IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

**No. 163 of 2019**

BETWEEN:

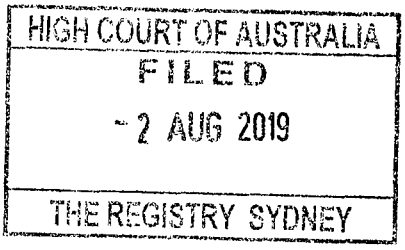
DONNA **GRECH**

Appellant

and

**THE QUEEN**

10 Respondent




# RESPONDENT'S SUBMISSIONS

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**Part I: Internet Certification**

1. These submissions are in a form suitable for publication on the internet.

**Part II: Issues in the Appeal**

2. The issues in the appeal are:

    1. Is it necessary for the Crown to demonstrate error within the meaning of *House v The King* (1936) 55 CLR 499 in order to succeed in an appeal under s. 5F(3A) of the *Criminal Appeal Act* 1912 (NSW) against a decision of a trial judge to exclude evidence under s. 138 of the *Evidence Act* 1995 (NSW)?

    2. Was the Court of Criminal Appeal ("CCA") correct to find error in the decision of the primary judge not to admit into evidence (i) the first recording; and (ii) the search evidence?

    3. If, as the respondent contends, the CCA was correct to find error, did the CCA err its redetermination of the admissibility of (i) the first recording; and (ii) the search evidence?

**Part III: Notice Under s 78B of the *Judiciary Act* 1903**

3. The respondent considers that no notice under s.78B of the *Judiciary Act* 1903 (Cth) is required.

**Part IV: Factual Matters in Contention**

4. The appellant's account in Part V of her submissions ("AS") is not disputed. The following additional facts are also relevant.

5. Further to AS [15], Ms White gave evidence that she believed police would be reluctant to become involved in investigating an anonymous complaint about animal cruelty, and that the RSPCA did not have powers under the *Surveillance Devices Act* 2007 (NSW). In her experience, police would refer animal welfare complaints to the RSPCA. She understood that the RSPCA had a memorandum of understanding with Greyhound Racing NSW ("GRNSW") which meant that any information given to the RSPCA would be shared with GRNSW. She believed that GRNSW was a compromised organisation, such that persons of interest would be "*tipped off*" and that it would fail to take action: CCA [35]-[36]; CAB 62.[1] To Ms White's knowledge live baiting had been rumoured to occur systemically in the greyhound racing industry for decades, however no enforcement body had been able to prove

[1] The judgment of the NSWCCA is reproduced in the Joint Core Appeal Book ("CAB") at 48ff.

and prosecute such offending. These problems had been raised at a NSW parliamentary inquiry[2] of which Ms White had knowledge.[3]

6. Further to AS [16], the RSPCA Chief Inspector O'Shannessy gave evidence that the RSPCA is an animal welfare organisation. It receives referrals from the NSW police relating to alleged animal cruelty.[4] It is a complaints-based organisation which does not have a particular focus upon greyhounds.[5] RSPCA would not accept anonymous complaints, except those relating to organised animal cruelty, such as in this case (CCA [47]; CAB 65). It was not the practice of the RSPCA to refer a complaint of this nature to police.[6] However, the RSPCA would accept the complaint for investigation. That investigation would involve conducting additional enquiries, including liaising with GRNSW.[7] The RSPCA is not empowered to apply for a surveillance device warrant and would not make a request of police to do so based on an anonymous complaint (CCA [89]; CAB 77).[8] The RSPCA may also exercise its powers conferred by s.24G of the *Prevention of Cruelty to Animals Act* 1979 (NSW) which included a power of entry and inspection upon an *"animal trade"* business (CCA [47]; CAB 65). Investigations were not normally kept confidential from GRNSW, but as a result of what Ms White told the meeting on 2 February 2015 about the risk of compromise, the RSPCA did not contact GRNSW on this occasion (CCA [45]; CAB 64).

7. Another RSPCA Inspector, Flett Turner, conducted some investigations into Mr Kadir's property.[9] In the view of Inspector Turner, Mr Kadir's business met the definition of an *"animal trade"*, and was therefore subject to inspection under the aforementioned legislative power.[10] The property was approximately 5 acres in size and included kennels and greyhound training facilities.[11] When the search was carried out, the RSPCA personnel arrived at the premises to discover the front sliding gate closed and locked. Having *"jumped the fence"*,

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[2] *First Report of the Select Committee on Greyhound Racing in NSW* published March 2014.
[3] Statement of Lyn White dated 28 April 2016 at [5], in VD Exhibit 1 (Appellant Grech's Further Materials – "DG AFM" – at 130); VD transcript at p9 (DG AFM 10); Animals Australia letter to RSPCA Chief Inspector dated 2 February 2015, Annexure E to Affidavit of David O'Shannessy sworn 11 November 2016, at p2, in VD Exhibit 1 (DG AFM 162).
[4] Affidavit of David O'Shannessy, sworn 9 June 2017, at [6] (DG AFM 198).
[5] Affidavit of David O'Shannessy, sworn 9 June 2017, at [7]-[13] (DG AFM 199).
[6] VD transcript 63.44-64.47 (DG AFM 64-65).
[7] VD transcript 63.44-64.47 (DG AFM at 64-65).
[8] Section 17(1) of the *Surveillance Devices Act* 2007 (NSW) empowers a "*law enforcement officer*" to apply for a surveillance device warrant. An RSPCA Inspector is not a "*law enforcement officer*" within s.4 of the Act, nor is the RSPCA a "*law enforcement agency*" as relevantly defined by the Act and Regulations.
[9] Statement of RSPCA Inspector Flett Turner dated 21 August 2015, in VD Exhibit 1 (DG AFM 203ff).
[10] Statement of RSPCA Inspector Flett Turner dated 21 August 2015 at [8] (DG AFM at 204).
[11] DG AFM at 207.

they proceeded down the driveway and towards the back of the property before encountering the bullring.[12]

8. An aerial photograph of the property, depicting the relative locations of the public road, the adjoining properties, and the bullring was tendered.[13] The locations where Sarah Lynch had placed the hidden cameras was marked on the Exhibit.[14]

## Part V: Argument

### Outline

9. The appellant contends that the CCA was not entitled to find *House* error in the primary judge's reasoning, and further, that the CCA's determinations under s. 138 consequent upon the finding of error were themselves infected by error.

