# SUPREME COURT OF QUEENSLAND

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| CITATION: | *McHarg & Anor v Racing Queensland Ltd* [2011] QSC 201 |
| PARTIES: | **ROBERT WILLIAM McHARG**<br>**(first applicant)**<br>**MAURICE NEIL ROLFE**<br>**(second applicant)**<br>**v**<br>**RACING QUEENSLAND LIMITED ACN 116 735 374**<br>**(respondent)** |
| FILE NO: | BS2473 of 2011 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating application |
| DELIVERED ON: | 14 July 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 May and 2 June 2011 |
| JUDGE: | Mullins J |
| ORDER: | **The proceeding is dismissed** |
| CATCHWORDS: | STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – CONSTRUCTION – *Racing Act 2002* (Qld), s 113D – where control body empowered to grant race information authority to use Queensland race information – where the control body requested applicant for race information authority to provide information and documents regarding financial standing and character – whether the Act precluded the control body taking into account matters relating to financial standing and character for Australian and New Zealand applicants – where the control body did not exceed its powers<br><br>STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – CONSTRUCTION – *Racing Act 2002* (Qld), s 113E(3)(a) – where control body for a code of racing empowered to issue a race information authority for the code of racing on a condition that the holder of the authority pay a fee for the use of the race information – whether control body empowered to impose a fee calculated by reference to a formula, rather than a fee of a fixed amount – whether formula is irrational – whether fee unable to be calculated with certainty – whether formula is unreasonable<br><br>*Racing Act* 2002, s 4, s 33, s 34, s 35, s 78, s 79, s 81, s 86, s 87, s 88, s 113A, s 113C, s 113D, s 113E, s 113EA, s 113EB, s 113EC, s 194, s 201, s 203, s 204, s 205, s 207, s 220, s 223, s 224, s 225, s 228, s 233, s 234, s 235, s 236, |

s 240, s 250, s 251
*Racing Regulation* 2003, s 3, s 4, s 5, s 6

*Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, considered
*King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, considered
*Racing New South Wales v Sportsbet Pty Ltd* [2010] FCAFC 132, considered
*TAB Limited v Racing Victoria Limited* [2009] VSC 338, distinguished

COUNSEL: A J Greinke for the applicants
R M Derrington SC for the respondent

SOLICITORS: Freestone Law Pty Ltd for the applicants
Cooper Grace Ward for the respondent

[1] The first applicant is a licensed bookmaker in Queensland and the chairman of the Queensland Bookmakers Association. The second applicant is a licensed bookmaker in New South Wales and the chairman of the New South Wales Bookmakers Cooperative. The applicants have brought this application in the interests of the members of their associations.

[2] As from 1 July 2010 the respondent (which is not a statutory corporation) was appointed the control body for thoroughbred, harness and greyhound racing under the *Racing Act* 2002 (the Act). (It was common ground that I should use reprint 2H.)

[3] Part 6 of chapter 3 of the Act regulates use of Queensland race information. It was inserted by the *Revenue and Other Legislation Amendment Act (No. 2)* 2008 (the 2008 Amendment). It is an offence under s 113C of the Act for a licensed wagering operator (which includes a bookmaker) to use Queensland race information for the conduct of the operator's wagering business, unless the operator is authorised to do so under a race information authority. The manner in which a licensed wagering operator must apply for a race information authority is set out in s 113D of the Act. Under s 113E of the Act the respondent is empowered to grant the application for a race information authority subject to conditions, including the imposition of a fee for the use of Queensland race information.

[4] The respondent determined that for the period 1 November 2010 to 30 June 2012 an applicant for a race information authority must apply on the form approved by the respondent (the approved form) which requires the production of documents identified in the approved form. The approved form states that it is for the period 1 January 2011 to 30 June 2012. Pages 10 to 12 of the approved form set out the formula for the calculation of fees payable for the race information authority and anticipate the form of condition that the respondent proposes to impose in relation to the fee to use the race information.

[5] The applicants object to providing the respondent with the information and documents required by the approved form that relate to the financial position and financial background of the applicant, its executive officers and any business

associate and the character and business reputation of the applicant, its executive officers and any business associate. The applicants also challenge the legality of the proposed fee to be calculated according to the formula set out in the approved form.

[6] The issues raised by the applicants' application are:

(a) whether the respondent has exceeded its powers under the Act by requesting the information and the documents specified in the approved form; and

(b) whether the respondent's proposed condition for a fee calculated by application of a formula for the use of the Queensland race information during the period authorised by the race information authority is invalid, on the basis of not being authorised by s 113E(3)(a) of the Act.

**Relevant statutory provisions**

[7] The main purposes of the Act are set out in s 4(1). For the purpose of deciding the issues on this application, the following purposes of the Act are relevant:

> "(a) to maintain public confidence in the racing of animals in Queensland for which betting is lawful; and
>
> (b) to ensure the integrity of all persons, involved with racing or betting under this Act."

