QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Mitchell v Gympie Regional Council* [2018] QCAT 160
PARTIES:	**KATE MITCHELL** (applicant) **v** **GYMPIE REGIONAL COUNCIL** (respondent)
APPLICATION NO/S:	GAR297-17
MATTER TYPE:	General administrative review matters
DELIVERED ON:	4 June 2018
HEARING DATE:	9 February 2018; 23 March 2018
HEARD AT:	Caloundra (9 February 2018) Brisbane (23 March 2018)
DECISION OF:	Member McLean Williams
ORDERS:	**1. The application for review is dismissed.** **2. The Respondent is to submit written submissions as to costs pursuant to s 102 of the QCAT Act within 14 days, and must provide a copy of those submissions to the Applicant.** **3. The Applicant may submit to the Tribunal any written submissions as to the Respondent's costs within 14 days of receipt of the Applicant's submissions.** **4. Thereafter the determination of the Respondent's entitlement to costs will be made by the Tribunal, on the papers.**
CATCHWORDS:	ADMINISTRATIVE REVIEW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – dangerous dogs – Destruction Notice – circumstances where previously declared dangerous dogs escape once more and alleged to engage in 'thrill killing' of another dog – issue of destruction notice and Application for Review – whether prior declaration of dangerousness able to be reviewed as part of right to review of subsequent decision to issue a destruction notice – allegations of trespass and illegality by Council enforcement officers – claimed constitutional invalidity of local government and local government enforcement of dangerous dog laws

Animal Management (Cats and Dogs) Act 2008 (Qld)
The Commonwealth of Australia Constitution Act 1901
The Constitution Act 1867 (Qld)
Constitution of Queensland 2001
Queensland Civil and Administrative Tribunal Act 2009 (Qld)

Union Steamship Co of Australia Pty Ltd v King [1988] HCA 55
Mazzaracca v Logan City Council [2012] QCAT 63

APPEARANCES & REPRESENTATION:	
Applicant:	Self-represented
Respondent:	L Taylor, solicitor of GTC Lawyers Gympie

REASONS FOR DECISION

[1] The Applicant, Ms Kate Mitchell, resides on Nash Road at Tamaree with her partner, Mr Price Hill. Tamaree is a locality within the jurisdiction of the Gympie Regional Council ('the Council').

[2] Ms Mitchell is the owner of two unregistered American Staffordshire Bull Terrier dogs: a fully-grown adult female, red, tan and white in colour named Maggie; and a much younger male, black in colour, named Max.

[3] On 7 February 2017, the Council issued two notices ('proposal notices') to Ms Mitchell under the *Animal Management (Cats and Dogs) Act* 2008 ('the AM Act'), proposing to declare both Max and Maggie dangerous dogs. The Council's intention to that end arose after an incident in January 2017, in which Max and Maggie had escaped, and then became involved in an attack on another dog.

[4] The proposal notices were sent to Ms Mitchell by means of registered post. These indicated that the Council proposed to declare Max and Maggie to be dangerous, and invited Ms Mitchell to make submissions as to why that should not happen. Nothing was received by the Council from Ms Mitchell.

[5] On 23 February 2017, Max and Maggie were each declared to be dangerous, by means of declaration notices. As had been the case for the proposal notices, the declaration notices were sent to Ms Mitchell by means of registered post. The declaration notices contained a further right to seek an internal review of the decisions to declare Max and Maggie dangerous, to be exercised within 14 days of receipt of the declaration notices.

[6] Mr Daniel Rogers is an Investigator in the Investigations and Statutory Compliance Department of the Council. At about 4.30pm on 8 March 2017, Mr Rogers received a phone call from Ms Mitchell's domestic partner, Mr Hill. Mr Hill accused Mr Rogers of corruption and threatened to sue the Council. Only then did it become clear to Mr Rogers that Mr Hill's call was actually about the declaration notices. Mr Hill told Mr Rogers that he and Ms Mitchell had only just received the declaration notices dated 23 February 2017. Mr Rogers then told Mr Hill that the Council was

still prepared to receive an application to review the decision, and that Council could still be persuaded to revoke the dangerous dog declarations, providing it received sufficient information to decide that revocation was appropriate. Mr Rogers also told Mr Hill that he would make a note on the file; a note to the effect that the 14-day period for the making of a submission should only commence from 8 March 2017, given that this was the date when Ms Mitchell and Mr Hill had first become aware of the declaration notices. Mr Hill concluded the conversation by informing Mr Rogers that a submission would definitely be forthcoming.

