alleged and the proposed sanction.
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> Ground 6: The Tribunal erred in exercising its discretion not to extend the time for filing the referral.
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> Ground 7: The Tribunal erred in failing to exercise its discretion to extend the time for filing the referral.

[14] As is noted above, these grounds raise two questions. Grounds 2 and 3 raise the question of whether an extension of time was required at all. It was submitted by the appellant that, in the context of the VR Act, s 38(4) of the AI Act is merely aspirational.[15] Reference was made to s 52(1)(c)(iii) of the VR Act, whereby the valuer could 'require' the Board to refer the matter to QCAT. It was submitted that this created a statutory duty on the part of the Board and it was not the legislative purpose to deprive QCAT of jurisdiction where the 'expedition obligation' had not been complied with. On that basis, in circumstances where the referral was not made as soon as possible, it was submitted that the Tribunal at first instance erred in finding that it had jurisdiction only if an extension of time were granted.

[15] In the alternative, if an extension of time is required, it is argued at grounds 5, 6 and 7 that in the exercise of its discretion the Tribunal erred in not granting an extension of time.

[16] It was common ground in the oral hearing before the Appeal Tribunal that the proceeding before the Tribunal below was an interlocutory decision and leave to appeal is therefore required.[16] In any event, in my view leave to appeal should be

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14 *Valuers Registration Board v Murphy* [2019] QCAT 41, [2], [11].

15 Referred to in the Board's submissions of 28 June 2019 as 'the expedition obligation'.

16 QCAT Act, s 142(3)(a)(ii). As stated in *Carruthers v Department of Agriculture and Fisheries* [2017] QCATA 115, [9]: 'An interlocutory procedural order under s 61(1) QCAT Act is not technically a final decision even though it may have the consequence of ending a proceeding started by a document filed out of time'. See also *Harper Property Builders Pty Ltd v Queensland Building and Construction Commission* [2018] QCATA 70. The appellant submits that the application was dismissed under s 47(2)(a) of the QCAT Act: see the Board's submissions at [10]. However, as acknowledged by the appellant, at common law the accepted test for determining whether an order is final is whether it finally determines all of the rights of the parties in the principal cause between them having regard to the legal rather than the practical effect of the order. Reference is made to *Hall v Nominal Defendant* (1966) 117 CLR 423, 439-440*; Bienstein v Bienstein* [2003] HCA 7, [25]. In *Bienstein* at [25], McHugh, Kirby and Callinan JJ stated: 'orders refusing to set aside a default judgment or refusing to grant an extension of time are not final judgments because the unsuccessful party could make a further

granted. The criteria for determining whether leave should be granted are well established: is there a reasonably arguable case of error in the primary decision, is there a reasonable prospect that the applicant will obtain substantive relief, is leave necessary to correct a substantial injustice to the applicant caused by some error, and is there a question of general importance upon which further argument and a decision of the appellate court or tribunal would be to the public advantage.[17] In the present case, there is an important question to be determined as to the operation of s 38(4) of the AI Act in the context of the referral of disciplinary proceedings to QCAT.

[17] The grounds of appeal raise questions of law, so that the decisions available to the Appeal Tribunal are those set out in s 146 of the QCAT Act. Grounds 1 and 2 raise the question of whether the timing for referral to QCAT is governed by s 38(4) of the AI Act. It is an error of law to misconstrue a statutory provision or to draw a conclusion as to whether the facts as found come within a statutory provision.[18] Grounds 5 to 7 are based on the submission that the discretion miscarried because the decision was outside the perimeters of a proper exercise of the discretion, either because the Tribunal took account of an irrelevant consideration (ground 5) or because it was manifestly unreasonable, as outlined in *House v The King* (grounds 6 and 7).[19]

Grounds 2 and 3 – submissions and discussion

[18] By s 34 of the QCAT Act, a referral must be made within the period provided for under the enabling Act. No period is expressly provided for under the VR Act. Accordingly, the question is whether s 38(4) of the AI Act applied and, if so, whether in the context of the present matter that provision is merely aspirational or whether any referral must be made 'as soon as possible'.

[19] The appellant submitted that if the legislature had intended that there be a time limit on referral, which was capable of extension, it would have specifically provided for that in the VR Act.[20] It was further submitted that the appellant had a statutory duty to make a referral to QCAT and that it would be 'a perverse outcome' if that duty could not be fulfilled because of the operation of an Act of general application (the AI Act), in circumstances where the VR Act itself imposed no time limitation'.[21]

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application for the same relief, even though such an application might have very little prospect of success'.

17 *Harrison and Anor v Meehan* [2016] QCATA 197; *QBCC v Crocker* [2018] QCATA 194, [4]; *Department of Child Safety, Youth and Women v PJC and the Public Guardian* [2019] QCATA 109, [14].

18 See, for example, *Penev v County Court of Victoria* [2013] VSC 143, [68].

19 (1936) 55 CLR 499. See also *Perry v Comcare* [2006] FCA 33, [38]-[39]. In the context of a statutory discretion, see also *Minister for Immigration v Li* (2013) 249 CLR 332, [23]-[30] per French CJ, [63-[76] per Hayne, Kiefel and Bell JJ. As to the close analogy between judicial review of administrative action and appellate review of a judicial discretion, see *Li* at [68], [75]-[76].

20 Submissions of the appellant, [24].

21 Ibid, [34].

[20] Reliance was placed on the decision of the Full Court of the Supreme Court of South Australia in *Registrar of Motor Vehicles v Vu and Anor*.[22] In that case, the question was whether driver disqualification notices issued under the *Motor Vehicles Act* 1959 (SA) were invalid. The Registrar of Motor Vehicles did not issue the relevant statutory disqualification notices until approximately two years after the commission of the related offences or accumulation of the prescribed number of demerit points. At first instance, it was held that the notices were invalid, the Registrar's duty being subject to and conditional upon an obligation to act 'with all convenient speed' in accordance with s 27(3) of the *Acts Interpretation Act* 1915 (SA). That decision was reversed by the Court of Appeal, which held that there was no legislative intention that a failure to give the notices 'with all convenient speed' would invalidate the notices.

[21] However, in my view, the motor vehicle legislation considered in *Vu* is markedly different from the provisions of the VR Act presently under consideration. There are several reasons for that conclusion. First, the cancellations and disqualifications under the *Motor Vehicles Act* arose by direct operation of the statutory provisions following the conviction of motorists for specified offences or accumulation of the prescribed number of demerit points.[23] It was not dependant on the exercise of a judicial or administrative discretion and the notice of the Registrar merely fixed the date of commencement of the cancellation or disqualification.[24] Second, there was a clear statutory duty on the part of the Registrar to issue the notices. Section 81D and 98BE(2a) of the *Road Traffic Act* 1961 (SA) provided that the Registrar 'must' issue the written notice where the mandatory disqualification arose.[25] On that basis, the mere inaction of the Registrar would not override that statutory prescription.

[22] Third, the clear purpose of the legislation was consistent with mandating cancellation or disqualification, regardless of any delay or inaction on the part of the Registrar. As stated by Kourakis CJ:[26]

> The manifest purpose of the scheme is to promote adherence to road rules by mandating fixed periods of disqualification and cancellation for the purposes of punishment, deterrence and the protection of the public. To achieve those purposes, the scheme relies on a high degree of certainty that the consequence of prescribed offending will be a period of cancellation or disqualification.

[23] Fourth, any requirement to issue notices 'with all convenient speed' would not have been consistent with the effective management of the scheme. It was noted that the Registrar might not be advised of a relevant offence until many months after its commission.[27] Kourakis CJ stated that, in the context of the legislative scheme, a requirement to proceed 'with all convenient speed' would impose a duty on the Registrar to actively seek out information about points incurred rather than waiting to be informed by issuing authorities or courts.[28] In addition, whether or not there

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22 (2013) 115 SASR 385.
23 *Registrar of Motor Vehicles v Vu and Anor* (2013) 115 SASR 385, [2].
24 Ibid.
25 Ibid, [12]-[13].
26 Ibid, [3].
27 Ibid, [14].
28 Ibid, [15].

was compliance with an obligation to proceed 'with all convenient speed' would depend on the facts of each individual case and, as noted by Kourakis CJ, may be impacted by factors such as computer malfunction, a missing file, or the impact of staff cuts or industrial action.[29] Kourakis CJ added that should the *Acts Interpretation Act* have the potential to invalidate a notice, the Registrar would, in the first instance, be bound to determine 'whether or not the delay had enervated her power to validly issue the notice' and that enquiry would 'require an examination of the conduct of the staff of her office, the issuing authorities and the Courts Administration Authority'.[30] It was added that such a process 'would substantially frustrate the legislative purpose of the scheme'.[31]

[24] The operation of the relevant provisions of the VR Act is quite different. There is no statutory duty on the part of the Valuers Registration Board to take disciplinary action in relation to a valuer. Rather, as allowed by s 50(2) of the VR Act, the Board 'may' refer the matter to QCAT to decide, or, if referral to QCAT is not warranted, take disciplinary action under s 51 or take no further action. Even where the valuer has elected to require the Board to refer the matter to QCAT pursuant to s 52(2)(c)(iii), there is no duty in a relevant sense to make that referral. Section 52(5) of the VR Act simply provides that once that election has been made 'the board can not proceed to take action against the valuer under section 51'.

[25] It is evident that it remains open to the Board not to proceed with disciplinary action at all.[32] Section 50(2) of the VR Act provides that the Board 'may' take disciplinary action and presumably, once a response is received from the valuer under s 52, it can review its decision and exercise the discretion not to continue with the disciplinary proceedings

[26] The operation of the VR Act differs from the South Australian *Motor Vehicles Act* in other ways. No liability or consequences attach to the valuer by force of the VR Act and the sort of factors that compelled the decision in *Vu*, relative to the objects of the applicable legislation and the effective operation of the scheme, have no application to individual disciplinary proceedings.

[27] In relation to the VR Act, there does not appear to be any reason why the requirement at s 38(4) of the AI Act should not have been intended to apply. That is, to refer the matter to QCAT 'as soon as possible', if it is to be referred at all, once the valuer has made the election. It is noted that in giving the valuer written notice pursuant to s 52 of the VR Act of its intention to take action, the notice 'must' specify a day, not less than, 14 days after the notice is given, for the valuer to make their election under s 52(2)(c) of the VR Act. In the present case, the respondent was given 22 days to respond. It would seem incongruous that the Board could and must mandate a time frame for a response, but then be able to sit on its hands indefinitely once the response is received. It is desirable that disciplinary proceedings proceed as

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29 Ibid, [33].
30 *Registrar of Motor Vehicles v Vu and Anor* (2013) 115 SASR 385, [34].
31 Ibid, [36].
32 See AI Act s 24AA. See also s 50(2)(b)(ii) of the VR Act, which makes it clear that the Board is not required to take action against a valuer.

soon as possible, not least of all because memories can fade and evidence can be lost. As stated by Kourakis CJ in *Vu*:[33]

> There is, in my view, an important distinction between the strict and short statutory time limits within which offences must be charged and the giving of a disqualification notice pursuant to the statutory disqualification scheme. Strict time limits for prosecuting offences are calculated to guard against the loss of evidence and to put the offender on early notice of the possible consequences of conviction. Disqualifications imposed pursuant to the statutory disqualification scheme are imposed only after a conviction or expiation of the offence. There is, therefore, no incongruity in barring a tardy prosecution but preserving the validity of a delayed statutory disqualification.

