Medico Legal Society of Victoria

Colour and Movement: Justice on the Racecourse

Justice Anthony Cavanough

13 November 2010

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1 A little over 30 years ago the Victorian Bar organised a "Meet the Judges" function for new barristers. One of the new barristers who went along was introduced to a senior County Court judge, with a very Irish name. He knew what to say:

> "Will I see you at Flemington tomorrow, Judge?"

His Honour replied:

> "It is my considered opinion that race tracks are full of pickpockets, pimps, urgers, ne'er-do-wells and touts."

Not a good start, but the barrister recovered well, still goes to the races and is now a leading Common Law silk.

2 According to Damon Runyon, whose short stories inspired "Guys and Dolls":

> "A tout is a guy who goes around a race track giving out tips on the races, if he can find anybody who will listen to his tips, especially suckers, and a tout is nearly always broke. If he is not broke, he is by no means a tout, but a handicapper, and is respected by one and all including the [racetrack detectives] for knowing so much about the races."[1]

3 I must confess that my attitude is closer to Damon Runyon's than to that of the former County Court judge. Students of breeding might see some inevitability in that. If my paternal grandfather was ever asked his age he would say he was born in Carbine's year (1890, of course). As for my father, I started going to the races with him when I was four years old.

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1 From 'Pick the Winner' in *Runyon on Broadway* (1954).

He was not only a part-time racing writer but, in his earlier years, a part-time bookie's clerk, occupations he managed to sustain alongside his day job as a bank officer. On the dam's side, my mother's brother, Uncle Vic, just loved the races.

4 I went to a school, St Bede's in Mentone, where nearly everyone was interested in racing one way or another. Not many of the families could afford to own horses, but there were trainers' sons and jockeys' sons and even the son of the Chief Steward. Needless to say, all classes stopped for the Melbourne Cup every year.

5 So as you can imagine I was pleased that in 1977 – the year Gold and Black gave Bart Cummings his sixth Melbourne Cup, beating Reckless who had been trained by Phar Lap's strapper, Tommy Woodcock – the Monash Law School kindly allowed me to combine undergraduate study and pleasure by doing my research paper on the topic "The 'Judicial System' of the Victoria Racing Club". It was essentially a thesis in administrative law; a study of the application of the principles of judicial review to the decisions of Victorian racing tribunals on disciplinary matters.

6 I thought I should include in the introduction to the research paper some justification for selecting the topic. Perhaps that was unduly cautious. Judy Bourke, whose father Brian Bourke is a doyen of the criminal law in Victoria, now teaches 'Racing Law' as a (respectable) optional subject at Melbourne University Law School.

7 Anyway, I pointed to the vast size and social significance of the horse racing industry in Australia. Even at that time, in Victoria alone, over 25,000 people depended solely or partly on racing for their livelihood. Beyond that, racing had always been (as it still is) a substantial part of Australian culture. Australia, despite its small population, had then and

still has more racecourses than any other country in the world. It is second to the United States in the number of horses starting in races each year and third, after the US and Japan, for the amount of prize money that is distributed annually.

8 Not only my old school but the whole nation and most of New Zealand stops for five minutes on the first Tuesday in November to watch or listen to the running of the Melbourne Cup. Victoria was the first state in the world to declare a public holiday for a horse race. When I wrote my paper, Victorians alone bet over half a billion dollars per year on Victorian racing. Despite the competition now from poker machines and so many other forms of gambling, about $12 billion is now wagered annually with legal bookmakers and TABs on thoroughbred horseracing in Australia, and a substantial proportion of that is bet on Victorian races alone. The new phenomenon of the Betfair betting exchange is additional.

9 The current controlling body of thoroughbred racing in Victoria, Racing Victoria Limited, rightly boasts that the contribution that the racing industry and its major events make to the Victorian and national economy is substantial. A published expert study shows that the 2009 Spring Racing Carnival alone contributed nearly $515 million in gross economic benefit to the Victorian economy.[2] We have just witnessed yet another fabulous Melbourne Spring Racing Carnival. We did get a bit wet especially on Derby Day and Cup Day but at the end of a 15 year drought spirits were little dampened by that.

10 People came from all over the world as they usually do to be part of our Spring Carnival. Sheik Mohammed himself came to watch the horses from his enormous Darley operation first hand. His competitors from

2 IER Pty Ltd, *2009 Spring Racing Carnival Economic Impact Study*, Racing Victoria Limited <http://www.racingvictoria.net.au/p_economic_benefit_study.aspx>.

