



RACING APPEALS TRIBUNAL
of New South Wales

Case Title: Mark Vallender v Harness Racing NSW

Hearing Date(s): 20 September 2011 (No Case to Answer Application)
19 October 2011 (Penalty)

Decision Dates: 7 October 2011 (No Case to Answer Application)
10 November 2011 (Penalty)

Jurisdiction: Racing Appeals Tribunal of NSW

Before: Kavanagh J; Mr A Mullins (Advisor)

Legislation Cited: Racing Appeals Tribunal Act 1983
Harness Racing Act 2009
Australian Harness Racing Rules
Income Tax Assessment Act 1936 (Cth)

Cases Cited: Al-Kateb v Godwin (2004) 219 CLR 562
Australian Securities and Investments Commission v Healey (2011) FCA 717
Clarke, Gough, Hines, McCoy, R W Waterhouse and W S Waterhouse (1 February 1985)
Federal Commissioner of Taxation v The Australia and New Zealand Banking Group Ltd (1979) 143 CLR 499
Greyhound Racing Authority (NSW) v Bragg [2003] NSWCA 388
Heatley v Tasmanian Racing and Gaming Commission (1977) 137 CLR 487
Kruger v Commonwealth of Australia; Bray v Commonwealth of Australia (1997) 190 CLR 1
MacDonald v Australian Securities Commission (1993) 43 FCR 466
Momcilovic v The Queen [2011] HCA 34
Oakley and Anor v Insurance Manufacturers of Australia Pty Ltd (2008) VSC 68
Ruddock v Taylor (2005) 222 CLR 612

Texts Cited: Magna Carta 1297
Blackstone, Commentaries of the Laws of
England (1765) Vol 1, 134

Category: Principal Judgment re penalty

Parties: Mark Vallender (Appellant)
Harness Racing NSW (Respondent)

Representation

- Counsel: Ms R Francois of counsel (Appellant)
Mr P R Callaghan SC (Respondent)

- Solicitors: Ms F Thomas, Holding Redlich Lawyers
(Appellant)
Mr H Cockburn, McLachlan Thorpe Partners
(Respondent)

DECISION

- 1 This is an appeal under s 15B(2) of the *Racing Appeals Tribunal Act 1983* against a decision of Harness Racing New South Wales ("HRNSW") made on 22 August 2011, which found Mr Mark Vallender ("the appellant") had committed an offence under rr 187(2) and 187(3) of the *Australian Harness Racing Rules* ("the Rules"). HRNSW determined Mr Vallender should be "warned off" pursuant to r 256(2)(d) of the Rules "until such time as you seek reinstatement from the Board of HRNSW."
- 2 Mr Vallender is the registered owner of a large number of horses which compete in harness racing in New South Wales. On 9 August 2011, Mr Reid Sanders, the Regulatory Manager of HRNSW, issued a Direction to Mr Vallender in the following terms:

Re: HRNSW Investigation

Harness Racing New South Wales is conducting an investigation into serious allegations relating to the control and conduct of licenced persons within the NSW harness industry.

As a registered Owner and to assist with investigation you are hereby directed to supply your mobile telephone records for the period 1 March 2011 until Monday 8 August 2011. The required information is to be provided to the writer by close of business Friday 19 August 2011.

Failure to comply with this direction, could result in action being taken against you under Rule of Racing 238 which reads:

A person shall not fail to comply with any order, direction or requirement of the Controlling Body or the stewards relating to harness racing or to the harness racing industry.

- 3 Mr Vallender did not produce his telephone records by 19 August 2011. He was then found to have committed an offence and suffered penalty.
- 4 Ms Rachel Francois of counsel represented Mr Vallender and Mr Hamish Cockburn, solicitor, appeared on behalf of HRNSW. The respondent tendered an affidavit of Reid Paton Sanders, affirmed 15 September 2011, with annexures numbered 1 - 18. All documents relied upon, including correspondence between HRNSW and Mr Vallender, through his various solicitors, were tendered through Mr Sanders.
- 5 At the end of the respondent's case, Ms Francois submitted the appellant had no case to answer: that is, that Mr Vallender committed no offence.

The Appeal

- 6 Mr Vallender relied upon the following (amended) grounds of appeal:

- 1 **MR VALLENDER DID NOT COMMIT AN OFFENCE UNDER RULE 187**

- A. The Notice was not issued under Rule 187

...

- B. The Notice Was Invalid under Rule 187

...

- 2 **PENALTY IS EXCESSIVE AND DISPROPORTIONATE TO ANY OFFENCE**

...

- 3 **OTHER CIRCUMSTANCES OF THE APPEAL**

- (9) This appeal is made in circumstances where:
- (a) HRNSW did not give Mr Vallender a hearing and an opportunity to make submissions before it made the decision communicated by Mr Saunders (sic) on 22 August 2011.
 - (b) HRNSW has only produced evidence that only one board member approved Mr Saunder's "flying minute" dated 22 August 2011 on 22 August 2011.
 - (c) Mr Vallender was only given the evidence upon which HRNSW relies upon to prosecute him for this offence after close of business on 6.09pm on Thursday 15 September 2011, being two business days before the hearing.

4 ORDERS SOUGHT

- (11) In accordance with section 17A of the *Racing Appeals Tribunal Act 1983*, Mr Vallender seeks that the Tribunal make the following orders:
- (a) An order settling (sic) aside the Decision made by the HRNSW on 22 August 2011 to warn off Mr Vallender pursuant to Rule 256 of the Australian Harness Racing Rules;
 - (b) An order varying the Decision and either:
 - (i) finding that Mr Vallender did not commit an offence under the Rules;
 - or in the alternative,
 - (ii) order that Mr Vallender be cautioned;

7 In the context of this appeal, the appellant presses for the application of the rigors of the criminal law contending the relevant *Australian Harness Racing Rules* were not properly applied; the investigator (Mr Sanders) was not properly empowered to issue the "Notice" (read: "Direction"); the "Notice" was therefore invalid and/or the "Notice" did not, in form, properly comply with the necessary legal requirements. Further, it was contended, there was a failure to provide the appellant with procedural fairness prior to the finding of the offence and in the application of penalty.

