IN THE SUPREME COURT OF NEW ZEALAND SC 68/2007

IN THE MATTER of a Civil Appeal

BETWEEN **LISA KATHRYN CROPP**

Appellant

AND **A JUDICIAL COMMITTEE**

1st Respondent

AND **BRYAN FRANCIS McKENZIE**

2nd Respondent

Hearing 13 March 2008

Court Blanchard J
Tipping J
McGrath J
Anderson J
Gault J

Counsel A Ivory and A Shaw for Appellant
S J E Moore and G H Anderson for 2nd Respondent

CIVIL APPEAL

10.00am

Ivory May it please the Court Ivory with Mr Shaw for the Appellant.

Blanchard J Yes Mr Ivory.

Moore May it please your Honours I appear for the second respondent with Miss Anderson.

Blanchard J Yes Mr Moore. Now before we begin I understand there has been a very late application from TV 3 for permission to I think take the feed of whats going out of the courtroom for the purposes of recording it for use on presumably a TV News programme. Does counsel have any problem with that?

Ivory Not especially from our point of view Sir. Radio NZ applied in a timely fashion that had the advantage that we were able to supply them with our written submissions so that they could have them in advance in the interest of accuracy for reporting of the oral argument subject to the later character of the application with no objection.

Blanchard J Thank you Mr Ivory.

Moore I am in the same position thank you Sir.

Blanchard J Well it is unfortunate the application has come in so late. News media who make very late applications do run the risk that they are going to be turned down but in this case the court can see no reason why they shouldn't have their application granted in this instance. Yes Mr Ivory.

Ivory Written submissions have been filed, the nub of the appellants case, yes it is actually a simple one and doesn't in fact involve novel propositions of law. The approach to statutory interpretation where there is a possibility of fundamental rights being affected particularly under the Bill of Rights Act is set up your Honours judgment in the *Hansen* case and there is no reason in my submission to depart from that approach here in addition the ordinary rules of interpretation would require the approach to interpretation that is contended for by the appellant. His Honour Justice McGrath in the *Hansen* case identified the starting point as identifying what rights may be affected. The appellant here has put forward in written submissions two rights, the right to bodily privacy and integrity and the right not to self-incriminate. On reflection the second of those rights is perhaps overstated by the appellant. Its not necessary to seek to promote a view of the right against self-incrimination as running as far as urine samples as in this case. The significance of the lack of protection for use of the samples and results later, can inform the interpretation issue, but is not now offered as an independent right. But the importance in terms of the fundamental right to bodily privacy and integrity that is promoted by the appellant here is that it is a common law right. Its not reliant on the Bill of Rights Act. It's a well-established common law right of long standing. There is an affirmation of a part of that right in s 21 of the Bill of Rights Act, the right against unreasonable search or seizure. But the

appellants primary reliance in this case is on the common law right and it's the appellants case in reliance on the common law right a proper interpretation of s 29 of the Racing Act, leads to an inevitable conclusion that there is no power in the Racing Act to make racing rules from random drug testing.

Blanchard J You said that part of the common law right is affirmed by s 21. Could you elucidate.

Ivory Yes s 21 is protection against an unreasonable search or seizure, the common law right is absolute. That's a right to bodily privacy and integrity and that needs to be taken away by a law. To any extent that it is taken away there must be a law to take it away. And the person seeking to take away any part of that right needs to point to that law.

Tipping J But doesn't that really depend on what you mean by integrity and privacy. That the right the so-called common law right to bodily, what was it bodily privacy and integrity one would need to explore quite carefully what is inherent in that right. It somewhat begs the question to say that its breached here.

Ivory In respect of the taking of bodily samples it's my submission that it's well established that that is a breach of the right to bodily privacy and integrity and any claim to a right to insist on the taking of any such samples from a person must be supported by a clear and express law.

Tipping J And the authority for that is.

Ivory There is a range of them. Taking the appellants

Tipping J This is from the common law point of view we are forgetting the Bill of Rights are we?

Ivory Yes

Tipping J But we are invited to completely forget the Bill of Rights as the founder for the moment as the foundation of this right.

Ivory For the moment yes its common law right. Starting simply using the index and the appellants bundle of authorities at tab 3 is *A v The Council of the Auckland District Law Society*.

Tipping J And could you refer us to the passage there that you rely on.

Ivory I draw your Honours attention to paragraph 33 following through to 38.

Tipping J This supports the proposition that there is a serious interference with fundamental rights. I was more anxious for you to direct our attention to authority which told us what this bodily privacy integrity common law right what the sweep of it is. I mean does it protect for example simply asking someone to produce a urine sample. I can understand if you put a needle into someone compulsorily to extract blood that might cross a line that someone might perceive, but here she is simply told isn't she to go and produce the sample, there is no sort of force applied if you like, its not an assault otherwise.

Ivory Yes I find that proposition somewhat surprising your Honour. First your Honour said ask for a sample in fact require is.

Tipping J I can see the difference myself at the moment subject to your help between requiring someone to submit to an assault and I just want to get a feel for the extent of this fundamental right.

Ivory Being required to give up bodily samples of any kind is surely an intrusion on the body of the person.

Tipping J Well I don't think you, may be that your surprise Mr Ivory is measured by the rather more subtle way I am looking at this.

Ivory In my submission it isn't a measure of bodily privacy and integrity that the alternative is assault.

Tipping J Alright now are you able to cite any authorities.

Ivory There isn't any authority for it in my submissions.

Tipping J Because I can quite understand if you would otherwise be committing a tort then that might be a factor but if you are not otherwise committing tort. Are you saying that there is some sort of inherently tortious or illegal conduct inherent in this?

Ivory Well in terms of tort I would have thought it was at least trespass to require somebody to give up some part of their bodily person would be at least trespass.

Anderson J Or require it is just a word meaning that its been asked for and if its not provided then there will be certain consequences, its not as though, one can be held down and have bodily samples extracted. Like asking for permission to go on land for the penalty if its not given, but it doesn't authorise you to go on the land.

Ivory It's a request that has the force of law and it has legal consequences.

Tipping J Legal consequences.

Ivory It's the same as being asked to give a breath test under the excess alcohol legislation.

Blanchard J It has the force of law in the sense that there are consequences if there is no compliance, but it can't be specifically enforced.

Ivory No it can not.

Blanchard So its hard to see that its an assault, hard to see that there is a trespass to the person.

Ivory If the requirement is unlawful it would be a trespass if the person gave it as in this case believing the request to be lawful or the requirement to be lawful.

Gault J It's a circle though isn't it to say if its unlawful, because what you are trying to contend for is that it is unlawful.

Blanchard J At most it is trespass to goods if you want to be really clinical about it.

Ivory Well it's a question of whether they are goods when they are inside you.

Blanchard J The sample is not submitted when it is inside.

Ivory No but the demand for it is for a substance that is inside you.

Blanchard J And that is going to emerge at some point anyway.

Tipping J If this argument had force surely there would be some authority somewhere that you can just simply refer to to say that this is a breach of a common law right.

Ivory The right to refuse.

Tipping J You are saying that this is a breach of a fundamental common law right and the right is framed as bodily privacy and integrity, now I just want an authority that says that there is a fundamental common law right along those lines – that's all.

Anderson J It's a facet of autonomy isn't it, where autonomy is recognised for certain purposes.

Ivory Yes it is.

Tipping J Is there no authority that you can cite for just a simple proposition that you're espousing or are you saying it so obvious that it.

Ivory There is a range of examples of it. There is *R v T* at tab 16.

Blanchard J That was about blood testing wasn't it?

Ivory That was blood testing in the context of a rape charge where an intellectually handicapped woman had miscarried.

Blanchard J But there the man was being compelled to give blood. Subject to the legislation being complied with he had no choice but to give the blood.

Gault J I am just wonder if you could help me Mr Ivory, you seem to be contending that a common law right upon which you rely is absolute whereas the right under the Bill of Rights s 21 is qualified by the reasonableness qualification, so are you saying that the common law right is wider.

Ivory Yes it is.

Gault J And if so, like Justice Tipping, I would like to say some authority for its scope.

Ivory In my submission all I have to contend for here is in respect of the requirement to provide urine samples on random drug testing. In order to describe the full scope of the right of privacy would be presumably a textbook.

Gault J I am afraid that doesn't help me very much. I would be assisted by some authority.