[8] Under s 4(2) of the Act, one of the means for achieving the main purposes of the Act is by providing for an approved control body to manage its code of racing. Chapter 2 of the Act regulates the process of approval of a corporation as a control body and its functions, powers and obligations. Section 33 of the Act provides:

> "**33 Function of control body**
>
> (1) The function under this Act of a control body is to manage its code of racing.
>
> (2) A control body has-
>
> (a) the powers necessary for performing its function; and
>
> (b) all other powers necessary for discharging the obligations imposed on the control body under this Act."

[9] The powers conferred on a control body for its code of racing are set out in s 34(1) of the Act and include:

> "(a) license animals, clubs, participants and venues that are suitable to be licensed for the code;
>
> (b) assess the performance of licensed animals, clubs, participants and venues to ensure the animals, clubs, participants and venues continue to be suitable to be licensed;
>
> …
>
> (i) issue race information authorities under section 113E(1)."

[10] A means by which a control body performs its function of managing its code of racing is by making policies about the management of its code of racing: s 78(2)(a) of the Act. Section 79 of the Act provides that the policies made by a control body for its code of racing are statutory instruments within the meaning of the *Statutory Instruments Act* 1992.

[11] The matters for which a control body must have a policy for its code of racing are specified in s 81 of the Act. Those matters include the way the control body must develop policies, its licensing scheme and the forms to be approved by the control

body for its code of racing. There is further statutory regulation of a control body's licensing scheme under division 2 of part 2 of chapter 3 of the Act. The purposes of a control body's licensing scheme for its code of racing are set out in s 86 of the Act and include ensuring the integrity of racing activities conducted as part of the code. The control body's policy for its licensing scheme must provide for the extensive list of matters found in s 87(2) of the Act and address the matters relating to an application for a licence that are set out in s 88 of the Act.

[12] Queensland race information is defined in s 113A of the Act and covers the name, number, time and details of a licensed animal (including rider and trainer) for an intended race at a race meeting at a Queensland licensed venue and the outcome of the race. Section 113C of the Act provides:

> "**113C Use of Queensland race information**
> A licensed wagering operator must not, whether in Queensland or elsewhere, use Queensland race information for the conduct of the operator's wagering business, unless the operator is authorised to do so under a race information authority.
> Maximum penalty—
> (a) for a first offence—600 penalty units or 12 months imprisonment; or
> (b) for a second or subsequent offence—4000 penalty units or 5 years imprisonment."

[13] Section 113D of the Act provides:

> "**113D Application for race information authority**
> (1) A licensed wagering operator wishing to use Queensland race information for the conduct of the operator's wagering business for a code of racing may apply to the control body for the code of racing for a race information authority for the code of racing.
> (2) The application must—
> (a) be made in the way prescribed under a regulation; and
> (b) be accompanied by—
> (i) any application fee decided by the control body; and
> (ii) the documents prescribed under a regulation.
> (3) The control body must consider the application and either grant, or refuse to grant, the application.
> (4) In deciding the application, the control body must have regard to the criteria prescribed under a regulation.
> (5) Without limiting subsection (4), the criteria that are prescribed under a regulation for that subsection may state—
> (a) the types of matters that may, or must, be taken into account by the control body in deciding the application; or
> (b) the types of matters that must not be taken into account by the control body in deciding the application."

[14] Section 3 of the *Racing Regulation* 2003 (the Regulation) gives effect to s 113D(2) of the Act:

> "**3 Application for race information authority—Act, s 113D(2)**
>
> (1) For the Act, section 113D(2)(a), the application must be in a control body form.
>
> (2) For the Act, section 113D(2)(b)(ii), the application must be accompanied by the documents identified in the control body form."

[15] The matters to be taken into account by the control body in deciding an application for race information authority are prescribed for an applicant who is a licensed wagering operator in a foreign country, other than New Zealand. Section 4 of the Regulation provides:

> "**4 Matters to be taken into account in deciding application—Act, s 113D(5)(a)**
>
> (1) This section applies to an applicant for a race information authority who is a licensed wagering operator who holds a licence or authority—
>
> (a) under a law of a foreign country, other than New Zealand, authorising the wagering operator to conduct a wagering business; or
>
> (b) issued by a principal racing authority of a foreign country, other than New Zealand, authorising the wagering operator to conduct a wagering business.
>
> (2) For the Act, section 113D(5)(a), the control body for a code of racing must take into account the following matters—
>
> (a) whether the applicant is suitable to hold a race information authority, having regard to all of the following—
>
> (i) the applicant's character or business reputation;
>
> (ii) the applicant's current financial position and financial background;
>
> (iii) if the applicant has a business association with another entity—
>
> (A) the other entity's character or business reputation; and
>
> (B) the other entity's current financial position and financial background;
>
> (iv) if the applicant is a corporation—
>
> (A) the character or business reputation of the corporation's executive officers; and
>
> (B) the current financial position and financial background of the corporation's executive officers;
>
> (b) whether issuing a race information authority to the applicant will undermine the integrity of the conduct of the code of racing in Queensland."