[7] However, when Mr Rogers went to re-check the Council file on Max and Maggie on 11 April 2017, no submission had been received by the Council. In those circumstances the Council took the view that Max and Maggie were still dangerous dogs, with effect from 23 February 2017.

Legislative Scheme

[8] The AM Act binds all persons and applies throughout the state of Queensland: see s 5.

[9] The purposes of the AM Act include for the provision of a scheme for the effective management of what the AM Act refers to as 'regulated dogs',[1] as well as to promote the responsible ownership of cats, and dogs.

[10] The statutory regime for regulated dogs is established by Chapter 4 of the AM Act, which expresses the specific purposes of the regulated dog regime, in s 59. These include key purposes of 'protecting the community from damage or injury, or risk of damage or injury from regulated dogs',[2] and 'ensuring that dogs are not a risk to community health or safety'.[3] These are expressed to be matters that are primarily achieved by means of a declaration regime for dogs that are variously 'dangerous', 'menacing', or 'restricted', then imposing conditions on the ownership of such dogs, as well as by allowing dogs to be seized, and destroyed, in particular circumstances.[4]

[11] 'Regulated dogs' include various restricted breeds, and dogs that have been individually declared by a local authority to be either 'dangerous' or 'menacing': see s 60. Any dog in Queensland may be declared to be dangerous, if grounds for that declaration exist under s 89(2), which provides that a dog may be declared dangerous if:

(a) the dog has seriously attacked, or acted in a way that caused fear to a person, or another animal; or

(b) the dog may, in the opinion of an authorised person, having regard to the way the dog has behaved towards a person or another animal seriously attack, or act in a way that causes fear to the person, or animal.

[12] In circumstances where it is proposed to make a regulated dog declaration, notice must first be given to the owner: see s 90. The owner may then elect to make written

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1 The AM Act, s 3.
2 Ibid s 59(1)(a).
3 Ibid s 59(1)(b)(i).
4 Ibid s 59(2).

representations as to why the proposed declaration ought not to be made. The local government must then reasonably consider any written representations that are made to it by the owner, before a regulated dog declaration is made: see s 94.

[13] If a dog is declared to be dangerous, quite onerous conditions apply to that dog's owner for the remainder of the life of their dog. Under s 70, the dog must be de-sexed. This is a mandatory requirement. Additionally, pursuant to Schedule 1 of the AM Act, the declared dangerous dog must:

(a) be implanted, with a prescribed permanent implantation device ('PPID');

(b) wear a prescribed tag;

(c) be muzzled, and under effective human control at all times when in a public place;

(d) be accommodated in a specified enclosure;

(e) not usually be kept at any place other than that specified in the dog's registration notice; and

(f) be kept at a place that is prominently sign-posted with the warning 'BEWARE – DANGEROUS DOG' and any change of address for the declared dog must be notified to the local government authority within seven days.

[14] As has already been recorded in these reasons in paragraphs [2]-[7], the Council complied with the statutory process culminating in Max and Maggie being declared dangerous, on 23 February 2017. Thereafter, the requirements for dangerous dogs that are summarised in paragraph [13], immediately preceding, applied to Max and Maggie, and to Ms Mitchell, as their owner.

[15] When Mr Rogers re-checked Council's files on 11 April 2017 to see whether an application to review submission had been received from Ms Mitchell, he also ascertained that Max and Maggie were still unregistered, and that the array of legislative requirements for dangerous dog owners were not being complied with. This was despite Ms Mitchell having been informed of the requirements, both at the time of her being sent the proposal notices, and then again, when sent the declaration notices. In consequence, a decision was made by Mr Rogers to also issue a compliance notice, pursuant to s 133 of the Act.

[16] Compliance notices act as a warning to the owners of declared dogs, of the need to comply with their obligations under the Act, and to warn that further enforcement action may be taken, should their non-compliance continue un-remedied. During prior dealings by Mr Rogers with Ms Mitchell and Mr Hill, they had insisted that all communications from the Council were to be made via their solicitor, a Mr Chris Anderson at Messrs Jeffrey, Cuhhidy & Joyce, Gympie. In conformity with that instruction the compliance notice was then served on Mr Anderson, on or around 20 April 2017.