Ivory Another example of the playing out of the right is in *R v B* which involved in fact a contest between two rights.

Blanchard J Where do you find that?

Ivory That's at tab 13 of the bundle.

Blanchard J Well that's a Bill of Rights case isn't it?

Ivory There was a contest between two essentially fundamental rights, the right to a fair trial, which of course is also a common law right and an end right to bodily integrity in part of a complainant.

Tipping J I would rather have thought Mr Ivory that whatever the common law was before the Bill of Rights it must now be heavily influenced by what Parliament has said is this right against unreasonable search and seizure. In other words I would have thought the idea that the common law right is absolute is a very awkward fit with the idea that the Bill of Rights right is subject to reasonableness. And I think you have really got to address that rather than work on the hypothesis that the common law right is more absolute if you like than the s 21.

Ivory The Bill of Rights Act doesn't derogate from any existing rights.

Tipping J But if there is any doubt about what the common law is surely what Parliament has said in s 21 is important as to what the scope of the right should be at common law. Should it be wider than that affirmed in s 21. You haven't yet demonstrated to my satisfaction that there is any such common law right that goes wider than s 21, but even if you could, and I wait with interest, I am not sure how that survives if you like the policy implications of s 21.

Blanchard J Surely the most you can say is that personal integrity is an important factor at common law as well as under the Bill of Rights and that accordingly even at common law the courts won't easily be persuaded that Parliament has given permission for an invasion of personal integrity, in other words it must be quite clear from the legislation that there is authorisation.

Ivory Yes

Blanchard It can't go any further than that can it.

Ivory Well the argument is certainly I accept that the position so far as whether the words do what is contended for by the party seeking to rely on them, the test is a stringent one, and I think it is pretty clearly set out in the Simms case and Morgan Grenfell.

McGrath J Just before you leave *R v B* is there anything in that judgment of the Court of Appeal that characterises the complainant's interest in not undergoing a medical examination as a common law right rather than if you like as a countervailing value that had to be weighed in looking at the accused's rights?

Ivory Justice Richardson certainly said that on any view freedom from invasion of physical privacy of bodily integrity is a fundamental human right.

McGrath J Where abouts are you at?

Ivory It is in the headnote first at page 173 and then he says it at page 182 lines 38-40.

McGrath J Thank you.

Tipping J What is to suggest at that passage that it is that right that has been affirmed if you like in s 21. I know s 21 isn't direct specifically to physical privacy and bodily integrity but it has been in some instances construed to cover that hasn't it.

Ivory In the particular case this was going to involve a vaginal examination and the particular rights in the Bill of Rights Act that were referred to in the judgment were ss 10 and 11.

Tipping J Right.

McGrath J So far you have identified an authority characterising as a fundamental human right, the right not to be subjected to medical treatment, but I haven't yet seen anything that indicates its absolute. It is useful here as a countervailing value isn't it, in a balancing exercise, nothing that indicates it absolute. Because if was absolute the decision wouldn't have required a Bill of Rights analysis.

Ivory Its absolute in the sense of requiring a law to take any part of it away. Its that kind of absolute. If someone seeking to infringe on it they must point to a law to justify their infringement or for it not to be an infringement I should say.

Tipping J And the essential thesis in this case is that the s 29 I think it is of the Racing Act which gives the catalogue of things you can pass rules for its just not sufficiently express to entrench on this fundamental human right.

Ivory That's the core of the appellate case.

Tipping J That's the core point.

Ivory When you search through s 29 you simply can't find anything there which is either express clearly not express, but there is nothing there which gives a necessary implication of a power to make random drug testing rules. Quite clearly there is nothing to stop Parliament empowering thoroughbred racing to make such rules.

Tipping J You have to characterise this as absolute in order to get to your proposition? Back to Justice Blanchard's point you seem to me to be taking higher ground than you need Mr Ivory.

Ivory I was simply distinguishing it between the right and the expression of unreasonable search and seizure in s 21. That was the purpose of my distinction. If I appear to be taking an overly strong case then perhaps we are at cross-purposes.

McGrath J This argument is solely being advanced as a preliminary to the vires argument.

Ivory It's the first step. What's sought by thoroughbred racing to be infringed here.

McGrath J This is what has to be taken away.

Ivory This is what has to be taken away, it's her right to say no.

Tipping J The extent to which it is taken away must be of some moment, must it?

Ivory Well in terms of taking a sample there are after all of course the random drug testing rules entail the taking of samples of all kinds of bodily part.

Tipping J But in the individual case in the present case the intrusion is perhaps at the lowest end, that's what I am suggesting to.

Ivory Lowest end might be brief.

Tipping J Alright, but its at the lower end of invasiveness if you like.

Ivory Yes that's at the lower end of invasiveness yes.

Tipping J Does that have a bearing on the question of whether the rule is valid to that extent?

Ivory In my submission no.

Tipping J Right well you will have to go on and develop that, I'm sure you will.

Ivory Moving to step two of the interpretative process there being a right which was sought to be taken away, the next test is to apply ordinary interpretative principles to it, over in paragraph 49 of my written submission. And because there is a fundamental right to be taken away what has become known as the principle of legality is applicable to the interpretative process, it's a well-established principle simply that rights won't be taken away without clear word express words or unnecessary implication.

Blanchard J Well isn't that really the same argument just looked at from a slightly different perspective?

Ivory The same argument as?

Blanchard J As your first step.

Ivory The first step is to identify whether there is a right and we have in fact been discussing.

Blanchard J I'm sorry I was talking about steps in your argument. You have been arguing about the position at common law and I think we accepted that the invasion of bodily integrity such as it may be it would be a value element in determining the interpretation, you are putting on top of that legality as well, in saying that you need to have something pretty clear in order to need an invasion of the right. But they are really two sides of the same coin.

Ivory They are because in identifying the right you also identify with it the associated need for any removal of a part of that right to involve clear words or necessary implication. This expression, principle of legality is relatively new expression but the principle itself is old.

McGrath J And it's no more is it than a principle that legislation has interpreted on the prime facie basis that it was not intended to interfere with human rights.

Ivory Oh yes that's right.

McGrath Isn't Lord Steyn's principle of legality a modern way if you like of saying it, but it is simply that principle isn't it?

Blanchard J It seems to me it is merely obfuscatory way of saying I just don't get much help from so-called principles of legality.

Ivory Bennion, I should mention in his latest edition 2002 would share your Honours view as to the expression. I think he describes it "the principle is good but the term is misleading".

Blanchard J Yes well I think that would be my position, I have got no problem with what underlies it. It is just the way its denominated.

Ivory He describes it at 703 of his volume as likely to lead to confusion as an expression and I wanted to draw that to your attention because if this country is going to go down the road of that term it needs to know that Mr Bennion at least disagrees with its use.

McGrath J Doesn't our legislative more secure basis for the approach to s 6 of the Bill of Rights which we can really now go to, the old common law presumption sometimes got some traction and sometimes did not, but now in s 6 of the Bill of Rights we have a statutory direction, isn't that really where we should be getting our guidance from rather than some sort of revival in the House of Lords of the common law presumption.

Ivory There is some reservation about that approach relying entirely on s 6 especially when this presumption, this rule of construction, has such a long common law history and has been so clearly stated recently in the House of Lords in the Privy Council.

Tipping J Is it not a point that is part of the ordinary process of interpretation before you reach s 6 if you like.

Ivory Yes and that's how it was used in cases such as *Drew* and *Auckland District Law Society*.

Tipping J But however you get there.

Ivory A number of cases used it and have in fact said in the course of the judgments that the Bill of Rights has not actually reached informing the view of the common law principle or rule of construction **.**

McGrath J But one view Mr Ivory is that really with the arrival of purposive of interpretation the common law presumptions have somewhat faded in their significance and that really the Bill of Rights provision is in the Act to ensure that the courts know that this old principle still has legal force and just for my own part I am a little hesitant about applying the same principle twice once on a common law presumption basis and then later of a statutory interpretation basis.

Ivory It would certainly be so if s 6 were reached first, but its not reached first with the strength that its reached under the common law. One finds oneself in the jaws of s 5.

McGrath J So you prefer the common law because its stronger than the statutory expression of the principle.

Ivory It's stronger because of the structure of the Bill of Rights Act as interpreted in *Hansen.* Common law in fact is stronger and the cases are resolved in fact without the complexity of the Bill of Rights Act.