[16] Section 5 of the Regulation prescribes the types of matters that must not be taken into account by the control body in deciding the application, as contemplated by s 113D(5)(b) of the Act:

> "**5 Matters not to be taken into account in deciding application—Act, s 113D(5)(b)**
>
> For the Act, section 113D(5)(b), the control body must not take into account the following matters—
>
> (a) for an applicant who is an individual whose principal place of residence is in another State—that the applicant's principal place of residence is in another State;
>
> (b) for an applicant who is an individual who conducts a wagering business in another State—that the applicant conducts a wagering business in another State;
>
> (c) for an applicant that is a corporation that has its registered office under the Corporations Act, or principal place of business, in another State—that the applicant has its registered office under the Corporations Act, or principal place of business, in another State;
>
> (d) for an applicant that is a licensed wagering operator that holds a licence or other authority under a law of another State authorising it to conduct a wagering business—that the licence or other authority is held under the law of another State;
>
> (e) for an applicant that is a licensed wagering operator that holds a licence or other authority issued by a principal racing authority of another State authorising it to conduct a wagering business—that the licence or other authority is issued by a principal racing authority of another State."

[17] Section 113E of the Act provides:

> "**113E Decision**
>
> (1) If the control body decides to grant the application, the control body must as soon as practicable issue a race information authority for the code of racing to the applicant.
>
> (2) If the control body decides to refuse to grant the application, the control body must as soon as practicable give the applicant a notice stating the decision and reasons for the decision.
>
> (3) If the control body decides to grant the application, the control body may impose any of the following conditions on the authority—
>
> (a) a condition that the holder of the authority pay the control body a fee for the use of Queensland race information for the conduct of the holder's wagering business for the code of racing;
>
> (b) a condition of a type prescribed under a regulation.

(4) In deciding whether to impose a condition on the authority, or the type of condition, the control body must not take into account the matters prescribed under a regulation.

(5) If the applicant has used Queensland race information for the conduct of the applicant's wagering business for the code of racing at any time during the period from 1 September 2008 to the day of issue of the authority to the applicant, a condition mentioned in subsection (3)(a) may be that the holder of the authority pay a fee for the use of the information during the period.

(6) Without limiting subsection (4), in deciding whether to impose a condition mentioned in subsection (3)(a) on the authority, or the amount of the fee, the control body must take into account any other fees payable to it by the holder of the authority under any agreement between the control body and holder of the authority.

(7) If the control body decides to impose a condition mentioned in subsection (3)(a) on the authority, section 35(2) does not apply to the amount of the fee charged."

[18] Section 6 of the Regulation deals with the type of conditions that may be imposed on the race information authority:

"**6 Conditions that may be imposed – Act, s 113E(3)(b)**

For the Act, section 113E(3)(b), the types of conditions are the following –

(a) conditions about the duration of the authority;

(b) conditions about the holder of the authority giving the control body information the control body requires to calculate any fees payable by the holders of the authority under section 113E(3)(a) of the Act;

(c) conditions about when the holder of the authority must pay any fees payable by the holder of the authority under section 113E(3)(a) of the Act."

[19] Section 113E(7) of the Act excludes the operation of s 35(2) from the condition that the holder of the race information authority pay a fee for the use of the race information. Section 35(2) prescribes that a fee charged by the control body for a service must reflect the reasonable cost to the control body of providing the service.

[20] Amendments were made to the Act in 2009 to empower the control body to establish a wagering monitoring system and to specify in s 113EA of the Act a standard condition for a race information authority that requires the holder of the authority to take part in a wagering monitoring system and comply with all reasonable requests by the control body to give the control body information or documents about bets placed with the holder. Provisions are then made in s 113EB and s 113EC for the use of documents or information by the control body obtained from a wagering monitoring system or as a result of making a request for a document or information and excusing the holder or employee of the holder of a race information authority from any liability for providing such documents or information about wagering activity to the control body.

[21] Bookmakers are regulated under chapter 6 of the Act. Section 194(1) of the Act provides:

> "**194 Requirement to hold racing bookmaker's licence**
> (1) A person must not carry on bookmaking at a licensed venue at any time unless the person is a racing bookmaker whose licence was granted by the control body exercising control at the licensed venue at that time.
> Maximum penalty – 600 penalty units."

[22] Although a bookmaker must be licensed by the control body, the applicant for a racing bookmaker's licence is required under s 201 of the Act to be a certificate holder which is defined in schedule 3 to the Act to mean "the holder of an eligibility certificate that continues to have effect." The eligibility certificate is issued by the gaming executive which is defined to mean the chief executive of the Department in which the *Wagering Act* 1998 is administered.

[23] In deciding whether or not an applicant for an eligibility certificate is a suitable person to hold an eligibility certificate, the gaming executive may have regard to the matters that are set out in s 203(2) of the Act which include the applicant's character or business reputation, the applicant's current financial position and financial background and, if the applicant has a business association with another entity, those same matters in relation to the other entity. Section 204 of the Act sets out the matters to which the gaming executive may have regard in deciding whether a business associate of an applicant for an eligibility certificate is a suitable person to be associated with the applicant. The definition of "business associate" in schedule 3 to the Act relevantly means a person whom the gaming executive believes will, if the applicant is licensed as a racing bookmaker, be associated with the ownership or management of the business conducted by the racing bookmaker. Section 205 of the Act clarifies that other matters that are not specified in s 203 or s 204 may be considered by the gaming executive in deciding matters to which those sections relate.