Coolmore were here too. Dermot Weld, the great Irish trainer who began the foreign invasion in earnest with Vintage Crop in 1993, was here again with Profound Beauty. Luca Cumani, the wonderful Anglo Italian trainer, tried again without luck. We had the marvellous stories of Bart Cummings, and So You Think, and the French horse Americain, who took the 150th Cup, and Black Caviar, the fastest sprinter in the world. Jim McGrath, the famous BBC race caller with the golden tonsils and an encyclopaedic knowledge of racing around the world, was here as well. Allowing for the caution of punters on wet tracks, betting turnover apparently remained high throughout the Spring Carnival.

11 So it seems to me that, generally speaking, the industry in Victoria must be doing things very well; and that includes matters of integrity. Although wet tracks will discourage punters a little bit, a perception that races are not being run honestly will soon destroy interest completely. And that is certainly not the case in Victoria, despite the colourful tales that can always be heard on racecourses, such as the well-known story that one of the leading jumps riders of the 1960s would sometimes tell his fellow riders during a race to give him room because he was going to get off at the next jump, and would. Of course, constant vigilance remains necessary, particularly in relation to the development of any new equine drugs.

12 The second main justification which I gave for selecting the topic of my research paper in 1977 was the legally interesting way in which Victorian racing was governed at that time, effectively by a private club, the Victoria Racing Club.[3] The controlling bodies of organised sports acquire their authority more often by accident than by design. One group of participants singles out as the most enthusiastic and competent to control the sport as a whole and the rest are generally glad to accept

[3] The following account of the historical circumstances, insofar as it takes the story to 1977, represents an edited version of Chapter I of my research paper.

some direction from them. Only when a sport becomes very dangerous or very lucrative does the government take an interest. This was the pattern with horse racing all over the world, including Victoria. I included in my research paper my father's account in his book of the foundation of the Victoria Racing Club, as follows:

> "The year 1864 was a fateful one for racing in Victoria. At the turn of the year, the sport was in a sorry state and it seemed a possibility that racing in Melbourne would die for want of organised control. Fortunately 25 men had sufficient interest in racing, and faith in the sport's future, to form a new club – the Victoria Racing Club. They subscribed £1800 which was enough to pay off the liabilities of their predecessors and leave a balance to finance the autumn program."

13 With general recognition of the need for firm control, the VRC quickly established itself as the unchallenged leader of Melbourne racing. The club took charge of Flemington Racecourse from the trustees in which it had been vested by Crown Grant, and spent considerable sums improving it, and Flemington became the leading track in Victoria. In 1871, the colonial government recognised the club's work by a private Act, the *Victoria Racing Club Act 1871*. That Act was only repealed in 2006 by the *Victoria Racing Club Act 2006*. Under the 1871 Act the Flemington Racecourse was vested in the Chairman of the Club and his successors in trust for the Club, to be used only as a public racecourse, and the Committee was empowered to make bylaws regulating the admission and expulsion of members of the club and providing for all matters connected with Flemington Racecourse, including all races and race meetings. Any such bylaws were to be advertised and were subject to disallowance or repeal by the Governor-in-Council. The Act gave the club power to make (in effect) "rules of racing", through the bylaw procedure, to cover meetings at Flemington only. However the club

never used that power. In *Meyers v Casey*[4] Isaacs J questioned the legality of any "rules", purporting to affect race meetings at Flemington, made otherwise than in accordance with the bylaw procedure. Nevertheless the VRC always relied on its published "rules of racing", which, although unsupported by the Act, purported to cover not only Flemington racing but all racing in Victoria. Clearly, the club was not empowered *by the private Act itself* to make general "rules of racing" by the bylaw procedure or in any other way. But no-one ever took the by-law point against the VRC in all of the years in which it controlled racing in Victoria. With the repeal of the private Act the point is no longer even a possible goer.

14 Over the latter part of the 19th century, the VRC became recognised nationally as the "principal club" for Victoria. It rules were modelled on the rules of the Jockey Club in England, with adaptations to meet local requirements. For the sake of convenience and uniformity, every other not-for-profit racing club in the State adopted the VRC rules and agreed to be bound by them. The VRC required that every jockey, trainer, stable hand and horse participating in racing under its control be licensed or registered and take no part in any unregulated race meeting. Each State had its own principal club controlling racing in much the same way. This pattern of control still exists in substance in Australia and in many other countries where racing is conducted.

15 As the sport grew and interstate transport of horses became more frequent, the need for a national code became apparent. The principal clubs decided to get together and in about 1920 framed the Australian rules of racing which consolidated matters of common concern. In its home state, a principal club may adopt local rules that are not inconsistent with Australian rules, to meet local circumstances, but the

4 (1913) 17 CLR 90, 109–110.

Australian rules are generally paramount. In Victoria the Australian rules and the local rules are published together as the "Rules of Racing of the Victoria Racing Club". The rules are expressed to extend to any person "who takes part in any matter coming within the rules".[5] It is well established in law that the rules, to the extent that they are valid, bind all persons who agree or consent to be bound by them, such as licensed trainers and jockeys, registered stable hands and owners who enter their horses in races.