McGrath J I just have a little difficulty with the notion that the statutory expression of a right in an instrument of constitutional significance like the Bill of Rights is and how interpretation principles were affected, it is in some way

narrower than the common law and we have to just put the statute aside and go back for a more robust approach in the common law.

Ivory It is not actually putting it aside, it's dealing with ordinary interpretation principles first and if the case is resolved by those principles, one need go no further, but if it is not resolved by those principles and there is an apparent inconsistency with a Bill of Rights affirmed right, then that process is engaged but of course one goes to s 5. There is no s 5 at common law.

Blanchard J Well I wonder if this isn't getting a little bit too abstract and that it might be helpful if you now furthered your argument by addressing how it applies to the particular statutory provision, s 29, that we have to consider.

Ivory Yes, I would like first before I move off this point just to draw your Honours' attention to the first expression of this rule of interpretation at common law that I have been able to find. It is provided to me by Lord Steyn in the *Pierson* case which appears as a reference in a number of the other cases that are in the bundles and its in a case Minet v Leman (1855) where Sir John Romill**y** said very family words "The general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched."

Blanchard J Do we have a reference to that?

Ivory What I can do your Honours is hand up extracts from *Pierson* which have that quote in them, not the whole judgment but at least extracts. It appears at page 518D of the extract.

Tipping J Is there any other real way of doing it but saying it must be clear that Parliament authorise this?

Ivory Yes

Tipping J Is it any more mysterious than that?

Ivory The virtue of the most modern exposition of it in *Simms* and *Morgan Grenfell* is that that is teased out because there had been some suggestions that even a necessary implication was not within the word clear, and it is now perfectly plain that it is express words or necessary implication that's what clear means.

Tipping J Not reasonable implications, necessary implications, yes.

Ivory And I think that modern exposition has been helpful and has I think solved all of the interpreted problems around what that rule is.

Tipping J Of course the difficulty is that clarity for one mind is not clarity for another. You will always get in terms of individual application that's the difficulty. But the principle is entirely straightforward.

Ivory Yes indeed.

Blanchard J And necessary implication takes you straight to context too.

Ivory Yes it does and all of those I think what is seen as well I suppose, depending on what side of the case you are on, is the joy and horror of the law, the expression context is everything.

Blanchard J That's another Steynism.

Ivory And a joy or a nightmare depending on whether you are using it or resisting it.

Tipping J Well one man's context is another man's irrelevance. I mean it's a lovely sort of mantra but analytically it's useless.

Ivory And I think justifiably to the general citizen it's a nightmare.

Anderson J They can't say that context is important.

Ivory It removes predictability from human affairs which I think is the biggest problem.

Tipping J But anyway I would like to be instructed as to how this isn't clear Mr Ivory.

Ivory Well its certainly not express words.

Tipping J Well no it doesn't say you are hereby authorised to make random a breath testing rule.

Ivory I am fully alive to the differing views of this Court in the *Hansen* case around whether the reverse onus at a balance of probabilities level was justified or not and I am in the same area here in that sense, that it is essentially going to be a matter of assessment for your Honours whether there is a necessary implication. It is important to refresh with the test which I would support in the *Morgan Grenfell* case provided by Lord Hobhouse. It is set out at page 15 of the written submission at paragraph 62. Necessary implication is not the same as a reasonable implication. A

necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary indication as a matter of express language and logic, not interpretation.

Blanchard J I am not sure I follow that last sentence.

Tipping J I think he is trying to say with respect that it must necessarily follow from the express language rather than it is a matter of interpreting the express language. I have also found that sentence difficult myself.

Ivory Yes it's rather a long distinction it distinguishes between and then there is a very long statement of what is on one side of the distinction and finishes with what is on the other side. It is not a case of would this be a good idea, would they have done it if they had thought of it, but does it necessarily follow from the words in the Act.

Blanchard J Have they done it.

Ivory Section 29 is the rule making part. Section 33 I draw your Honours'attention to again. Section 33 limits the rule making part to s 29. There can be no rules other than s 29 rules. The respondent relies on s 29(1). Section 29(2)(d) and s 29(2)(i).

Gault J I suppose for completeness you want to refer us to s 31.

Ivory Yes in my written submissions I have done. It reinforces of course at every step of the way both the general law, the rules of interpretation that I have been putting forward and of course the Bill of Rights Act.

Tipping J Well the general law that you rely on I suppose. Is this perhaps not an absolutely absolute but fundamental human right of bodily integrity.

Ivory Yes and how any law which would otherwise infringe on it is to be interpreted.

Tipping J So the effect of 31(1) I suppose is that if there is to be any entrenchment on any common law rule it must be done by statute and not by rule.

Ivory Oh yes. The power to make random drug testing rules has to be found in this section.

Tipping J But it goes a little further from that doesn't it, any provision in the rules that is in conflict, even if – I suppose one reinforces the other I suppose it doesn't actually add to the other.

Ivory No it is a statutory reminder that this Act does not empower the authorities to make rules outside the general law. This Act or the Bill of Rights Act, but if there are express words or a necessary implication to take away a fundamental right then that would operate. Section 31 would not prevent that from being so. And it's a very unusual signal to send by statutory means.

Tipping J So do we read s 31(1) as if it had added to it "save as may have been expressly authorised by this Act or by necessary implication under this Act" because otherwise the things going to be self-defeating isn't it.

Ivory If s 29 contained a provision which set out a code for a random drug testing there wouldn't be any problem.

Anderson There would be no conflict.

Ivory There would be no conflict. So what has to be found in s 29 is a power to make such a code.

Tipping There would be no conflict with this Act but there might be a conflict with the general law, so you really have to read s 31(1) even if there is a conflict with the general law, if its authorised expressly or necessarily implication by s 29 it's ok.

Ivory I think that would have to be so. Yes

Anderson If it's authorised the general law is modified accordingly.

Ivory The general law would be modified by that. But the Bill of Rights Act of course would not. The Bill of Rights Act would still have to go through the process but in going through the process you would presumably end up at s 4, because s 29 is clear in its terms.

Blanchard J Well are you going to move now to s 29?

Ivory Well 29(1) is the first rule relied on by the respondent and my submission it's a forlorn proposition in any legislation affecting rights, general words are insufficient in authorities.

Blanchard J All that is saying is that they have to have rules.

Ivory Yes

Tipping J Well I would have thought for myself that if it didn't come under 2(d) it doesn't stand a show.

Ivory No. Its got to be in the words safety or its nowhere.

Anderson J "Including safety", (d) covers the conduct and control of race meetings, including but not confined to safety.

Ivory They are said here to be made for safety.

Anderson J But one could also see that they are made for fairness. Fair treatment of the public, fair treatment of other horse owners, punters and owners don't want to be competing against people who have got a drug advantage.

Ivory Disadvantage in fact.

Anderson J Well it depends on the drug. Forget about methamphetamine think of some other drug, any drug that is comprehended by it. There might be performance enhancing drugs.

Ivory One of the difficulties in my submission with the regime that they have is that they have focused entirely exclusively on the controlled drugs and the Misuse of Drugs Act Schedules. Those are the only drugs that are subject of this regime. They are not focusing at all on performance enhancing drugs; there is no mention of alcohol.

Anderson J Caffeine.

Ivory Well none of the forms of caffeine that I am aware of. The schedules for the Misuse of Drugs Act would be perhaps more familiar your Honours than me, I have not done a drugs case for a very long time. But I looked through the schedules and the hieroglyphics of chemistry that I might recognise and what I did recognise was codine. Any presence of codine apparently is enough to have you suspended.

Anderson J Because it is an opiate

Ivory Yes its an ordinary painkiller for a headache.

Tipping J Mr Ivory, is it the randomness that attracts the criticism rather than if you had some sort of reasonable cause to suspect or something like that in it, I dare say you are not able to conceive that that would be alright but it's the randomness that is the icing on the cake from your point of view.

Ivory Yes the randomness is certainly part of that is fatal to is in my submission its fatal anyway. They already have provisions to immediately suspend somebody from racing to put a stop to them on the spot without further if they have reasonable cause to believe that they are affected in anyway whatever. Those provisions are already in the rules and they are not subject to this case at all. So if anybody is in anyway seen on the day or at any time indeed to be affected they can be stopped. And that can be obviously for these sorts of substances, for alcohol for anything illness anything at all and those provisions are obviously fine. Whether there would a power to take samples if there was reasonable cause to believe, there again I think that those rules would probably fail as well but I don't need to argue that I only have to deal with the random drug testing rules.