8 The appellant, in submissions, referred to the Direction issued by HRNSW as a "Notice to Produce". However, as referred to in the letter to Mr Vallender of 9 August 2011 and pursuant to the Rules, HRNSW issued a "Direction" to Mr Vallender to produce his telephone records, for a given period of time and for the purpose of assisting in an investigation.

HRNSW, the evidence revealed, were conducting an investigation into the conduct of the harness racing industry in New South Wales given admissions from two Stewards who had resigned.

The Evidence

9 Mr Vallender, in correspondence with HRNSW through various solicitors, acknowledged receipt of the Direction but questioned HRNSW's power to compel him, as a registered owner, to produce his telephone records. Mr Vallender did not fully produce his telephone records until 12 September 2011. This was after he failed to comply with the Direction to produce within the stated time. He was then found by HRNSW to be in breach of the Rules and was, on 22 August 2011, "warned off" with all its serious associated consequences.

10 HRNSW presses, through Mr Sanders, the view that the failure of Mr Vallender to produce his records "was done to frustrate and interfere with the HRNSW investigation." Mr Sanders first explained this view to one of Mr Vallender's solicitors in his letter of 26 August 2011 as follows:

3. Your client's failure to produce documents within the prescribed time; and now, his further ongoing refusal to provide documents either adequately or at all, has caused significant prejudice to an ongoing investigation which involves issues of the utmost seriousness. One example of that prejudice is that the delay occasioned in this aspect of the investigation has meant that HRNSW has been frustrated in its attempt to retrieve relevant closed circuit television footage from betting outlets and other places within the necessary timeframe. Your client's conduct in delaying or withholding the provision of records has therefore already severely prejudiced the investigation.

Even if your client were to fully produce documents now, it may not be possible to remedy that prejudice. We further note that your client's offer still involves less than a full production of records. That is completely unacceptable.

11 Mr Sanders was cross examined on this view at the appeal hearing:

Q. You say in para 3 that there has been prejudiced (sic) caused by the delay in providing the record. You say one example of the prejudice is that the delay occasioned in this aspect of the investigation has meant that Harness Racing New South Wales has been frustrated in its attempt to retrieve closed circuit television footage from betting outlets and other places in the necessary timeframe?

A. Correct.

Q. You later develop that in your solicitor's submission to say that this organisation destroyed closed circuit television footage after a certain time?

A. Correct.

Q. And it was always available to you, wasn't it, to write to those places and asked them to preserve their closed circuit television footage?

A. I am not sure what you mean there but unfortunately dealing with clubs and hotels during this investigation, if we ring and ask them for closed circuit television they destroy it so to write to them and advise them to hold something would only hinder our investigation further.

Q. You are saying, and it is your serious evidence to this Court that in your experience betting outlets who are licensed I think under the Act and through other mechanisms deliberately destroy evidence that they know that there was investigation on foot but it is correct, isn't it that there was a Police investigation on foot into the same matters?

A. Well I can cite two places for the purposes of investigation, and I will not name them, but two places where we have gone to seek CCTV footage. We have spoken to them and we have gone to retrieve it and it has been deleted so you draw an inference that it has miraculously deleted for whatever reasons I don't know.

...

Q. But wouldn't you agree with this, Mr Sanders, any deliberate deletion by these agencies is unrelated to my client's behaviour in relation to whether they would produce these records?

A. The reason for obtaining your client's records is there are numerous bodies which were seeking to obtain the telephone records, as you would be well aware, here is a location of where the call is made so in tracking down agencies where many transactions may have taken place that will assist us, hence why it frustrated the investigation.

...

12 From the above evidence I accept, *prima facie*, the failure of Mr Vallender to produce his records could have had a serious detrimental effect on the investigation.

13 The evidence from the correspondence between the parties and tendered by the respondent reveals:

- Following the Direction issued on 9 August 2011, Mr Vallender contacted Mr Sanders, acknowledging receipt of the Direction, and was told his records were required but that HRNSW was only interested in the calls relating to the harness racing industry.
- On 15 August 2011, solicitors for Mr Vallender wrote to Mr Sanders stating "your organisation lacks power to give this direction."
- On 16 August 2011, HRNSW referred Mr Vallender's solicitors to sections of both the *Harness Racing Act 2009* (s 10) and the Rules (rr 15 and 299) as to Mr Vallender's obligations under the Act and Rules (attaching some relevant copies) and again required compliance with the Direction and reminded Mr Vallender of the power held by HRNSW to impose a penalty for a breach. The letter warned:

In the absence of production, we reserve the right to impose penalties of the type foreshadowed in our previous letter or otherwise provided for by the Act and Rules.

- On the same day solicitors for the appellant again challenged the power of HRNSW to give "a lawful direction" to Mr Vallender.
- On the same day Mr Sanders, for HRNSW, wrote back:

If your client continues to fail to comply with directions to produce documents, he will be in direct breach of the Rules, **including, but not limited to the following Rules** (emphasis added):

187. (2) A person shall not refuse to answer questions or to produce a horse, document, substance or piece of equipment, or give false or misleading evidence or information at an inquiry or investigation; and/or

187 (3) A person shall comply with an order or direction given by the steward; and/or

187 (7) A person who fails to comply with any provision of this rule is guilty of an offence and/or

238. A person shall not fail to comply with any order, direction or requirement of the Controlling Body or the stewards relating to harness racing or to the harness racing industry.

In the event your client commits a breach of the Rules by failing to produce documents, HRNSW will impose a penalty pursuant to Rule 256. Your client is on notice that HRNSW will proceed to impose a penalty of warning off pursuant to Rule 256(d) if the documents are not produced by close of business on **Friday 19 August 2011.**

- By 19 August 2011, the date set in the Direction, there was no production by Mr Vallender.
- On 22 August 2011, HRNSW determined "Mr Vallender is now warned off pursuant to r 256(d)." Both Mr Vallender and his solicitors were advised on the same date and the associated restrictions thereby placed upon him were explained in an attachment.
- On 24 August 2011, different solicitors, by telephone representing Mr Vallender, stated Mr Vallender would provide records but would black out some numbers.

- On 26 August 2011, solicitors were advised by Mr Sanders:

Nothing short of immediate, and full, production of the records requested will give HRNSW any reason to reconsider its position in relation to its decision and the penalty imposed. We look forward to hearing from you as a matter of urgency.

- Mr Vallender produced the records on 12 September 2011. He had been "warned off" since 22 August 2011.