16 It was not until about 1929 that the VRC in fact could control all thoroughbred racing in Victoria. For many years, private individuals and proprietary interests had conducted race meetings in opposition to the meetings registered and conducted under VRC rules. Only non-proprietary (not-for-profit) clubs were approved by the VRC to hold meetings under the rules. Any participants, human or equine, in unregistered racing were *ipso facto* disqualified from participating in registered meetings, but this rule did not prevent proprietary racing from flourishing in the suburbs of early 20th century Melbourne. However, in 1929, the State Government sought fit to abolish proprietary racing, and to place all racing firmly under VRC control.

17 The *Police Offences (Race-Meetings) Act 1929* introduced a licensing scheme which, in its essentials, still regulates racing in Victoria. The scheme is now contained in the *Racing Act 1958*, the main difference being that in 2001, under pressure from the State Government, the controlling body ceased to be the VRC and commenced to be Racing Victoria Limited, a company limited by guarantee the members of which are the VRC, the Melbourne Racing Club, the Moonee Valley Racing Club and the Country Racing Council. The directors of Racing Victoria Limited are appointed under a process designed to ensure their

5 Australian Rule 2; Local Rule 3.

independence from political or sectional interests. At no time has the legislation directly empowered the VRC or Racing Victoria Limited to govern racing, but the legislation so recognised the defacto position of the Club (and now of Racing Victoria Limited) as to render it quite secure. The key provision is still s 6 of the *Racing Act 1958* which, so far as relevant to thoroughbred racing, provides:

> "(1) Unless this part otherwise provides, a race meeting for horse racing … may only be held –
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> (a) on a racecourse licensed under s 24 … ; and
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> (b) in accordance with the rules for the time being in force of Racing Victoria … ."

18 The effect of this provision is that no race meeting may be held in Victoria unless the body holding it agrees to be bound by the rules of racing. The rules in turn require that both racing clubs and race meetings be registered with the controlling body. To gain registration the club must agree to be bound by the rules. Section 23 of the *Racing Act* imposes a criminal penalty for the holding of a race meeting in contravention of the Act. The authority of Racing Victoria is further recognised in s 14B of the *Racing Act 1958* which provides that the dates and times for horse race meetings are such dates and times as are fixed by and under the rules for the time being in force of Racing Victoria.

19 Racing Victoria is not the sole authority in Victorian racing. The Act allots certain administrative functions to the Minister and in practice Racing Victoria maintains close contact with the Minister and his department. However, the day to day administration of racing is left almost entirely to Racing Victoria.

20 To sum up so far, the power of the controlling body was not statutorily conferred but is statutorily protected. This may be contrasted with the

regulation by the same Act[6] of harness racing and greyhound racing, whereby bodies created by the Act have for many years been invested directly with rule-making powers. I will come shortly to what this may mean in terms of the power of the controlling body of thoroughbred racing to deal with individuals who are not licensed or registered persons such as jockeys, trainers and stable hands and who have not otherwise consented to be bound by the rules, but let me remind you first that for many decades the sharp end of power in Victorian racing was in the hands of the committee and the stewards of the VRC. Until 1983 there was no statutory right of appeal nor any statutory tribunal to which to appeal.

21 In those simpler days a dream brief arrived for me in my second year at the Bar. It was to appear for a jockey before the VRC Committee in the famous Ararat Cup Inquiry. Some days after the running of the Ararat Cup in 1981 an allegation had been made to the VRC that all had not been above board in the running of the race. In fact it was alleged that it was, in racing terminology, a boat race, that is to say that only one horse was trying. Under the rules as they were at the time, the stewards had no jurisdiction because the allegation only surfaced after the day of the race. So the matter was the subject of a formal inquiry in front of the full committee of the Victoria Racing Club. There were about eight horses in the race and all of the jockeys and most of the trainers were alleged to be in on the sting. They all needed legal representation. There were fifteen counsel at the makeshift Bar table counting both silks and juniors. I was brought in as junior counsel to Ray Lopez for our jockey. I think I was only briefed because Ray Lopez had never been on a racecourse in his life whereas that could not be said of me. We did not start off too auspiciously. We decided that for Ray's education I should take him to a race meeting before the hearing started. We went out to Moonee Valley

6 The *Racing Act 1958*.

and in the stabling area noticed one of our client's co-accused, who had a common interest. We went over to say hello only to have him tell us that he was not the co-accused but his twin brother and that he sincerely hoped we would show a bit more acumen when the hearing got started.