Tipping J Quite.

Ivory And those are the only ones I am targeting.

McGrath Mr Ivory I wondered whether you were developing a notion that or inviting us to accept that perhaps these rules weren't concerned with safety at all they were more concerned with the reputation of those actively engaged in the racing industry.

Ivory Well I certainly am attacking them with the cause of what appears to me to be an exercise of moral disapproval rather than any kind of real focus.

McGrath J But the case is really being run on the basis without any contradiction as I understand it so far that on the basis that it's the safety is the reason for the rules.

Ivory That is the reason, Mr John McKenzie in his affidavit, puts that forward.

McGrath J And there is no contradiction in your affidavits apart from some passing reference I think to stable personal.

Ivory Well were we say it seems unlikely given that stable hands can be randomly tested.

McGrath J But they ride horse too I presume.

Ivory They can, but they don't ride them in races.

McGrath No.

Anderson Help prepare them.

Ivory They help prepare them, they certainly handle them, but as someone pointed out to me yesterday, if the appellant was sitting in the back of the room now a Racecourse Inspector could tap her on the shoulder and require her to go out the back and give a sample, right now, under these rules. That's the nature of the rules. They are certainly being challenge for their effectiveness for safety.

Tipping J Surely they are rationally connected with safety. Are you saying they over-reach?

Ivory They wildly over-reach in my submission. There is no evidence at all that the drugs in the Misuse of Drugs Act pose a problem in thoroughbred racing.

Anderson J You don't want a jockey riding a steeplechase under the influence of dope.

Ivory Well you don't want it, but the question is whether there is a sufficient problem to justify this interference.

Anderson J Well I was addressing the issue of the connection between the drugs and the schedules and safety in the industry.

Gault J It's not what we think anyway is it Mr Ivory, was it reasonable for the promulgators of the rules to take that view.

Ivory Yes. And in my submission they have no basis for doing it, other than a kind of a general drugs are bad attitude, there is no evidence that it's a problem in the industry.

Tipping J They don't want it to start to be a problem. I think that's a bit naive with respect that there is no evidence that there is a problem.

Ivory There is no attempt to deal for example with alcohol.

Blanchard J Well the fact that they haven't dealt with some other things that could be a problem may be a reason for criticising the effectiveness, but I don't think it impugns the intent behind the regime.

Ivory In my submission it certainly goes for the quality of the rules and as to whether they are in fact properly designed to do what they need to do in any rational and proportionate way.

Tipping J Isn't the argument in favour of randomness that that has a deterrent affect which is going to disincline people to do what the rule is designed to prevent.

Ivory That certainly the proposition advanced by the respondents.

Tipping J But that must have some force mustn't it.

Ivory It has some force but insufficient in my submission to justify them.

Anderson J What if it was fiscally and practically possible to test every jockey before every race so there is no element of randomness. Would that be unreasonable?

Ivory In my submission, yes. But I don't have to defend that case.

Anderson J What is it about, why is randomness a defect?

Ivory Because in my submission there is no connection between the – the only purpose it can't be for immediate safety that's clear.

Anderson J Deterrent.

Ivory Its purely deterrent.

Anderson J And the degree of randomness affects the degree of risk that you will be found out if you are using.

Ivory It does.

Anderson J So it's a lesser risk if its random than if its routine.

Ivory One struggles also with these random drug testing rules when we have nothing like it even in respect of the road. We are clearly any.

Anderson J You might want it on a car race track for example.

Ivory I can't say what the situation is in respect of motor racing, I don't know. The regulatory controls the motor racing of course are quite different to.

Tipping J Are you saying, in effect Mr Ivory, that this paragraph 29 (2)(d) doesn't authorise any form of drug testing regime?

Ivory Yes I do. But I don't need to say that.

Tipping J I know you don't need to but I am just trying to, it's a question of quality rather than degree is it, if you understand me. In other words they can't do it at all, they haven't sinned through going too far, they have sinned through doing it at all.

Ivory Well they have sinned doing it all and they have also sinned by going too far. They go too far as well.

Blanchard J Well perhaps you better address first that they have sinned by doing it at all, that's a pretty difficult proposition I would have thought, unless you are going to be able to persuade us that drug testing in any form has nothing to do with safety. And I would have thought it obviously does.

Ivory Well it can. The difficulty here is that there is no demonstrated problem to justify the interference.

Gault J But is that really what you have to argue. Don't you have to argue that there was no basis therefore it wasn't open to those promulgating the rules introduce this, in other words it is not for the purpose of safety and they couldn't have conceived it as for the purpose of safety. Its not for us to say that there is no case, it's a matter of what they perceived it.

Blanchard J I would have thought it was blindingly obvious that certain types of drugs lead people under their influence to do stupid things, to not be masters of themselves and to be a danger to others. There is so much evidence of that in society, I would have thought any contrary argument is quite hopeless. If a rider were to be under the influence of LSD for example during a race, god only knows what the rider might do or try to do with attendant danger not only to that person and the horse that he or she was riding but to all the others in the race.

Ivory The category of such persons that your Honour is directing attention to are those who would not be suspected before they got on the horse. Someone who is under the influence of LSD, I would suggest, inevitably I would have suggest inevitably in the course of preparation for the race be identified as a problem.

Blanchard J LSD is the extreme example, but to suggest that any form of drug testing regime is outside the word safety requirements seems to me a quite hopeless argument.

Ivory I don't need to defend it.

Tipping J Alright that's fine.

Blanchard J You did appear to be turning though… .

Ivory I did preface my remark.

Blanchard J You have got better arguments than that.

Tipping J If they can do it in theory, what makes this one objectionable?

Ivory What makes this one objectionable is its randomness, there is no cause to suspect.

Tipping J Its really the randomness element isn't it. Putting it simply? Its not sufficiently tightly drawn in other words.

Ivory Yes, its not sufficiently tightly drawn.

McGrath J It is also randomness in element of time, place and circumstance I gather to. Because you are concerned it could happen in this courtroom.

Ivory In this room yes. It's impossible to draw any circumscription on the scope of the lawmaking power from s 29(2)(d).

Tipping J Does that make the rule itself ultra vires or is it to be controlled by saying that there may be exercises of the power that are vitiated but the rule itself if administered within purpose and reasonably is valid.

Ivory In my submission it tells against the power itself, examples are *Payn* the blood alcohol case which is at tab 17.

Tipping J Well I think this is getting to the heart of this case Mr Ivory whether an overreaching rule, if it is, is invalid per se or whether it has to be read down so as to be if its administered properly and within purpose and reasonably its ok but not otherwise, and you say *Payn's* cases is helpful there is it.

Ivory The struggle there was with what circumstances were going to permit entry onto premises, taking of samples arrests and so on around excess blood alcohol. I draw your Honours attention to page 69 of the judgment. Your Honours, Justice Cooke as he then was, beginning at about line 28 after a discussion, said "in the result four of the five Judges who had to decide the question see in the statute some necessary implication of rights of entry but there is no clear consensus as to the extent of these rights and in a field such as this it is of first importance powers exercisable against citizens should be clear and easily understood, or over while the object of the blood alcohol legislation is to preserve human life" and so it goes on. And he says "I am afraid that in defining the extent of any rights of entry the Courts would pass beyond interpreting and would be speculating".

Anderson J Mr Ivory is there any provision in these rules which are fairly extensive or provisions which serve to indicate the territorial scope, shall we say, in the Steward's power?

Ivory No.

Blanchard J Mr Ivory assuming that there is power to make some kind of drug testing rules, that its not absolutely prohibited and I think you have almost conceded that, is it objectionable that these rules are intended to deter rather than to detect an offence, sorry, to detect a dangerous situation that has already arisen.

Ivory They certainly won't do that. They won't do the latter, that's common ground because it is simply not tested on the day, they could only have a deterrent purpose.

Blanchard J Is that objectionable?

Ivory A deterrent purpose?

Blanchard J Yes.

Ivory If there is a pressing need to deter, no, that would be a reasonable purpose. But there is no pressing concern here that one can discern. It seems to be merely prophylactic.

Blanchard J Well you say they can't make rules to keep a bad thing out, they can only make rules in relation to a problem that already exists.

Ivory Yes in my submission. In order to read into those words this power in my submission there needs to be some kind of pressing concern for that, not merely a good idea.