[17] Mr Rogers then tried on a number of occasions to speak to Mr Anderson about the compliance notice. When Mr Rogers did eventually manage to speak with Mr Anderson, Mr Anderson told Mr Rogers that Ms Mitchell was aware of the compliance notice, and that a response to it from Ms Mitchell would be sent to

Council by no later than 28 April 2017. Yet, nothing further was then heard from Ms Mitchell, or her solicitor. On 15 June 2017, the Council issued Ms Mitchell with a Penalty Infringement Notice (in other words, a fine), again via Mr Anderson.

[18] On 5 July 2017, Max and Maggie again escaped from Ms Mitchell's property. At about 7.00am that morning, a Ms Lee Brand (who is one of Ms Mitchell's neighbours further along Nash Road), contacted the Council to complain that two dogs had attacked and killed one of her dogs, a young pup by the name 'Boof'. Ms Nash also told the Council that the two dogs were still lurking in the vicinity, and that the dogs now appeared to be guarding Boof's carcass.

[19] Mr Darren O'Brien is a Regulatory Services Officer with the Gympie Regional Council. Mr O'Brien's duties include those of dog-catcher. He arrived at Nash Road shortly after 8.00am on 5 July 2017, and impounded the two dogs found near Boof's carcass. By that stage, Ms Mitchell had also arrived. The two dogs were identified by Ms Mitchell as Max and Maggie.

[20] On 19 July 2017, Council wrote to Ms Mitchell and advised that Max and Maggie could be released to her, if Council could be satisfied that the conditions for the keeping of regulated dangerous dogs (those same requirements for which Ms Mitchell had been fined on 15 June 2017 for having failed to comply) were being complied with. Despite further discussion, no agreement could be obtained from Ms Mitchell by the Council. In consequence, Max and Maggie have remained impounded. Max and Maggie still remain impounded even now, more than ten months later.

[21] On 22 August 2017 the Council again wrote to Ms Mitchell, this time informing that it now proposed to issue a destruction order for Max and Maggie, pursuant to s 127 of the Act. Sections 127(4)-127(6) of the AM Act provide that an authorised person may make a destruction order for a regulated (dangerous) dog on the giving of 14 days' notice to the owner, and that the dog may be destroyed if the owner does not make an application for internal review of the decision to have the animal put down.

[22] On 4 September 2017, Ms Mitchell did make an application for internal review. This was made not only against the proposal to issue a destruction order, but also against the original decision, to declare Max and Maggie dangerous, as had been made by the Council on 23 February, 2017.

[23] On 14 September 2017, the Gympie Regional Council responded to Ms Mitchell's internal review application. The Council's acting Chief Executive, Ms Gina Vereker, advised Ms Mitchell that she refused to review the original decision to declare Max and Maggie dangerous, on the basis that Ms Mitchell was out of time to seek a review of that decision, and otherwise confirmed the more recent decision to issue a destruction order.

[24] In relation to the destruction order, the acting Chief Executive concluded that the original decision should be confirmed, because:

(a) the process under the Act for issuing a destruction order had been complied with;

(b) both Max and Maggie were already subject to Dangerous Dog Declarations, these having been made on 23 February 2017;

(c) Ms Mitchell was in ongoing breach of s 97 of the Act for her having not complied with the dangerous dog permit conditions;

(d) Ms Mitchell was in breach of s 194 of the Act for not having taken reasonable steps to ensure that Max and Maggie did not attack or cause fear, which had occurred on 5 July 2017;

(e) Ms Mitchell was in breach of s 44 of the Act for having failed to register either Max or Maggie with the Council; and

(f) None of the evidence submitted by Ms Mitchell since commencing her application for an internal review on 14 September 2017 was sufficient to persuade the Council that a contrary decision should now be made.

This QCAT Application for Review

[25] Section 127(7)(b) of the AM Act provides a stay of destruction decision, in that a dog may *not* be destroyed if an application for external review has been commenced. Section 188 of the Act provides that an external review of an internal review decision (such as that made by the Council on 14 September 2017) may be taken to QCAT. Ms Mitchell has now commenced an application for an external review, before QCAT.