22 After the hearing did get going the crucial moment arrived when they were going to show the film of the race. This involved lowering the lights in the room, of course. Well I wouldn't like to say that any of the members of the committee had already made up their mind before the evidence was finished but my learned leader happened to notice as the lights were going down that one of the committeemen, someone who loved a cigarette, was heading for the exit. Ray called out something like: "So and so is not quite ready". The committeeman resumed his seat and the film was shown. Later about half of the defendants were found guilty, not including our client, I am happy to say. Then the power of administrative law took over. Cliff Pannam QC and Neil Young drew a writ on behalf of their convicted client alleging that one of the committeemen (not our smoker) had had a private conversation with one of the chief witnesses without disclosing it to the hearing. As soon as the writ was served the VRC agreed that all penalties would be quashed and no further steps would be taken.

23 Whether it was that rather shambolic affair that led to the creation in 1983, under the *Racing Act,* of the Racing Appeals Tribunal I cannot say, but thereafter racing justice, at least at an appellate level, was competently and efficiently administered by the several experienced County Court judges who were appointed to the Racing Appeals Tribunal.

24 At first instance or trial level, until about 2004, the stewards reigned supreme in relation to nearly all racing offences in Victoria. For decades they had acted as investigators, witnesses, prosecutors and judges in the

one cause. This practice, which was common under rules of racing both in Australia and overseas, was recognised and approved by Adam J in *R v Brewer ex parte Renzella*[7] in 1973. That judgment in turn was approved by Justice Gray in *Sellen v Victorian Amateur Turf Club*[8] who said:

> "What emerges from the judgment of Adam J is that a person who voluntarily submits to the rules of racing must accept that transgressions alleged against him will be dealt with in accordance with the long standing practice of stewards, which is authorised by the rule. Racing is a sport in which sharp practice is not unknown. The stewards have the unenviable duty of endeavouring to ensure that the sport is conducted fairly. Prompt action will often be required. Inquiries will have to be undertaken in circumstances of urgency. In such cases, adhering to legal niceties is likely to prove an impediment to the attainment of justice. If, in a particular case, an injustice stems from the special nature of the inquiry, a right to a full re-hearing before an independent tribunal is provided by law."

25 The Full Court dismissed an appeal from Justice Gray's judgment in *Sellen* on 5 October 1989. These matters were all noticed by Justice Balmford in *Riley v Racing Appeals Tribunal*[9] in 2001 in which her Honour followed and applied the observations in *Renzella* and *Sellen*.

26 However, in about 2004, notwithstanding that until that time, in Victoria and throughout the racing world, the attitude of the courts to the rules of racing and to the stewards system had remained mostly quite deferential, Racing Victoria decided to amend its rules very significantly so as to deprive the stewards of jurisdiction to hear and determine any "serious offence" as that term was defined in the amended rules. The definition covered virtually all offences of dishonesty or serious impropriety. The stewards could continue to investigate and to give evidence, including evidence of their own observations, in all cases,

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7 (1970) 3 VR 375.
8 Unreported, Supreme Court of Victoria, Gray J, 15 June 1988.
9 [2001] VSC 259.

including serious offences, but they were required to bring any "serious offence" charges before a body newly created by the Rules of Racing called the Racing Appeals and Disciplinary Board ("RAD Board"). The *Racing Act* was amended to give the Racing Appeals Tribunal jurisdiction to hear appeals form the RAD Board. The Board has operated very fairly and very efficiently since its creation. It has been chaired for much of its life by a retired County Court judge, Judge Russell Lewis, together with some fourteen other part time or sessional independent members. So successful was the new quasi-judicial structure that applications to the Supreme Court for judicial review in thoroughbred racing disciplinary cases fell away to virtually nothing.

27 In 2007, however, some problems emerged. It was discovered by staff of the Integrity Department of Racing Victoria that their superior, the CEO of the organisation, had been making bets under an assumed name. This led to a scandal and in turn to a broad ranging independent inquiry headed by Judge Gordon Lewis of the County Court. His Honour's report was published on 1 August 2008. Written in his Honour's trademark punchy style, it hit the headlines and caused quite some alarm. The inquiry had ranged across all three racing codes — thoroughbreds, harness racing and greyhound racing. The matter of the CEO of Racing Victoria was seen to be isolated and not particularly sinister. But Judge Lewis expressed himself to be convinced by an anonymised Australian Crime Commission Report that "criminal activity in the industry was rampant". The main concern identified was the potential for money laundering, rather than any real indication of widespread dishonest running of horses. Among 63 recommendations, his Honour called for more focussed police involvement and recommended the establishment of a Racing Integrity Commissioner to supervise and monitor integrity assurance activities across the three codes and to encourage appropriate cooperation and liaison. On the

other hand Judge Lewis was very impressed with the existing RAD Board and recommended that it be extended to the other codes. He noted that bookmakers' discipline was differently administered, with an appeal lying to the Victorian Civil and Administrative Tribunal (VCAT). Largely for the sake of uniformity and to relieve pressure on the County Court he recommended that the Racing Appeals Tribunal be abolished and its functions and jurisdiction be placed with VCAT also.