Tipping J Have you finished with *Payn's* case because I have something that I would like to ask you?

Ivory Yes.

Tipping J Does this case assist, and if so how, on the question of if you have rule that's passed that is capable of being exercised outside purpose or unreasonably but equally capable of being exercised in the converse way, does the capacity for it to be exercised power unreasonably, invalidate the whole rule? Because that seems to me to be the crunch point here, because the exercise of the power on this occasion seems to me to be unarguably within the purpose of safety and reasonable, from the point of view of the actual, if the power is valid in itself and its only its exercise which can be challenged then I think you are in difficulties. But if the power is invalid altogether then obviously you will succeed.

Ivory Our proposition is that there is no power to make these rules.

Tipping J There is power to make certain rules but not these ones. But these ones are capable of being exercised, are they not, appropriately but according to your argument are capable of being exercised.

Blanchard J Well no, I think Mr Ivory was arguing the prior point which was the one that I was engaged in discussing with him that there is no ability to make rules about deterrent drugs because there is no drug problem.

Tipping J Yes I have moved on from that point. I don't agree with you there.

Blanchard J Well I don't either but I thought Mr Ivory might want to develop it further.

Tipping J Certainly if you want to, but I give notice that I am going to come back to this point that I have just raised because it seems to me to be crucial.

Gault J I think there is a related point too and that would be a question of interpreting the rule having regard to its overall purpose in context.

Blanchard J Yes. What Justice Tipping was leading up to.

Gault J Yes, it doesn't seem to me that takes us very far to refer to the possibility of somebody being demanded of in the back of a courtroom. Because plainly the rules would be construed having regard to their context and purpose.

Tipping J That's essentially my point. That you have to read the rules as being subject to the discretionary power granted by them being exercised within purpose and reasonably.

Ivory Yes but if it's a random, a power to randomly test, you don't when or where.

Blanchard J But that's because it has a deterrent purpose. If I know that I am going to be tested tomorrow morning at 10.30 I won't be taking methamphetamine tonight because I know it will still be in my urine tomorrow morning.

Ivory Indeed.

Blanchard J So you don't want people to know when they are going to be tested. If as I think deterrence is something they can make rules about then it would seem to me that the random element is not a problem. The only question would be whether the rule would be bad because it has no limit in terms of time, place or circumstance, which is what Justice Tipping is I think interested in exploring.

Tipping J That's exactly right, it seems to me that the only argument really here is that the rule overreaches to such an extent that it is wholly bad. Putting it in a simple colloquial way. I am not saying that's my view but I want to hear argument on it.

Ivory There is a range of ways in which we would say the particular rules are wholly bad in themselves. But I am dealing with the prior argument whether there is a rule making power at all, of course.

Tipping J But we have got to the point that there is a power to make rules dealing with drug testing, its just, you say you can't argue and you are right, but there is no such power. It's the nature of this rule, was there a power to bring in this rule?

Blanchard J A deterrent rule.

Tipping J A deterrent rule.

Blanchard And then this rule in particular.

Ivory Well these rules in particular because there are several of them.

Anderson J Some of the specific powers of Stewards and inspectors are expressed in terms of being exercisable at any time, whereas the specific rules relating to blood samples, saliva samples and all the rest don't have that broad reach of any time, so the inference must be that they can do it when its reasonable having regard to the purposes of the Act and the rules themselves. Just looking for example at page 298 of the Case on Appeal volume C sets out the powers of Stewards and under B it says "at any time" and then sets out a number of matters and then at any time that the power requiring bodily samples it doesn't have that qualification and similarly at page 300 of that volume one looks at rule 226 in its entirety. I just bring this to your attention in view of Justice Tipping's suggestion I think that the rule itself must be construed as qualified in relation to reasonable.

Ivory That would be true in respect of 226(2)(d) which says at such time and place as the Racecourse Inspector shall nominate.

Tipping J But you see the problem is as Justice Blanchard has been pointing out that to be effective there has to be a substantial element of randomness in the potential reach of the law.

Blanchard J So much so that it would be quite a difficult drafting exercise I would think to try and carve out in any sensible way when random testing could not be carried out. Therefore it might be a legitimate approach to cast the

rule widely knowing that it will always be read down in relation to purpose and a requirement that it be exercised reasonably. In other words, if the Inspector arrived at the back of the courtroom and demanded a urine test, that would obviously be challenged as having no purpose connected with the rule, unless perhaps Ms Cropp was about to leave the courtroom to go straight to a racetrack and get on a horse.

Ivory That cuts across the very point in that your Honour was saying about randomness being essential to deterrence.

Blanchard J Why.

Ivory Because this is exactly an example of randomness here today.

Blanchard J Yes, but my point is it would be very hard to delineate exactly when a random test would be appropriate both in relation to purpose and reasonableness, and therefore it may be entirely understandable that the rule does not do that. I mean the rule could go on to say, but the testing has to be related to purpose and it has to be done reasonably in the circumstances, but if that's going to be implied into the rule anyway it's a bit of a pointless exercise to put it in expressly.

Ivory It generates a huge uncertainty in the persons subject to the requirement.

Tipping J I'm not sure Mr Ivory.

Ivory To know whether or not they are entitled on any particular occasion to refuse. Because the consequences of refusal of course are disciplinary.

Tipping J But if deterrence is a relevant element of purpose then it is very unlikely that any random test is going to fail for purpose. Where it may fail is that if you did it at 3am when it would have been perfectly sensible and alright to do it at 6am, that could be regarded as unreasonable. In other words if you do it in the middle of the night and there is absolutely no reason for doing it in the middle of the night for the deterrent purpose it could be just as good to do it at breakfast time. Then it might well be unreasonable. But purpose is likely. If deterrence is a proper feature of purpose then the randomness per se is unlikely to be outside purpose.

Ivory That proposition as I said throws a huge burden on the person subject of the requirement because usually ordinary people. They have to decide in the circumstances whether they are entitled to refuse and the consequences of a mistaken judgment there is disciplinary.

McGrath J Would they be forced to challenge the outcome effectively through the courts.

Ivory Well the outcome of course would be the consequences of refusal which are disciplinary could lead to suspension and they would have to go through a process, this sort of process.

Blanchard J Well you have hit now on the point that has been troubling me.

Ivory That was really a *Payn* point that Justice Cooke was getting to is that these things need to be very clear, people need to know what they are in for, what the rules are, exactly what they have to do and what they don't have to do.

McGrath J But that was in relation to whether you could enter, whether people could enter private property or not.

Ivory Yes and he wasn't prepared to effectively speculate on where the line should be drawn, it should be drawn clearly by the law.

McGrath J Dealing with a value of a different character. But here what I think we are really looking at the moment is whether the time is unreasonable to being accepted that provided the test is requested and the right time and place and circumstance. A rule authorising that would be reasonable within power and we are really concerned with what might happen if it was outside of that, I mean its not really a *Payn* case is it, its by no means as clear-cut as *Payn*.

Ivory It is for the citizen because the citizen doesn't know where the boundaries are and it is being asked to make a reasonable/unreasonable judgment instead of having a set of rules that they can see, there they are, this is what they have to do, this is what they don't have to do.

Blanchard J If it were accepted, and I know you don't accept this, that the statute does authorise some form of regime of random testing, would it be possible to come up with a sensible regime which actually delineated time and circumstance in which random testing could occur?

Ivory It would be possible, yes.

Anderson J Rule 2(11) says during a race meeting, so suppose this rule was expressed in terms of during a race meeting a Steward or Racing Inspector may require, that be alright?

Ivory It would certainly be better.

Anderson J What would be wrong with it?

Ivory I still take the position its fundamentally wrong.

Anderson J They can't be forced to provide it, they just say, unless you provide it you don't race because we can draw inferences from your refusal.

Ivory With respect that is exactly the situation that the practitioner A faced in *A v Auckland District Law Society* and Justice Randerson in my submissions rightly held that that in effect was effectively force. The power under the Act for drawing adverse inference for refusal to undergo these medical tests was effectively force.

Anderson J The inference that logically would lie in a case such as this is that you may be affected by drugs, not that you have taken them, but that you may have, and that in itself imposes a risk where a horse could jump off the track in amongst the public for example, if wrongly ridden.

Blanchard J But anyway what you were effectively saying was that you could circumscribe the rule by saying it applied only at a race track.