[28] The operation of s 38(4) of the AI Act has been considered in the context of applications to extend time to file an appeal, in circumstances where the relevant legislation was silent as to when an appeal may be instituted. In *Conset Investments Pty Ltd*,[34] the operation of, then, s 38(5) of the AI Act was considered, which provided:

> Where no time is prescribed or allowed within which anything shall be done, such things shall be done with all convenient speed, and as often as the prescribed occasion arises.

Relevant to that case, an appeal could be made to the Supreme Court from an order of the Tribunal constituted under the *Building Units and Group Titles Act* 1980 (Qld), on the ground that the order was 'erroneous in law'. The appeal in that case was filed more than 8 months after the order was made by the Tribunal. It was submitted by the respondent that s 38(5) of the AI Act applied, while the appellant submitted that it did not apply. Ryan J stated:[35]

> For the Appellant, it was submitted that the words 'shall be done' in the first clause of s 38(5) were apt to describe an act in performance of a statutory duty or obligation rather than the doing of an act in exercise of a right or entitlement. Likewise, the concluding words 'and as often as the prescribed occasion arises' were not apt in the context of the exercise of a right or entitlement. Here the relevant act, the institution of an appeal, was in the nature of an entitlement conferred by the legislation.

However, Ryan J considered that 'too restrictive an interpretation' of s 38(5) and that the words were 'sufficiently comprehensive to include a situation where no time limit is prescribed within which any appeal may be instituted'.[36] It was added:[37]

> Nobody is, of course, required to institute an appeal, though certain persons may do so. But if a person exercises his entitlement to appeal, no time is prescribed by the Act within which the appeal is to be instituted, and s 38(5) is therefore applicable.

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33 (2013) 115 SASR 385, [29].
34 (1992) 2 Qd R 244.
35 Ibid, 245.
36 Ibid.
37 Ibid.

It was also concluded in that case that the appeal had not been instituted 'with all convenient speed' and it was held that the appeal was incompetent. The question of a possible extension of time was not discussed.

[29] In *Crowley v McKay*[38] application was made to the District Court to appeal a decision of the Magistrates Court concerning the issuing of a licence under the *Weapons Act* 1990 (Qld). While the *Weapons Act* allowed for an appeal to the District Court on a question of law, there was nothing in that Act indicating how or when an appeal was to be instituted. McGill DCJ, citing *Conset Investments Pty Ltd*, held that s 38(4) of the AI Act applied. Further, in finding that the rules made pursuant to the *Magistrates Court Act* 1921 (Qld) did not apply,[39] it was held that there was no jurisdiction to extend time.

[30] The operation of s 38(4) of the AI Act was considered more recently, in a quite different context, in *Ashtrail Pty Ltd v Council of the City of Gold Coast*.[40] The applicants sought leave to appeal from a decision of the Planning and Environment Court, ordering the applicants to comply with conditions imposed in relation to the granting of a development approval for a material change of use in relation to land owned and used by the applicants to conduct a business. Those conditions included financial contributions towards the water supply and water networks. Approval was granted in 2010 and show cause notices were issued to the applicants by the Council in 2013 and 2017, alleging non-compliance with certain of the conditions of approval. It was contended by the applicants that the show cause notices were misconceived. In January 2018, proceedings were commenced in the Planning and Environment Court seeking orders for compliance with the approval conditions.

[31] The applicants submitted that s 38(4) of the AI applied in circumstances where the Council failed to institute proceedings in respect of the conditions of the 2010 approval until January 2018. Both the Planning and Environment Court and the Court of Appeal rejected that submission. Morrison JA, with whom Mullins JA and Callaghan J agreed, adopted the reasoning of the Planning and Environment Court:[41]

> I am unable to accept that the operation of s 38(4) of the AIA brings into force some form of de facto limitation of actions defence. I agree with the submission made on behalf of the Council that as a matter of both construction and intent, the construction of s 38(4) does not create any legal limitation or bar to a proceeding of the type under consideration. In this context, it is also quite clear that the respondents are relying on s 38(4) as a defence for the "recovery of money". In my view, in circumstances where s 10 of the Limitation of Actions Act 1974 specifically deals with "an action [in (contact or tort) for the recovery of a sum recoverable…" there is no scope for the operation of s 38(4) of the AIA as contended for. As was submitted on behalf of the Council, insofar as proceedings of that nature are concerned, s 10 of the Statute of Limitations Act 1974 "covers the field". (emphasis added)

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38 [1999] QDC 281.

39 Rule 291(1) provided: 'Appeals from a Magistrates Court shall be to a District Court as provided for in the *District Courts Act* 1967 s 111'.

40 [2020] QCA 82.

41 Ibid, [87].

It was added:[42]

> If s 38(4) did not operate as a limitation of or a bar to the institution of proceedings, as I consider to be correct, its application otherwise would depend upon the delay causing some form of prejudice. However, the applicants confront factual findings that prevent that conclusion.

[32] The Court of Appeal also noted that failure to pay the infrastructure charges 'would constitute a continuing breach of the obligation', adding:

> That there was a continuing breach is a circumstance that would prevent finding that the delay in commencing the proceeding caused any prejudice, or was something not done 'as soon as possible' within the meaning of s 38(4) of the *Acts Interpretation Act*.

[33] In the present case, it is not contended by the respondent that the failure to make the referral as soon as possible gave rise to a nullity or statutory invalidity.[43] Rather, it was submitted that where the referral was not made 'as soon as possible', the referral can proceed only if an extension of time is allowed pursuant to s 61 of the QCAT Act.

[34] As noted above, unlike the duty to issue notices that arose under the legislation considered in *Vu*, in the present case there was no obligation on the part of the Board to institute disciplinary proceedings. In any given case, it is at the discretion of the Board. Upon receiving the election to refer the matter to QCAT, the Board could either make the referral or determine to discontinue disciplinary proceedings. In that sense, there is an analogy with the 'right or entitlement' to appeal considered in *Conset Investments Pty Ltd* and *Crowley*. If the Board elected to continue, there is good reason why it would have been within the contemplation of the VR Act that s 38(4) of the AI Act should apply. As is noted above, memories can fade and there is the potential for loss of evidence. Also, it is less than desirable that a person have disciplinary proceedings hanging indefinitely over their head. As is also noted above, the valuer is provided with a time frame within which an election must be made and it would appear unlikely that it was intended that the Board, having been notified of that election, is subject to no time limit within which any referral must be made.

[35] In my view, the referral must be made 'as soon as possible', in accordance with s 38(4) of the AI Act. Grounds 2 and 3 of the appeal should be dismissed.

Grounds 5, 6 and 7 – submissions and discussion

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[42] Ibid, [88]. In the Planning and Environment Court (see [2019] QPEC 12, [25]), reliance was placed on *Conset Investments Pty Ltd*. However, RS Jones DCJ stated that that case and other authorities cited:

> were concerned with circumstances where it could readily be appreciated that the party having to defend itself would be or could be materially prejudiced by the passage of time. For the reasons set out in more detail below, I do not consider that is the situation in this case. The passage of time, particularly involving material delay, will almost always be a relevant consideration in the exercise of discretion. However, in this case it has not caused the respondents such prejudice as to warrant precluding the Council from seeking appropriate relief.

[43] Transcript of proceedings, 1-59.

[36] Allowing that the AI Act did require the appellant to make a disciplinary referral 'as soon as possible', the questions raised by grounds 5 to 7 are could and should the Tribunal have allowed an extension of time pursuant to s 61(1) of the QCAT Act. As is noted above, it is not contended by the respondent that the failure to make the referral as soon as possible gave rise to a nullity or statutory invalidity and it is accepted that the Tribunal might grant an extension of time pursuant to s 61 of the QCAT Act.

[37] As stated in *Ashtrail Pty Ltd*,[44] s 38(4) of the AIA does not bring into force 'some form of de facto limitation of actions defence'; it 'does not create any legal limitation or bar to a proceeding of the type under consideration'. Rather, s 38(4) of the AI Act is a procedural requirement, which might attract the operation of s 61(1) of the QCAT Act. Section 61(1) confers a wide discretion on the Tribunal to extend time. It provides that the Tribunal may: 'extend a time limit fixed for the start of a proceeding by this Act, an enabling Act or the rules'. The time limit 'as soon as possible' is 'fixed', in the sense of being set in place, by the VR Act (the 'enabling Act') when read with the AI Act.

[38] In relation to grounds 5, 6 and 7, the appellant submits that there was a wrongful exercise of the discretion in refusing the application to extend time. Reliance is placed on *House v The King*.[45] In that case, Dixon, Evatt and McTiernan JJ stated:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

[39] On that basis, two submissions are made. First (ground 5), it is maintained that in exercising its discretion the Tribunal took into account an irrelevant consideration; namely, the gravity of the misconduct alleged and the proposed sanction. Second, (grounds 6 and 7), it is maintained that the decision was manifestly unreasonable in placing too much weight on the delay and the lack of a satisfactory explanation, and insufficient weight on the merits of the case and lack of prejudice to the respondent.[46]

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44 [2020] QCA 82, [87].
45 (1936) 55 CLR 499 at 504-505.
46 Submission of the appellant, [48]-[50].

[40] In relation to ground 5, in the Tribunal at first instance it was stated:[47]

> In my view, it is also relevant to take into account the nature of the misconduct alleged. The complaint stemmed from the fact that Mr Murphy represented a client in interlocutory proceedings before the Land Court, where the expert witness engaged by the client was a member of the same firm of valuers as Mr Murphy. The Land Court Member noted that a provision of the relevant Code of Conduct requires the strictest independence and impartiality on the part of a valuer where the exercise of objective judgment is required. The Code gives as an example of unacceptable behaviour acting as an advocate in a matter where another member of the advocate's firm has acted as an expert in the matter.
>
> It appears from the material in the referral that Mr Murphy's lawyers have argued that the provision in question would apply to a final hearing but not to interlocutory steps where, it is argued, it is unremarkable and appropriate for a firm which has provided a valuation to appear as a client's advocate in order to save the client money.
>
> It is not for me to resolve whether Mr Murphy engaged in professional misconduct, but it is readily apparent that if his conduct did amount to misconduct, it was not at the graver end of the scale. It was done openly in Court, presumably in the belief that it was entirely proper. It did not involve dishonesty. The relatively minor nature of the alleged breach is reflected in the nature of the disciplinary orders sought by the Board: a reprimand, an undertaking not to repeat the conduct, a financial penalty, and costs. The Board has not called for the more serious sanctions of suspension or cancellation of registration. (footnotes omitted)

[41] It was submitted by the appellant that the reason for the proposed sanction was to do with the fact that the Board initially determined to deal with the matter itself and that it was the respondent who referred the matter to QCAT.[48] Had it dealt with the matter itself, the sanctions were limited to those set out in s 51(1) of the VR Act. While in the submissions on behalf of the appellant in reply it was accepted that the discretion whether to grant an extension of time is 'substantially untrammelled',[49] it was submitted that nevertheless the proposed sanction should be looked at against the background of the Board's limited powers under s 51(1) of the VR Act. However, it remains, as acknowledged by the Board, that under the statutory scheme the invoking of s 51(1) presupposes that the Board has formed the view that the matter does not warrant referral to QCAT.