[24] In order to facilitate the investigation by the gaming executive of the applicant's suitability to hold an eligibility certificate, where the applicant is an individual, the applicant must under s 207 of the Act consent to the individual's fingerprints being taken for the gaming executive and for information about the individual to be obtained by the gaming executive and the investigation of the individual's background. The investigation may include a criminal history check with the Commissioner of the Police Service.

[25] If the gaming executive grants an application for an eligibility certificate, the eligibility certificate continues to have effect, until it lapses under s 220(3) of the Act or is cancelled under s 236 or surrendered under s 240. Under s 220(1) of the Act, the eligibility certificate must state the date by which the certificate holder must apply for a licence as a racing bookmaker. Section 220(3) then provides that if the certificate holder does not apply to a control body for a racing bookmaker's licence before the date stated in the certificate, the certificate lapses.

[26] Under s 223 of the Act the gaming executive may approve an audit program for investigating certificate holders (and the business associates of certificate holders) and is responsible for ensuring that such investigations are conducted under the audit program. Section 223(3) specifies that a person may be investigated under an

audit program only if there has not been an investigation of the same person within the proceeding three years. Apart from an audit program, the gaming executive is authorised under s 224 of the Act to investigate a certificate holder to find out whether the certificate holder is a suitable person to continue to hold an eligibility certificate, if there is suspicion by the gaming executive that the certificate holder is no longer a suitable person to hold an eligibility certificate. The gaming executive has a similar power of investigation of a business associate under s 225 of the Act. As part of its investigation of a certificate holder (or a business associate), the gaming executive may require the control body to give the gaming executive information or a document the gaming executive believes is relevant to the investigation.

[27] The grounds for cancelling an eligibility certificate are set out in s 230 of the Act. Any cancellation must be preceded by the giving of a show cause notice under s 231 of the Act and the decision on whether to cancel an eligibility certificate or censure the certificate holder cannot be made by the gaming executive until after the gaming executive has considered all written representations made by the certificate holder and the relevant control body: s 233, s 234, s 235 and s 236 of the Act.

[28] Under s 250(1) of the Act a bookmaker must have an insurance policy or bond for each code of racing for which the bookmaker is licensed that is acceptable to the control body responsible for managing the code. A control body is specifically required under s 251(1) of the Act not to license a person as a bookmaker or renew a bookmaker's licence unless the relevant person has a policy of insurance or a bond that complies with s 250 of the Act.

**Licensing scheme policy**

[29] The respondent made its licensing scheme policy (the licensing policy) on 1 July 2010 with effect from the same date. It was amended on 3 September 2010. It is a comprehensive document that covers all types of licensing undertaken by the respondent for each code of racing. Many of the general provisions in the licensing policy apply to bookmakers' licences.

[30] Under the licensing policy all licensees (and applicants for licences) must meet suitability requirements which are expressed in terms of whether or not the licensee remains a fit and proper person to be licensed. In addition, the respondent may at any time request that a licensee (or an applicant for a licence) provide a current national police certificate. There is also provision for the respondent to institute an audit program for every category of licence based on risk management principles.

[31] The licensing policy states that a licence will be issued in the form of a licence card or badge and when the licence is issued the licensee will be provided with the details of the type of licence, the period and any special conditions. There is provision for licence renewal. The licensing policy does not specify the usual duration for each of the various licences. According to Mr Peter Smith, the respondent's Licensing and Training Manager, the respondent issues bookmakers' licences for a period of one year. Mr Smith exhibits a copy of the renewal application form to his affidavit. It is a one page document requiring minimal information.

**Background to the enactment of part 6 of chapter 3 of the Act**

[32] The Explanatory Notes for the Bill that was enacted as the 2008 Amendment give an explanation for what prompted the Queensland Legislature to enact part 6 of chapter 3 of the Act. The New South Wales Government had enacted legislation requiring all wagering operators, including TABs, to apply for approval to publish NSW race information and to pay a fee of up to 1.5% of turnover on NSW races from 1 September 2008. The Victorian Government had enacted, and other States were proposing to enact, corresponding legislation. Part 6 of chapter 3 of the Act was therefore enacted to enable Queensland control bodies to charge a fee that would require those whose revenue is derived from wagering on Queensland racing to make a contribution to the cost of conducting racing in Queensland.

[33] In the Explanatory Notes for the Bill that was enacted as the 2008 Amendment, the explanation for s 113E(3) is:

> "Subsection 3 of section 113E provides that a control body may impose a condition on a race information authority which requires the holder of the authority to pay a fee for the use of Queensland race information. The amount of the fee and how the fee is to be calculated are to be determined by the control body. Other conditions that a control body may impose on an authority are to be prescribed by regulation."