[26] Hearings before QCAT are conducted *de novo*. All of the evidence available to the original decision-maker, as well as any new evidence not previously available to the original decision-maker, is to be considered by QCAT in order for the Tribunal to step into the role as decision-maker, and to make what the QCAT Act terms the 'correct and preferable decision',[5] in accordance with the requirements of both the AM Act and the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'). Here, it is to be remembered that QCAT must apply the same laws as did the Council, before it.

[27] The matter was originally heard before me at Caloundra on 9 February 2018. Partly because of the disruptive behaviour of Mr Hill throughout that hearing, and also because Ms Mitchell expressed a wish to cross-examine the Council dog-catcher, whom had not been called by the Council to give any evidence, I adjourned the matter, part-heard, to resume at Brisbane. The hearing then resumed in Brisbane on 23 March 2018.

The Applicant's Case on Review

[28] Ms Mitchell's Application to QCAT raises a number of legal arguments, as well as one factual argument.

[29] In terms of the factual argument, Ms Mitchell and Mr Hill concede that on 5 July 2017, Max and Maggie had escaped from their property, sometime early in the morning, probably by means of a gate that had been left open, by one of their children. Ms Mitchell says that Max and Maggie ordinarily slept on dog beds on their veranda, and that the children went from the house to an adjoining stable very

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[5] QCAT Act s 20(1); see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

early that morning to check on a litter of puppies in a whelping box. Ms Mitchell now suspects that the children left the gate open, thus allowing Max and Maggie to escape from the confines of the house yard.

[30] Despite that, Ms Mitchell and Mr Hill vehemently deny that Max and Maggie could have killed Boof, and say that Boof must have been killed prior to Max and Maggie having escaped, and that Max and Maggie merely discovered the carcass of an already dead Boof, such that they are unjustly accused 'victims of circumstance'. In support of that theory Ms Mitchell says that there is a lot of evidence of wild dogs around the vicinity of Nash Road, killing domestic animals and livestock, and that she had been awoken at about 4.00am on 5 July 2017 by Max and Maggie barking at a disturbance, which she and Mr Hill now suspect were these wild dogs.

[31] Ms Mitchell and Mr Hill also point to the fact that when they were apprehended by the Council that neither Max nor Maggie had any blood on them, in circumstances where the deceased pup Boof had bled profusely prior to death, and where there was much blood on the ground, surrounding Boof's carcass. Ms Mitchell submits that, had her dogs been involved in Boof's slaughter, then it would be reasonably expected that Max and Maggie would have been discovered covered in blood, yet they were not.

[32] In terms of legal argument, Ms Mitchell submits a curious amalgam. Doing my best to now distil the elements, it includes the following:

(a) On various dates between October 2016 and 25 July 2017 Mr Dan Rogers entered the Applicant's property to inspect fencing and to make inquiries in relation to an alleged dog attack without the Applicant's consent, and hence did so unlawfully. It is presumed that the intent of this submission is that everything that flows from the allegedly unlawful entry is 'the fruit of a poisonous tree', and thus void, ab initio.

(b) Prior to 25 July 2017 Max and Maggie were not regulated dogs. Hence, any Council enforcement efforts prior to that were unlawful acts of trespass, and therefore null and void;

(c) The original complaints in January 2017 that originally lead to Max and Maggie being declared dangerous, in February 2017, were vexatious, false, and motivated by malice towards Ms Mitchell and Mr Hill;

(d) The Council did not comply with the correct procedures for issuing a destruction order, and has conducted an illegal investigation; and

(e) Local government, and the inclusion of references to local government in the *Constitution of Queensland* 2001, is repugnant to the *Commonwealth Constitution* 1901, which does not recognise the existence of local government. And, related to that, the Gympie Regional Council is a trading corporation, and may now only be regulated by means of Commonwealth jurisdiction. In that light, any attempt by the Queensland Parliament to confer power on the Gympie Regional Council is contrary to section 109 of the Commonwealth Constitution.

Evidence heard before the Tribunal

[33] Ms Mitchell and Mr Hill did not call any witnesses, but did submit materials, cross-examined council witnesses, and made oral and written submissions before the Tribunal. The submitted material includes photographs, and media reports, to show that wild dogs have been active in the vicinity of Tamaree, killing domesticated animals, and livestock. Clearly, the intention behind that material was to 'build the case' that Max and Maggie were *not* responsible for the death of Boof.