28 Most of the recommendations of the Lewis report have been accepted and implemented. By amendments to the *Racing Act* made in 2009 the office of Racing Integrity Commissioner was established and the Racing Appeals Tribunal was abolished and its jurisdiction to hear appeals from the RAD Board was conferred on VCAT.

29 The first and as far as I know the only decision of VCAT in this new jurisdiction is *Clements v Racing Victoria Limited*[10]. The decision was given on 30 July 2010 and the time for any appeal has now long expired, so I feel that I can make some observations about it. It raised acutely a legal question to which I had devoted a fair part of my University research paper, namely the question whether the controlling body of Victorian racing could validly impose penalties or sanctions on individuals who were not licensed or registered with the controlling body and who had not otherwise expressly or impliedly consented to be bound by the rules of racing. That was the situation of Mr Clements, according to the Tribunal's findings. The stewards had charged Mr Clements with a breach of Rule 8 of the *Australian Rules of Racing*, which purports to empower stewards "to require and obtain production and take possession of any mobile phones, computers, electronic devices, books, documents and records, including any telephone or financial records relating to any meeting or inquiry". Mr Clements had

10 [2010] VCAT 1144.

been directed to provide his telephone records for a period in connection with a stewards' inquiry into a series of losing rides by a licensed jockey, D. Nikolic. Mr Clements was alleged to have been in contact with the jockey shortly before each of the rides in question and to have laid each of the horses to lose on the Betfair betting exchange, sometimes for amounts in excess of his usual bets. Mr Clements refused to produce the records requested, asserting that the authorities had no legal basis to demand the production of them, and relied on a concern for his privacy and the privacy of others. He was charged with a breach of Australian Rule 175(p)which provides that the stewards may penalise:

> "(p) Any person who fails or refuses to comply with any order, direction or requirement of the stewards or any official."

30 The RAD Board found Mr Clements guilty as charged. Its decision was to 'warn off' Mr Clements indefinitely. Warning off is a well established sanction in racing world-wide. It is equivalent to disqualification of a licensed person. The intent is that the warned-off person may not enter any racecourse during a race meeting. Further, there are rules requiring licensed and registered persons and legal bookmakers not to do any racing-related business with the warned off person. Local disqualifications and warnings-off are recognised and enforced interstate and internationally pursuant to standing agreements and arrangements between racing authorities.

31 Mr Clements appealed to VCAT, which was constituted by the President, Justice Ross, retired County Court Judge John Nixon (a former member of the Racing Appeals Tribunal) and Senior Member Reigler. The appeal was allowed, on the basis that Mr Clements was not subject to the rules of racing for the purposes of the hearing of the charge. The VCAT panel described him as a member of the public, albeit one who derives income from racing: in the vernacular, a professional punter. It had been

conceded by Racing Victoria that the *Racing Act 1958* did not give the rules statutory force in their own right. It was also accepted that Mr Clements had not agreed to be bound by the rules, either expressly or by implication, and that he had not submitted to the jurisdiction of the stewards or of the RAD Board. VCAT proceeded on the basis that the stewards and the Board were to be regarded as domestic tribunals; and it held that the disciplinary powers of domestic tribunals could be derived only from contract or consent.

32 VCAT discussed an extensive range of Australian and overseas authorities. Strikingly, it declined to follow a decision of the Privy Council given in 1937 in an appeal from NSW, namely *Stephen v Naylor*,[11] which for some 70 years has generally been taken as authority for the proposition that, even in the absence of statutory backing, contract or consent, rules of racing may validly authorise officials to disqualify or warn off any person whose activities have brought him or her within the purview of the rules of racing. Later cases have qualified this to the extent that the power should only be exercised for due cause, on proper notice and after a proper hearing.

33 It seems clear enough that punishments such as fines under the rules of racing cannot be enforced in court against a person who has not contracted or consented to be bound by the rules under which they were imposed. Further, it might have been possible in *Clements* to read down the particular rule allegedly breached by Mr Clements so as to make it inapplicable to a person in his position.