10. In the proceedings below, the CCA proceeded upon the agreement of the parties that it was necessary to establish *House* error to intervene.[15] This issue has not been determined by this Court.[16] At the special leave hearing, a question was raised as to whether the principles in *House* apply to a s. 5F(3A) appeal against a decision made under s. 138 of the *Evidence Act*.[17] Neither the present appellant, nor her co-appellant Mr Kadir, suggested that there was any unfairness in this Court considering this issue for the first time on appeal.

11. Accordingly, the resolution of the present appeal raises the following issues:

    i. Was it necessary for the CCA to find *House* error?

    ii. If so, was the CCA correct to find *House* error?

    iii. Was there any error in the CCA's determination under s. 138 of the *Evidence Act*?

12. Each of these issues are addressed below. For the reasons outlined below, it is submitted that it was not necessary for the CCA to find *House* error. However, upon the finding of *House* error, the CCA proceeded to redetermine the s. 138 decision afresh pursuant to the power

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[12] Statement of RSPCA Inspector Flett Turner dated 13 February 2015 at [2]-[6].
[13] VD Exhibit 2 (included in the Respondent's Additional Materials – "RFM" – at 169-170).
[14] VD transcript 39.15-40.48 (DG AFM at 40-41).
[15] CCA [69]; CAB 71.
[16] The CCA noted that different views had been expressed in New South Wales as the applicability of *House* to issues under s. 138, referring to *Gedeon v R* [2013] NSWCCA 257 at [174]-[178] and *R v Rapolti* [2016] NSWCCA 264. In Victoria, *House* has been held to apply to a s. 138 decision: *Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, at [47]. However, each of those authorities predated the analysis of this Court as to the application of *House* to "evaluative" decisions in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 92 ALJR 713, which is discussed further below.
[17] *Grech v The Queen; Kadir v The Queen* [2019] HCATrans 106.

conferred by s. 5F(5)(b) of the *Criminal Appeal Act*. There was no error in that redetermination. Accordingly, the appellant's appeal should be dismissed.

13. In the alternative, it is submitted that there was no error in the CCA's finding that the primary judge had committed the *House* errors identified in the CCA judgment. Further, there was no error in the CCA's redetermination of the s. 138 decision to admit the first recording or the search evidence. Accordingly, the appeal should be dismissed.

## The standard of review

### Introduction

14. The determination of which standard of review applies requires consideration of the interaction between two statutory provisions, namely s. 5F(3A) of the *Criminal Appeal Act* and s. 138 of the *Evidence Act*. Each of these provisions is addressed below.

### Section 5F of the *Criminal Appeal Act*

15. It is common ground between the parties that the nature of an appeal under s. 5F(3A) of the *Criminal Appeal Act* is a rehearing, rather than an appeal in the strict sense, or an appeal *de novo*: AS at [44].[18] So much is clear from (i) s. 5F(4), which provides that the appeal is to be determined on the evidence given in the proceedings, but which enables the CCA to grant leave to a party to "*adduce fresh, additional or substituted evidence*";[19] (ii) s. 5F(5) of the *Criminal Appeal Act*, which provides that the CCA may make another order, judgment, decision or ruling "*in place of*" the order, judgment, decision or ruling appealed against; and (iii) the absence of any limitation in the text of s. 5F which would have the effect of confining the appeal to the correction of errors of law alone (cf s. 56 of the *Crimes (Appeal and Review) Act* 2001 (NSW)).[20]

16. Where, as here, an appeal is in the nature of a rehearing, the appellate court must "*give the judgment which in its opinion ought to have been given in the first instance.*"[21] In so doing,

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[18] The different categories of appeal are set out in *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [20], per Gleeson CJ, Gummow and Kirby JJ, citing *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622, per Mason J. See also *R v Ford* [2009] NSWCCA 306; 201 A Crim R 451 at [68]-[72] and the cases cited therein.

[19] See *Dwyer v Calco* [2008] HCA 13; 234 CLR 124 at [2], citing *Fox v Percy* at [20].

[20] Cf also s 5(1) of the *Criminal Appeal Act*, which limits an accused's right of appeal against conviction to grounds which involve a question of law alone, but which provides that the CCA may grant leave to an accused person to appeal on a question of fact alone, or a mixed question of fact and law.

[21] *Fox v Percy* at [23]; *Dearman v Dearman* (1908) 7 CLR 549 at 561, per Isaacs J; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 92 ALJR 713 at [30], per Gageler J (with whom Edelman J relevantly agreed, at [153]).

the appeal court is "*obliged to conduct a real review of the trial and ...* [the trial judge's] *reasons*".[22] Accordingly, unless the appeal is in respect of an issue of procedure or a "*discretionary*" determination then, provided that the appellate court observes the "*natural limitations of the record*" (for example, by giving deference to any findings of fact that are based on the credibility of witnesses),[23] the appellate court "*cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions.*"[24] In such a case, the appellate court is not required to find *House* error in order to intervene.