[34] The Council, as the Respondent, called evidence from:

- the dog catcher, Mr O'Brien;
- a Mr Darren Pointon who is a professional animal trapper who provides periodic services and advice to the Council;
- Mr Rogers; and
- the owner of Boof, Ms Lee Brand.

[35] Mr Darren Pointon gave evidence before the Tribunal on 9 February 2018, at Caloundra. Mr Pointon told the Tribunal that on 31 July 2017 he had been shown a series of photographs taken by the Council. These revealed a deceased puppy, aged about 5 months, with bite marks to its throat and chest, and around its tail and rump. The photographs also show what Mr Pointon described as 'two domestic pit bulls', located near to the carcass of the dead pup, Boof. These two dogs are now known to be Max and Maggie.

[36] In Mr Pointon's opinion, Boof had been killed in an attack, by two dogs. A larger dog (judging by the size of bite marks) had attacked Boof around the chest and neck, while a smaller dog had simultaneously attacked from the rear, around the tail and rump. In Mr Pointon's opinion the wounds sustained by Boof are consistent with the types of wounds that he would expect to see in an attack by 'domesticated pit bull-type dogs', involved in what he termed to be a 'thrill kill'. In Mr Pointon's opinion the photographs also reveal Maggie 'guarding her kill'.

[37] Mr Pointon clearly held the opinion that Max and Maggie killed Boof, despite there being no eyewitnesses to that killing. Ultimately, no satisfactory evidence was heard by me in relation to resolution of the question as to why Max and (particularly) Maggie were found without any blood on their coats, mostly in consequence of the unhelpful interjections during Mr Pointon's evidence, by Mr Hill.

[38] Ms Lee Brand gave evidence about her discovery of her five month old pup, Boof, bloodied and dead, with two other dogs standing nearby. Ms Brand said that it felt obvious to her that these two dogs had attacked and killed Boof, and that she was quite fearful of the two dogs, and much too frightened to go anywhere near them. Ms Brand could not explain why she felt that it was so obvious to her at the time that Max and Maggie had killed Boof, but was nonetheless confident in 'just knowing' what had happened.

[39] Mr Rogers gave evidence of his protracted and unproductive attempts at dealing with Ms Mitchell and Mr Hill, as well as with their solicitor.

[40] The Council dog-catcher, Mr O'Brien, gave evidence when the hearing was reconvened at Brisbane in relation to his having attended along Nash Road in response to Ms Brand's complaint, and of his having captured Max and Maggie. Mr O'Brien told the Tribunal that Ms Mitchell had been on scene at the time that the two dogs were impounded and that she had identified the dogs as her dogs, Max and Maggie. As he impounded Max and Maggie, Ms Mitchell was quite distraught and said words to the effect of: 'just take them, this has happened before'.

Respondent's position

[41] The Gympie Regional Council submitted that the decision now under review was entirely regular, and reasonable, and should be confirmed. In addition, the Council submits that this Application for Review is vexatious, and unmeritorious, and that the Council should be entitled to costs, pursuant to s 102 of the QCAT Act.

Analysis

[42] None of the Applicant's legal propositions, as now summarised at paragraph [32] (above) can be accepted.

[43] As to the first of these, it is to be noted that Mr Daniel William Strode Rogers is an 'authorised officer' for diverse legislative enforcement purposes, including those under the AM Act. A certificate to that effect has been produced, by the Respondent.

[44] Pursuant to Part 2 of the AM Act, an authorised person has a number of general powers of entry that are not subject to the prior permission of the owner. Here, consider: sections 111(1)(e)-(h), 111(4), 112, and 113.

[45] Ms Mitchell and Mr Hill even attempted to issue a 'Trespass Infringement Notice' to Mr Rogers, ostensibly pursuant to the *Justices Act* 1886 (Qld), as well as to fine Mr Rogers $4,500, for trespass and invasion of privacy, having copied the form for their infringement notice from a website 'Love for Life', complete with the same typographical errors found in the original on that website. Lawyers acting for the Council wrote to Ms Mitchell on 28 September 2017, pointing out that the purported notice was of no legal effect.

[46] As to the second legal argument as advanced by Ms Mitchell, it is only to be noted that Max and Maggie were each declared dangerous on 23 February 2017.