14 The appellant, at the close of HRNSW's case, submitted the appellant has no case to answer and the "Notice" was invalid (notwithstanding the evidence that Mr Vallender has now complied with the Direction).

The No Case to Answer Submission

15 As to the no case to answer submission, Ms Francois, in challenging the form and validity of the Direction, contended that Mr Sanders, the Regulatory Manager of HRNSW who signed the letter of Direction of 19 August 2011:

- (a) did not purport to issue the Notice as a steward but rather as the "Regulatory Manager of HRNSW";
- (b) did not cite Rule 187 and instead cited Rule 238 in the Notice, which is consistent with the Notice being issued by the Regulatory Manager and not a steward;
- (c) did not cite Rule 187 when first challenged about the power to issue the Notice;
- (d) only cited Rule 187 after the issue of the adequacy of the description of the investigation in the Notice was drawn to his attention and he realised the difficulties of Rule 238 which is limited by reference to "harness racing or the harness racing industry".

16 Ms Francois contends the "Notice" (read: "Direction") failed, as required by law, to identify who and what was being investigated; was misleading in

that it failed to state Mr Vallender was a subject of the investigation; was not issued under r 187 as stated; and did not give a directive.

Relevant Principles

17 The Federal Court has recently confirmed the relevant principles applicable to a no case application made to a Judge. In *Australian Securities and Investments Commission v Healey* [2011] FCA 717, the Court confirmed the principles set down by Kaye J in *Oakley and Anor v Insurance Manufacturers of Australia Pty Ltd* [2008] VSC 68 which read, relevantly, at [3]:

1. ...
2. The test which is applicable, where a judge is sitting without a jury, is less stringent. In such a case the judge may uphold a no case submission, notwithstanding that the evidence, on the view most favourable to the respondent party, could support a judgment in favour of the respondent party.
3. In such a case the judge may perform an assessment of the quality of the evidence which has been called on behalf of the respondent party. In some cases, such an assessment may involve the judge evaluating the credit of witnesses from whom such evidence has been called.
4. In determining a no case submission, the judge is entitled to draw inferences from the evidence.
5. On a no case submission, the judge cannot draw an inference against the party making the submission (“the moving party”) based upon the absence of evidence from that party.
6. Although the judge, sitting alone, may assess the quality of the evidence in determining a no case submission, nonetheless the test which is to be applied by the judge, at that stage, is different to the test which the judge would apply in determining the ultimate outcome of the case, at the conclusion of a trial. Notwithstanding that the judge, in determining the no case submission, may assess the quality of the evidence, nonetheless the test remains whether, on the evidence so assessed, the judge “could” (not would) find for the respondent party on the evidence so far led. In such a case, the judge would only find against the respondent party

if the evidence, so far adduced, is so unsatisfactory or inherently unreliable or equivocal that he were to conclude that he could not be reasonably satisfied of the case made by the respondent party on the evidence thus far adduced.

Power of the Regulatory Officer

- 18 The appellant firstly contends the Direction was issued by Mr Sanders who signed himself "Regulatory Manager". The appellant contends only a Steward of HRNSW has power under the Rules to issue a Direction. The evidence before the Tribunal is fourfold on this issue.
- 19 Firstly, although Mr Sanders signed the letter as Regulatory Manager, the content refers to HRNSW as conducting the investigation.
- 20 Secondly, HRNSW contends Mr Sanders has all the authority of a Steward of HRNSW given the effect of r 300 of the Rules:

Stewards' powers exercisable by controlling body

300. The Controlling Body or a person authorised by the Controlling Body may exercise the powers conferred on the stewards or upon the Chairman of the Stewards or Deputy Chairman of Stewards, by these rules.

This rule gives the Controlling Body the power to delegate, to a person authorised, the powers of a Steward.

- 21 Thirdly, given the Controlling Body's power to delegate, the respondent's Chief Executive Mr Sam Nati wrote on 15 September 2011:

...

I understand that an issue has arisen in the appeal regarding the powers of the Regulatory Manager of Harness Racing New South Wales, Mr Reid Sanders.

The Board resolved to delegate all powers to Mr Sanders to act in the capacity of a Stipendiary Steward at race meetings and any other inquiries as required in association with the application of the Australian Harness Racing Rules from the

date of Mr Sanders' appointment to the position of Regulatory Manager on 1 August 2011.

The letter of 15 September 2011, however, does not refer to the date the Board delegated the powers of a Stipendiary Steward to Mr Sanders.

22 Finally, Mr Sanders gave evidence on the issue. When asked about the letter of 9 August 2011 directing production (referred to by the appellant as the "Notice"), the evidence was as follows:

Q. So when you drafted this letter it was you as a delegate of Harness Racing New South Wales?

A. Well I drafted the letter using the powers that I had delegated to me under Harness Racing New South Wales.

Q. That is why you signed it in your capacity as regulatory manager?

A. Correct.

Q. And you turned your mind to which powers you were exercising, didn't you?

A. Correct.

Q. And you considered that if the notice was not answered Mr Vallender shall be in breach of r 238 of the rules?

A. Rule 238 says that "Any person shall not fail to comply with any order" which had been issued to Mr Vallender in that notice of 9 August.

Q. So you considered you were using the general powers of Harness Racing New South Wales to issue orders, directions or requirements in relation to Harness Racing which is the racing industry?

A. Correct.

23 I find Mr Sanders a witness of truth. He believed he had delegated power and that he was acting on behalf of HRNSW (read: the Controlling Body) when conducting all his duties including at race meetings, during appeals and in conducting the investigation as Regulatory Manager on behalf of HRNSW. He could not conduct these activities without the knowledge of the Controlling Body. Further he stated:

Q. You are not listed on the website of Harness Racing New South Wales as a steward, are you?

A. My title is regulatory manager and I perform duties as a regulatory manager as a steward on a regular basis, I chair many races, and sit on the panel at the Menangle harness meetings.

- 24 I am satisfied there is *prima facie* evidence that Mr Sanders is, in his role as Regulatory Manager, by delegation a Steward, notwithstanding it is open to argument as to when that delegation was formally authorised, Mr Sanders' immediate activities since taking up his position from 1 August 2011 has been to serve HRNSW with the full authority of a Steward. There is *prima facie* evidence HRNSW empowered Mr Sanders to act with all the powers of a Steward from his appointment from 1 August 2011 as Regulatory Manager.