[34] The express purpose of s 113E(6) was to accommodate arrangements such as the moneys paid by UNiTAB Limited to the control bodies under an agreement referred to as the "Product and Program Agreement" which should be taken into account to reduce the fees that would otherwise be imposed on that body under s 113E(3).

**The approved form**

[35] The approved form is a control body form which meet the requirements of s 113D(2)(a) of the Act and s 3 of the Regulation.

[36] The documents listed on page 8 of the approved form that are required to accompany the application include:

> "Gross Revenue documents, statements and reports, Auditor's statement and Audited financial documentation necessary to establish Gross Revenue and race information fees payable.
>
> Most recent Audited financial statements, and if more than six (6) months since balance date, Management accounts for the period from the last balance dated to the last day of the month preceding the date of this Application.
>
> Evidence to support the Applicant's character/business reputation, including police certificates, business character reference and evidence of the financial position and financial background of each director, the person holding the position of the Senior Executive of the Applicant and the Chief Financial Officer of the Applicant."

[37] The approved form incorporates a sample monthly return form that can be downloaded from the respondent's website that shows the information required for calculation of the race information fee on a monthly basis. Financial data is

required to be inserted on page 7 of the approved form for each month from January 2011 for which an applicant has not previously supplied the data required for calculating the race information fee. It is specified on page 10 of the approved form that:

> "As the holder of a race information authority (Authorised Operator) under Chapter 3, Part 6 of the *Racing Act 2002* (Qld), the Authority Operator must pay to Racing Queensland Limited in relation to each Authority Period an amount or amounts calculated in accordance with the following formula:
>
> RIF = (GR – GSTA) x Rate
>
> RIF – is the fee payable for each Authority Period during the Authorised Period
> GR is Gross Revenue for the Authority Period
> GSTA is the GST Adjustment for the Authority Period
>
> Rate is :-
>
> (ii) for the whole period, other than May and June at 10% (all Codes), and
> (iii) for the months of May and June at 15% (all Codes)."

[38] Definitions of the expressions used in the formula and others used in the definitions are then set out. The definitions also incorporate explanations to assist in the application of the formula. For example, the definition of Gross Revenue endeavours to explain how losses are treated:

> "**Gross Revenue:** Includes the income derived from betting on races conducted in QLD, whether placed with or through the betting operator, less the amounts payable in respect of winning bets, with any other costs incurred by the betting operator not being deductible. The derived income includes any commissions or fees charged in relation to the bets or winnings and unclaimed dividends will also form part of the betting operator's gross revenue. Gross revenue is not reduced by any betting tax, GST or pooling fees paid. Essentially, gross revenue is defined as turnover less winnings paid. Bet backs which are made by an approved operator on the backers side will be included in calculating Gross Revenue. GST is deducted from Gross revenue when the race information fee is calculated
>
> **Losses** going forward where the gross revenue to the approved operator for the approved period is zero or less than zero then RQL is under no obligation to pay any amount to the approved operator. Losses cannot be carried forward and cannot be taken into account when the race information fee is payable by the approved operator in relation to future periods."

[39] It is apparent from the approved form that the intention of the formula is that the race information fee is payable monthly by reference to actual revenue throughout the Authorised Period. The Authorised Period is not defined on pages 10 to 12 of the approved form, but is designated on page 1 as 1 January 2011 to 30 June 2012. That makes sense of describing RIF in the formula as "the fee payable for each Authority Period during the Authorised Period." That suggests the definition of

Authority Period on page 10 of the approved form as "the duration of the Authority as specified in the Authority" is inconsistent with the use of that expression in the explanation of the formula. The GST Adjustment is defined on page 11 of the approved form in terms of a calculation for the Payment Period where that expression is then defined to mean "the payment period as may be specified in a relevant Authority."

[40] In summary, Gross Revenue is defined as turnover from betting on races conducted in Queensland less winnings paid with Bet Backs included in calculating Gross Revenue.

[41] How to work out Gross Revenue and Assessable Turnover is illustrated on page 10 of the approved form:

> "**Gross Revenue** is worked out in the following way:
>
> *Step 1* Work out Assessable Turnover
> *Step 2* Work out Bets Paid
> *Step 3* Work out Bet Back Revenue
> *Step 4* Subtract Step 2 from Step 1
> *Step 5* Add Step 3 and Step 4
>
> **Assessable Turnover** is worked out in the following way:
>
> *Step 1* Work out Bets Taken
> *Step 2* Work out AB
> *Step 3* Subtract Step 1 from Step 2"

[42] The abbreviation AB is defined to mean:

> "the aggregate amount paid by the Approved Operator during the Authority Period under Betting Transactions constituting Bet Backs with an Approved Operator."

[43] The definition of Bet Back is also set out in the approved form:

> "'**Bet Back'** means a Betting Transaction which is made by an Authorised Operator on the 'backers' side of a Betting Transaction:
>
> (a) for the purpose of genuinely reducing or laying-off the Authorised Operator's liability on a Betting Transaction which has already been accepted by the Authorised Operator and on which the Authorised Operator has taken risk on the 'layers' side of the Betting Transaction;
>
> (b) on the same contingency in relation to the Queensland Race as the Authorised Operator has already accepted risk on the 'layers' side of the Betting Transaction."