[47] In relation to Ms Mitchell's third legal proposition, it again bears emphasising that Ms Mitchell did not contest the Council declaring Max and Maggie dangerous, on 23 February 2017. The proposal to declare them dangerous had been advised to her by means of the proposal notices, sent on 7 February 2017. These contained an invitation to make a submission to persuade Council otherwise. Even after the dogs were declared dangerous, Mr Rogers advised Mr Hill - on 8 March 2017 - that the Council would allow a further 14 days within which to persuade the Council to revoke the declarations; yet no submission was forthcoming in response to that invitation, either. Even if the original complaints about Max and Maggie attacking other dogs (in January 2017) that led to them being declared dangerous *were* vexatious, or *were* motivated by malice towards Ms Mitchell and/or Mr Hill (and I have seen no such evidence), then the time for Ms Mitchell to raise that was in response to the original proposal notices or, at the very least, in response to Mr Roger's further invitation, on 8 March 2017.

[48] As to Ms Mitchell's contention that Council did not comply with the correct procedures for issuing a destruction order, and conducted an 'illegal investigation', I have now traced through all of the processes conducted by the Gympie Regional Council, culminating in the internal review decision of 14 September 2017. I am unable to identify any point of non-conformity with the process required by the Act.

The Applicant's Constitutional Argument

[49] The Applicant's final legal argument - as summarised by me at paragraph [32] (above) - and as so enthusiastically championed by Mr Hill on 9 February 2018 at Caloundra, has clearly become the *raison d'être* for Ms Mitchell's civil disobedience. Nor, as I recall, is this the first time that these types of arguments have been attempted before the Tribunal. Lest other dog owners now be drawn into this same fool's paradise, it is appropriate that I attempt to explain why these arguments can gain no traction.

[50] The Applicant's contention is comprised by the following assertions:

(a) The absence of any reference to local government in the Constitution - as confirmed by the will of the electorate in the 1988 Referendum refusing to allow the inclusion of any reference to local government in Commonwealth Constitution – has the effect that all local councils act without authority (seemingly because these are not referred to in the Constitution), and no State government can now purport to legislate to dignify the continuing existence of local government. Hence, no council officer operates lawfully, and no council laws or by-laws can be used lawfully, against any citizen.

(b) The Gympie Regional Council operates under an Australian business number ('ABN'). By so doing it has entered the realm of a trading corporation, and thereby submits to exclusive Commonwealth jurisdiction, because of section 51(xx) of the Constitution. Pursuant to s 109 of the Constitution, any Queensland State laws touching upon the operation of local government are invalid, by reason of their inconsistency with the bare fact of the Commonwealth having corporations law.

[51] Ms Mitchell is correct when noting there to be no reference in the Commonwealth Constitution to local government. However that observation is of absolutely no help to her here.

[52] Ms Mitchell's arguments reveal no appreciation of the long-established, (already judicially determined) relationship between the State and Federal levels of government. State legislatures pre-date that of the Commonwealth and, subject to those powers conferred to the Commonwealth by the Constitution (and by any implied restrictions on State power arising from the Constitution), the States retain plenary power for all other matters, which are the same in nature as those of the Imperial Parliament, at Westminster.[6]

[53] *The Constitution of Queensland* 2001 commenced operation on 6 June 2002.[7] According to its object, it 'declares, consolidates and organises the constitution of

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6 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

7 See: *Constitution of Queensland* 2001, s 2.

Queensland'.[8] Section 8 of the *Constitution of Queensland* 2001 makes reference to the State's law-making power, by reference to the continuing applicability of the *Constitution Act* 1867 (Qld), and section 2 therein, which provides: [9]

> Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make **laws for the peace welfare and good government** of the colony in all cases whatsoever.