17. In other words, whilst the appellate court must be satisfied of "error" in the decision of the primary judge,[25] such error will be established where the appellate court forms a different conclusion to the primary judge on the question which is the subject of the appeal. Such a conclusion may result from the giving of more, or less, weight to a relevant consideration; cf AS at [41]. For example, in an interlocutory appeal against a trial judge's determination that specified tendency evidence does not have significant probative value, error will be established where the appellate court considers that the evidence has significant probative value.[26] It is not necessary for the appellate court to be satisfied that the primary judge's decision was "unreasonable" or "not open" or was infected by another form of *House* error (such as failing to take into account a relevant consideration, or taking into account an irrelevant consideration).

18. Of course, where a s. 5F(3A) appeal is against a "*discretionary*" decision, then it will be necessary for the appellate court to be satisfied of *House* error in order to intervene.[27] For example, if an appeal were lodged under s. 5F(3A) against a decision to adjourn a trial, it would be necessary for the prosecution to demonstrate *House* error in that decision in order for the CCA to intervene; cf AS at [42]. However, as outlined below, an evaluative conclusion is not to be equated with a discretionary decision.[28] This is so even where the evaluation concerns an issue about which minds may differ.

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[22] *Fox v Percy* at [25], per Gleeson CJ, Gummow and Kirby JJ; *Dearman* at 561, per Isaacs J; *SZVFW* at [33], per Gageler J and [153], per Edelman J.
[23] *Fox v Percy* at [23]; *Dearman* at 561; *SZVFW* at [33] and [153].
[24] *Fox v Percy* at [23]; *Dearman* at 561; *SZVFW* at [32] and [153].
[25] *Fox v Percy* at [27]; *Allesch v Maunz* (2000) 203 CLR 172 at [23], per Gaudron, McHugh, Gummow and Hayne JJ.
[26] *The Queen v Bauer (a pseudonym)* [2018] HCA 30; 92 ALJR 846 at [61]. Bauer concerned an appeal against conviction, rather than an interlocutory appeal. However, it may be noted that the authority cited by the Court for this proposition was Ford, which was an appeal under s. 5F: see *Ford* at [98] and [145]-[146].
[27] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission and Others* [2000] HCA 47; 203 CLR 194 at [18] and [21], per Gleeson CJ, Gummow, Hayne and Crennan JJ.
[28] See below at RS [26]-[29].

19. Whilst there are differences in the text of s. 5F(3A) of the *Criminal Appeal Act* and s. 75A of the *Supreme Court Act* 1970 (NSW),[29] those differences do not alter the analysis outlined above; cf AS at [44]. There is no foundation to imply into s. 5F(3A) any requirement for deference to the primary judge's decision beyond the areas recognised in rehearings generally (such as discretionary decisions). Any such implication would not accord with the policy of s. 5F(3A), which is to confer upon the Attorney General and the Director a right of appeal, that is not subject to any leave requirement (cf s. 5F(2)), but which is limited by the requirement that the decision or ruling must eliminate or substantially weaken the prosecution's case, recognising that, in contrast to an accused person, the public interest cannot be vindicated by an appeal against the ultimate verdict.

20. In any event, there appears to be no dispute that it is not necessary to demonstrate *House* error in a s. 5F(3A) appeal where the decision appealed from concerns a question which "*demands a unique outcome*": see AS at footnote 20; and [49].[30] Nor is there any dispute that it is necessary to demonstrate *House* error where the decision-maker is "*allowed some latitude as to the choice of decision to be made*"; see AS at [49].[31] Rather, the dispute between the parties concerns the proper characterisation of s. 138 of the *Evidence Act*, and in particular, whether a court's determination under s. 138 is properly characterised as being within the former or the latter characterisation. This issue is addressed below.

**Section 138 of the *Evidence Act***

21. Whether a decision appealed from concerns a question which "*demands a unique outcome*" or "*allows latitude as to the choice of decision to be made*" is a question of statutory construction.[32] For the reasons outlined below, the text, context, purpose and history of s. 138 demonstrates that a decision under that provision demands "*a unique outcome*" and does not allow the trial judge a "*choice*" of the decision to be made.

22. First, s. 138 does not provide for the Court to fashion orders from amongst a "*range of outcomes*". Rather, s. 138 requires a determination that involves a binary determination rather than a choice of outcomes on a spectrum: the illegally obtained evidence is either admissible

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[29] Section 75A(6) of the *Supreme Court Act* provides that the powers of the Court include the "*powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning ... (b) the drawing of inferences and the making of findings of fact.*" There is no equivalent provision in s. 5F of the *Criminal Appeal Act*.

[30] See *Coal and Allied Operations* at [19] and *SZVFW* at [49], per Gageler J.

[31] See *Coal and Allied Operations* at [19] and *SZVFW* at [47], per Gageler J and [144], per Edelman J.

[32] *SZVFW* at [151], per Edelman J.

(subject to other evidentiary provisions), or inadmissible.[33] In this way, the character of a s. 138 determination is very different from the broad discretions considered in decisions such as *House v The King*[34] (sentencing), *Norbis v Norbis*[35] (the alteration of assets under the *Family Law Act* 1975 (Cth)), *Gronow v Gronow*[36] (custody of a child), *Pennington v Norris*[37] (apportionment legislation); *Precision Plastics v Demir*[38] (damages); and *Coal and Allied Operations* (the setting of a workplace bargaining period).