[44] The discrepancies in the approved form in relation to the formula for calculation of fees for the race information authority are not easily reconcilable within the approved form. In particular, although the formula purports to apply to the calculation of the race information fee for the entire duration of the race information authority, the elements for the calculation seem to be applied to the monthly calculation of the payment due on account of race information fees.

[45] Reference to the standard set of conditions that the respondent currently imposes on the issue of a race information authority suggests similar discrepancies. The standard set of conditions were exhibit EJS1 to the affidavit of Mr E J Sweeney filed by leave on 2 June 2011. Those conditions show the Authority Period as from 1 January 2011 to 30 June 2012. Clause 6 of the conditions requires a Licensed Wagering Operator to pay any Race Information Fees to the respondent as a condition of the authority granted by the respondent. Clause 6.1 is given the heading "Race Information fee based on a percentage of Gross Revenue." The formula is preceded by the following words:

> "The holder of a Race Information Authority (Authorised Operator) under section 113C of the Act must pay to RQL Fees in relation to each Authority Period an amount or amounts calculated in accordance with the following formula."

[46] The formula that is then set out in clause 6.1 is identical to that set out on page 10 of the approved form. The definition of Authority Period following the formula is the same as on the approved form, but there is no reference in the conditions to the meaning of Authorised Period and the reference in the opening words of the formula to "each Authority Period" appears to be inconsistent with the meaning otherwise given to Authority Period. Payment Period is defined in the conditions as "the payment period as may be specified in a relevant Authority." The formula for the calculation of the race information authority fees is set out under the heading for clause 7.1 of the conditions of "Monthly calculation." Clause 7.2 of the conditions requires the bookmaker to provide the monthly statement of Wagering Turnover and Gross Revenue regardless of whether the bookmaker must pay a race information fee for that month. That recognises that, in some months, the bets paid out by the bookmaker may exceed the Assessable Turnover after taking into account any Bet Back Revenue. Clause 9.0 of the conditions provides that if the race information fee for one month is not paid by the 10th day of the following month, interest accrues at a specified daily rate on the amount outstanding.

[47] Clause 7.3 of the conditions states:

> "**7.3 Annual Statements and adjustments**
>
> The Licensed Wagering Operator must submit and Annual Statement setting out its Wagering Turnover and Gross revenue for a Financial Year to the Control Body within 60 days of the end of the Financial Year.
>
> The Annual Statement of the Licensed Wagering Operator must set out the 3 codes Turnover and Gross Revenue for the relevant Financial year.
>
> If the total of the payments made by the Licensed Wagering Operator during the Financial Year to the Control Body were more or less than the Race Information Fee which is payable to that Control Body for the Financial Year, no adjustment will be made as losses cannot be carried forward and cannot be taken into account when the Race Information Fee is payable by the Approved Operator in relation to future periods."

**The respondent's power to request the information and the documents specified in the approved form**

[48] The applicants rely on the structure of the Act to submit that the respondent is precluded from taking into account matters that relate to the character and financial standing of an Australian or New Zealand licensed bookmaker who is the holder of an eligibility certificate for the purpose of deciding whether to grant such a bookmaker a race information authority. The applicants submit that the approved form is invalid to the extent it requires an applicant to provide information and documents in relation to the financial position and background of the applicant and every person with whom the applicant has a business association and the character and business reputation of the applicant, its executive officers and every person with which the applicant has a business association. The argument is based solely on statutory interpretation to determine whether the Act allows the respondent to seek information relevant to the suitability of the applicants to participate in the racing industry for the purpose of making the decision whether or not to grant the applicants a race information authority.

[49] The applicants submit that the gaming executive is given the responsibility under the Act to determine the suitability of a person to be an eligibility certificate holder, that the respondent then has the responsibility for licensing the certificate holder as a bookmaker which requires it to be satisfied that the applicant has an insurance policy or bond as specified in s 250 of the Act, and that it would be contrary to the statutory allocation of roles for the respondent to determine the suitability of applicants for the purpose of issuing a race information authority. The applicants submit that was reinforced by the enactment of s 113EA, s 113 EB and s 113EC.

[50] As s 4 of the Regulation expressly requires the respondent to take into account the suitability of an applicant who holds a wagering licence or authority from a foreign country (other than New Zealand) (to whom I will refer as a foreign operator) when deciding whether to grant a race information authority to a foreign operator, the applicants submit that the Legislature did not intend the respondent to canvass the same issues when determining whether to grant a race information authority to an Australian or New Zealand applicant.

[51] The applicants rely on the statement made by Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7:

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

[52] That decision, however, has application where there is a general power sought to be exercised which covers the same grounds as a specific power which, if exercised, would be circumscribed by conditions and restrictions. That does not reflect the relationship between s 113D of the Act and s 3, s 4 and s 5 of the Regulation and the approach of that decision does not assist in the interpretation of s 113D of the Act.