[54] The expression 'laws for the peace, welfare and good government' as used in s 2 of the *Constitution Act* 1867 (Qld) is one with an established meaning. In *Union Steamship Company of Australia Pty Ltd v King*,[10] the High Court (per Mason CJ, Wilson, Brennan, Dean, Dawson, Toohey, and Gaudron JJ) unanimously said:

> The scope and content of the power conferred by section 5 of the Constitution Act 1902 (NSW)…to make laws "for the peace, welfare, and good government of [NSW]" is still a topic of current debate…this may seem somewhat surprising. The explanation is historical and needs to be found in the evolving relationships between the United Kingdom and its Colonies, especially the relationships with the Australian Colonies and, after Federation, with the Commonwealth of Australia and the Australian States.
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> The power to make laws "for the peace, welfare, and good government" of a Territory is indistinguishable from the powers to make laws "for the peace, order and good government" of a Territory. Such a power is a plenary power and it was so recognized, even in an era when emphasis was given to the character of Colonial legislators as subordinate law-making bodies. The plenary nature of the power was established in a series of historic Privy Council decisions at the close of the nineteenth century: *Reg. Burrah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; Po*well v Apollo Candle Company* (1885) 10 App Cas 282; *Riel v The Queen* (1885) 10 AppCas 67. They decided that Colonial legislators were not mere agents or delegates of the imperial Parliament.
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> …
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> These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a Territory is as ample and plenary as the power possessed by the imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the Courts of the Colony, just as they do not confer on the Court of the State, jurisdiction to strike down legislation on the ground that, in the opinion of the Court, the legislation does not promote or secure the peace, order, and good government of the Colony. Just as the Courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of [an Australian State] is not susceptible to judicial review on that score.

[55] The Commonwealth Parliament only has enumerated powers. In other words, it may legislate only in respect of subject matters where the Commonwealth has been

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8 Ibid s 3.

9 Section 2, the *Constitution Act* 1867 (Qld). The **emphasis** has been included here, by me.

10 [1988] HCA 55, [13] – [16]; (1988) 166 CLR 1.

expressly conferred with legislative power, by the Constitution. To the extent that the Commonwealth Constitution is silent on an issue, then that subject matter remains within the legislative power of the States. This includes, therefore, a power for the States to continue to legislate in respect of local government. The State of Queensland has done so by the means of the *Local Government Act* 2009, and in section 70 of the *Constitution of Queensland* 2001. In this sense, the Gympie Regional Council (as well as all other Queensland local governments) exists by reason of enactments of the Queensland Parliament.

[56] The Commonwealth Constitution is also silent on the subject of dogs, such that the regulation of dogs (here, particularly dangerous dogs), is also a matter for the States. And now, Queensland has recognised its legislative right to regulate dangerous dogs by means of enacting the AM Act. Thereunder, the State has conferred enforcement powers on local government, including here, the Respondent, Gympie Regional Council. The State Parliament is entitled to confer enforcement power on local government, by reason that this is an instance of unrestricted plenary power.

[57] The second aspect of Ms Mitchell's constitutional argument is to submit that, by reason of the Gympie Regional Council operating under an ABN it has submitted to section 51(xx) of the Constitution, which is the power of the Commonwealth to legislate in respect of trading corporations. Then it is submitted by Ms Mitchell that section 109 of the Constitution provides that any law of the State that is inconsistent with a law of the Commonwealth is invalid to the extent of any inconsistency with the Commonwealth enactment, such that any attempt by the Queensland parliament to enact laws for local government 'must be' repugnant seemingly because the Gympie Regional Council is a corporation, with an ABN.

[58] This argument can only fail. The simple fact that the Gympie Regional Council has obtained an ABN for some unrelated purpose does not, of itself, serve to transform the very nature of the Council into that of a trading corporation, *subject only* to Commonwealth legislative power. Nor is there any discernible inconsistency between the AM Act and the conferral by it of State enforcement powers on local government, with section 51(xx) of the Constitution, arising by dint of the Gympie Council having an ABN. There is just nothing here now triggering s 109 of the Commonwealth Constitution.

Applicant's Factual Argument

[59] For reasons now explained, all of Ms Mitchell's legal arguments are spurious. However Ms Mitchell also makes one arguably relevant factual point. This relates to this being a circumstantial case wherein Max and Maggie are merely presumed to have slaughtered Boof, on the basis of circumstantial evidence. Proper analysis reveals however that this point is not relevant, either.

[60] If this case were a canine murder trial, one where the onus of proof of guilt needed to be discharged beyond reasonable doubt, then the point may have had some moment. However, this is not a canine murder trial, and Max and Maggie do not stand charged with the murder. This is an application to QCAT to review the internal review decision of the Gympie Regional Council, as was made on 14 September 2017. Here, the role of the Tribunal is to determine whether the decision made on 14 September 2017 confirming that Max and Maggie should be destroyed

was the 'correct and preferable' decision, in light of the law and all the available evidence.