[42] In my view the Tribunal did not take into account an irrelevant consideration. As noted, the discretion whether to grant an extension of time is 'substantially untrammelled'. A relevant issue in relation to disciplinary proceedings is the public interest. As stated in *Walter v Council of Queensland Law Society Incorporated*:[50]

> The public interest is an important factor in disciplinary proceedings because a primary object of such proceedings is to protect members of the public from professional misconduct

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47 [2019] QCAT 41, [39]-[41].

48 Submissions of the appellant, [56].

49 Submissions of the appellant in reply, [6]. In that regard, see *Rintoul v State of Queensland* [2015] QCA 70, [16]-[17]; *Crime and Misconduct Commission v Chapman* [2011] QCAT 229, [7].

50 (1988) 77 ALR 228, 235; [1988] HCA 8.

[43] It follows that the more serious the allegations, and in turn the potential serious consequences for members of the public who rely on the person's professional services, the more imperative it becomes that disciplinary action be taken. The converse is also true.

[44] In my view there has been no relevant error and ground 5 of the appeal should be dismissed.

[45] In relation to grounds 6 and 7 of the appeal, it is submitted that the decision was unreasonable in placing too much weight on the delay and the lack of a satisfactory explanation, and insufficient weight on the merits of the case and lack of prejudice to the respondent. In *Minister for Immigration and Citizenship v Li*,[51] it was stated:

> Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

[46] Matters typically considered where there is an application for an extension of time are: the length of the delay, the explanation for the delay, the strength of the applicant's case, the likelihood of prejudice to other parties, and the interests of justice.[52]

[47] The Tribunal at first instance addressed those issues and the related submissions of the appellant. It was accepted by the Tribunal that the delay had 'not caused any forensic disadvantage to the respondent' and while it accepted that the Board had 'an arguable case' it was noted that it was 'apparent from the investigator's report that it is also arguable that Mr Murphy did not engage in professional misconduct'.[53]

[48] It is the submission of the appellant that 'the key feature' of the case is that, despite the delay, 'the agreement about the underlying facts meant there was absolutely nothing standing in the way of the Registrant receiving a fair hearing. The substantive hearing would effectively be resolved by argument, with no contested evidence'.[54] However, the potential for forensic prejudice is not the only factor to be considered. Even within the confines of prejudice, there is also the potential prejudice that arises simply from having disciplinary proceedings unduly delayed. However, as is noted above, there are other factors which should be and were considered by the Tribunal at first instance.

[49] It is noted that one of the objects of the QCAT Act is 'to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick'.[55] As

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51 (2013) 249 CLR 332, [76], per Hayne, Kiefel and Bell JJ. Reference was made to *House v The King* and it was added: 'The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power'.

52 See, for example, *Jensen v Queensland Building and Construction Commission* [2019] QCATA 11, [7].

53 [2019] QCAT 41, [38].

54 Submissions of the appellant, [66].

55 *QCAT Act*, s 3(b).

stated by McHugh J in *Herron v McGregor*, the 'limitation period represents the legislature's judgment as to what the public interest requires after taking into account the relevant factors including the prejudice which delay may create'.[56] In *Brisbane South Regional Authority v Taylor*, McHugh J stated:[57]

> A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated.

[50] It is evident that the delay was largely attributable to delay on the part of the then legal representative of the Board, who took 'a long time' to draft the referral.[58] In a delay of some 5 months, it seems that the legal representative was off work, ill, for about one month.[59] Otherwise it is not clear why it took so long to draft the referral. In *Gallow v Dawson*,[60] McHugh J stated:

> A case would need to be exceptional before a court would enlarge by many months the time for lodging an appeal simply because the applicant had refrained from appealing until he or she had researched the issues involved.

In the present case, in circumstances where an investigator's report had been completed prior to taking disciplinary action pursuant to s 51 of the VR Act, where the Board would have been aware of the statutory option available to the valuer to have the matter referred to QCAT upon receiving notice of the disciplinary proceedings, where that option had to be exercised within a specified time frame, where there was no compelling explanation for the delay, and where little was required of the Board in making the referral, coupled with the potential for prejudice that almost inevitably arises in delaying disciplinary proceedings, in my view, in all the circumstances, there is nothing in the reasons given or the decision made by the Tribunal at first instance that would give rise to a finding of unreasonableness in the relevant sense. As stated in *House v The King*,[61] the question is not one of whether the Appeal Tribunal, if it had been in the position of the Tribunal at first instance, would have taken a different course.

[51] Grounds 6 and 7 and the appeal should be dismissed.

Member Browne:

[52] I have had the advantage of reading Senior Member Aughterson's reasons and I respectfully disagree with his reasons and the orders that he proposes. I have set out below my reasons and the orders that I propose in this matter.

[53] Neil Patrick Murphy seeks to appeal against a decision of the Tribunal in its original jurisdiction refusing an application for an extension of time to make a disciplinary

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56 (1986) 6 NSWLR 246, 253.
57 (1996) 186 CLR 541, 553.
58 [2019] QCAT 41, [13]. See also at [15]-[17], [20]
59 Ibid, [13].
60 (1990) 93 ALR 479, 481; [1990] HCA 30.
61 (1936) 55 CLR 499 at 504.

referral and dismissing the referral filed by the Valuers Registration Board of Queensland ('the Board') arising out of conduct alleged against Mr Murphy.[62]

[54] On 13 September 2016, Mr Murphy appeared as a representative for a party in a proceeding before the Land Court of Queensland. Member Cochrane of the Land Court made observations about Mr Murphy's conduct in the proceeding in his published decision.[63]

[55] In April 2017, the Board received a complaint about an aspect of Mr Murphy's professional conduct arising from the Land Court's decision.

[56] An investigator was appointed by the Board and a final report prepared by the investigator dated 23 February 2018.

[57] On 20 March 2018, the Board's Secretary wrote to Mr Murphy giving him notice under s 52(1) of the *Valuers Registration Act* 1992 (Qld) ('the VR Act') that it proposed to take certain disciplinary action again him. The Board invited Mr Murphy to respond to the allegations by 11 April 2018, by which he may- (i) make written representations to the Board; or (ii) request the board to hear him; or (iii) require the Board to refer the matter to the Queensland Civil and Administrative Tribunal ('QCAT').[64]

[58] On 10 April 2018, Mr Murphy's lawyers advised the Board to refer the disciplinary matter to QCAT pursuant to s 52(2)(c)(iii) of the VR Act. Relevantly, s 52 of the VR Act is silent as to the timeframe within which the Board must refer the matter to QCAT.

[59] The Board filed an application or referral in the Tribunal on 19 September 2018, some five months after the date when Mr Murphy advised the Board to refer the matter to QCAT. Importantly, the referral was filed in the Tribunal following an exchange of correspondence between the parties' lawyers about why the referral had not yet been filed in QCAT.

[60] The current matter before the Appeal Tribunal arises from the Board's delay in filing the referral in the Tribunal.

[61] In the proceeding below, Mr Murphy filed an application to dismiss the referral on the basis that the Tribunal lacked jurisdiction because of the Board's delay.[65] This required the Tribunal to exercise the discretionary powers under s 47(2)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('the QCAT Act') to determine whether the referral should be dismissed. The Board, in responding to Mr Murphy's application, made an oral application for an extension of time to file the referral, if such an extension were necessary.[66]

[62] Mr Murphy contended in the Tribunal proceeding below that s 52 of the VR Act is silent as to the timeframe within which the Board must refer a matter to QCAT and therefore s 38(4) of the *Acts Interpretation Act* 1954 (Qld) ('the AI Act') applies. Section 38(4) of the AI Act provides that if no time is provided or allowed for doing

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62 *Valuers Registration Board v Murphy* [2019] QCAT 41 ('reasons').

63 See Referral filed 19 September 2018 and *Bunnings Properties Pty Ltd v Valuer-General; The Trust Company Limited v Valuer-General* [2016] QLC 63, [117]-[128].

64 Appeal Book, p 103.

65 Appeal Book, p 91 and see Mr Murphy's outline of submissions filed 9 August 2019.

66 Reasons, [37].

anything, the thing is to be done 'as soon as possible…'. Mr Murphy contended that the Board failed to refer the matter to QCAT within the required timeframe and invited the Tribunal to strike out the referral on the basis that QCAT does not have jurisdiction to hear it and/or, it is frivolous, vexatious or misconceived, lacking in substance, or otherwise an abuse of process.[67]

[63] The Tribunal below found that the Board did not refer the matter to QCAT as soon as possible and considered whether the Board's failure to refer as soon as possible deprives QCAT of jurisdiction.

[64] The Tribunal below found that the Board's delay in referring the matter does not deprive the Tribunal of jurisdiction, provided that an extension of time is granted. The Tribunal ordered that the application for an extension of time is refused and the referral is dismissed.[68]

The application for leave to appeal or appeal

[65] At the oral hearing before the Appeal Tribunal, Mr Templeton appearing for the Board abandoned Grounds 1 and 4 of the grounds of appeal.[69] The remaining grounds of appeal as set out in the application for leave to appeal or appeal are as follows:[70]

(a) **Ground 2**: The Tribunal erred in holding that it had jurisdiction to determine the referral only if an extension of time was granted.

(b) **Ground 3**: The Tribunal erred in failing to hold that it had jurisdiction to determine the referral even if the referral was not filed 'as soon as possible'.

(c) **Ground 5**: The Tribunal erred by taking into account an irrelevant consideration with respect to the exercise of the discretion to extend the time for filing the referral, namely the gravity of the misconduct alleged and the proposed sanction.

(d) **Ground 6**: The Tribunal erred in exercising its discretion not to extend the time for filing the referral.

(e) **Ground 7**: The Tribunal erred in failing to exercise its discretion to extend the time for filing the referral.

[66] The Board seeks final orders in the disposition of Grounds 2 and 3 of the appeal that Mr Murphy's application to dismiss the referral brought under s 47 of the QCAT Act be dismissed. In the alternative and if the Board is not successful on Grounds 2 and 3, the Board seeks final orders, in allowing Grounds 5, 6 and 7, to dismiss Mr Murphy's dismissal application and to order that the Board's application to extend the time for filing the referral is allowed.

[67] It was common ground in the oral hearing before the Appeal Tribunal that the proceeding before the Tribunal below ought to be properly categorised as an interlocutory decision and leave to appeal is therefore required.[71] Further to that, it is

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67 Appeal Book, p 97.
68 Reasons, [44].
69 Application for leave to appeal or appeal filed 25 March 2019.
70 Ibid.
71 QCAT Act, s 142(3)(a)(ii) and see *Harper Property Builders Pty Ltd v Queensland Building and Construction Commission* [2018] QCATA 70.

noncontentious that Grounds 5, 6 and 7 of the appeal raise questions of mixed fact and law for which leave to appeal is required.[72]

[68] Leave to appeal will usually be granted where there is a reasonable argument that the decision is attended by error, and an appeal is necessary to correct a substantial injustice to the applicant caused by that error.[73] The question of whether there is an issue of general importance, upon which further argument and a decision of the appellate court or tribunal would be to the public advantage, is also relevant.[74]

[69] I am satisfied that the application for leave to appeal or appeal raises a question of general importance about the application of the AI Act and whether it applies to an enabling Act that confers jurisdiction on the Tribunal. As identified by Mr Templeton appearing for the Board in the oral hearing before the Appeal Tribunal, there are a number of Acts that confer jurisdiction on the Tribunal to hear and determine a disciplinary matter. The effect of section 38(4) of the AI Act, if engaged and in the absence of any express provision as to the time for filing a referral, may require a referral of a disciplinary proceeding to be filed as soon as possible. Both the application and effect of s 38(4) of the AI Act on a matter that confers jurisdiction on the Tribunal, in circumstances where there is an alleged delay in referring the matter to QCAT and absent a contrary intention in the enabling Act, will undoubtedly have ramifications for the future conduct of disciplinary matters. Leave to appeal should be granted.