23. Second, there is no textual indication that the legislature intended that the trial judge be allowed "*latitude as to the choice of decision to be made*" in making a determination under s. 138 of the *Evidence Act*. The text of s. 138 provides that evidence that was improperly or illegally obtained "*is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*" (emphasis added).[39] In this way, s. 138 echoes the text of provisions such ss. 56, 59 and 76 of the *Evidence Act*, which each concern forms of evidence that are stated be "*not admissible*", unless falling within exceptions specified in other provisions of the Act. The appellant does not suggest that an appellate court would be required to find *House* error before intervening in any of these determinations: see, for example, AS at fn 20.

24. Section 138 also stands in stark contrast to other provisions of the *Evidence Act*, such as s. 135, which provides that a court "*may*" refuse to admit evidence if the probative value of the evidence is substantially outweighed by the danger of prejudice, confusion, or undue waste of time.[40] The text of s. 138 also differs in fundamental respects from the text of s. 192 of the *Evidence Act*; cf AS at [54]. In its terms, s. 192 only applies to provisions which are expressed to confer a choice upon the trial judge ("*If, because of this Act, a court may give leave, permission or direction*", emphasis added). The absence of clear language of discretion or

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[33] *R v Ford* [2009] NSWCCA 306 at [75].
[34] At 504-505, per Dixon, Evatt and McTiernan JJ
[35] [1985] HCA 17; 161 CLR 513.
[36] [1979] HCA 63; 144 CLR 513 at 516-517, per Stephen J.
[37] [1956] HCA 26; 96 CLR 10 at 15-16, per Dixon CJ, Webb, Fullagar and Kitto JJ.
[38] [1975] HCA 27; 132 CLR 362 at 369, per Gibbs J.
[39] See similarly *Parker v Comptroller General of Customs* [2009] HCA 7; 252 ALR 619 at [162], per Heydon J (dissenting); cf *Em v R* [2007] HCA 46; 232 CLR 67 at [95], per Gummow and Hayne JJ.
[40] See also s. 38 (a party "*may*", with leave of the court, question the witness as though the party were cross-examining the witness); s. 46 (the court "*may grant leave*" to a party to recall a witness); s. 53 (a judge may, on application, order that a demonstration, experiment or inspection be held); s. 56 (the court "*may*" find that the evidence is relevant: (a) if it is reasonably open to make that finding, or (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding).

choice as seen in other provisions of the *Evidence Act* is a strong indication that the legislature did not intend to allow latitude to the trial judge in a determination under s. 138.

25. Third, the history of s. 138 indicates that the provision was deliberately intended to differ from the common law *Bunning v Cross* "*discretion*" from which it was derived.[41] In particular, in 2007 the heading to Part 3.11 was amended "*to clarify that s. 137 of the* Evidence Act *is a mandatory exclusion.*"[42] Like s. 138, s. 137 is expressed in mandatory, rather than discretionary terms.

26. Fourth, the evaluation which is to be made under s. 138 is one in which the CCA is "*in as good a position to decide as the trial judge*".[43] Further, the trial judge does not hold any "*special expertise*" in the area of adjudication to which s. 138 applies.[44]

27. That s. 138 requires the "*weighing*" of "*incommensurables*" does not signify a legislative intent to allow the trial judge a "*choice*" in the decision to be made; cf AS at [46]; and [52]-[54]. *Warren v Coombes* established that the mere fact that a decision can be characterised as *"evaluative"* in nature is not sufficient to engage the principles enunciated in *House v the King*.[45]

28. As Gageler J observed in *SZVFW*, *Warren v Coombes* concerned the conclusion that a defendant had not failed to exercise reasonable care. Other evaluative determinations that do not engage *House* principles include findings of unconscionability,[46] whether specified tendency evidence has significant probative value,[47] the proper construction of a contract, and the correct interpretation of a statute.[48] Further, and of particular relevance in the present case, various intermediate appellate courts have held that a decision in respect of public interest immunity does not attract *House* principles.[49]

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[41] *Uniform Evidence Law* (ALRC Report 102) at [16.81]. See also NSW Law Reform Commission, *Illegally and Improperly Obtained Evidence* (NSWLRC, 1979) at [2.3]; *Evidence* (ALRC, Interim Report 26, 1985) at Ch. 20; *Review of the Uniform Evidence Acts* (ALRC DP 69, NSWLRC DP 47, VLRC DP) at [14.67].
[42] *Uniform Evidence Law* (ALRC Report 102) at 16.50.
[43] *Warren v Coombes* (1979) 142 CLR 531 at 542, per Gibbs ACJ, Jacobs and Murphy JJ.
[44] See similarly *SZVFW* at [153], per Edelman J.
[45] *SZVFW* at [46], per Gageler J, at [85], per Nettle and Gordon JJ (with whom Kiefel CJ agreed).
[46] *Australian Competition and Consumer Commission v C G Berbatis Holdings* [2003] HCA 18; 214 CLR 51.
[47] See *Bauer* at [61].
[48] *SZVFW* at [150], per Edelman J.
[49] *Victoria v Brazel* [2008] VSCA 37; 19 VR 553 at [38], followed in *Ryan v Victoria* [2015] VSCA 353 at [50] and *ASIC v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; 169 FCR 227 at [21]; *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at [15]; cf *New South Wales Commissioner of Police v Nationwide News Pty Ltd* [2007] NSWCA 366; 70 NSWLR 643 at [26].