Validity of the Direction

- 25 The appellant's counsel conceded she was taking a criminal law approach to the case. That approach was further demonstrated in the attack made to the validity of the Direction. Mr Vallender has been found to have committed an offence and has not been found guilty of a criminal charge. This is an administrative Tribunal. However, the Tribunal keeps in mind the significant consequences to a person who earns an income from - in this case, harness racing - whose interest must be balanced along with the protective interest in ensuring the integrity of a sport - in this case, harness racing.
- 26 It was contended by the appellant that the statutory powers which compel the production of documents require bodies (such as HRNSW) to identify in the Direction, expressly or by necessary inference, the matter or matters within the concern of the body to which the information or documents sought relate. Reliance is placed on the view expressed by Gibbs ACJ in *Federal Commissioner of Taxation v The Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at (525):

To be valid a notice to produce documents under s. 264(1)(b) must of necessity identify with sufficient clarity the documents which are required to be produced. However the notice must in my opinion go further: it must show the person to whom it is addressed that any documents which he is required to produce is one whose production the Commissioner is entitled to require.

(See also *MacDonald v Australian Securities Commission* (1993) 43 FCR 466).

- 27 The "Notice", it was submitted, failed to identify who and what was being investigated and/or was misleading in that it failed to state that Mr Vallender was the subject of the investigation and, instead, was framed to mislead him into thinking he was not the subject of the investigation. Further the "Notice", in its demand, was excessive.
- 28 On the face of the letter of 9 August 2011, I am satisfied the Direction identified the documents required from Mr Vallender. I do not accept, in the circumstances, the request for "all" his telephone records for the period stated was excessive particularly given the evidence satisfied that over 10 persons were issued with such a Direction on the same day and, if any such person did not hold all the telephone records required, an extension of time was given by HRNSW, on request, to assist in compliance with the Direction. Mr Vallender made no such request.
- 29 As to the purpose of the Direction, the letter of 9 August 2011 revealed HRNSW was conducting an investigation into various allegations relating to the control and conduct of licensed persons within the industry. To suggest, as did the appellant's counsel, that, because Mr Vallender was, the day before the letter (dated 9 August 2011), named in the investigation by one of the Stewards (and this was interpreted by Mr Sanders in evidence as making Mr Vallender "a person of interest"), that Mr Vallender should have been so told in the form of the Direction is rejected. The Direction, *prima facie*, clearly stated the purpose for the request. HRNSW was, at that stage, looking into the activities, as stated, of "licensed

persons". Mr Vallender is a "registered owner" under r 108 of the Rules not a "licensed person". This is not to accept the inference that the obligations are different upon a "licensed person" than those held by a "registered owner" under the Rules (this point was not argued but see ss 9(2)(b) and 10(2)(b) of the *Harness Racing Act 2009*). The Direction clearly stated what records were required and for what purpose. Mr Vallender's asserted offence is in relation to the failure to produce. There is no unfairness in the content of the Direction. However, even if, in a HRNSW investigation conducted under its rules, there is required a rigorous application of the general principles of law, the Direction complies with the formal principles. It stated clearly the purpose for the demand and what was required and it provided a timetable for compliance.

- 30 It is necessary, however, to state that the relevant Act and Rules covering the conduct of HRNSW do not prescribe the formality asserted by the appellant. The appellant relies upon authorities relevant to different legislative provisions (for example the "Notice to Produce" which was a proscribed form under s 264(1)(b) of the Commonwealth *Income Tax Assessment Act 1936* the subject of the consideration in *Federal Commissioner of Taxation v The Australia and New Zealand Banking Group Ltd*; see also the proscribed Notice pursuant to R 5 of the *Australian Securities Commission Regulations 1990* the subject of the consideration in *MacDonald v Australian Securities Commission*). These authorities deal with the legality of formal "Notices to Produce" under different specific legislative provisions. Such legislative provisions do not import their strict formal requirements onto a Direction issued by the respondent under the New South Wales *Harness Racing Act 2009* and/or the *Australian Harness Racing Rules*. There is no proscribed form with which HRNSW was required to comply under either the Act or the Rules.
- 31 Further, to apply such formality to a HRNSW Direction would be expressly contrary to the broad powers and obligations placed upon HRNSW pursuant to the *Harness Racing Act 2009* (particularly ss 10(1) and 10(2)) and under the Rules. The only limitation on a Direction is it needs to relate

"to harness racing or the harness racing industry" (under r 238 of the Rules).

The Power to Issue a Direction

32 The appellant contends the "Notice" was issued under r 187 of the Rules. *Prima facie*, from the evidence, that is not a fact. The letter of 9 August 2011 cites HRNSW as conducting the investigation. Under s 9 of the *Harness Racing Act 2009*, headed "Functions of HRNSW", HRNSW has, as its function, power to control, supervise and regulate harness racing in NSW (s 9(2)(a)) and, relevantly, to register owners (s 9(2)(b)). Under s 10, headed "Powers of HRNSW", HRNSW, through its controlling body, has powers to supervise the activities of persons registered by HRNSW (s 10(2)(b)). It also has power to inquire into and deal with any matter relating to harness racing and to refer any such matters to the Stewards or others for investigation and report (s 10(2)(c)). HRNSW may make rules for the control and regulation of harness racing (division 2, s 22). HRNSW has adopted the *Australian Harness Racing Rules 2009*. Under the Rules "offences" can be found through inquiries and investigations (part 11) through analysis of prohibited substances (part 12) or under the general offences provisions (part 14). The Rules then deal with penalty (part 15). The range of penalties are proscribed (r 256 under part 15). HRNSW had full power to issue a Direction to a registered owner.

33 Ms Francois contends r 187 of the Rules is only to be applied by the Stewards and only when they are conducting a hearing. Rule 187 is found in part 11 which refers to "Inquiries and Investigations". Part 11, I agree, applies to Stewards' activities either self-initiated or under instruction by the Controlling Body of HRNSW. However, within part 11 is r 187 and r 187 deals with "offences" arising from such investigations. Rule 187 is not a rule relating to the power to issue requests for documents. It is an "offence" provision, which relates not to the source of powers to make a request, but to the finding of an offence which arises after a failure to comply with a rule or a provision of the Act. Rule 187 therefore is not the source of the power to issue the Direction, it is a rule which creates an

offence for a failure, in this case, to comply with a Direction issued by HRNSW.