Do Grounds 2 and 3 raise questions of law or mixed fact and law?

[70] In the oral hearing before the Appeal Tribunal, Mr Templeton appearing for the Board submitted that there is a contest between the parties as to whether Grounds 2 and 3 raise questions of law or involve the exercise of the Tribunal's discretion and therefore raise questions of mixed fact and law.[75]

[71] Mr Templeton submitted that Grounds 2 and 3 raise questions of law as to whether the learned Member found the correct interpretation of the relevant provisions of the VR Act and the AI Act that acted together with respect to the obligation to file as soon as possible. Mr Templeton submitted that the Tribunal's underlying finding about whether the delay did or did not deprive the Tribunal of jurisdiction is not one that involves the exercise of a discretion; instead, that is a matter of statutory interpretation.

[72] On the other hand, Mr Murphy would have us find that Grounds 2 and 3 involve an exercise of discretion and fall squarely within *House v King*.[76] In the oral hearing before the Appeal Tribunal, Mr Traves QC appearing for Mr Murphy submitted that the Tribunal is not deprived of jurisdiction by reason of the fact that the extension of time is not granted because s 38(4) of the AI Act creates a defence and the correct remedy is the exercise of power under s 47 of the QCAT Act that was, in this case, properly exercised by the Tribunal below.

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72 QCAT Act, s 142.

73 *Pickering v McArthur* [2005] QCA 294 at [3] (Keane JA).

74 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389 (Carter J); *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578 (Macrossan CJ),580 (McPherson J).

75 QCAT Act, s 142.

76 (1936) 55 CLR 499, 504.

[73] The question of whether Grounds 2 and 3 raise questions of law or involve an exercise of discretion and therefore raise questions of mixed fact and law are important because the Appeal Tribunal will not usually interfere with the Tribunal's exercise of discretion unless it can be shown that the learned Member acted upon a wrong principle or made mistakes of fact which affected the decision, or was influenced by irrelevant matters.[77] It must be shown that the decision is plainly unjust or unreasonable and involved a clear misapplication of the discretion.[78]

[74] If Grounds 2 and 3 are found to raise questions of law as contended by the Board, the Appeal Tribunal may proceed under s 146 of the QCAT Act to, amongst other things, set aside the Tribunal's decision and substitute its own decision.[79]

[75] In an earlier decision of the Appeal Tribunal, the distinction between questions of law and fact were considered. In *Racing Queensland Limited v Dixon*,[80] the Deputy President stated:

> Provided that the question raised by the relevant appeal ground is properly framed as a question of law then the appeal on that ground may proceed before the Appeal Tribunal as of right. Leave is not required.[81]

[76] In the present matter, I consider that Grounds 2 and 3, properly framed, raise questions of law. Grounds 2 and 3, concern the Tribunal's ultimate finding at paragraph [44] of its reasons in which the learned Member found that the Board's delay in referring the matter does not deprive the Tribunal of jurisdiction provided that an extension of time is granted. I accept Mr Templeton's submission made in the oral hearing that Grounds 2 and 3 raise a question of statutory construction as to the Tribunal's jurisdiction. The question of jurisdiction concerns the effect of s 38(4) of the AI Act, if applied to the VR Act, in circumstances where the Board does not file the referral in QCAT as soon as possible.

The relevant legislation

[77] It is convenient to set out the relevant provisions of the legislation that the Tribunal below considered in determining the matter before it.

The Valuers Registration Act 1992 (Qld) ('the VR Act')

[78] The VR Act establishes the Valuer's Registration Board of Queensland.[82] The Board is empowered to do a number of things, such as keep a register of valuers and, in certain circumstances, to register a person as a valuer.[83]

[79] Part 4 of the VR Act provides a procedure for the handling of complaints and in certain circumstances taking disciplinary action against a registered valuer. Under s 44 of the VR Act, the Board may in certain circumstances investigate a complaint made in writing under s 43 or of its own initiative. The Board may authorise a person who is not a member or an assistant member to carry out an investigation of conduct of a registered valuer on behalf of the Board.[84] An investigator appointed by

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77 *House v King* (1936) 55 CLR 499, 504.
78 *Lovell v Lovell* (1950) 81 CLR 513.
79 QCAT Act, s 146(b). See *Ericson v Queensland Building Services Authority* [2013] QCA 391.
80 [2013] QCATA 172.
81 *Racing Queensland Limited v Dixon* [2013] QCATA 172, [9].
82 The Act, s 5.
83 Ibid, s 26 and s 30.
84 Ibid, s 44(2).

the Board has certain powers including, for example, the power to enter a place and search for evidence and the power to apply to a magistrate for a warrant in relation to a particular place in certain circumstances.[85] Section 44(2) of the VR Act provides that the investigator must give the board a written report on the investigation.

[80] Under s 50 of the VR Act, the Board may, after considering an investigator's report and if satisfied that a valuer has engaged in professional misconduct, or incompetence or negligence in the person's performance as a valuer, do one of three things. The Board may, if it considers appropriate, refer the matter to QCAT to decide or, if it considers the matter does not warrant referral to QCAT, it may take disciplinary action under s 51, or take no further action. Relevantly, s 50 provides as follows:

> **50 Disciplinary proceedings**
>
> (1) This section applies if, after considering an investigator's report, the board reasonably considers that a valuer has engaged in—
>
> (a) professional misconduct; or
>
> (b) incompetence or negligence in the person's performance as a valuer.
>
> (2) The board may, as it considers appropriate in the circumstances—
>
> (a) refer the matter to QCAT to decide; or
>
> (b) if it considers the matter does not warrant referral to QCAT—
>
> (i) take disciplinary action against the valuer under *section 51* ; or
>
> (ii) take no further action.
>
> (3) A referral under *subsection (2) (a)* must be made as provided under the *QCAT Act* .

[81] Before taking any action against a valuer under s 51(2)(i), the Board must give to the valuer written notice of its intention to take action as required under s 52. Section 52 requires the notice to state certain things including a day, at least 14 days after the day the notice is given, by which the valuer may, in relation to the allegations stated in the notice either make representations to the board, or request the board to hear him, or her, or require the board to refer the matter to QCAT. If the valuer requires the board to refer the matter to QCAT, the board cannot proceed to take action against the valuer under s 51(2)(i). Relevantly, ss 51 and 52 provide as follows:

> **51 Board may take disciplinary action**
>
> (1) Subject to section 52, the board may do 1 or more of the following—
>
> (a) admonish or reprimand the valuer;
>
> (b) order the valuer to give an undertaking to abstain from particular conduct;
>
> (c) order the valuer to pay to the board a penalty of an amount equal to not more than 20 penalty units.

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[85] Ibid, ss 46 to 48.

(2) The board must give a valuer an information notice for its decision to take action against the valuer under subsection (1).

(3) The board may publish, in the newspaper or on its website, notice of any action taken under subsection (1).

52 Notice of intention to take disciplinary action

(1) Before taking action against a valuer under *section 51*, the board must give to the valuer written notice of its intention to take the action.

(2) The notice must state—

(a) the professional misconduct, incompetence or negligence alleged against the valuer; and

(b) the facts and circumstances forming the basis for the allegations; and

(c) a day, at least 14 days after the day the notice is given, by which the valuer may, in relation to the allegations stated in the notice—

(i) make written representations to the board; or

(ii) request the board to hear him or her; or

(iii) require the board to refer the matter to QCAT.

(3) If the valuer requests a hearing, the board must advise the valuer of a time and place at which the valuer may appear before the board.

(4) When deciding the action to be taken against a valuer under *section 51* , the board must consider any representations made by the valuer about the allegations.

(5) If the valuer requires the board to refer the matter to QCAT, the board can not proceed to take action against the valuer under *section 51* .

[82] Section 52 of the VR Act is silent as to the time for filing a referral in QCAT where a valuer has nominated that the board refer the matter to QCAT under s 52(2)(c)(iii).

The Acts Interpretation Act 1954 (Qld) ('AI Act')

[83] The AI Act applies to all Acts.[86] The application of the AI Act may be displaced wholly or partly by a contrary intention appearing in the Act.[87] Section 38 contains provisions about the reckoning of time. Relevantly, section 38(4) provides that, if no time is provided or allowed for doing anything, the thing is to be done as soon as possible. Section 38(4) provides as follows:

38 Reckoning of time

…

(4) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens.

[84] Section 49A provides that if a provision of an Act whether expressly or by implication authorises a proceeding to be instituted in a particular court or tribunal

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86 AI Act, s 2.

87 Ibid, s 4.

in relation to a matter, the provision is taken to confer jurisdiction in the matter on the court or tribunal.

The Queensland Civil and Administrative Tribunal Act 2009 (Qld)

[85] The Tribunal has jurisdiction to deal with matters it is empowered to deal with under the QCAT Act or an enabling Act.[88] Section 34 of the QCAT Act applies if an enabling Act provides for the referral of a matter to the tribunal. Section 34(2) relevantly provides that the referral must be made within the period provided for under the enabling Act and in a way complying with the rules. Section 34(2) provides as follows:

> **34 Referring matter**
>
> (1) This section applies if an enabling Act provides for the referral of a matter to the tribunal.
>
> (2) The referral must be made—
>
> (a) within the period provided for under the enabling Act; and
>
> (b) in a way complying with the rules.

[86] The Tribunal has the power under s 61 of the QCAT Act to, amongst other things and in certain circumstances, extend a time limit fixed for the start of a proceeding by the QCAT Act or an enabling Act or extend or shorten a time limit fixed by the QCAT Act, an enabling Act or the rules. The Tribunal may also in certain circumstances waive compliance with another procedural requirement under the QCAT Act, an enabling Act or the rules. Section 61 of the QCAT Act provides as follows:

> **61 Relief from procedural requirements**
>
> (1) The tribunal may, by order—
>
> (a) extend a time limit fixed for the start of a proceeding by this Act or an enabling Act; or
>
> (b) extend or shorten a time limit fixed by this Act, an enabling Act or the rules; or
>
> (c) waive compliance with another procedural requirement under this Act, an enabling Act or the rules.
>
> (2) An extension or waiver may be given under subsection (1) even if the time for complying with the relevant requirement has passed.
>
> (3) The tribunal cannot extend or shorten a time limit or waive compliance with another procedural requirement if to do so would cause prejudice or detriment, not able to be remedied by an appropriate order for costs or damages, to a party or potential party to a proceeding.
>
> (4) The tribunal may act under subsection (1) on the application of a party or potential party to the proceeding or on its own initiative.
>
> …

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88 QCAT Act, s 9.