29. In each of these contexts, a decision maker may draw upon a range of relevant considerations and different decision makers may give different weight to competing considerations in determining the correct outcome. Notwithstanding this degree of indeterminacy, each of these issues are recognised to admit of only "*one correct answer.*"[50]

30. The fact that "*reasonable minds may differ*" as to what that "*answer*" should be does not suggest a legislative intention to require judicial restraint in the appellate process; cf AWS at [49].[51] As the majority justices in *Warren v Coombes* explained:

> "The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to us in itself to be a reason why no narrow view should be should be taken of the appellate function. The resolution of these questions by courts of appeal should lead ultimately not to uncertainty but to consistency and predictability, besides being more likely to result in the attainment of justice in individual cases."[52]

31. This reasoning applies with particular force to a determination under s. 138 in a criminal trial. Section 138 concerns questions of high public importance, namely, the balance to be struck between the desirability of admitting evidence which may be integral in the prosecution of a serious crime, and the undesirability of encouraging or perpetuating the obtaining of evidence via improper or illegal means. The resolution of these questions by the CCA will lead to consistency and predictability in the balance that must be struck under s. 138, as well as attaining justice in the particular case.

**Conclusion**

32. For the reasons outlined above, a decision under s. 138 of the *Evidence Act* is a decision for which there "*can only ever be one correct answer*".[53] There is no basis to require an implication of appellate restraint in the text, context, history or purpose of s. 138 of the *Evidence Act*.[54] Accordingly, the CCA was not required to demonstrate *House* error in the appeal.

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[50] See, in the context of tendency evidence, *Bauer* at [61].
[51] *Bauer* at [61].
[52] *Warren v Coombes* at 552, per Gibbs ACJ, Jacobs and Murphy JJ. See also *Bauer* at [61].
[53] *Bauer* at [61].
[54] The appellant's analogy with judicial review principles does not assist: AS at [58]. The principles in *House v The King* are arguably analogous to requirements of judicial review because both concern the review of "discretions" given to decision makers. However, there are important differences, in particular, in respect of the principles that apply to the review of decisions of courts in judicial review proceedings in comparison to those that apply to the decisions of administrative bodies: *Kirk v Industrial Relations Commission* [2010] HCA 1; 239 CLR 531 at [68], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. In the present case, the analogy does not provide any assistance in the determination of question of whether *House* applies. For the reasons

33. It was unnecessary for the CCA to make the findings of *House* error. However, upon the finding of *House* error, the CCA proceeded to redetermine the admissibility of the evidence under s. 138 afresh pursuant to s. 5F(5)(b) of the *Criminal Appeal Act*. For the reasons outlined at RS [53]-[67] below, there was no error in that redetermination. Accordingly, the appellant's appeal should be dismissed.

**In the alternative, if *House* error was required, the CCA correctly found that the primary judge had committed *House* error**

**Outline**

34. The CCA held that the primary judge committed two related *House* errors.[55] These were that the primary judge erred in failing to assess the admissibility of the first recording in isolation from the subsequent recordings (CCA [105], [107]; CAB 81, 82); and second, that his Honour erred in failing to separately assess the admissibility of the RSPCA search evidence (but instead applied his assessment of the recordings "directly" to the search evidence) (CCA [125],[126]; CAB 89, 90).

35. In the CCA, the appellant conceded that the primary judge considered the admissibility of the seven illegally obtained recordings as though they were a single piece of evidence, but contended that this was the correct approach: CCA [75]-[76] (CAB 72-73). In this Court, however, the appellant contends that the primary judge did consider the first recording separately (AS [61]-[63]); and submits that, in any event, failure to do so would not amount to *House* error.

36. The respondent contends that the reasons for judgment reveal that the primary judge did not consider the first recording separately; and further, that the CCA correctly held failure to do so was an error of principle.

37. With respect to the RSPCA search evidence, the appellant accepts that the primary judge applied the reasons for his decision with respect to the recordings "directly" to the question of the admissibility of the search evidence (AS [72]). The respondent submits that a failure to separately address the considerations applicable to the RSPCA search evidence was clearly an error and that the CCA was correct to so find.

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outlined above, s. 138 does not confer a "discretion" on a trial judge. There is no basis to extend the principles of *House v The King* to judicial decisions which are not of a discretionary character in the sense outlined above.

[55] Although the appellant's Notice of Appeal also refers to the admissions, this appellant does not deal with the admissions (see AS footnote 1) and accordingly neither does the respondent in these submissions.

**The first recording (Ground 1)**

38. The primary judge did not separately consider the s. 138 factors as they applied to the first recording, by contrast with the second and subsequent recordings. Both textually, and in substance, the primary judge treated "the recordings" as a single piece of evidence to which he applied the balancing considerations.

39. Having set out a summary of facts and evidence, and the submissions of the parties, his Honour's determination commenced as follows: "*There are essentially three pieces of evidence to which the voir dire was directed. I propose to deal with them separately*".[56] The first "piece of evidence" considered was "the recordings".[57] Thereafter the primary judge grouped "the recordings" together in his consideration, and did not differentiate between them when addressing each of the subsections of s 138.

40. When considering the gravity of the contravention (s. 138(3)(d)), the primary judge found that the "repeated deliberate breaches" rendered the conduct of Animals Australia more serious.[58] As the appellant accepts, read in context, this was a reference to the repeated incursions on to the property to obtain further recordings without instead taking some other, lawful, step once the first recording was obtained: CCA [104] and AS [64].

41. When considering the difficulty of obtaining the evidence without the contravention (s. 138(3)(h)), the primary judge again gave simultaneous consideration to the position before and after the first recording had been obtained. The primary judge made observations about the position *prior to* the first recording being obtained; and to the position *once the first recording was obtained* in the same short passage of the judgment.[59] The different positions were neither considered sequentially nor separately: cf. AS [61] and [62].