Ivory That would be better than what presently stands. If your Honours find here in that word safety, the power to make, to create, a regime for random drug testing, that would be a unique position in New Zealand law. There is no other random drug testing regime that is created by this means. The rules set out in primary legislation or mandated one.

Blanchard J I cannot say that in itself troubles me particularly.

Ivory It's an indication of the precision and care with which they need to be spelt out by law so that people know they can do and what they can't do, what they have to do and what they can refuse to do. What we end up with here is a regime that doesn't compare comparison with any other.

Tipping J In that it does not authorise by primary legislation.

Ivory Its not authorised by primary legislation. The contents of the scheme are slip-shot to say at best.

Gault J Just for my assistance, Mr Ivory, can you tell me whether the statutorily authorised regime based on the International sporting arrangements delineate time, place and circumstance.

Ivory That's in the wider code in Volume B.

Gault J Because I understand under that for example, athletes may be tested at any time up to certain periods before events. Its not just on the day of the event. Do they specify a time, place and circumstance.

Ivory Yes I think the randomness is in fact totally random. But I can check that for you at the adjournment.

Tipping J No, that was my understanding also.

Blanchard J And that is considered ok in other contexts is it?

Ivory It's express more because the New Zealand Act empowers the local body to make rules but the rules must incorporate the wider code and be consistent with it, they must be different from the code.

Blanchard J But it hasn't been found possible in the wider code if I understand the position correctly, to delineate time, place and circumstance.

Ivory Anything is possible by express law.

Anderson J The protocol in this case makes it plain that the testing will occur at a racecourse or possibly at a practice course.

Ivory The protocol is not part of the rules.

Anderson J I know. But what if the rule actually incorporated the protocol just repeated it as rules. Would there be an objection there?

Ivory Yes I would take exception.

Anderson J Not on terms of unreasonableness as to time and place, but because it's a fundamental intrusion.

Ivory Well I guess there are all sorts of reasons to. There is no proper provision for a B sample, there is no explanation given to the testee of what their rights are, whats going to happen. None of that occurs.

Gault J Mr Ivory, could you just help me a bit about this protocol. You're saying well its not part of the rule. In other fields is not the policy written or specified in the application of particular rules relevant? Let's say departmental policy as to how they will administer particular relevant powers.

Ivory The protocol is not policy, the protocol purports to set out the regime for conducting the testing.

Gault J Yes I understand that but I would interpret that as proposed policy for the implementation of the rules.

Ivory If its policy then its certainly just that its not the rules.

Gault J I understand that.

Ivory And the rules contain nothing in the way of the regime for testing but the tester is required to follow and the testee is entitled to insist on.

Blanchard J Do the rules contemplate the protocol in any way?

Ivory No.

Tipping J It would be pretty good evidence as to what was reasonable or unreasonable wouldn't it, if you went outside the protocol you would have to show some convincing that this was nevertheless. I am unattracted to the view that the whole rule must fail just because its capable of being administered in a way that is outside purpose or unreasonable, that's fundamental difficulty. Now I am completely open-minded Mr Ivory, are there cases which say that if a piece of delegated legislation is capable of being administered in a way that's outside purpose or unreasonable that invalidates the whole rule or delegated legislation whatever it is. In other words the topic is authorised by the head legislation, like drug testing, but the way in which its been put in place under the rule is capable on one view of being misused, the power is capable of being misused. Now something tells me that there is quite a fine line between the doctrine, the fact that a power is capable of being misused does not per se invalidate the power but in some circumstances as I understand it that view is different. Now, what law is there in and around this? Because I see this as pretty central to what we have got to decide here because there is an argument that this rule overreaches. The question is does that invalidate the whole rule as opposed to invalidating individual exercises of the power granted by the rule?

Ivory Can I give that some thought over the adjournment which I see its nearly 11.30.

Blanchard J Well would it be convenient to you if we took the adjournment now.

Ivory Fine.

Blanchard J Right 15 minutes.

11.27 Morning adjournment.

11.45 Court resumes

Ivory I am afraid I don't have in my bag over there a clutch of authorities addressing the proposition raised by Justice Tipping. The core objection,

however, to a set of rules or should I say this set of rules, these random drug testing rules, as a set claiming to be authorised under s 29(2)(d) is that they fail wholly to prescribe a fair and reasonable process for the taking of samples, for protecting the rights of the testee and for ensuring the testee knows what is required of him or her and knows what he or she is entitled to resist. Every other regime for random drug testing contains those requisites, even those for convicted prisoners in jail. The difficulty with these random drug testing rules is that no person asked to submit to them knows what they are entitled to resist and what they are required to do. If their rights are being taken away they must surely be entitled to know what the limits are.

Blanchard J And how do you relate that back to the rule making power, are they bad because they are unreasonable in those respects?

Ivory I was addressing the proposition on the basis that the rule making power is valid, which I don't accept of course, but on that basis the question then is are these rules valid rules under that power and I'm saying no they are not.

Blanchard J Because they are unreasonable.

Ivory Yes, for the reasons I have set out.

Blanchard J Have you any case law on rules that are bad for unreasonableness?

Ivory No I haven't, but it seems to be on principle these must fail. If your Honours look at any of the other regimes.

Tipping J Put in the simplest terms your argument is that they are unreasonable for uncertainty.

Ivory That's the first proposition, yes. The second proposition they're unreasonable because they fail to set out the persons rights.

Tipping J Well same point really. Its all under the rubric if you like if they are not specific enough.

Ivory They are certainly not specific enough. But in there I submit there is a right to be informed to know what you are being asked to submit to and what the limits of that are.

Blanchard J Do you link the unreasonableness there back to s 21 of the Bill of Rights.

Ivory Oh yes. We have been arguing this, at my insistence I confess, on common law basis but all of this of course everything I have been saying is capable of being reframed under the Bill of Rights Act in terms of s 21 and

then in terms of ss 4, 5 and 6. For example the propositions I have just put can be framed in terms of ration and proportional response in s 5. So that the case is simply recast in terms of the Bill of Rights Act as a Bill of Rights Act case as well.

Tipping J Well that's it basically is it without wanting to sound remotely dismissive. That is the essence of your case that this is an unreasonable exercise of the rule making power for the reasons you have articulated.

Ivory I have my prior proposition as well of course. That's the second proposition. The third area of contention which I am now doubtful about is to whether it is in fact an area of contention as the issue of consent. That adopted.

Blanchard J I don't know that you need to explore that too much with us we will see whether Mr Moore wants to try and hang on to the Court of Appeal judgment on that basis.

Ivory I don't think he wants to hang on to the Court of Appeal judgment on that basis but I think we may have been at cross-purposes in the whole question of consent and I see at paragraph 8.3 of the respondents submissions, the very last paragraph. That's a limited proposition in terms of invalidity but I think the proposition can be stated more broadly if the random drug testing rules are invalid then they accept the consent couldn't save anything, and if that is so then we are not at odds on question of consent and my friend's submissions on consent may be directed to a proposition we weren't making. Which is that if the rules were valid the consent was nevertheless invalid and somehow there was an invalidity arising from an invalid exercise of a consent in respect of valid rules, which is not the proposition. Our proposition is if the rules are invalid no consent can save them.

Blanchard J It's not an informed consent.

Ivory Well it can't bring anything to life, as the Court of Appeal seemed to think.

Tipping J Well even if it is informed.

Blanchard J Well maybe if they had said to a jockey who was applying for registration or whatever the expression is, "We want you to consent to this regime. By the way the rule is invalid" and the jockey nevertheless said "Well I'm prepared to consent to that", maybe there would be an argument.

Ivory I don't think there would in fact because of the regulatory environment. In a non-regulatory environment that might well save the day, but not here.

McGrath J Quite apart from that theres not much voluntariness about this consent is there. You don't give it, you don't ride horses.

Ivory You are required to consent if you want to earn a living.

Tipping J And you are required to consent and if you don't you will get done for failing to.

Ivory The one thing they have been very good at in these rules is extracting the requirement of consent from you. It turns up at every conceivable situation where they fail in all the other respects I have described. They are my submissions.

Blanchard J Thank you Mr Ivory. Yes Mr Moore.

Moore To a considerable extent your Honours I am going to be assisted now that the issues have been narrowed in the fashion they have by you perhaps indicating the areas of interest or concern to you. What I had proposed to do was to really confront the issue head on and discuss with your Honours the question of s 29 and whether it authorised the drug testing regime, and then secondly whether or not that regime was consistent with the Bill of Rights. I don't know whether your Honours still want me to go through that particular process.