[87] The Tribunal also has the power, in certain circumstances, to dismiss a proceeding or part of a proceeding if satisfied that it is frivolous, vexatious or misconceived, or lacking in substance, or otherwise an abuse of process.[89]

Tribunal's findings

[88] The Tribunal's reasons identify the application before it, the relevant law and contains findings about the steps taken by the Board in dealing with the complaint after Mr Murphy elected to have the matter proceed to QCAT. Relevantly, there was a delay of some five months from when Mr Murphy made the election to proceed to QCAT to the date when the referral was filed in the Tribunal.

[89] Mr Murphy applied to the Tribunal below for the disciplinary proceedings to be struck out for lack of jurisdiction because of the delay by the Board in referring the matter to QCAT. The learned Member said that he was required to determine the strike-out application as a preliminary question.[90]

[90] The Tribunal's reasons set out the undisputed history of the matter at paragraphs [3] to [6], inclusive, that I have now summarised below as follows:

(a) On 13 April 2017, the Board received a complaint about an aspect of Mr Murphy's professional conduct. Importantly, the Board was made aware of the complaint as early as December 2016.

(b) On 23 February 2018, the Board appointed a Queen's Counsel as investigator and a final report was provided to the Board.

(c) On 20 March 2018, the Board wrote to Mr Murphy giving notice that it proposed to take certain disciplinary action against him and invited a response by 11 April 2018.

(d) On 10 April 2018, Mr Murphy's lawyers responded by advising that he required the Board to refer the matter to the Tribunal.

(e) On 19 September 2018, the referral was filed in QCAT.

(f) On 12 October 2018, Mr Murphy's lawyers file the application to strike out the referral by way of an application for miscellaneous matters.

(g) On 5 February 2019, the Tribunal conducted a hearing of the strike-out application.

[91] Under the heading 'relevant law', the Tribunal referred to relevant sections of the VR Act and the AI Act. The Tribunal found that the Board must give a notice to the valuer that, amongst other things, specifies a date by which he may make written representations to the Board, or request a hearing by the Board, or 'require the Board to refer the matter to QCAT'.[91] The Tribunal observed that if the Board is required to refer the matter to QCAT ('the last option')[92] there is no other provision conferring jurisdiction on QCAT. The Tribunal relied on s 49A of the AI Act and found that the implied authorisation of a proceeding must be taken to confer jurisdiction on QCAT. Further to that, the Tribunal observed that the VR Act does

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89 QCAT Act, s 47.
90 Ibid, [2].
91 QCAT Act , [7], see The Act, s 52(2)(C)(iii).
92 Ibid, [7].

not specify a time limit for the Board to refer the matter to QCAT and s 38(4) of the AI Act applies to require the referral to QCAT be made as soon as possible.[93]

[92] Under the heading 'the parties' positions,' the Tribunal summarised the competing submissions made in the hearing of the application stating that Mr Murphy argues that the referral to QCAT was not made as soon as possible and that as a result the Tribunal lacks jurisdiction. The Board argued that the referral was made as soon as possible and even if it was not, the Board argued that the Tribunal retains jurisdiction and, if necessary, the Tribunal can grant an extension of time under s 61 of the QCAT Act.

[93] The Tribunal addressed the question 'was the referral made as soon as possible' and found that there was a little more than five months after Mr Murphy elected to require the Board to make the referral and that this was 'quite a long time'.[94] The learned Member observed, amongst other things, that by the time Mr Murphy made an election to have the matter referred to QCAT an investigation report had been prepared and the Board had already been required to formulate the basis for disciplinary action.[95] The learned Member found that there is no reason that the process of referral should take as long as five months.

[94] The Tribunal considered the Board's explanation for the delay in its reasons in paragraphs [13] to [20], inclusive. The Tribunal considered the Board's evidence given in the hearing below by its secretary that the Board promptly engaged a barrister (not its current barrister). The barrister took a long time to draft the referral and the Secretary chased up the barrister as much as she could. The Tribunal observed that some of the delay happened because the barrister was off work ill for about a month from 7 July 2018.

[95] The Board submitted that it had done all that it could reasonably do to refer the matter as soon as possible and submitted that the Tribunal should not conclude that the Board should have switched to another lawyer at some point, as this proposition was not put to the Board's secretary in cross-examination. The Tribunal concluded that it was not critical to put that proposition because ultimately the question of whether the referral was made as soon as possible is to be determined objectively, regardless of the views of the secretary.[96] The Tribunal found that the matter was not very complicated and a competent lawyer could have easily been able to take over the matter.[97] The relevant extracts from the reasons are set out as follows:

> Mr Templeton pointed out that a change of lawyer would itself slow progress for a time, while the new lawyer became acquainted with the matter.
>
> That is true, but the matter is not very complicated and a competent lawyer (without other demands on his or her time) would have easily been able to read the material and draft the referral within a day, in my view. It is also relevant to note that the detailed reports of the investigating Queen's Counsel were available. So it was a matter that could have been taken over quite easily by a new lawyer.

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93 Ibid, [8].
94 Ibid, [12].
95 QCAT Act, [12]
96 Reasons, [15].
97 Ibid, 15].

[96] The Tribunal referred to *Crowley v McKay*[98] to determine the meaning of the phrase 'as soon as possible' in s 38(4) of the AI Act and observed that the meaning is more stringent than a 'within a reasonable time requirement'. The Tribunal said that in *Crowley*, the Court ruled that an appeal filed more than six months after the decision in question was not filed as soon as possible and the appeal right was lost.

[97] The Board referred the Tribunal to a South Australian decision in *Registrar of Motor Vehicles v Vu and Anor*[99] that said 'a person subjected to a duty to act with all convenient speed can do no more than act as expeditiously as he or she can in the circumstances'.[100] The Tribunal found that the observations in *Vu* would apply in respect of the requirement in Queensland to act as soon as possible and found that the Board started the process to refer the matter to QCAT promptly and later encountered unexpected delays by its then-lawyer. The Tribunal found that the Board did not refer the matter to QCAT as soon as possible. The learned Member found:

> No doubt that observation would apply equally in respect of the requirement in Queensland to act as soon as possible. I accept that the Board started the process to refer the matter to QCAT promptly and later encountered unexpected delays by its then-lawyer. However, once a few weeks had passed without a drafted referral by the lawyer, in my view it became incumbent on the Board to seek alternate legal representation urgently, or if necessary to draft the referral itself, to ensure that it met its legal obligation to refer the matter as soon as possible. Instead, the wait for the lawyer to draft the referral dragged on.
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> I find that the Board did not refer the matter to QCAT as soon as possible.

[98] The Tribunal proceeded to address the question as to whether the Board's failure to refer as soon as possible deprived QCAT of jurisdiction. The Tribunal considered, amongst other things, *Project Blue Sky v Australian Broadcasting Authority*[101] and *Vu* and the Board's submissions in the hearing below. The Board submitted that a time requirement could have been placed in the VR Act had parliament intended it to be pivotal and given the lack of precision in the phrase 'as soon as possible' considerable uncertainty would arise as to whether referrals were valid or invalid if compliance with the time requirement was essential for validity.[102] The Tribunal observed that the importance of disciplinary proceedings for maintaining public confidence in the profession and in protecting the public also weighs in favour of treating a referral as valid even though it may be late.[103] Further to that, the Board submitted in the hearing below that the Board has a statutory duty to refer a matter and submitted that while a right such as the right to appeal in *Crowley* may lapse through delay, it is not likely that Parliament would have intended a duty to similarly lapse.[104]

[99] The Tribunal found it unlikely that Parliament would have intended that the Tribunal would invariably lack jurisdiction when a referral is not made as soon as possible. Further to that, the Tribunal considered that the power to extend time in the

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98 [1999] QDC 281.
99 [2013] ASACFC 10.
100 Reasons, [19] and see [2013] ASACFC 10, [19].
101 (1998) 194 CLR 355, 388-9.
102 Reasons, [29].
103 Reasons, [29].
104 Ibid.

QCAT Act might suggest that this is a mechanism for balancing duties imposed on a body, such as the Board's duty on the one hand to refer a matter and on the other to do so as soon as possible. The Tribunal found that s 61 of the QCAT Act enables the Tribunal to 'extend a time limit fixed for the start of a proceeding by ….an enabling Act'.[105] The Tribunal found that a referral can be made late after the 'soon as possible' period has expired, but only if an extension of time is granted. The relevant paragraphs of the Tribunal's reasons are now set out below as follows [footnotes omitted]:

> The enabling Act in this case is the Valuers Registration Act. When the Valuers Registration Act is read in the way required by the Acts Interpretation Act, it imposes an obligation to refer a matter to QCAT as soon as possible. It does therefore serve to impose a time requirement. But does it fix a time limit? 'Time limit' and 'fixing' bring to mind definite periods, such as 28 days after conviction to lodge an appeal. 'As soon as possible', in contrast, is inherently imprecise. Nonetheless, I consider that it does not unduly strain the language of section 61(1)(a) of the QCAT Act to interpret it as extending to a requirement to refer a matter as soon as possible. Reading it that way enables proper regard to be had not only to the Board's duty to refer a matter but also to its obligation to do so as soon as possible.
>
> In other words, a referral can be made late – after the 'as soon as possible' period has expired – but the referral can proceed only if an extension of time is granted.
>
> I have borne in mind Mr Templeton's point about uncertainty. Extrapolating that point, when will the Board know that an extension of time is required? I appreciate this is a difficulty, but in practice the need for an extension of time application is likely to arise only if the respondent takes issue with a delay in referral.

[100] The Tribunal considered the question of whether an extension of time should be granted, in paragraphs [37] to [43] inclusive, according to established principles. The Tribunal accepted the delay had not caused any forensic disadvantage to Mr Murphy, that there is a public interest in the system of professional discipline being enforced, and it does not appear that it is no longer open to the Board to take internal disciplinary action. The Tribunal accepted that the Board has an arguable case but observed, however, that it is also arguable that Mr Murphy did not engage in professional misconduct.[106] The learned Member did not accept that the Board had a satisfactory explanation for the delay but did accept that the Board and its Secretary wanted to refer the matter in a timely way. The learned Member reasoned that objectively the Board did not have sufficient regard to its obligation to do so as soon as possible and found that the delay was substantial.[107]

[101] The Tribunal made observations about the nature of the misconduct alleged such as, amongst other things, that it is readily apparent that if the conduct did amount to misconduct, it was not the graver end of the scale. It did not involve dishonesty and the Board has not called for the most serious sanctions of suspension or cancellation of registration.[108]

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105 Ibid, [33].
106 Reasons, [38].
107 Ibid, [38].
108 Ibid, [41].

[102] The Tribunal considered on balance that the interests of justice do not favour an extension of time and refused the Board's application for an extension of time. The learned Member held that it followed that the referral must be dismissed.[109] In conclusion, the Tribunal decided that the Board's delay in referring the matter does not deprive the Tribunal of jurisdiction, provided an extension of time is granted. The Tribunal decided that an extension of time was not appropriate and made final orders to dismiss the referral.[110] The relevant extracts from the reasons appear at paragraph [44] as follows:

> [44] I have decided that the Board's delay in referring the matter does not deprive the Tribunal of jurisdiction, provided that an extension of time is granted. I have decided that an extension of time is not appropriate. Accordingly, I will dismiss the referral.

[103] The Tribunal made final orders that the application by the Valuers Registration Board for an extension of time to make the disciplinary referral is refused and the disciplinary referral is dismissed.