34 But VCAT went beyond this. It appears to have determined that neither Racing Victoria nor the stewards nor the RAD Board can warn off or disqualify or take any other action against a person who has not expressly or impliedly consented to be bound by the rules. Such a view

11 (1937) 37 SR (NSW) 127.

seems to imply that the authorities could not warn off or disqualify even a person whose proven or admitted conduct would clearly render the person unfit or undesirable to be associated with racing. Insofar as this was VCAT's approach, it preferred the reasoning of the Full Court of British Guiana in *Demerara Turf Club v Phang*[12] to the reasoning of the Privy Council in *Stephen v Naylor.* Further, VCAT noted that in *R v Disciplinary Committee of the Jockey Club Ex parte Aga Khan*[13] the English Court of Appeal held that a particular disciplinary decision of the Jockey Club affecting a licensed trainer and the owner of a registered horse was not subject to judicial review as a matter of public law, because the Jockey Club was a private body and the relationship between the parties concerned was contractual.[14] VCAT considered that this supported the view it adopted about racing authorities' powers over unlicensed persons. VCAT also considered that its view was supported by the principle of legality.

35 VCAT recognised the importance to the general public of the disciplinary functions exercised by the stewards and the Board; and recognised that VCAT's ruling may leave a regulatory gap. However it took the view that this was a matter for the legislature to attend to.[15]

36 VCAT's decision could have implications for various other professional sports. It remains to be seen whether VCAT's approach represents the last word on this matter. It may be that in some future case it will be necessary to consider closely the distinction between the question whether disciplinary racing decisions are judicially reviewable and the question whether racing authorities do or do not have power to warn off or disqualify "strangers". In that regard and more generally, it may be

12 (1961) 3 WIR 454.
13 (1993) 1 WLR 909.
14 See, generally, *D'Souza v Royal Australian and New Zealand College of Psychiatrists* [2005] 12 VR 42.
15 It should also be noted that since 2005 the Chief Commissioner of Police has had power under Division 5 of Part I of the *Racing Act 1958* to issue "exclusion orders" against persons other than licensed bookmakers and holders of other occupational racing licences.

necessary to pay particular attention to the reasoning and observations of the English Court of Appeal in *R v Disciplinary Committee of the Jockey Club ; Ex parte Aga Khan*[16] and to those of the Australian High Court in *Forbes v NSW Trotting Club Ltd*[17].

37 On the other hand, if it is decided that new legislation is required to plug the perceived regulatory gap, particular attention may need to be given in that regard to the requirements of the *Charter of Human Rights and Responsibilities Act 2006*, not least to s 32 (3)(b) thereof which deals with subordinate instruments in particular.

38 Whatever may be the fate of the reasoning in *Clements* in the future, racing cases have already made a substantial contribution to the development of broad administrative law principles, although these days nothing can compete with migration cases in that regard!

39 Some of you will be familiar with *Russell v Duke of Norfolk*[18], an English case from 1949 concerning the withdrawal by the Jockey Club of Mr Russell's licence to train horses. In that stern post war period a majority of the Court of Appeal construed the rules of the Jockey Club as conferring an unfettered discretion to withdraw a trainer's licence without any inquiry at all; and held that it was therefore impossible to imply a term in the contract that any inquiry that they did hold should be held in accordance with the rules of natural justice. Nevertheless there is a passage in Lord Justice Tucker's judgment which, although strictly obiter, has been quoted time and time again in administrative law cases ever since, both in England and here in Australia. It concerns the flexibility of the requirements of natural justice. His Lordship said:

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16 (1993) 1 WLR 1302, esp 915G–916A (Bingham MR), 928E (Farquharson LJ) and 930H–931C (Hoffman LJ).

17 (1979)143 CLR 242, esp 275 (Murphy J) and 278 (Aickin J, with whom Stephen J agreed).

18 [1949] 1 All ER 109.

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth."[19]

40 Lord Denning dissented on the principal point concerning the effect of the rules. Foreshadowing an approach that was to prevail in numerous later cases, he said that when the stewards of the Jockey Club exercised the power of withdrawing a trainer's licence on the ground of misconduct, they were required to give the trainer an opportunity of defending himself. (In those days it was only males who could be trainers). His Lordship said this:

> "This penalty of disqualification is the most severe penalty that the stewards can inflict. It is the same penalty as that which is imposed on persons guilty of corrupt practices. It disqualifies the trainer from taking any part in racing and thus takes away his livelihood. Common justice requires that before any man is found guilty of an offence carrying such consequences, there should be an inquiry at which he has the opportunity of being heard. It might, perhaps, be possible for the stewards to stipulate expressly for power to condemn a man unheard, but I should doubt it. It may be that such a stipulation would be contrary to public policy. … It is very different from a mere dismissal of a servant or withdrawal of a licence or even expulsion from a club … The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding responsibilities. Howsoever that may be, I find no stipulation here enabling the stewards to act under rule 102 without an inquiry."[20]

41 By 1966 Lord Denning had become Master of the Rolls and was firmly in charge of the Court of Appeal. In *Nagle v Fielden*[21], in refusing to strike

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19 [1949] 1 All ER 109, 118. Cited in, among other leading cases, *Kioa v West* (1985) 150 CLR 550, 612–613 (Brennan J) and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 367 (Deane J).