Blanchard J You may find it more convenient to proceed on that basis and if there is something that we don't require assistance on we perhaps will hurry you along on that aspect of the argument.

Moore More than happy to be dealt with that way. The starting point, the primary focus in terms of s 29 and its rule making power. I think we must accept that it is to s 29(2)(d) that we need to turn first. But in my submission the regime is also empowering. Just invite your Honours to turn to s 29, its under tab 1 of the appellants bundle. In my submission the rule making power is very broad, extremely broad, but there are good policy reasons which relate to racing as to why that is. The starting point is s 29(1) which is couched in mandatory language and requires every racing code. Now there are three racing codes which are covered by the Act. There is thoroughbred racing which we are concerned with here, there is harness racing, which is the trots, and there is greyhound racing. So those are the three codes. And they must make and maintain and enforce rules relating to the conduct of racing by their code. So its mandatory. Subsection (2) starts with the words "without limiting subs (1)". So it needs to be seen against that kind or examined against that kind of background because clearly what is dealt with and covered in subs (2) is, I hesitate to use the word, subservient to, but certainly subject to, the broader mandatory requirement in subs (1).

Anderson J Subsection (1) is qualified by s 31 isn't it?

Moore It is absolutely, I agree with that. So that the two provisions under subs (2) which in the respondent's submission provide the power to make rules in addition to the power of which we submit exists under subs (1) will be paragraphs (d) and (i). Its probably noteworthy

Blanchard J Actually its overkill really isn't it "Without limiting subs (1)".

Moore It certainly is.

Tipping J It certainly is belt and braces.

Moore Well it very much is belt and braces. What is interesting about this analysis is it is different from the regime that operated under the predecessor of the 2003 Act which was the 1971 Racing Act because the predecessor of s 30 which in fact simply empowered racing codes to in directory rather than mandatory language to make rules, nothing about safety. Safety is new, safety was introduced in the 2003 Act. Now I don't know why. Any research we have undertaken doesn't indicate why that has occurred and why the legislature saw fit to include safety specifically. But perhaps what is also significant in this analysis is that the particular regime we are talking about this, I know we call it the random drug testing regime and that certainly one way in which its operated, but it is a drug testing regime. That was initiated as I understand it by the predecessor of New Zealand Thoroughbred Racing. It was called New Zealand Racing Conference in 1995, so it existed as a regime under the original Act where the rule making powers were in fact considerably less specific and arguably less robust than they are in the present form of s 29. I know we have talked about the context is everything and certainly from the respondent's point of view that is very much it. And if I could perhaps in developing that submission turn to paragraph 5.7 of the second respondent's submissions which are found at page 6. And the second respondent's submission is, and it's recorded at paragraph 5.7, is that s 29 is purposely set wide because its presumed that a racing code, in this case New Zealand Thoroughbred Racing, is in the best position to judge what rules are necessary to cover the conduct of racing. Now its recorded there in the submissions that the rules contain over 1,500 individual rules, that is perhaps hyperbole and that might be the most generous way of saying it. There are in fact 15 chapters, but there would most certainly be over 1,500 rules and sub-rules, which cover really quite arcane topics specific and peculiar to racing, things like, the sort of whip that you can carry, the design of footwear, the dimensions sirsingles and other bits of tackle, those sorts of matters, and it simply would not have been possible and Parliament hasn't intended in any way to do so. To provide a kind of

detailed legislative empowering impramateur to be able to cover all of those matters. Its also perhaps of assistance in support of that submission to turn to the explanatory notes which accompanied the passage of the new Act. These are recorded under tab 2 of the appellants bundle and I draw the Courts attention to two particular passages, one found on page three. It's the appellants bundle, tab 2 at the bottom of page 3.

McGrath J This is the explanatory note to the Bill.

Moore To the Bill yes but the form was unchanged in this particular respect between the Bill and the Act. I am referring here to the last sentence at the bottom of that page. The underlying philosophy is that racing should be given greater control over and responsibility for its own affairs. Industry groups will be empowered to make their own decisions within a coherent framework. There is a further relevant passage in the explanatory note in the middle of page 5. Its beginning of the second to last paragraph which reads: "The rules of racing will remain the responsibility of the individual codes and the Board will no longer have the power to amend them". And then further down that same quote: "also they affect narrowly defined and clearly identifiable groups of people, rather than the public at large". The latter point is also applicable of the Boards procedural rules. So that s 29 generally and then in subs (2) the respondent submits that there are two mechanisms by which questions relating to safety and drug testing, this is taking up my submissions at paragraph 5.9 of page 7. And in paragraph 5.9 one of the observations which we make is that (d) is simply a statutory recognition of the obligation that the racing code has because the racecourse and tracks must be a workplace for the purpose of the Health and Safety in Employment Act and so there are supervening obligations that apply to New Zealand Thoroughbred Racing.

Tipping J Well if you didn't have some form of drug testing regime you may well be in breach of that obligation.

Moore That's my point.

Tipping J Well sorry Mr Moore.

Moore Well thank you for making it for me but that is the point, this very point. It would be negligent if there was an accident which had been caused as a consequence of a lack or.

Tipping J It doesn't necessarily justify these rules but it justifies some rule.

Moore Touching on safety.

Tipping J Yes.

Moore Again it is in this context that I just remind the Court and I know that your Honours have touched on this already, but what is the nature of thoroughbred racing? It is an inherently dangerous activity. It involves individuals necessarily of diminutive stature, perched precariously on the back.

Tipping J There aren't seven people behind us.

Moore I'm sorry, the only reason I am passionate about this is I have done this myself, and galloping in a racecourse is a terrifying experience second only to appearing in the Supreme Court for the first time. So the description to which Her Honour Justice Andrews recorded as attributable to Mr Dickie is a very central to this because this is a very dangerous activity. Large animals.

Anderson J None of us thinks its lawn bowls.

Moore Its not lawn bowls no.

Anderson J The media always has incidents of jockeys being injured or killed in races, sometimes horses getting out of control and endangering members of the public.

McGrath J This danger you are speaking of is really just related to while racing.

Moore Yes it is while perched on a horse.

McGrath J Which is in a race.

Moore No, it doesn't have to be in a race.

McGrath J I am just trying to get an idea of the time at which it is a dangerous sport.

Moore The racing that we see on television is really just the tip of the iceberg in terms of this industry, because below that there is training, which happens most days of the week early in the morning. And that is where stable-hands and jockeys will ride horses around in track work, they will do timing runs, they will put them over fences, they are training, they are bringing the horses up, getting them fit for the race. There are also trials which occur. And trials are to not inconsiderable extent training exercises for horses which may not be familiar with racing to teach them about galloping in the close proximity to others, getting used to the starting gates, these sorts of things. So trials is another part where jockeys and stable-hands may be perched on horses travelling at speed. There are barrier trials, which are the same sort of thing which occur. So there is a whole level of activity involving the riding of racehorses at speed which

occurs below and out of the public sight of what we all imagine racing's about. So its quite a lot more than just sitting in a race and riding in a race.

McGrath J It happens on days other than race days.

Moore It happens every day of the week of the year I suspect. What the respondent says then is that plainly there is legislative power, in fact a requirement to make rules which relate to safety. The next question then is, I suppose, what is the link then between safety and drugs and a drug testing regime, because if it is accepted that safety is in fact properly engaged in terms of the rule making power then what is the connection with drug testing and safety. And there are several sources for that and there are five in particular that I now raise at this point. The first one is the original decision of the Judicial Committee, the specialist tribunal, and is, should be in volume B.

Tipping J You are on the generic point at the moment Mr Moore.

Moore I am on the generic point at the moment. I am going to move to the specific.

Tipping J I personally wouldn't need much persuasion but I think it would be helpful if you give us the five.

McGrath J Just before you go, is the Judicial Committee a committee of New Zealand Thoroughbred Racing Incorporated.

Moore No I don't believe it is, I believe it is created by the Judicial Control Authority which is set up under the Racing Act. I am getting nods from the back of the Court which would indicate.

McGrath J You might perhaps convert that into something a bit more specific after lunch.

Moore I can probably do that now. Section 39 of the Racing Act provides for the establishment of Judicial Committees and subs (1) requires the Judicial Control Authority which is set up under s 38 to appoint judicial committees. And those judicial committees will be specific to the individual racing codes so they are made up of panels of individuals who have an expertise or an interest in the individual code.