42. The full passage of the primary judge's findings on this issue is as follows:

> "The effect of Ms White's evidence was that she formed a view that no surveillance device warrant could be obtained and that if she approached the RSPCA or the police they would inevitably involve Greyhound Racing New South Wales, which she believed would in effect not properly investigate the matter. To my mind, this involved to a significant degree, sheer speculation. It was open to Animals Australia to approach both the RSPCA and the police on a confidential basis and at least obtain advice from them as to whether or not the police were prepared to undertake initial lawful investigatory steps that might lead to such an application. Ms White was in

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[56] VD Judgment 22.48-50 (CAB 31).
[57] VD Judgment 23.49-52 (CAB 32).
[58] VD Judgment 27.35-43 (CAB 36).
[59] VD Judgment 30 (CAB 39).

> no position, in my view, given her limited experience in relation to the obtaining of warrants of any type, to simply make a decision that the only way to obtain the evidence was through breaching the *Surveillance Devices Act*. No attempt to conduct other investigatory steps or approach the police or the RSPCA on a confidential basis to engage in other investigatory steps was engaged in prior to the decision being made to breach the *Surveillance Devices Act*. The evidence from the chief inspector of the RSPCA was that the RSPCA would have conducted an investigation into an anonymous complaint of live baiting. No doubt given the concerns held about Greyhound Racing New South Wales, appropriate steps could have been taken by the RSPCA not to involve that organisation, but involve the police at a senior level and to ensure confidentiality. Once the first recording was obtained, there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device. No such approach was taken and multiple breaches of the *Surveillance Devices Act* were then engaged in. I am satisfied that there was some difficulty in obtaining the evidence in some other way which did not involve a contravention, but the degree of difficulty is not easily determined when no steps were taken to endeavour to obtain the evidence in a lawful way. There clearly were other investigatory steps, such as by way of covert visual surveillance, that could have been attempted prior to engaging in the deliberate breach of the *Surveillance Devices Act*, in my view." (Emphasis added.)

43. As the CCA observed, the primary judge had earlier noted the distinction between the position Ms White was in before and after the first recording was made: CCA [100]; CAB 80. However, having reviewed the position both before and after the first recording was obtained, the primary judge made a single finding: that there was "some difficulty" obtaining the evidence in another (lawful) way. As the CCA correctly held, on an overall reading of the reasons, the primary judge did not assess the first recording in isolation from the subsequent recordings in determining the difficulty of obtaining the evidence in some other way: CCA [105]; CAB 81. Furthermore, the primary judge did not proceed by assessing the Crown case "at its highest", with reference to the first recording, but instead dealt with the recordings compendiously: cf AS [65].

44. The CCA correctly held at [104] (CAB 81) that "*while it was not necessarily incumbent on his Honour to address each of the s. 138 factors separately ad seriatim in relation to each successive recording obtained by Ms Lynch, the weight to be attributed to factors such as the difficulty of obtaining the evidence and the gravity of the breach should at least have been addressed separately with respect to the first recording, as distinct from the assessment of those matters with respect to the later recordings*".

45. Failure to do so was an error of principle: cf AS [66]. Section 138 of the *Evidence Act* requires consideration of whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence

was obtained. The application of s. 138 requires the analysis and balancing of the characteristics and circumstances of the particular item of impugned evidence.

46. By way of analogy, in addressing the admissibility of a hearsay representation pursuant to s. 65 of the *Evidence Act*, this Court held that the question of the reliability of the representation is not to be approached on a compendious basis whereby an overall impression is formed of the general reliability of the representations.[60] Similarly, in the present case, each recording was a separate item of evidence to which objection was taken, and ought to have been considered as such. The way in which the first recording was obtained was critically different from the way in which the second and subsequent recordings were obtained. The compendious approach taken by the primary judge to all of the recordings together obscured the important differences.

47. In contrast to the primary judge, the CCA did not take a compendious approach to the evidence. The CCA decision was not premised upon the acceptability of the primary judge "considering the second through seventh recordings together" (cf. AS [67]), but upon the acceptability of giving reasons which were identical for the second to seventh recordings, because the considerations for those recordings were relevantly identical. For the reasons outlined above, the considerations for the first as against the subsequent recordings were not relevantly identical.

**The RSPCA search evidence (Ground 2)**

48. The RSPCA entered Mr Kadir's property on 12 February 2015 pursuant to a lawful search warrant and pursuant to independent powers of entry and search conferred by s.25G of the *Prevention of Cruelty to Animals Act*. The appellant was present on the property at the time they entered. A dead rabbit and rabbit body parts were found in the bull ring attached to the lure arm. A veterinary surgeon opined that the rabbit had been inflicted with severe injuries consistent with a dog attack.[61] The RSPCA Chief Inspector gave evidence that "but for" the provision of the unlawful recordings to him by Animals Australia, he would not have arranged for a search warrant application: CCA [113]; CAB 84. He also gave unchallenged evidence that he had no involvement with, nor prior knowledge of, the conduct of Animals Australia in unlawfully obtaining the recordings: CCA [28]; CAB 60.

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[60] *Sio v The Queen* [2016] HCA 32; 259 CLR 47 at [57]-[61].
[61] Certificate of Expert Evidence of Dr Magdoline Awad 20 May 2015 at [53], in VD Exhibit 1 (RFM 143).

49. The appellant does not dispute that the primary judge, having made a finding that the search evidence was obtained "in consequence of" the original illegality by Animals Australia, then "directly applied" the s.138 factors to the question of the admissibility of the search evidence: AS [72]. The CCA held that this approach disclosed error, as the s.138 factors could not "directly apply" to the admissibility of the search evidence, because the RSPCA was acting in discharge of its functions and within the limits of its legislative authority: CCA [124]; CAB 89.