Grounds 2 and 3: Error in the Tribunal's finding as to the Tribunal's jurisdiction to determine the referral

[104] At the oral hearing before the Appeal Tribunal, Mr Templeton for the Board referred to the Tribunal's finding at paragraph [44] and the Tribunal's consideration of whether the Board's failure to refer as soon as possible deprives QCAT of jurisdiction. Mr Templeton submitted that the use of the words 'require the Board to refer the matter to QCAT' in s 52(2)(c)(iii) of the VR Act is, in effect, a statutory command on the Board that it must undertake. When considering the effect of a failure to do that as soon as possible, Mr Templeton submitted that the obligation which arises under the VR Act is to be considered.

[105] As I understand Mr Templeton's submission to be, he would have us find that the operation of s 38(4) of the AI Act does not set a time limit like other provisions, such as, for example, the *Limitations of Actions Act* 1974 (Qld), but rather creates an administrative obligation on the Board 'to do so as soon as possible' referred to as 'the expedition obligation'.[111] Mr Templeton submitted that the power of the Board to file a referral is subject to the overriding power of the Tribunal to dismiss the proceeding as an abuse of process.[112]

[106] In written submissions filed in support of the appeal, the Board says that when the evaluative task set out in *Project Blue Sky* is considered, it is apparent that there cannot be a discerned legislative purpose to deprive QCAT of jurisdiction in circumstances where the expeditation obligation has not been complied with.[113] Further to that, the matter fundamental to the learned Member's reasoning, namely the power to extend time under s 61 of the QCAT Act, is not properly a matter which is indicative of a legislative intention to deprive QCAT of jurisdiction. For these reasons the Board says that the learned member erred in finding that QCAT

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109 Ibid, [43].
110 Ibid, [43].
111 Board's submissions dated 28 June 2019.
112 See *Walton v Gardiner* (1993) 177 CLR 378.
113 Board's submissions dated 28 June 2019, p 9.

did not have jurisdiction without an extension of time and Mr Murphy's application ought to have been dismissed.[114]

[107] In response, Mr Traves QC appearing for Mr Murphy contended in the oral hearing before the Appeal Tribunal that the appeal falls into several parts. Firstly, whether the proceeding or referral was made as soon as possible. Mr Traves QC submitted that in the matter below the learned Member found, and the Board does not seek to challenge in the appeal, that the referral was not made as soon as possible.

[108] Secondly, whether the failure to commence or refer the matter 'as soon as possible' deprives the Tribunal of jurisdiction. Mr Traves QC submitted that the effect of the provision requiring that something be done at a certain time does not render it a nullity but what it does, instead of extinguishing it, is to give rise to a remedy. Mr Traves QC contended that unless a relevant extension is granted then it would follow that the action or referral should be struck out as being bound to fail. Mr Traves QC submitted that the learned Member found that the referral can be made after the 'as soon as possible' period expired, but can proceed only if an extension of time is granted.

[109] Mr Traves QC submitted that the authorities generally hold that a provision relating to limitation of actions does not, absent any express words, render the commencement of a proceeding beyond that limit of time a nullity but it does create a remedy that is, in effect, a defence.

[110] Mr Traves QC submitted that the application that proceeded before the Tribunal below was heard and determined in an entirely regular manner and, in relation to the decision not to extend time, Mr Traves argued that a discretionary decision is not something to be interfered with simply because the appeal courts might have a different view about the outcome, so the decision was regular. That said, Mr Traves submitted that when read literally, the Tribunal's reasons suggest that if an extension of time is not granted, then the Tribunal is deprived of jurisdiction. The correct analysis, as contended here by Mr Traves QC, is that the Tribunal is not deprived of jurisdiction by reason of the fact that the extension of time is not granted. What arises is a defence and the correct remedy is the exercise of power under s 47 of the QCAT Act and indeed it was asked of the Tribunal in the hearing below to do so.

[111] The submissions raise the following questions:

(a) Does s 38(4) of the AI Act apply for the purposes of referring a matter to QCAT pursuant s 52(2)(c)(iii) of the VR Act?

  (i) What is the nature of the Board's power to refer a matter to QCAT under the VR Act?

(b) If the answer to (a) above is yes, then what is the effect of s 38(4) of the AI Act, if applied to the VR Act, in circumstances where there is a failure by the Board to file the referral in QCAT as soon as possible?

Does s 38(4) of the AI Act apply for the purposes of referring a matter to QCAT pursuant s 52(2)(c)(iii) of the VR Act?

[112] As provided under s 2 of the AI Act, the relevant sections apply to all Acts unless displaced, wholly or partly, by a contrary intention appearing in the Act. In the present

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[114] Board's submissions dated 28 June 2019, p 9.

matter, there is no contrary intention in the VR Act that s 38(4) of the AI Act does not apply nor is there a provision providing the time for filing a referral in QCAT.

[113] It is non-contentious that the Board did not file the referral in QCAT in the matter below as soon as possible. The matter does not end here, however, because it is necessary to consider the nature of the proceeding filed in the Tribunal below.

[114] Mr Traves QC submitted in the hearing before the Appeal Tribunal that the relevant sections of the VR Act that applied in the matter below are not truly administrative in nature but invite contested legal proceedings and are in the nature of the commencement of a proceeding. In my view, this raises a question of statutory construction to be determined by reference to the VR Act and the nature of the Board's power to refer a matter to the Tribunal.

(i) Nature of the Board's power to refer a matter to QCAT under the VR Act

[115] The Board is empowered to investigate and deal with complaints about a valuer's conduct. The Board's power to deal with a complaint under s 50 of the VR Act is clearly discretionary such that after receiving an investigator's report the Board may, if satisfied that certain requirements set out under s 50 of the VR Act have been met and only after being satisfied that it is appropriate to do so, do one of three things: (1) refer the matter to QCAT to decide; (2) deal with the matter internally by taking disciplinary action under s 51; or (3) take no further action.

[116] The Board is not permitted to deal with the matter under s 51 unless a notice is given to the valuer. Section 52 requires that the notice to be given to the valuer state certain things such as, amongst other things, a day at least 14 days after the day the notice is given by which the valuer may respond to the Board. Under s 52(2), the valuer may require the Board to refer the matter to QCAT in which case the Board cannot proceed to take action against the valuer under s 51. In my view, for reasons discussed below, the Board is required to refer the matter to QCAT to decide.

[117] It is settled law that a statutory provision is to be interpreted in a way that is consistent with the language and purpose of all of the provisions of the Act.[115] An interpretation of a provisions which best achieves the purpose of the Act is to be preferred.[116]

[118] On a fair reading of the relevant sections 50, 51 and 52 of the VR Act as a whole, I consider that the Board's duty to deal with the complaint for the purposes of s 50 continues after the Board has determined to take action under s 51 and the valuer has responded to the required notice under s 52(2). If the valuer elects to have the matter referred to QCAT under s 52(2)(c)(iii), the Board remains seized of the matter for the purposes of s 50 and has a duty to file a referral in QCAT.

[119] Mr Murphy's contention that the relevant sections of the VR Act are not administrative in nature misconstrues the language used in s 50 and the purpose of the VR Act, that is, for the Board to, amongst other things, investigate and deal with complaints concerning a registered valuer. All of those things are a means of dealing with the complaint about a valuer's conduct that is expressly authorised by the Act. Indeed, the importance of disciplinary proceedings for maintaining public

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115 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

116 *Acts Interpretation Act 1954* (Qld) s 14A and see *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 410.

confidence in the profession and in protecting the public also weighs in favour of construing the VR Act as conferring a statutory duty on the Board to file a referral in QCAT.

[120] The Tribunal's jurisdiction is enlivened upon the filing of a referral by the Board in QCAT. Upon the filing of a referral, the Tribunal may do one or more of the things, in certain circumstances and if satisfied the allegations are proven, in imposing a sanction as provided under s 59 of the VR Act.

[121] The Board's statutory duty to deal with the complaint is not extinguished upon the Board making a decision to file a referral in QCAT under s 50(2)(a) nor is it extinguished upon the Board making a decision to proceed under s 51, subject to the required notice being given to the valuer under s 52. If the valuer gives notice to the Board that he contests the matter and requests that it be referred to QCAT under s 52(2)(c)(iii), the Board's statutory duty remains for the purposes of filing a referral in QCAT. Indeed, the Board's statutory duty in respect of the matter continues after the referral is filed in QCAT such that the Board must prove the allegations giving rise to the complaint to the required civil standard.

[122] I reject Mr Murphy's submission that the relevant sections of the VR Act, in particular s 52, are not truly administrative in nature but rather, as contended by Mr Murphy, invite contested legal proceedings and are in the nature of the commencement of a proceeding. I consider that that the Board has a statutory duty to deal with a complaint under the VR Act and this includes imposing a discipline under s 51 and filing a referral in QCAT where the valuer has elected that the matter proceed to QCAT under s 52(2)(c)(iii). These things, such as imposing a discipline under s 51 and filing a referral in QCAT, clearly fall within the Board's powers to deal with a complaint expressly authorised by the VR Act and are clearly administrative in nature.

[123] The answer to question (a) above is yes.

What is the effect of s 38(4) of the AI Act, if applied to the VR Act, in circumstances where there is a failure by the Board to file the referral in QCAT as soon as possible?

[124] The Board submits, and I accept, that the question of whether a failure by the Board to act as soon as possible deprives QCAT of jurisdiction to hear the referral is to be derived from the language of the legislation, its subject matter and objects, and the consequences for the parties of holding void every act done.[117]

[125] The Board relies on *Vu* as authority to support its contention that s 38(4) of the AI Act imposes an expedition obligation on the Board. Further to that the Board contends that the expedition obligation, rather operating as a condition of invalidity (or validity), more aptly operates as a provision for administrative accountability.[118]

[126] In *Vu*, the South Australian Supreme Court held that a finding of the trial judge below that the Registrar did not act without convenient speed is plainly right.[119] The Court held that notices issued by the Registrar of Motor Vehicles under legislation were valid notwithstanding the requirement under s 27(3) of the *Acts Interpretation*

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117 Board's submissions dated 28 June 2019, [16[.
118 Ibid, p 8-9.
119 *Registrar of Motor Vehicles v Vu and Anor* [2013] ASACFC 10, 393. 393.

Act 1915 (SA) to act 'with all convenient speed'. The Court cited the relevant passage from the High Court decision in *Project Blue Sky* to describe the task in which a court engages to ascertain the legal consequence of a breach of statutory duty:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. …[120]

[127] In *Vu*, the Court considered that the expediation obligation is sourced in the *Acts Interpretation Act*, a general enactment, and is an obligation of a very different nature to the notice requirement. Further, the Court considered that the legislative choice not to impose a time limit in the Act itself in the same words, or in a form more tailored to the statutory disqualification scheme, suggests a failure to act with all convenient speed was not intended to invalidate the notices and did not expressly impose an obligation on the Registrar to attend to his or her function with all expediation, or even within a specified time.[121]

[128] In the present matter, the Board refers us to the following passage from *Vu* and the findings of Kourakis CJ with whom Anderson and Stanley JJ agreed, now set out as follows:

> In my view a construction of the statutory disqualification provisions which would hold void any notice which was given with all convenient speed would substantially frustrate the legislative purpose of the scheme. It would undermine its administrative efficacy and substantially compromise the public interest. In my view those consequences are a powerful indication against invalidity.[122]

[129] More recently, the Queensland Court of Appeal considered the application of the AI Act to legislation that required a thing to be done. In *Ashtrail Pty Ltd & Anor v Council of the City of Gold Coast*,[123] the Council issued a show cause notice to the applicant requiring it to show cause why an enforcement notice should not be issued under legislation in respect of its non-compliance with conditions of Approval. In the proceeding below, the action commenced by the Council under the relevant legislation was held by the trial judge to be an action to enforce a condition of an approval concerning alleged non-compliance. The Trial Judge's findings below as to the nature of the cause of action were upheld on appeal by the Court of Appeal.[124]

[130] In *Ashtrail*, the Court of Appeal found that the nature of the proceedings in the hearing below were for declaratory relief, the grant of which was always dependent upon an exercise of discretion in favour of the Council who was bringing the application.[125] The Court of Appeal considered a submission advanced in the appeal, also raised in the proceeding below, in which it was contended that s 38(4) of the AI

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120 (1998) 194 CLR 355, 388-9.
121 *Registrar of Motor Vehicles v Vu and Anor* [2013] ASACFC 10, 395.
122 Ibid, p 397. See Board's submissions dated 28 June 2019, [41].
123 [2020] QCA 82.
124 Ibid, [75]
125 Ibid, [77].