[61] The Respondent Council submits that there are no limits on the power to issue a destruction order for dogs under s 127(4) of the Act, if:

(a) the dogs are (as here) already declared dangerous dogs; and

(b) if (as here) a proposal notice has been issued to the owner, at least 14 days prior to the dogs' destruction.

The Council further submits that the decision now under review was made for a multitude of reasons, including:

(a) Max and Maggie are already declared dangerous;

(b) Ms Mitchell is in continuing breach of s 97 of the Act;

(c) Ms Mitchell is in breach of s 194 of the Act; and

(d) Ms Mitchell is in breach of s 44, by her having failed to have Max and Maggie registered with the Council.

[62] Even if Max and Maggie had nothing whatsoever to do with the death of Boof on 5 July 2017, Council submits that Max and Maggie were still allowed to escape by Ms Mitchell, and were thereby still enabled to cause fear to Ms Brand, which is contrary to Ms Mitchell's enduring obligations under s 194(1) of the Act; and, enough for the Council to now issue a destruction order. The Council also says that all of the other reasons given by its acting Chief Executive for confirming the original destruction order on 14 September 2017 remain valid, as well. In simple terms, going forward from here the Council just cannot be confident that Ms Mitchell will comply with her legal obligations as the owner and custodian of two dangerous dogs.

[63] Ultimately, I accept that the photographic evidence reveals neither Max nor Maggie to have had blood on their coats, when apprehended. However, for the reasons now explained in paragraphs [61] and [62] (immediately above), that fact is not germane to the proper question, which is whether a power exists under s 127(4) to order that already declared dangerous dogs be destroyed. In my view, the decision made by Council on 14 September 2017 was legally and factually correct.

Determination

[64] The initial determination made as part of the internal review decision on 14 September 2017 to decline to review the decision made on 23 February 2017 to declare Max and Maggie to be dangerous dogs was the correct decision. Ms Mitchell had already been afforded two opportunities to seek an internal review of that decision, yet had not availed herself of either of them. She is now out of time to seek to review that decision.

[65] For reasons already elaborated, the decision to issue a destruction order for each of Max and Maggie is also confirmed by the Tribunal as being the correct decision.

[66] The Council submits that the Application for Review was unmeritorious, and vexatious, and now seeks its costs of needing to appear before QCAT pursuant to s 102 of the QCAT Act. I agree that the Application was unmeritorious, and that it was always destined to fail: see QCAT Act s 102(3)(c).

[67] Although Mr Hill behaved objectionably at Caloundra, I do not find that Ms Mitchell behaved vexatiously. Nonetheless, the ratepayers of Gympie should still not be left out of pocket, in circumstances where the Gympie Council has become obligated to divert finite resources (ones that might otherwise have been more productively expended for the benefit of Gympie Regional Council citizens) to the need to respond to an entirely unmeritorious claim. In order to determine the quantum of any costs, I will however first need to receive written submissions.

[68] In addition, the Council makes reference to s 102 of the AM Act, and further seeks to recover the substantial costs incurred by it in having to continue to kennel and care for Max and Maggie, over the more than ten-month period that they have been subject to these review proceedings. An affidavit from Mr Rogers sworn on 16 March 2018 indicates that the Council has already incurred costs of *at least* $11,224, in that regard.

[69] Although the kennelling costs sought by the Council appear initially justifiable, s 102(4) of the AM Act provides that these costs are able to be claimed and ordered in a proceeding (a), 'to recover a debt of the amount'; or (b), 'for an offence against Chapter 4 of the Act'. These QCAT proceedings are pursuant to Chapter 8 of the Act, such that I am not satisfied that I have the jurisdiction to award the additional costs, now claimed under s 102 of the AM Act. Council will need to commence separate proceedings for recovery of these costs, in the Magistrates Court.

[70] In an effort to urge me to the contrary, Ms Taylor for the Council has referred me to a decision of Member Allen, in *Mazzaracca v Logan City Council*,[11] where the Tribunal has previously awarded kennelling costs to a Respondent local government under s 102. Yet, I am of the view that costs under s 102 in *Mazzaracca* were incorrectly awarded by Member Allen, who does not appear to have been aware of subsection 102(4).

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11 [2012] QCAT 63, [21], [22].