50. The CCA correctly held at [124]-[125] (CAB 89):

> "The combination of his Honour's findings and the undisputed evidence was that RSPCA acted in discharge of its functions and conformed with the limits of its legislative authority. As noted the undisputed evidence was the RSPCA had no prior knowledge of or even reason to suspect that Animals Australia would contravene the *Surveillance Devices Act*. RSPCA was a body vested with a legislative responsibility for animal welfare. It was presented with strong evidence of "live baiting" and took the only relevant step that it could be expected to take namely seek lawful evidence to support the allegations made to it.
>
> Subsection 138(1) required his Honour to address the undesirability of admitting the search warrant evidence "in the way in which the evidence was obtained". In the circumstances of this case, the "way" in which the search warrant evidence was obtained was materially different to the "way" in which Ms Lynch obtained the search warrant evidence. It follows that the undesirability of receiving the search warrant evidence obtained by RSPCA in these circumstances is not the same as the undesirability of receiving the evidence obtained by Ms Lynch."

51. In reaching this conclusion, the CCA did not "overlook" the fact that the unlawful conduct of Animals Australia was part of the way in which the evidence was obtained (cf AS [73]), nor regard that conduct as irrelevant (cf AS [74]): see CCA [128]; CAB 90-91. To the contrary, the CCA held that it was necessary to take into account those features *but also* the critical fact that the RSPCA had not engaged in any wrongdoing. Moreover, the RSPCA was exercising its lawful functions and seeking to obtain lawful evidence to support allegations of serious animal cruelty offences.

52. Contrary to AS [74], the CCA's conclusion that this matter was a critical part of the way in which the evidence was obtained was not simply a "difference of opinion" between the CCA and the primary judge as to the weight to be afforded to the lack of impropriety on the part of the RSPCA. In applying the reasoning with respect to the illegal recording "directly" to the search evidence, the primary judge gave no weight at all to the fact that there was no impropriety on the part of the RSPCA. The CCA correctly concluded that this failure was productive of error.

**The CCA's redetermination of admissibility under s. 138 (Ground 3)**

53. Having found *House* error,[62] the CCA was empowered by s. 5F(5b) of the *Criminal Appeal Act* to redetermine the admissibility of the recordings and the search evidence. In conducting this redetermination, it was necessary for the CCA to take account of any advantages that the primary judge, for example, in having heard evidence from the various witnesses on the voir dire. However, the CCA was "*in as good a position as the trial judge*" to draw inferences from the facts and was not bound by the primary judge's findings as to the weight to be given to the various factors considered.[63]

54. The CCA concluded that the admissions, the search evidence and the first recording (but not the second and subsequent recordings) should be admitted under s. 138 of the *Evidence Act.* There was no error in the CCA's determination. In particular, (i) on a proper reading of the CCA judgment as a whole, it is plain that the CCA understood and applied the onus correctly (cf AS at [78]-[80]); and (ii) the CCA's decision to admit the first recording and the RSPCA search evidence was in conformity with the evidence and not otherwise attended by error (cf AS [68]-[70]; [75]-[76] and [82]-[85]).

The onus

55. A proper reading of the CCA reasons as a whole makes it clear that the onus was correctly applied: cf. AS [80]-[81]. The CCA referred, without criticism, to the primary judge's express statement that *"the onus"* was on the Crown (CCA [49], [63]; CAB 65, 69). From first instance the Crown had accepted that the recordings were unlawfully obtained, there was no question concerning "onus", and the proceedings in both courts were conducted on the understood basis that it was for the Crown to satisfy the Court that the evidence should be admitted. In these circumstances, it was not necessary for this proposition, which was not in contention, to be restated. The CCA correctly stated its conclusion in the terms of s.138, namely that it was satisfied that "the desirability of admitting the first recording in this case does outweigh the undesirability of admitting the evidence in the way that it was obtained" (CCA [107]).

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[62] Or, alternatively, not being required to find *House* error: see at RS [14] – [33] above.
[63] *Warren v Coombes* at 542, per Gibbs ACJ, Jacobs and Murphy JJ.

The first recording

56. The CCA correctly carried out the statutory task required. The CCA engaged in a detailed analysis of all of the s.138 factors in its consideration of whether the primary judge had erred: CCA [107]-[112] (CAB 82-84). In doing so, the CCA adopted a number of the primary judge's conclusions, which had been previously analysed by the Court in its consideration of error. It was unnecessary for the Court to repeat its reasons in full when turning to this task: cf AS [82].

57. In determining the. 138 decision afresh, the CCA held that the difficulty of obtaining the evidence another way was a factor of such significance in the circumstances of the present case, that the desirability of admitting the evidence outweighed the undesirability of admitting the evidence: CCA [111]; CAB 83-84.

58. The CCA was correct to find that there were real difficulties in obtaining evidence of criminal activity taking place in the bullring without a contravention.

59. As outlined above, it was neither necessary nor correct to "have regard to the repeated breaches" in assessing the difficulties attending the obtaining of the first recording. The fact that Animals Australia returned to the property to obtain further recordings after they had the first recording may have been relevant to an assessment of the motives of Ms White (noting however, that the primary judge rejected the submission of Mr Kadir that the primary purpose of Ms White's actions was publicity)[64] but it could not be a matter relevant to the "difficulty" of obtaining direct and probative evidence of animal cruelty offences occurring in the bull ring: cf AS [69].