20 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 119.

21 [1966] 2 QB 633.

out a statement of claim brought against the Jockey Club by a woman who had been refused a trainer's licence, Lord Denning said:[22]

> "The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it, at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it. … But if the rule is reasonable, the courts will not interfere.
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> …
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> In the present case the plaintiff does not seek admission as a member of the Jockey Club. She only applies for a trainer's licence. But this makes no difference. If she is to carry on her trade without stooping to subterfuge she has to have a licence. When an association, who have the governance of a trade, take it upon themselves to license persons to take part in it, then it is at least arguable that they are not at liberty to withdraw a man's licence – and thus put him out of business – without hearing him. Nor can they refuse a man a licence – and thus prevent him from carrying on his business – in their uncontrolled discretion. If they reject him arbitrarily or capriciously, there is ground for thinking that the courts can intervene. …
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> In this case the plaintiff alleges that the stewards of the Jockey Club make a practice of refusing any woman trainer who applies for a licence. She is refused because she is a woman, and for no other reason. The practice is so uniform that it amounts to an unwritten rule. The only way she can get around it is to get her head lad to apply. The licence is granted to him, not to her.
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> It seems to me that this unwritten rule may well be said to be arbitrary and capricious."

42 Florence Nagle got her licence. About 20 years later there was a comparable epic battle in New South Wales between Gai Waterhouse

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22 Ibid, 644–647.

and the Australian Jockey Club before that august institution eventually, reluctantly, gave her a licence to train. As many of you will know, she has not looked back since, despite the vicissitudes that have befallen the larger Waterhouse family over the years.

43 *Nagle v Fielden* has had a broad and long lasting impact. As Cliff Pannam QC points out in the third edition of his book *The Horse and the Law*, an English judge has stated the effect of *Nagle v Fielden* in this way:

> "*Nagle v Fielden* established, in my judgment, that where the rules or regulations of a body with power to control professional sport are restrictive of the ability of professionals within that sport to earn their living from the sport, the doctrine of restraint of trade applies. The restrictive rules or regulations must be franked by passing through the reasonableness gateway."[23]

44 And, as Pannam points out[24], it is well settled now in Australia that the restraint of trade doctrine is not limited in its scope and application to the parties to contracts. It "applies both to persons who are affected by the terms of a contract between others and to any rule or regulation to which they are subject and which affects their interests".[25] In *Buckley v Tutty*[26], the leading High Court case on restraint of trade in professional sport, which was decided in 1971, the High Court expressly followed *Nagle v Fielden*[27].

45 *Stollery v Greyhound Racing Control Board*[28] is a leading High Court decision from 1972 on reasonable apprehension of bias. In that case the manager of a greyhound racing club who was also a member of the Control Board had levelled a complaint of bribery against Mr Stollery.

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23 See *Watson v Prager* [1991] 1 WLR 726, 747 (Scott J), cited in Clifford L Pannam, *The Horse and the Law* (3rd ed, 2004) 221.
24 Ibid.
25 Ibid.
26 (1971) 125 CLR 353.
27 Ibid, 381. But see *Forbes v NSW Trotting Club* (1979) 143 CLR 242, 282 (Aickin J).
28 (1972) 128 CLR 509.

The manager retired with the Board when it was considering its decision, although he took no part in its deliberations. This was held to invalidate the decision. Medical practitioners here this evening might be interested to know that in May this year the Court of Final Appeal for Hong Kong distinguished *Stollery's* case in holding that it was lawful for the legal advisor of the Medical Council of Hong Kong to retire with the Council to provide legal advice in the course of its deliberations and to prepare the first and all subsequent drafts of its decision at a medical disciplinary inquiry.[29]

46 In *Heatley and Tasmanian Racing and Gaming Commission*[30], in 1977, the High Court first gave cautious approval to the notion of legitimate expectation in relation to natural justice. The defendant in that case had a statutory "warning off" power. A majority was prepared to hold that every member of the public had a legitimate expectation of being permitted to enter a public race course on tender of the applicable fee; and that, accordingly, the rules of natural justice were applicable to any proposed exercise of the statutory power. The doctrine of legitimate expectation thereafter had a pretty good run in Australia in cases like *Quin*[31] and *Teoh*,[32] although more recently it hit a fairly high hurdle in *Lam*.[33]

47 There are more racing cases that are of broad general importance. Many of them are discussed in Dr Pannam's book. An example is *Calvin v Carr*[34], a decision of the Privy Council which deals with the question whether the existence of a right of appeal from one domestic tribunal to another (in that case, from the stewards to the Committee of the Sydney-based Australian Jockey Club) can overcome or cure deficiencies such as

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29 *Medical Council of Hong Kong v Helen Chan* [2010] HKCFA 19.
30 (1977) 137 CLR 487.
31 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
32 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
33 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.
34 [1980] AC 574.

lack of procedural fairness at first instance. *Calvin v Carr* was discussed at some length recently by our Court of Appeal in *Garde-Wilson v Legal Services Board*[35].