Act had application to the Council's failure to institute proceedings in respect of the non-compliance of the conditions of the 2010 Approval until it filed the current proceedings in January 2018.

[131] In *Ashtrail,* the Court of Appeal upheld the trial judge's finding that s 38(4) of the AI Act was not applicable and its application otherwise would depend upon the delay causing some form of prejudice. Relevantly, the trial Judge found that s 38(4) of the AI Act does not create any legal limitation or bar to a proceeding of the type under consideration. The relevant extract from the Court of Appeal's decision in *Ashtrail* is now set out as follows (footnotes emitted[126]):

> The applicants' contentions cannot, in my respectful view, succeed. The learned trial judge considered the issue of delay in bringing the proceedings and concluded that s 38(4) was not applicable. In my respectful view, his Honour correctly analysed the flaw in the contention:
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> > "[24] I am unable to accept that the operation of s 38(4) of the AIA brings into force some form of a de facto limitation of actions defence. In this context, I agree with the submission made on behalf of the Council that as a matter of both construction and intent, the construction of s 38(4) does not create any legal limitation or bar to a proceeding of the type under consideration. In this context, it is also quite clear that the respondents are relying on s 38(4) as a defence for the "recovery of money". In my view, in circumstances where s 10 of the Limitation of Actions Act 1974 specifically deals with "an action [in (contact or tort) for the recovery of a sum recoverable…" there is no scope for the operation of s 38(4) of the AIA as contended for. As was submitted on behalf of the Council, insofar as proceedings of that nature are concerned, s 10 of the Statute of Limitations Act 1974 "covers the field"."
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> If s 38(4) did not operate as a limitation of or bar to the institution of proceedings, as I consider to be correct, its application otherwise would depend upon the delay causing some form of prejudice. However, the applicants confront factual findings that prevent that conclusion.

[132] In this matter, I consider that *Ashtrail* is instructive as to the effect of s 38(4) of the AI Act on legislation such as the VR Act. The effect of s 38(4) of the AI Act on the VR Act, absent a contrary intention in the Act, does not bring into force a statute of limitations defence.[127] Properly applied, s 38(4) of the AI Act requires the Board to file a referral in QCAT as soon as possible. As observed by Kourakis CJ in *Vu* the relevant section in the AI Act for doing a thing, absent a contrary intention in the Act, more aptly operates as a provision for administrative accountability than a condition of invalidity.[128] Further to that, the Board's failure to file the referral in the Tribunal as soon as possible does not render the referral a nullity nor does it deprive the Tribunal of jurisdiction to determine the matter.[129] Such an approach, as to the application of s 38(4) of the AI Act to the VR Act is consistent with the legislative purpose of the VR Act that provides a legislative scheme for monitoring

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126 Ibid, [87], Morrison JA with whom Mullins JA and Callaghan J agreed.

127 *Ashtrail Pty Ltd & Anor v Council of the City of Gold Coast* [2020] QCA 82, [87], Morrison JA with whom Mullins JA and Callaghan J agreed.

128 *Registrar of Motor Vehicles v Vu and Anor* [2013] ASACFC 10, [37].

129 See Board's submissions in reply filed 13 September 2019 and Mr Murphy's outline of submissions filed 9 August 2019.

and enforcing compliance with the Act and to investigate complaints concerning valuers.[130]

[133] I accept the Board's contention that the Board's statutory duty to refer the matter to the Tribunal in the proceeding below was created by the relevant Act under which the Board operated.[131] If the Board's statutory duty could not be fulfilled because of the operation of the AI Act, absent a section under the VR Act that limits the performance of the statutory obligation which it creates, it would be an outcome contrary to the intention of the VR Act because the Board could not fulfil its statutory duty to, amongst other things, deal with complaints and discipline valuers who have engaged in certain conduct.

Error in the Tribunal's finding that it had jurisdiction only if an extension of time was granted and in failing to find that it had jurisdiction even if the referral was not filed 'as soon as possible'

[134] Mr Murphy's contention that the Tribunal below correctly proceeded on the basis that the failure of the Board to refer the matter as soon as possible did not render the referral a nullity misapprehends the learned Member's findings in the decision below.[132]

[135] The Tribunal below found that there is no equivalent nor clear indication in the VR Act that a disciplinary matter referred late cannot be heard.[133] The Tribunal properly considered the importance of disciplinary proceedings that is for the maintaining of public confidence in the profession and protecting the public.[134] Further to that, the Tribunal correctly found that it is unlikely that Parliament would have intended a duty (to refer a matter) would lapse and, amongst other things, found that the fact that a statutory duty, rather than a right, is involved it is unlikely Parliament would have intended that the Tribunal would invariably lack jurisdiction when a referral is not made as soon as possible.[135]

[136] Despite its findings, the Tribunal below proceeded to consider the question of whether an extension of time should be granted and, having decided that an extension of time is not appropriate, proceeded to dismiss the referral. On a fair reading of the learned Member's findings, he found that jurisdiction is not deprived provided that an extension of time is granted, the effect of which was to apply s 38(4) of the AI Act as a statutory bar or limitation preventing the Board from bringing the referral unless an extension of time was granted.[136]

[137] It is trite law that the effect of a statute of limitations on a cause of action is to bar the remedy not the right.[137] In the present matter, however, as discussed above the filing of the referral in the Tribunal proceeding below was in performance of the Board's statutory duty or obligation rather than in the nature of an entitlement that gives rise to the commencement of proceedings.

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130 See *Project Blue Sky*, 388-9.
131 Board's submissions dated 28 June 2019, [34].
132 Mr Murphy's outline of submissions filed 9 August 2019, p 5.
133 Reasons, [24].
134 Ibid, [29].
135 Reasons, [29] and [31].
136 Mr Murphy's outline of submissions filed 9 August 2019, [16].
137 See *Commonwealth v Mewett* (1997) 191 CLR 471, 534-353, per Gummow and Kirby JJ and 507 per Dawson J and *Commonwealth v Verwayen* [1990] 170 CLR 394, 405 per Mason CJ.

[138] Section 38(4) of the AI Act, properly applied to the VR Act, requires the Board to file a referral in QCAT as soon as possible. The effect of s 38(4) of the AI Act, in circumstances where there is a failure to file as soon as possible, would depend upon the delay causing some form of prejudice.[138] For example, depending upon the circumstances of the matter, such as the delay causing some form of prejudice in filing the referral in QCAT, may give rise to an application for dismissal for an abuse of process brought by the registrant.

[139] There is an error in the Tribunal's finding that it had jurisdiction provided that an extension of time was granted. Further to that and despite finding that there is no clear indication that a disciplinary matter referred late cannot be heard, noting the importance of disciplinary proceedings and finding that it is not likely that Parliament would have intended a duty to lapse, the Tribunal below failed to find that it had jurisdiction to determine the referral even if the referral was not filed as soon as possible.

[140] It was not necessary for the Tribunal below to consider whether an extension of time should be granted. Indeed, it is apparent from the Tribunal's reasons that the Board made the oral application for an extension of time only if it was required to do so.[139] Further to that, the transcript of the proceeding below shows that Mr Templeton appearing for the Board submitted to the Tribunal below that it is not necessary to revert to that power (meaning the power to extend time under s 61 of the QCAT Act).[140]

[141] The Board's application for an extension of time in the proceeding below was misconceived for the purposes of s 47(1)(a) of the QCAT Act because the Tribunal did have jurisdiction to determine the referral and, further to that, the application for an extension of time was made by the Board only if required. An application for an extension of time was not required in the proceeding below.

[142] The application before the Tribunal below was Mr Murphy's application to dismiss the referral that, as contended by Mr Murphy before the Tribunal below, was made on the basis that the Tribunal does not have jurisdiction to hear it.[141] Mr Murphy did not contend nor did the Tribunal below find that the delay caused any forensic prejudice to Mr Murphy. Indeed, the transcript of the proceeding below shows that the submissions advanced on Mr Murphy's behalf before the Tribunal below were essentially that QCAT is only seized of jurisdiction to hear the matter where the Board makes the referral as soon as possible after receiving a request from Mr Murphy that such a referral was to be made.[142]

[143] Mr Murphy's application for dismissal in the proceeding below was for the purposes of s 47(1)(a) of the QCAT Act, frivolous, vexatious or misconceived because the Tribunal did have jurisdiction to hear the referral even if the referral was not filed as soon as possible.

[144] Grounds 2 and 3 of the appeal are allowed. In proceeding under s 146(b) of the QCAT Act, orders 1 and 2 of the Tribunal's decision of 25 February 2019 are set aside and the following orders are substituted:

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138 *Ashtrail Pty Ltd & Anor v Council of the City of Gold Coast* [2020] QCA 82, [88].
139 Reasons, [37].
140 Appeal Book, p212, L6-11.
141 Appeal Book, p 97.
142 Ibid, p 179, L35-42.

(a) The application for dismissal filed by Neil Patrick Murphy on 12 October 2018 is dismissed pursuant to s 47(2)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

(b) The application for an extension of time made orally by the Valuers Registration Board of Queensland on 5 February 2019 is dismissed pursuant to s 47(2)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

[145] For completeness, I have considered below the remaining grounds of appeal in the event that I am wrong as to my understanding of the Tribunal's findings made in the proceeding below and/or my consideration of s 38(4) of the AI Act, if applied to the VR Act, in circumstances where the referral is not filed as soon as possible.