[53] The respondent submits that the only matters that the Regulation prohibits the respondent from considering in relation to an application by an Australian or New

Zealand bookmaker for a race information authority are those which would, if taken into account, contravene s 92 of the Commonwealth *Constitution*, and that does not prevent the respondent from considering the matters relevant to the suitability of an Australian or New Zealand bookmaker to hold a race information authority which are otherwise mandated by s 4(2) of the Regulation for the respondent to take into account in relation to deciding whether to grant a race information authority to a foreign operator. The respondent's argument is that, if the Legislature intended suitability matters not to be taken into account in deciding whether to grant the race information authority to an Australian or New Zealand applicant, that could have been expressly provided for as contemplated in s 113D(5)(b) of the Act. The respondent submits that the purposes of the Act would be promoted by a control body taking into account financial and probity information relating to an applicant and whether or not the granting of a race information authority to an applicant would undermine the integrity of the conduct of the code of racing when considering whether to grant such an authority.

[54] I consider the respondent's submissions on the construction of the Act are compelling, as they reflect the purposive approach to statutory interpretation. In relation to the respondent's consideration of an application for a race information authority by an Australian or New Zealand resident, the discretion conferred by s 113D(3) of the Act is in terms an unfettered discretion (subject only to s 5 of the Regulation that is directed at ensuring there is no infringement of s 92 of the *Constitution*). The suitability of a bookmaker to be involved in betting on Queensland races and therefore to use Queensland race information could not be an irrelevant consideration, when the respondent is expressly required to consider that matter in relation to an applicant who is a foreign operator and whether issuing a race information authority to a foreign operator will undermine the integrity of the conduct of the code of racing in Queensland. The purpose to be achieved by the respondent's management of the codes of racing assists in the interpretation of the power conferred by s 113D. The exercise by the respondent of its power to grant a race information authority which facilitates participation by the bookmaker in betting on Queensland races must be carried out in the context of the respondent managing its codes of racing with a view to achieving the main purposes of the Act to maintain public confidence in the racing of animals in Queensland for which betting is lawful and to ensure the integrity of all persons involved with racing or betting under the Act.

[55] The Full Court of the Federal Court in *Racing New South Wales v Sportsbet Pty Ltd* [2010] FCAFC 132 at [138] and [139] recognised that the similar race field information scheme established under the relevant New South Wales Act and Regulation "regulates a trade well understood to require the protection of the community from the hazards of fraudulent practices, and financially irresponsible operators" and that the use of race field information to conduct a wagering operation "is obviously intended to be denied to those who are unable to demonstrate financial responsibility and integrity."

[56] In relation to bookmakers licensed under the Act, the Act does accommodate checking of suitability for the bookmaker for involvement in betting on Queensland racing at the eligibility certificate stage and the licensing stage. The application for a race information authority, however, may occur at a time which is distant from the checks undertaken in relation to the holding of an eligibility certificate or the issuing by the respondent of a bookmaker's licence. Some aspects of the eligibility

certificate regime, the licensing scheme and the wagering monitoring system and the potential for audit programs of certificate holders and licensees overlap, but the Act provides for layers of regulation directed towards achieving the maintenance of the integrity of persons involved with racing or betting under the Act without treating each layer of regulation as exclusive in operation from the other layers of regulation.

[57] The approach of the applicants to the interpretation of the Act by drawing inflexible boundaries between the layers of regulations of bookmakers overseen by the gaming executive and the respondent is too prescriptive and does not give effect to the language of the Act. The intention of the Legislature reflected in s 113D(3) of the Act is to confer on the respondent a broad discretion, subject only to s 5 of the Regulation, in relation to deciding whether to grant a race information authority to an Australian or New Zealand bookmaker, to be exercised in the context of the subject matter, scope and purposes of the Act.

[58] During the hearing of this application, I made a number of observations about the inflexibility of the approved form in seeking the specified documents, particularly if an applicant for a race information authority had been licensed as a bookmaker in the months immediately preceding the application for a race information authority. The applicants are seeking relief based on the issue of whether the respondent had the power to seek the documents and information specified in the approved form and no issue of reasonableness or burden was therefore relevant to this application.

[59] The applicants cannot succeed on the first issue raised by their application. As a matter of interpretation of the Act and the Regulation, the respondent has not exceeded the power conferred on it under the Act in requesting that the applicants provide information and documents relevant to their character and finances that are specified in the approved form.

**Validity of the proposed fee condition for the race information authority**

[60] The applicants seek a declaration in terms that "the imposition of the fee condition on a race information authority in the terms set out in the application form approved by the respondent for a race information authority for the period ended 30 June 2012 is invalid." The respondent takes issue with the lack of particularity in the terms of the declaration that is sought by the applicants, as the form of declaration does not identify what aspects of the fee condition are the subject of complaint. There is also the problem that there are differences between the information contained in the approved form relating to the formula for calculation of fees for the race information authority and the respondent's set of standard conditions. The submissions of counsel were directed to the application of the formula for calculation of fees found in the approved form and the substance of what is proposed from the sample monthly return that the race information fee is calculated and payable on a monthly basis.