- 34 The respondent, on 16 August 2011 (see [13] above), placed the appellant on notice of his potential to infringe r 187 of the Rules and also quoted other applicable provisions of the *Harness Racing Act 2009* and the Rules. It therefore brought to Mr Vallender a number of the provisions of the Act and Rules under which he held obligations. The letter then went on to warn Mr Vallender of the serious consequences of a breach of the deadline for production under the HRNSW Direction.

Procedural Fairness

- 35 There was an assertion Mr Vallender was not given a hearing as required under the Rules before penalty. The correspondence satisfies, *prima facie*, Mr Vallender was given, through his solicitors, every opportunity to be heard. The effect of the Rules and a breach thereof was explained to him. There was no breach of the rules of procedural fairness in such a circumstance. As was said by Santow J in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [75]:

The Tribunal is not a court of law any more than the medical tribunal was in Spackman. Moreover as I have said, the Tribunal like the Committee was “not bound by the rules of, or practice as to, evidence but may inform itself of any matter in such manner as it thinks fit”; Regulations 11 and 23 of Greyhound Racing Authority (Appeals) Regulation. The Tribunal, like the Committee, may direct the manner in which any appeal before it is to be conducted; Regulations 15 and 28. Such informality reflects a very different context from a court of law in applying *Briginshaw* standards in the determination of serious allegations with serious consequences. What was here required was a comfortable level of satisfaction commensurate with the gravity of the charge, reached fairly and properly in accordance with the kind of processes appropriate to a tribunal, not a court of law.

- 36 The *Harness Racing Act 2009* and the *Australian Harness Racing Rules* provide flexibility of process for the Controlling Body and the Stewards in the same manner as the Tribunal which was the subject of *Bragg*. The

appellant, through solicitors, had unequivocally refused to comply with the Direction. Rule 256(7) of the Rules does not make mandatory a hearing. There was no obligation on HRNSW to conduct an oral hearing of this matter. It was not a denial of natural justice or procedural fairness for the Controlling Body in the circumstance to make a determination in the absence of an oral hearing (*Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487). Had there been any procedural unfairness, it is necessary to state such an omission would now be rectified by the rehearing conducted before this Tribunal.

- 37 Therefore I am satisfied, *prima facie*, the evidence so far led could establish Mr Sanders was empowered by the Controlling Body to act as a Steward, and the Direction given by HRNSW to Mr Vallender was within power and, in its form, valid. Because of Mr Vallender's failure to produce within the specified time there was, it could be held, an offence.

Election

- 38 The Tribunal has a discretion whether to put the moving party to its election not to adduce further evidence in the substantive case, after determination of the no case application (*ASIC v Healey*). The relevant considerations in exercising that election are recited in *ASIC v Healey* at [539] include:

539. Considerations relevant to the exercise of the discretion include the following:

(a) A departure from the general rule can seldom be justified unless adherence to the rule would not serve the ends of justice or convenience – see: *Protean* at 238 (citing *Sampson v Richards* [1949] VicLawRp 2; [1949] VLR 6); *Jones v Peters* [1948] VicLawRp 56; [1948] VLR 331); and *ACCC v Amcor* at [62]);

(b) The Court will have regard to all the circumstances of the case, including the nature of the case, the stage it has reached, the issues involved and the evidence given – see: *Protean* at 238; *William H Muller & Co v Ebbw Vale Steel, Iron & Coal Ltd* [1936] 2 ALL ER 1363 at 1365-6 (quoted with approval in *Rasomen* at 223); and *ACCC v Amcor* at [62]).

(c) Regard should be had to whether, in all the circumstances of the case, putting the party to its election will

result in the most efficient resolution of the proceeding – the Court will consider whether putting a party to its election will lead to the party unnecessarily leading the remainder of its evidence or, conversely, whether not putting the party to its election may result in a real risk that the Court will be required to consider the same evidence twice – see: William H Muller (quoted with approval in *Rasomen* at 223); *Compaq Computer* at 9; *Tru Floor* at 540 (paras [27] and [28]); *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2009] FCA 1678 at [92]; and *ACCC v Amcor* at [71] and [72].

(d) Departure from the general rule may be justified where the case alleges fraud or dishonesty – in those circumstances it would normally be wrong to permit a defendant to be cross-examined where there really is no evidence against him/her of fraud – see *Union Bank of Australia v Puddy* [1949] VicLawRp 46; [1949] VLR 242); at 245-6 (quoted in *Tru Floor* at 538); *Protean* at 215 and 236; *Compaq Computer* at 7 and 9; *Tru Floor* at 540 (paras [28] and [29]).

(e) Similarly, in *ACCC v Amcor*, Sackville J considered that defendants accused of serious breaches of the *Trade Practice Act 1974* (Cth) which would render them liable to substantial civil penalties (and also cause potential loss of business reputation), and that the allegations were analogous to a fraud case, were reasons why the defendants should not be put to their election: see *ACCC v Amcor* at [67]-[68].

(f) Justice Davies in *Trade Practices Commission v George Weston Foods Ltd* (No 2) [1980] FCA 16; (1980) 43 FLR 55, rejected the fact that the proceeding was a civil penalty proceeding as a ground for not putting the defendants to their election. He nevertheless took into account as a matter to be considered that the allegation is one that calls for a standard of proof consistent with the seriousness of the allegations made.

- 39 Counsel for the appellant has elected not to go into evidence and conceded, if the appellant's no case to answer submission failed, a finding of an offence under the Rules would be established on the evidence of the respondent (or, as it was submitted, Mr Vallender would be found "guilty").
- 40 I am satisfied on a review of the evidence of the respondent, not challenged by any evidence led by the appellant, that the offence is proven. Mr Vallender failed to comply with a valid Direction to produce his telephone records by 19 August 2011.

41 The parties wish to be heard on appeal on the penalty of a "warning off" as given by the Stewards.

Penalty

42 The appellant, as to the penalty of a "warning off", makes firstly a general attack on the *Australian Harness Racing Rules* contending that in giving "the most minor" of a breach - namely: the failure to produce records within a stated time constraint - there is, in the severity of a "warning off", a breach of the common law presumption against a legislative interference with a person's rights and freedoms. Therefore, it was contended, r 256 of the Rules is, in its serious ramification, *ultra vires* the rule making powers under the *Harness Racing Act 2009*.