Grounds 5, 6 and 7 of the appeal: The Tribunal erred by taking into account an irrelevant consideration, namely the gravity of the misconduct and the proposed sanction; the Tribunal erred in exercising its discretion not to extend the time for filing the referral and failing to exercise its discretion to extend the time for filing the referral

[146] I accept the Board's contention that the learned Member took into account an irrelevant matter, namely the gravity of misconduct and the proposed sanction.[143] Further to that, I accept, as contended by the Board, that the learned Member's decision was plainly unreasonable because it placed too much weight on the delay and the lack of satisfactory explanation and insufficient weight on the merits of the case and lack of prejudice to Mr Murphy.[144]

[147] The learned Member found, at paragraph [39] of his reasons, that it is relevant to take into account the nature of the misconduct alleged. Further to that the learned Member, despite acknowledging that it was not necessary for him to resolve whether Mr Murphy engaged in professional misconduct, found at paragraph [41] that it is readily apparent that if his conduct did amount to misconduct it was not at the graver end of the scale.[145] The learned Member considered the disciplinary sanction that might follow and found that the relatively minor nature of the alleged breach is reflected in the disciplinary orders sought by the Board, noting that the Board has not called for the more serious sanctions of suspension or cancellation of registration.[146] The learned Member found (footnotes omitted):

> It is not for me to resolve whether Mr Murphy engaged in professional misconduct, but it is readily apparent that if his conduct did amount to misconduct, it was not at the graver end of the scale. It was done openly in Court, presumably in the belief that it was entirely proper. It did not involve dishonesty. The relatively minor nature of the alleged breach is reflected in the nature of the disciplinary orders sought by the Board: a reprimand, an undertaking not to repeat the conduct, a financial penalty, and costs. The Board has not called for the more serious sanctions of suspension or cancellation of registration.[147]

[148] Although the exercise of the discretion in determining whether to extend the time for filing an application or a referral remains unfettered, there are a number of

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143 Board's submissions dated 28 June 2019, p 9.
144 Ibid.
145 Reasons, [41].
146 Ibid.
147 Ibid.

considerations that are recognised as being relevant to the Tribunal's task. In *Harper Property Builders Pty Ltd v Queensland Building and Construction Commission*,[148] the Appeal Tribunal identified the considerations as follows:

(a) The length of delay;

(b) the adequacy of explanation for the delay;

(c) the merits of the proceeding sought to be litigated;

(d) prejudice to others; and

(e) the interests of justice (sometimes expressed as 'general considerations of fairness'[149]).

[149] In *Harper Property Builders Pty Ltd*, the Appeal Tribunal said that in addressing the merits of the proceeding the notion that there is a particular threshold is fallacious. The Appeal Tribunal said that the Tribunal's task is to consider that factor together with other relevant considerations in exercising the discretion to extend time. The Appeal Tribunal said (footnotes omitted):

> However, the entire notion that there is any particular threshold, whether low or high, that is requisite for the determination of this factor, is fallacious. In each case the tribunal's task is simply to do the best it can to derive an impression of the strength or weakness of the foreshadowed case, and then to consider that factor along with other recognised factors.
>
> Cases may be found containing a wide range of epithets of evaluation of a foreshadowed case. They range through 'strong', 'weak', 'slim', 'arguable', 'unarguable', 'unpromising', 'hopeless' and many others. Whatever the rating or description, this factor is then thrown into the crucible with the other recognised considerations. The discretion is exercised according to their combination. A 'slim' case might be allowed to proceed if the other factors sufficiently favoured the time being extended. Conversely, a very strong case with every chance of succeeding might fail to obtain the necessary extension if other factors such as inexcusable delay and irremediable prejudice to others militated sufficiently against it.[150]

[150] In this present matter, the learned Member has taken into account the gravity of Mr Murphy's conduct and the sanction sought as matters that weighed against the exercise of the Tribunal's discretion. The reasons show that the learned Member referred to Mr Murphy's conduct as 'an error of judgment' and ultimately found that the community would expect that a person facing the type of accusation that Mr Murphy is facing would not be subjected to prolonged uncertainty. The learned Member found as follows:

> I consider the question of whether an extension of time should be granted as rather finely balanced. There is, of course, a genuine public interest in ensuring that professional misconduct, or alleged professional misconduct, is addressed. On the other hand, the community would expect that a person facing the type of accusation that Mr Murphy is facing – that seems to involve

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148 [2018] QCATA 70.

149 *Harper Property Builders Pty Ltd v Queensland Building and Construction Commission* [2018] QCATA 70, [26].

150 *Harper Property Builders Pty Ltd v Queensland Building and Construction Commission* [2018] QCATA 70, [32]-[34].

> an error of judgment at worst – would not be subjected to prolonged uncertainty.[151]

[151] I accept the Board's submission that the learned Member's findings about the gravity of conduct, including an ultimate finding that the Board has not called for the more serious sanctions of suspension or cancellation of registration, reveals a failure to appreciate the nature of the proceeding before the Tribunal and the statutory framework conferring power on the Board and indeed the Tribunal to discipline Mr Murphy, subject to the Tribunal finding the conduct proven.

[152] In the proceeding below, the Board initially proposed to impose a disciplinary sanction of a reprimand requiring an undertaking and a penalty on Mr Murphy. That proposal was made, however, on the basis that the matter was to be dealt with internally and subject to Mr Murphy responding to the required notice given under s 52 of the VR Act. Due to Mr Murphy having made an election under s 52(2)(c)(iii) of the VR Act that the matter be referred to QCAT, the Board no longer had the power to discipline Mr Murphy. The Board was not seeking the imposition of a more serious sanction because it was proposing to deal with the matter itself and, by virtue of the relevant sections of the VR Act, it could only take certain action as provided under the Act.

[153] I accept the Board's submission that the learned Member has formed a view that the lower gravity of the conduct and the sanction sought were facts which went against the exercise of discretion. Although, as contended by Mr Murphy, the scope of matters to be considered by the learned Member in such an application are broad, the relevant factors are to be considered together with other relevant considerations in exercising the discretion to extend time.[152] In the proceeding below, the learned Member has considered factors such as gravity of conduct and the sanction to be imposed without appreciating the nature of the proceeding before the Tribunal and the statutory framework conferring power on the Board. This is an error of law such that the principles in *House v King* are enlivened.[153]

[154] I also accept the Board's contentions that the Tribunal below considered three matters that went against the exercise of the discretion, such as delay, the unsatisfactory explanation for the delay and the nature of the misconduct alleged and sanction sought.[154]

[155] The learned Member accepted the Board's evidence given in the proceeding below that it wanted to refer the matter in a timely way but found that objectively the Board did not have sufficient regard to its obligation to do so as soon as possible and the delay was substantial.[155]

[156] The learned Member accepted that the Board started the process to refer the matter to QCAT and encountered unexpected delays by its then-lawyer.[156] It is apparent from the Tribunal's reasons that the learned Member did not reject the Board's evidence adduced in the hearing below that, amongst other things, the Board's Secretary promptly engaged a barrister to act and the barrister took a long time to

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151 Reasons, [42].
152 Mr Murphy's outline of submissions filed 9 August 2019, p 9.
153 *House v King* (1936) 55 CLR 499.
154 Board's submissions dated 28 June 2019, p 11.
155 Reasons, [38].
156 Ibid, [13].

draft the referral.[157] The learned Member accepted that some of the delay happened because the barrister was off work ill for about a month from 7 July 2018 and the Secretary chased up the barrister as much as she reasonably could.[158]

[157] The learned Member went on to find that once a few weeks passed without a draft referral it became incumbent on the Board to seek alternate legal representation urgently, or if necessary, draft the referral itself.[159] The learned Member found:

> No doubt that observation would apply equally in respect of the requirement in Queensland to act as soon as possible. I accept that the Board started the process to refer the matter to QCAT promptly and later encountered unexpected delays by its then-lawyer. However, once a few weeks had passed without a drafted referral by the lawyer, in my view it became incumbent on the Board to seek alternate legal representation urgently, or if necessary to draft the referral itself, to ensure that it met its legal obligation to refer the matter as soon as possible. Instead, the wait for the lawyer to draft the referral dragged on.[160]

[158] I accept the Board's submission that, even if the learned Member decided that there was not a satisfactory explanation for the delay, the delay itself and the explanation for the delay were not matters which ought properly to have weighed heavily against the exercise of the discretion.[161]

[159] In the proceeding below, the history of the matter is undisputed. There was a delay of five months in filing the referral. The learned Member found that the delay had not caused any forensic disadvantage to Mr Murphy.[162] These findings are not challenged on appeal in the present matter before me. Indeed, Mr Murphy, despite any delay, would be given an opportunity to present evidence and respond to the allegations at the hearing before QCAT in the proceeding below. Further to that, Mr Murphy was on notice that the Board intended to take certain action in respect of the complaint as early as December 2016. Correspondence was also exchanged between the parties' lawyers during the period from 10 April 2018, when Mr Murphy requested that the matter be referred to QCAT to 19 September 2018, when the referral was filed in QCAT.[163]

[160] In the proceeding below, Mr Murphy elected to have the matter referred to QCAT on 10 April 2018, being five months before the referral was filed. As found by the learned Member, the Board wanted to refer the matter in a timely way and in explaining the delay the Board's Secretary chased up the barrister as much as she reasonably could.

[161] Despite the learned Member's findings about the absence of any forensic disadvantage to Mr Murphy and having accepted the Board's evidence that it wanted to refer the matter in a timely way the learned Member has, in considering the delay, exercised his discretion against granting an extension of time. This is apparent from the learned Member's finding that, once a few weeks passed without a draft referral, it became incumbent on the Board to seek alternative legal representation urgently

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157 Ibid.
158 Ibid.
159 Ibid, [20].
160 Ibid.
161 Board's submissions dated 28 June 2019, p 12.
162 Reasons, [38].
163 See chronology in Mr Murphy's submissions filed 9 August 2019.

or if necessary, draft the referral itself. I accept the Board's submission that the learned Member has placed insufficient weight on the consideration of delay without having proper regard to the question of whether the delay has made the chances of a fair trial unlikely.[164] Further to that, the learned Member failed to consider the issue of delay together with other relevant considerations, such as whether the Board had an arguable case and the underlying public objective of ensuring that complaints made about a valuer are dealt with.

[162] To the extent that the Tribunal below made findings about Mr Murphy's conduct giving rise to the complaint, the sanction sought to be imposed and the steps that should have been taken by the Board to find alternative legal representation, is an error in the Tribunal's exercise of discretion not to extend time. Further to that, the Tribunal below, despite finding the delay had not caused any forensic disadvantage to Mr Murphy, found that the Board wanted to refer the matter in a timely manner. Furthermore, the evidence indicated that Mr Murphy was put on notice as early as 2016 about the matter and failed to exercise its discretion to extend the time for filing the referral.

[163] Grounds 5, 6 and 7 of the appeal are allowed. In proceeding to re-hear the matter, it is established law that, 'judgment may be given as ought to be given if the case came at that time before the court of first instance'.[165]

[164] I adopt the learned Member's findings in relation to the Board's explanation for the delay, that the delay had not caused any forensic disadvantage to Mr Murphy and the Board wanted to refer the matter in a timely manner. I also accept the uncontested evidence that Mr Murphy was put on notice as early as 2016 about the matter and the parties' lawyers exchanged correspondence about the matter during the five-month period before the referral was filed in QCAT. The discretion to extend time, properly exercised, should be made in favour of the Board.

[165] In proceeding under s 147(3)(b) of the QCAT Act, orders 1 and 2 of the Tribunal's decision of 25 February 2019 are set aside and the following orders are proposed:

(a) The application for dismissal filed by Neil Patrick Murphy on 12 October 2018 is dismissed pursuant to s 47(2)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

(b) The application for an extension of time made orally by the Valuers Registration Board of Queensland on 5 February 2019 is allowed.

Orders

[166] In consideration of the above, the final orders are as follows:

1. Leave to appeal granted.

2. The appeal is dismissed.

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164 Board's submissions dated 28 June 2019, p 12 and see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 550.

165 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, per Dixon J at 107, citing *Quilter v Mapleson* (1882) 9 QBD 672.