60. In assessing the difficulties which faced Ms White in obtaining the evidence by other lawful means, the primary judge held no relevant advantage by having heard Ms White give evidence: cf AS [70]. As the CCA held, in the absence of a direct challenge to Ms White's truthfulness, the primary judge's findings were findings of unreliability not dishonesty: CCA [80]; CAB 74. The CCA was in "*as good a position*" as the primary judge to draw inferences from the available evidence concerning the difficulties that existed.[65]

61. Having assessed the evidence, the CCA found that there were real concerns as to the unlikelihood of an anonymous complaint being properly and effectively investigated: CCA

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[64] VD Judgment 33.45-55 (CAB 39).
[65] *Warren v Coombes* at 542, per Gibbs ACJ, Jacobs and Murphy JJ.

[111]; CAB 84. The appellant submits that the CCA was not entitled to make this finding, because of the undisturbed finding of the primary judge that Ms White's opinion to the same effect was "*no more than speculation*": AS [85], referring to CCA [106] (CAB 82). However, it is to be borne in mind that, what the CCA rejected was the Crown's submission that the primary judge's finding disclosed *House* error.[66] Even in this context, the CCA characterised Ms White's opinion not as "*sheer speculation*" (the words of the primary judge), but as "*informed speculation*": CCA [106]; CAB 82. This difference assumed some significance when the CCA came to reconsider the s. 138 decision concerning the first recording.

62. The criterion of "*difficulty*" in s. 138(2)(g) is an objective test. When the CCA held at [111] that there were "*real concerns as to the likelihood of an anonymous complaint being able to be properly and effectively investigated*" (CAB 84), the Court was not only referring to concerns subjectively held by Ms White. Reference was made to the risk that even the lodgement of a complaint might lead to a "tip-off" by persons associated with the greyhound industry. Such matters had been discussed at the Special Commission of Inquiry into the greyhound racing industry: CCA [106]; CAB 82. Further, whilst the RSPCA Chief Inspector said he would have conducted an investigation into an anonymous complaint; importantly his evidence also included the fact that such an investigation would have included liaising with GRNSW: CCA [90]; CAB 77.[67] At the relevant time, the RSPCA regularly liaised with GRNSW with respect to complaints involving the greyhound industry.[68] The confidentiality that was employed on the occasion of the execution of the search warrant by the RSPCA in the present matter was a special case.[69]

63. Further, whilst the primary judge had found that covert visual surveillance could have been attempted, the CCA observed, critically, that there was no evidence to suggest that such surveillance could have obtained evidence of *activity in the bull ring*. Indeed, the evidence is to the contrary. Exhibit 2 on the voir dire (the aerial photographs)[70] demonstrates that covert visual surveillance from a position on the public road would not have enabled evidence to have been obtained of activity taking place in the bull ring: see RS [8] above.

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[66] The Crown submitted that this finding was not open to the primary judge: see Crown written submissions in CCA at [95] (ZRK AFM 240).
[67] See also Affidavit of David O'Shannessy sworn 9 June 2017, at [7]-[11] (DG AFM 199); and VD transcript 65 (DG AFM 66).
[68] Affidavit of David O'Shannessy sworn 9 June 2017, at [11] (DG AFM 199).
[69] VD transcript 65.49-66.15 (DG AFM 67-68).
[70] See in particular RFM 170.

64. In summary, the evidence of the RSPCA Chief Inspector was consistent with the conclusion that ordinarily, an investigation of an anonymous complaint about animal cruelty relating to greyhounds would have led to the RSPCA informing GRNSW about its inquiries. Such a matter would not have been referred to police (the only body with powers to apply for a surveillance device warrant). Further, the layout of the property supported the inference that neither lawful covert visual surveillance, nor an announced visit by RSPCA Inspectors utilising s.24G powers would have yielded probative evidence of animal cruelty activities taking place in the bull ring.

65. The CCA was correct to find that there were real difficulties in obtaining the evidence – the first recording – without a contravention. Accordingly, the CCA was entitled to place weight on the difficulty of obtaining the evidence without a contravention. No error is demonstrated in the analysis nor in the conclusion reached by the CCA that the first recording should be admitted under s. 138 of the *Evidence Act*.

The RSPCA search evidence

66. The CCA addressed the statutory factors relevant to the admissibility of the search evidence in considering error, and again in summary at CCA [127]; CAB 90. Appropriately however, what assumed the most importance in the CCA's consideration of the admissibility of the search evidence by the CCA were the broader (and competing) public policy objectives underpinning the balance of considerations pursuant to s.138: CCA [128]-[129] (CAB 90-91); cf AS [75].

67. The evidence obtained during the search was highly probative of serious animal cruelty offences of a particular nature which had been difficult to investigate and to prosecute. The CCA expressly took into account the consideration that the admission of the search evidence had the potential to confer *"curial approval"* of the original unlawful conduct: CCA [129]; CAB 91. However, when appropriately balancing all considerations, the CCA correctly concluded that the "*desirability of admitting the search warrant evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*": CCA [130]; CAB 92. No error has been demonstrated in the manner in which this task was carried out, nor in the conclusion reached.

**Remittal or redetermination**

68. If contrary to the above, error is found in the CCA's redetermination of the admissibility of the evidence under s. 138, the admissibility of the evidence should either be determined by

this Court,[71] or remitted to the CCA for redetermination. Section 5F(5) of the *Criminal Appeal Act* empowers the appellate court to determine questions of admissibility. There is no new evidence, nor any foreshadowed new evidence, which requires consideration by the primary judge.

**Part VI: Notice of Contention**

69. The respondent filed a Notice of Contention on 7 June 2019 (CAB 114). The respondent's submissions in support of this Notice of Contention are set out at RS [14]-[43] above.

**Part VII: Estimate**

70. It is estimated that the respondent's oral argument in this appeal and the appeal of the co-appellant Mr Kadir will require 1.5 – 2 hours to present.

Dated

2 August 2019

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[71] See, for example, *Bauer* at [61].