[61] The applicants' submissions in support of the invalidity of the proposed fee condition largely mirror arguments that were considered in *TAB Limited v Racing Victoria Limited* [2009] VSC 338 (the Victorian case). In summary, it is claimed that the fee formula proposed by the respondent is invalid as it is a formula and not a quantified sum, the amount of the fee cannot be calculated with certainty but involves matters of judgment as to its application, the formula is irrational in that

the definitions are incoherent and inconsistent, and the formula is unreasonable in that it may act capriciously across bookmakers.

[62] The terms of the *Gaming Regulation Act* 2003 (Vic) (the Victorian Act) that were considered in the Victorian case differed in material respects from the Act. Whereas, under s 113C of the Act, it is an offence for a licensed wagering operator to use Queensland race information for the conduct of the operator's wagering business unless authorised to do so under a race information authority, s 2.5.19B(1) of the Victorian Act also made it an offence where the operator's use of the Victorian race field did not comply with the conditions of the publication and use approval:

> "A wagering service provider must not, in Victoria or elsewhere, publish, use or otherwise make available a race field in the course of business unless –
>
> (a) the wagering service provider has obtained the publication and use approval of the appropriate controlling body; and
>
> (b) the wagering service provider complies with the conditions (if any) to which the approval is subject.
>
> Penalty: 60 penalty units."

[63] Section 2.5.19D(4) of the Victorian Act provided:

> "Publication and use approval may be granted subject to any conditions the appropriate controlling body thinks fit, including a condition that the wagering service provider pay a fee or a series of fees of an amount or amounts and in the manner specified in the approval."

[64] Davies J in the Victorian case found at [29] that it was relevant to the construction of the scheme under the Victorian Act that the condition for the payment of the fee could be enforced by making it an offence for the wagering service provider to publish or use a race field if payment of the fee was not made. In relation to thoroughbred racing, the fee was 10% of revenue derived from betting on race fields less GST (except for October and November when it was 15%. Because s 2.5.19D(4) described the fee for the approval in terms of "a fee or a series of fees of an amount or amounts," Davies J concluded at [31] that the imposition of fees determinable by the application of a formula was not in compliance with the provision which required quantified sums to be stipulated as the fees charged, as the fee had to be of an amount which must be construed as a quantified sum.

[65] Section 113E(3)(a) of the Act does not describe the fee as an amount. In addition, if there were any ambiguity, the note on s 113E(3) in the Explanatory Notes to the Bill for the 2008 Amendment supports the contention that the use of the word "fee" was not restricted to a fixed sum as reference was expressly made to the calculation of the fee being determined by the control body. That is also reflected in s 6(b) of the Regulation.

[66] I therefore consider that the decision in the Victorian case does not apply to s 113E(3) which does allow for the fee for Queensland race information to be calculated by reference to a formula.

[67] The applicants rely on the authority of *King Gee Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, 197 for the proposition that delegated legislation may be invalid for uncertainty where it is concerned with the fixing of a price or standard or the like and involves some matter which is not an ascertainable fact or figure, but a matter of estimate or discretionary assessment resulting in the attribution of an amount or figure as a matter of judgment. Davies J in the Victorian case identified at [35] a number of elements for the calculation of revenue by TAB that had been raised in complaints about the application of the formula. Unlike the formula in the Victorian case, the formula in the approved form is set out at length with explanations and the issues raised in the Victorian case on the argument of uncertainty are not applicable. The application of the formula, as set out in the approved form, does not require the exercise of any discretionary judgment in any relevant way. The formula is therefore not invalid for uncertainty.

[68] On reaching the conclusion that the approved form requires the calculation of the race information fee on a monthly basis, the discrepancies in the definitions are academic. This disposes of one aspect of the applicants' irrationality argument.

[69] The way the formula works on a monthly basis is that there is no fee payable if the Bets Paid exceed Assessable Turnover (adjusted for Bet Back Revenue). The loss on Assessable Turnover in such a month is not set off when calculating the race information fee for a subsequent month. The applicants argue that the prohibition included in the explanation of the formula against adjustment between the accumulated monthly results and the calculation of an annual race information fee is irrational. The answer to that is that is how the respondent has decided to impose the formula. That is a policy decision. The formula can be applied consistently on a monthly basis without permitting the carrying forward of losses. It is not objectively irrational.

[70] The applicants rely on the same analysis to support the submission that the formula is liable to act capriciously across bookmakers and, in addition, because the formula focuses on Gross Revenue (less Bets Paid), the fee makes no allowance for differing cost structures for bookmakers. There is nothing capricious about the operation of the formula that has intentionally chosen a method for not carrying forward monthly losses or basing the formula on gross revenue which is ascertainable and bears some relationship to the bookmaker's use of Queensland race information.

[71] The applicants' challenge to the validity of the respondent's exercise of power to calculate the race information fee by reference to a formula is unsuccessful.

**Orders**

[72] It follows from my conclusions in respect of each of the issues that was raised by the applicants on this application that the proceeding must be dismissed. Subject to any submissions that the parties wish to make on the order for costs, I would propose that the applicants pay the respondent's costs of the proceeding to be assessed.