43 The appellant submitted:

Applying this principle to legislation which unmistakably intends some interference to be authorised but the scope of the permitted interference is in issue, it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision. In that regard, the more substantial is the infringement with the right or freedom, the more is required to show that the interference is necessary to meet the aims postulated and the interference should be the least necessary for that purpose.

The penalty of "warning off", therefore, it was contended, interferes with three fundamental rights and freedoms of Mr Vallender:

1. his freedom to associate: *Kruger v Commonwealth of Australia*; *Bray v Commonwealth of Australia* (1997) 190 CLR 1;

2. his freedom of movement: *Ruddock v Taylor* (2005) 222 CLR 612; and
3. his right to ownership and the peaceful enjoyment of property: Magna Carta 1297 clause 39; Blackstone, Commentaries of the Laws of England (1765) Vol 1, 134.

44 Reliance is placed by the appellant upon the reasoning in *Al-Kateb v Godwin* (2004) 219 CLR 562 where Gleeson CJ referred to the presumption as the "principle of legality" (at 577). The appellant, in submissions, illustrated, through a recitation of the authorities, the philosophy behind the principle of presumption and adopted the explanation and reasoning of French CJ in *Momcilovic v The Queen* [2011] HCA 34 where the principle was affirmed as follows at [42] - [43]:

42. The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as "the ultimate constitutional foundation in Australia". It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a "liberal democracy founded on the principles and traditions of the common law." It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality.

43. The principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. The range of rights and freedoms covered by the principle has frequently been qualified by the adjective "fundamental". There are difficulties with that designation. It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power. Nevertheless, the principle is a powerful one. It protects,

within constitutional limits, commonly accepted "rights" and "freedoms". It applies to the rules of procedural fairness in the exercise of statutory powers. It applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power. It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.

45 As to the presumption of legality, French CJ commented, in *Momcilovic* at [43], it is a presumption which exists when:

"[p]arliament does not intend to interfere with common law rights and freedoms".

However, his Honour went on to note there can be an exception to the presumption if the Parliament "by clear and unequivocal language" makes an exception. Such is the circumstance in the legislation affecting harness racing. Section 21 of the *Harness Racing Act 2009* reads as follows:

21 Disciplinary and occupational health and safety action may be taken by HRNSW

(1) HRNSW may, in accordance with the rules, do any of the following:

- (a) cancel the registration under this Act of:
 - (i) any harness racing club, or
 - (ii) any harness racing horse, or
 - (iii) any owner, trainer or driver of harness racing horses, or bookmaker or other person associated with harness racing,
- (b) disqualify, either permanently or temporarily, any owner, trainer or driver of harness racing horses, or bookmaker or other person associated with harness racing,
- (c) prohibit any person from participating in or associating with harness racing in any specified capacity,
- (d) prohibit any horse from competing in any harness race,

- (e) prohibit any person from attending or taking part in a harness racing meeting,
- (f) impose fines, not exceeding 200 penalty units, on any harness racing club or on any owner, trainer or driver of harness racing horses, or bookmaker or other person associated with harness racing for breaches of the rules,
- (g) suspend, for such term as HRNSW thinks fit, any right or privilege conferred by this Act or the rules on any owner, trainer or driver of harness racing horses, or bookmaker or other person associated with harness racing,
- (h) prohibit any person registered under the rules from taking part in any harness racing meeting held by any harness racing club that is not registered under the rules.

(2) Any fine imposed under subsection (1) (f) is to be paid to and be the property of HRNSW.

(3) HRNSW may only take action under this section for disciplinary purposes or for the purposes of occupational health and safety.

46 By the implementation of any of the alternatives under s 21 of the *Harness Racing Act* 2009 so legislated, there is interference with a person's freedom and rights.

47 In compliance with provisions of the *Harness Racing Act* 2009, HRNSW adopted the *Australian Harness Racing Rules*. Rule 256 is found in Part 15 headed "Penalties" which reflect s 21 of the *Harness Racing Act* 2009. The defendant attacks r 256 of the Rules as being *ultra vires* because it does, in effect, place an interference in the fundamental rights and freedoms of a person within the harness racing industry.

48 Rule 256 in the "Penalties" section of the Rules in Part 15, which section follows the "General Offences" section in Part 14, states:

PENALTIES

256. (1) One or more of the penalties set out in sub rule (2) may be imposed on a person, club or body guilty of an offence under these rules.

- (2)
 - (a) A fine within the limits fixed by legislation or by the Controlling Body,
 - (b) conditional or unconditional suspension for a period;
 - (c) disqualification, either for a period or permanently;
 - (d) warning off, either for a period or permanently;
 - (e) exclusion from a racecourse, either for a period or permanently;
 - (f) a bar, either for a period or permanently, from training or driving a horse on a racecourse, track or training ground;
 - (g) conditional or unconditional suspension of registration for a period or cancellation of registration;
 - (h) conditional or unconditional suspension of a licence for a period or cancellation of a licence;
 - (i) a severe reprimand;
 - (j) a reprimand or caution.

(3) Should a rule of its own terms impose a penalty in respect of an offence created by that rule then, subject to any contrary intention expressed or otherwise apparent in that rule, that penalty is the only one which can be imposed in respect of that offence.

(4) Penalties, whether under this or any other rule, attach from the time they are imposed, except that the Controlling Body or the Stewards may postpone such attachment.

- (5)
 - (a) Penalties other than a period of disqualification or a warning off under this or any other rule may be suspended for a period not exceeding 12 months upon such terms and conditions as the Controlling Body or Stewards see fit;
 - (b) If the offender does not breach any term or condition imposed during the period of suspension, the penalty shall be waived;
 - (c) If the offender breaches any term or condition imposed during the period of suspension then, unless the Controlling Body or Stewards otherwise order, the suspended penalty thereupon comes into force and penalties may also be imposed in respect of any offence constituted by the breach.

(6) Although an offence is found proven a conviction need not necessarily be entered or a penalty imposed.