48 Two leading Australian cases on the vexed question of whether there is a different test of bias for non-statutory tribunals as compared with statutory tribunals are trotting cases, namely *Hall v New South Wales Trotting Club Limited*[36] and *Dale v New South Wales Trotting Club Limited*,[37] and another is a greyhound racing case, *Maloney v NSW National Coursing Association*.[38] These and other cases are discussed by Richard Tracey (now Justice Tracey) in his article 'Bias and Non Statutory Administrative Bodies – A Wrong Turning'[39]. The matter is also discussed, and further racing cases are cited, by Ashley J in *D'Souza v Royal Australian and New Zealand College of Psychiatrists*[40].

49 I shouldn't forget our friends across the Tasman. Racing is very big in New Zealand too. As you know the New Zealanders keep trying to take our Melbourne Cup. They were ahead of us in setting up quasi-judicial structures for dealing with alleged infractions of the rules of racing. And, recently, at the instance of the leading female jockey Lisa Cropp, the Supreme Court of New Zealand has held that the entitlement of the racing authorities to conduct a search or to require the provision of a human sample is subject to scrutiny by reference to the reasonableness requirement in s 21 of the *Bill of Rights Act 1990* (NZ).[41]

50 I have mentioned the vicissitudes of the Waterhouse family. Many of you will remember the famous Fine Cotton saga of 1984. Fine Cotton

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35 [2008] 19 VR 398.
36 [1977] 1 NSWLR 378.
37 [1978] 1 NSWLR 551.
38 [1978] 1 NSWLR 161.
39 (1983) 57 *Australian Law Journal* 80.
40 [2005] 12 VR 42 at 60-61 [120]-[124].
41 *Cropp v Judicial Committee* [2008] 3 NZLR 774. Ultimately, however, Ms Cropp's challenge to the procedures which led to her suspension on drug charges failed.

died last year at the grand old age of 31. The event was written up in detail in the Coffs Coast Advocate[42] because of the horse's links to Coffs Harbour. The story is somewhat comforting to me, because it suggests that attempts at major fraud in connection with the running of races in Australia are uncommon and usually fail. Summarising the Advocate's account, the story went like this:

> It all began when Coffs Harbour jockey Pat Haitana, locked up for a short period in Brisbane's Boggo Road Jail, met small time hustler John 'The Phantom' Gillespie, who claimed he had a fool proof way to make money by substituting a high quality horse for a poorly performed animal in a weak race, then betting up big.
>
> Haitana suggested his brother Hayden — training a small string of horses in Coffs Harbour — was just the man to prepare the plunge horse and within weeks wildcat schemes were turning into reality.
>
> It is one of the great mysteries how the fix progressed as far as it did, given the escalating string of misadventures as the day of the planned 'ring in' approached.
>
> The plotter obtained Fine Cotton early in the piece, but then had difficulty finding a similar looking animal.
>
> They eventually obtained Bold Personality. A stand in strapper was dispatched form Brisbane to Coffs Harbour to pick it up.
>
> But during the six hour float trip north he left the horse wrapped in a heavy duty blanket, ensuring it arrived in Queensland in a distressed state and severely dehydrated .
>
> They next attempted to make the horse look more like Fine Cotton by changing its markings.
>
> Clairol hair colouring failed to do the trick and white wash also proved ineffective.

[42] Published 25 February 2009.

> In desperation, white paint was applied which refused to dry and continued to run as the horse broke out into a severe sweat.[43]
>
> Even as the horse was led out to the start the paint continued to streak its face and drip down onto its hooves.
>
> Once the horses crossed the line and the 'winner' was disqualified the enormous fallout began and has never ceased.[44]
>
> Gillespie and Hayden Haitana and six other people were warned off racecourses for life.
>
> Leviathan bookmakers Bill and Robbie Waterhouse were caught up in the scandal and their story is a saga in itself.

51 There will always be stories of infamous conduct told on racecourses, but in my view, while vigilance is always necessary and some regulatory gaps have recently been perceived, the level of integrity in the actual running of races in Australia, and especially in Victoria, is higher than most non-racing people believe, and our elaborate quasi-judicial system in Victoria has operated very fairly and very successfully. Long may it be so.

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43 I understand that all this was being done in the front garden of a suburban house in Brisbane opposite a police station!

44 "Fine Cotton" had won by a nose.