(7) Before an offence is found proven, the following conditions shall be satisfied:-

- (a) the offender shall be afforded reasonable opportunity to cross examine witnesses, make submissions, present evidence to the Controlling Body or the Stewards as the case may be;
- (b) those submissions or evidence shall be taken into account;
- (c) evidence relied upon in establishing the offence shall be identified;
- (d) in a matter before the Stewards, those Stewards who finally determine that an offence has been committed shall be present during the whole of the proceedings.

- 49 Rule 256, therefore, produces a range of penalties. The rule has the same effect as that of s 21 of the *Harness Racing Act 2009*. As referred to by French CJ in *Momcilovic* in its use of "clear and unequivocal language" the rule removes some common law rights.
- 50 It is also submitted that it is contrary to the intention of the *Harness Racing Act 2009* and its cognate legislation, the *Racing Appeals Tribunal Act 1983*, to impose more than a five penalty unit fine for the offence of failing to produce documents (see s 41(4) of the *Harness Racing Act 2009* and s 16A(2) of the *Racing Appeals Tribunal Act 1983*). It was contended the penalty is excessive given the compliance and in a comparative with statutory equivalent penalties under the relevant Acts for similar offences (s 41(4) of the *Harness Racing Act 2009* and s 16A(2) of the *Racing Appeals Tribunal Act 1983*).
- 51 However, the appellant was not charged under either of the particular rules relied upon above. Rule 256(3) acknowledges, had Mr Vallender been charged under either of those sections, then the penalty would be that imposed under the relevant section's terms. In charging the appellant with an offence under r 187, the appellant was informed before the breach as to the seriousness of the offence in the circumstances. Further, there was no constraint as to penalty in the section or the rule's terms.

- 52 The appellant next contended, as to penalty, that his "warning off" from any activities relating to the conduct of harness racing in NSW is excessive particularly in the circumstance where he has produced (by 12 September 2011) all the telephone records requested of him in accordance with the directive issued by HRNSW on 9 August 2011. He contends all of the records were not made available to him prior to that date. However, the Tribunal does not accept this has been a warning off for a "minor offence" as contended by the appellant. The offence was on the evidence not just a breach of the rules but the frustration of an investigation.
- 53 The following facts, it was contended, also establishes the need for mitigation of penalty:
- Mr Vallender's failure to produce should be considered in the context of the misleading legal advice he received.
 - Mr Vallender attempted, through solicitors, to reach a compromise with HRNSW.
 - Mr Vallender has long since produced the relevant records.
- 54 The appellant asks the Tribunal to give mitigation of penalty in a circumstance where Mr Vallender acted upon misguided legal advice. From a reading of the correspondence from Mr Vallender's solicitors, I reject the proposition proffered by the appellant's counsel that Mr Vallender was, throughout the relevant period, trying to reach a mutual agreement with HRNSW with the intention of complying with the direction. Mr Vallender can gain no comfort from the fact he received misleading legal advice. In the context of the solicitor's correspondence, Mr Vallender was giving clear instructions to them that he did not accept he was, under the Rules, obliged to comply with the direction.
- 55 The assessment of the applicable penalty in this matter was made by HRNSW on a recommendation of the Stewards. "Warning off" is referred to in the "Dictionary" section of Rules as:

... a decision or penalty prohibiting a person from entering any racecourse or place under the control of a club or the Controlling Body and a person 'warned off' shall be subject to the same prohibitions as a disqualified person mentioned in rule 259 sub rule (1).

- 56 "Warning off" is a penalty of significant tradition in the disciplinary aspect of racing. In the appeal of *Clarke, Gough, Hines, McCoy, R W Waterhouse and W S Waterhouse* (1 February 1985) (the "*Fine Cotton*" matter), his Honour Judge A J Goran QC considered the use of the power to "warn off" (at 111):

... The matter was dealt with by Scrutton, L.J., in *Cookson v. Earl of Harewood*, 1932 (2) K.B., 478 at p.483. In that case, which dealt with a plaintiff suing for defamation because he had been "warned-off Newmarket Heath", he was said by the learned Judge to be able to claim that the words meant "undesirable on the turf and unfit to associate with the gentlemen of the turf".

The ability to warn-off is a necessary part of the control of racing. It is a protective power rather than a punitive power. It is meant to protect racing from undesirable persons, such as cheats and frauds. Race controllers recognize that they may well fall prey to people of this kind, indeed as the Committee of the Australian Jockey Club recognized in the present cases, and it is necessary for them to be able to use preventative measures in order that racing should not continue to be exploited by such people with their fraudulent practices.

...

His Honour went on to say (at 112 - 113):

... However, on the order for warning-off an alteration of the order goes to the root of the whole proceeding brought against each of the appellants. It was a fundamental element of the proceedings before the Committee in each case that if he failed to show cause, that is, as the matter was fought out, if the evidence showed on the balance of probabilities that he was guilty, he must inevitably be warned-off.

Thus any move by this Tribunal to substitute a penalty other than warning-off, such as disqualification or suspension,

would be most inept. It would really be an attempt by the Tribunal to impose a penalty available under the Rules of Racing as a punishment upon an appellant who had been found guilty in an entirely different proceeding, where he was being kept away from racing as a protection for racing itself.

Thus there can be no question of the Tribunal interfering with the order to warn-off in any case before it, even though such order contains the punitive effect of an order to disqualify.

...

- 57 The "warning off" penalty is, therefore, available in the use of the discretion of HRNSW in a particular and serious circumstance. Mr Vallender, through correspondence, was warned of the serious frustration to the investigation if he failed to produce within the stated deadline (see letter from HRNSW 16 August 2011). He was also further informed in a letter from HRNSW dated 26 August 2011:

... your client's failure to produce documents within the prescribed time; and now, his further ongoing refusal to provide documents either adequately or at all, has caused significant prejudice to an ongoing investigation which involves issues of the utmost seriousness. One example of that prejudice is that the delay occasioned in this aspect of the investigation has meant that HRNSW has been frustrated in its attempt to retrieve relevant closed circuit television footage from betting outlets and other places within the necessary time frame. Your client's conduct in delaying or withholding the provision of records is therefore already seriously prejudiced the investigation.

- 58 In such a particular circumstance, a warning off was not, therefore, an excessive use of the provision.

- 59 However, the circumstances have now changed. Mr Vallender has now complied with the directive by way of full production of his telephone records on 12 September 2011. The information required was revealed, in evidence, to cover some 60 pages of telephone records.

- 60 He has now been warned off for over two and a half months. The evidence has revealed Mr Vallender has a significant investment in the harness

racing industry. I have no doubt there has been, through the warning off, a significant effect on his harness racing activities. He has been negotiating with the racing authority to dispose of some of that investment by way of an agreed arrangement. Evidence also revealed harness racing is not his sole source of income. Mr Vallender emphasised this fact.

61 Further, evidence before me from the Regulatory Manager, who initially conducted the inquiry and who is continuing to investigate for HRNSW, is that Mr Vallender is now a "person of interest" in that investigation. Given that evidence it is necessary to respect HRNSW's obligation to control and protect harness racing in NSW. To have effective control it must be able to use its "warning off" protective power.

62 In its consideration of penalty for a breach, the Tribunal has the following powers under s 17A of the *Racing Appeals Tribunal Act 1983*:

17A Determination of appeals relating to greyhound racing or harness racing

(1) The Tribunal may do any of the following in respect of an appeal under section 15A or 15B:

- (a) dismiss the appeal,
- (b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the steward, club or GRNSW or HRNSW (as the case requires),
- (c) make such other order in relation to the disposal of the appeal as the Tribunal thinks fit.

(2) the decision of the Tribunal is final and is taken to be a decision of the person or body whose decision is the subject of the appeal.

63 HRNSW, in giving the "warning off", did not order a limitation to be placed on the period of "warning off". The penalty was issued in the following way by HRNSW:

You are hereby warned off pursuant to Rule 256(d) until such time as you seek reinstatement from the Board of HRNSW.

It has been the view of the parties under the Rules that, if an appeal is on foot, no application could be lodged by Mr Vallender to HRNSW for such a review. That view of the effect of the Rules has not been litigated before me but may be open to argument. However, it explains why Mr Vallender has made no application for a review following his production of telephone records.

64 The circumstances before me do not establish Mr Vallender is corrupt. Apart from the subject offence, Mr Vallender has no adverse record in harness racing. Further, HRNSW published on its website that this appeal was "dismissed". That is not a true reflection of the proceedings where the Tribunal was part heard and had simply held the offence was established. In that context, Mr P R Callaghan SC, representing HRNSW, has accepted there was error and agreed it would be immediately rectified.

65 In determining penalty, the appellant submitted, a caution could be warranted but opposed any referral back to the controlling body, HRNSW, contending the Tribunal would be concerned from the HRNSW submissions (which proposed a three year limit to the warning off then finally a referral back to HRNSW) which could indicate to the Tribunal an existing attitude held by HRNSW against Mr Vallender's interest.

66 Goran J in the *Fine Cotton* matter (at 116) expressed the view it is the Committee (in this case, the controlling body of HRNSW) with:

"its Stewards and its knowledge of the industry"

who should make the assessment as to re-admission:

"[i]t will also know the state of the industry at the time, and any danger that exists of its being affected by the presence within the sport of the applicant before it".

- 67 Harness Racing NSW began to conduct an investigation into the integrity of the harness racing industry in NSW. It has now identified Mr Vallender as a "person of interest" in that investigation. By his acts Mr Vallender frustrated this most important of investigations and breached rules of HRNSW. I accept the warning off was not an excessive penalty.
- 68 I adopt the power of the Tribunal under s 17A(c) of the *Racing Appeals Tribunal Act 1983* and refer the matter back to the Board of HRNSW with the comment the "warning off" period served and continuing to be served is sufficient in the circumstance for the offence of the failure to produce documents and its effect in frustrating the investigation. The Board of HRNSW should reconvene, as a matter of urgency, to re-consider its "warning off" decision and the possible reinstatement of Mr Vallender. The question as to whether Mr Vallender is still a "person of interest" such as to require a continuum of the warning off is a matter for HRNSW and such a determination must be made in accordance with HRNSW powers under the rules which acknowledge its protective obligations.
- 69 Harness Racing NSW asks for costs. Goran J, in the *Fine Cotton* matter, addressed the question of costs in an application from Racing NSW as follows (at 121 - 122):

This is not to be regarded as an ordinary tribunal. It is more in the nature of an industrial tribunal. Of course, it is a sporting tribunal, but most of the people who are likely to appear before it on appeal are participants in the industry, whether as trainers, jockeys, bookmakers, clerks and the like. Some of these have no great wealth at their disposal; others may barely make a living. The Tribunal will be dealing largely with the livelihood of these persons. It appears to me to be most inappropriate that such people, having been affected by an adverse decision of the Committee, which deprives them at least in part of their livelihood, and having been given the chance by the Government of testing that decision on appeal, should be deterred from appealing by the fear that, if they are unsuccessful, they will face a large bill of costs.

It must be realised that under Clause 11 of the Regulation the Tribunal cannot hear an appeal ex parte unless the Committee consents. Thus, whenever it chooses, the Committee may appear and, if the Committee applies to the Tribunal to be represented by a solicitor, barrister or agent, at the hearing the Tribunal may grant leave to the Committee for such representation. It would be most unusual for the Tribunal to attempt to refuse representation to the Committee, since the question would then be asked: Who is to appear?

In short, my view is that no costs should be awarded unless in special circumstances, so that an appellant should regard this Tribunal as his or her own tribunal, to be approached if the appellant has suffered any of the penalties outlined in Clause 13 of the Regulation.

However, special circumstances will exist if there is a frivolous or vexatious appeal, or a party causes unreasonable delay or expense. In such a case this Tribunal will not hesitate to award costs in favour of the Committee as against the appellant.

70 I have accepted that Mr Vallender has frustrated an investigation being conducted by HRNSW by refusing to produce his telephone records. He was given a most serious penalty - a "warning off". No limitation has been placed upon that most serious of penalties. His activities in the harness racing industry have also been frustrated by that order. He finally, perhaps upon acknowledgement of wise advice, complied and produced his telephone records. However, he was entitled to test the validity of the Rules and whether those rules obliged him to comply and as well the severity of the sentence and, on the latter issue, he has been partly successful. I do not find Mr Vallender pursued a frivolous or vexatious appeal.

71 The Tribunal, therefore, makes no determination as to costs.

72 Therefore, the Tribunal determines:

1. The offence is proven.
2. Mr Vallender, as a registered owner within HRNSW, is referred back to the Board of Harness Racing NSW for its re-consideration as to his "warning off".