McGrath J But they are appointed under a statutory power, not by any incorporated society.

Moore They are appointed under a statutory power, yes. So if I invite your Honours to turn to the Case on Appeal volume B, its tab 12, I think its

paragraph 68. Yes its paragraph 68 but its to be found on page 24 which is page 91 of the case. To place the paragraph in context you probably should start reading, it from the bottom of page 23, where the tribunal says "it's the committees view that matters relating to WADA in the New Zealand Sports Drug Agency Act which were raised by counsel relate to a separate drug testing regime that has a different purpose to that adopted under the rules of racing, for example, the emphasis there is on performance enhancing drugs, whereas quite rightly the drug testing regime in terms of New Zealand thoroughbred racing, whereas quite rightly the drug testing regime in terms of New Zealand thoroughbred testing of jockeys is concerned with health and safety issues to ensure that jockeys who are prepared to take controlled drugs or illicit substances do not ride and thereby endanger themselves and fellow jockeys. This is the primary purpose behind r 528" Now r 528 is the provision which creates the offence. The next source that links the drug testing regime with safety is the affidavit of Mr McKenzie which is found in the same volume at tab 10. The relevant passage is brief, its at the top of page 63 of the case paragraph 6 of his affidavit.

Blanchard J I think we have had occasion to study that paragraph.

Moore Right. Interestingly enough and I may take your Honours back to it if it ends up being a matter of significance or interest, but there were questions earlier on about the provenance of the protocol and here it is set out from paragraphs 8 through to 12.

Blanchard J It's a voluntarily act presumably establishing a protocol, there is no requirement of there being a protocol.

Moore No there is no requirement to establish the protocol.

Blanchard J And no recognition of it in the rules?

Moore No there is no recognition of it in the rules. This particular protocol was established pursuant to cl 11 of the Constitution of New Zealand Thoroughbred Racing. New Zealand Thoroughbred Racing is an incorporated society and its constitution admits it to provide for rules or declarations, I can't remember the exact wording of cl 11, but it's the power for them to do a variety of things and it was pursuant to that power that they saw fit to establish the protocol.

Blanchard J Do we have that constitution?

Moore Yes you do because its part of the rules of racing. So if you turn to volume C of the case.

Blanchard J I think I have seen it in fact.

Moore Under tab 19, I would have to say just a little bit difficult to find. Its on page 279 of the case. Clause 11 provides for the powers and duties of the Board and it permits them under in terms of the general powers under subs (2) paragraph (d) probably to maintain and strive to improve the integrity of thoroughbred racing and (l) is all powers duties and obligations contained in the rules. Most of the other powers are to do with more mundane functions like raising funds.

Tipping J Are you embarked at the moment Mr Moore on endeavouring to demonstrate that in generic terms there is some sufficient link between safety and drug testing.

Moore Yes I am, but I am working my way through it.

Tipping J No no I know Mr Ivory can't accept that but with great respect it seems to me to be blindingly obvious.

Moore Well I am vaguely reassured by that comment, but I thought it might be helpful in this process though to point out what the factual position is as far as this hearing is concerned.

McGrath J But you are also linking the protocol to rules aren't you through the constitution you say is part of the rules.

Moore Well I think the protocol is ultimately I think the protocol is perhaps most useful to meet some of the concerns which your Honours expressed and I will move onto this later on about the breadth of the rule as it is expressed.

McGrath J If you have something further to point us to apart from these very generally express provisions in the powers of the Board that you have just looked at under 11.2 (d) and (l) there is nothing more that gives the protocol status.

Moore No.

Blanchard J Is the protocol a set of regulations made under 11.3 (g)(1) of the constitution? Right at the bottom of page 279.

Moore I don't really think I can go that far.

Anderson J What one has is a regulatory regime providing a mechanism for obtaining samples. And the consequence of either not providing a sample or of having a sample which shows drugs, what the protocol does is to prescribe the testing method.

Moore That's right it's a guideline.

Anderson J Well the test might not even be necessary. The issue here is whether the mechanism for obtaining a sample or the consequences of failing to provide it is comprehended by the Racing Act, that's what its all about.

Moore Yes.

Anderson J And it is or it isn't and the protocol just says how are we going to test them.

Moore Exactly, I agree with that. But the relevance of the protocol may well be and its something that I propose to move onto later, it does show the way in which New Zealand Thoroughbred Racing has seen to implement the particular rule. It pursuant to the protocol has seen fit to limit the exercise of power in terms of time and place. But that's an issue I can develop later on.

Gault J Mr Moore just coming back to the previous point raised by Justice Blanchard, just looking at cl 11.3 (g) of the Constitution and looking at (g)(2), that's page 279, and reading that with the opening paragraph of the protocol itself at page 506, it does appear that protocol is an order under that rule.

Moore Yes it does.

Tipping J If the rule is bad completely the protocol can't save it. But the protocol is very informative as to how one might ordinarily expect the rule to be administered.

Moore Exactly it informs as to the extent of the exercise of a power which might otherwise not be obvious and that's where I think in my submission that the protocol is of assistance. And of course the proof of the pudding is in the context of this particular case, that is just what happened.

Blanchard J And the rule in the protocol existed before the Act.

Tipping J The rule did, not sure about the protocol.

Blanchard J The protocol did.

Tipping J Did it?

Moore The date of the protocol was passed by New Zealand Thoroughbred Racing under its Constitution on the 12 July 2002. So it predates.

Blanchard J I am not sure what the significance if anything of that is.

Moore Well there may well be a significance in that because the rules obviously under which this protocol was established were in force before the passing of the 2003 Act and if we are talking about the extent of the power in s 29 we know its predecessor s 30 was much less specific in terms of the limits and purposes that NZTR could promulgate rules.

Gault J You are not taking the further point that because they were in place when the Act was passed and the 2003 Act designated those rules as the rules of racing.

Moore Yes and to be valid and that's s 29 subs (3).

Gault J Are you in fact arguing that would validate a prior invalid rule?

Moore No, I can't go that far.

Gault J I didn't think you are.

Blanchard J I think that case was knocked out by the..

Gault J You are simply pointing to the factual position.

Moore Exactly. And we are talking about a regime that has been in place for 13 years and has been operating for 13 years.

McGrath J I certainly understand better now how the protocol fits in and see that it does have status. That's the present position I am in.

Moore Yes well thank you. There is also I think some assistance in terms of the factual component in this by referring to the affidavit of Dr Goodwin, this was filed by the appellant. Tab 9 in volume B of the case.

Tipping J This is the third of the five points is it Mr Moore.

Moore It is. If I could invite your Honours to turn to page 60 of the case and paragraph 6 of Dr Goodwin's affidavit. What he obviously is intending to convey here is, there is a level of arbitrariness in relation to this rule that the mere presence of any controlled drug is not going to be of assistance as a determinative of whether there is a level of impairment, but certainly as I read between the lines your Honours paragraph 6.2 certainly records that the safety clearly can be an issue when the presence of drugs in a jockeys system reaches a certain level.

Anderson J You don't know what level it is unless you take a sample.

Tipping J 6.3 is a rather dopy point if I am able with great respect to put it that way.

Moore Exactly. The fourth point are the observations made by Her Honour Justice Andrews, and that should be in volume A of the case, tab 5, paragraphs 66 and 79, page 34. Sixty-six is on page 34 where she says the purpose of the drug testing regime is race day safety, a purpose for which NZTR is expressly authorised to make rules under s 29(2)(d) of the Act. It was noted earlier there was no express power to make rules as to safety under the old Act.

Anderson J You can take it further than that and say well its just as apt for training days. In any use.

Moore Yes we do. And then paragraph 79 which is page 36 of the case, I am not sure aphorism is the right word but that was certainly the description which I tended to convey earlier about the nature of the level of safety that we are talking about here, and the last sentence of your Honours finding, further I accept that the use of controlled drugs could place at risk horses and jockeys involved in races.

Tipping J And that para 80 is really the punch line.

Moore Yes that's the punch line.

Blanchard J And you would say I think that the obligations under the Health and Safety Employment Act just couldn't be met without this kind of deterrent testing.

Moore In addition to no doubt other common law obligations, but certainly there is a direct statutory obligation to take whatever steps can be taken to.

Tipping J As are practicable, I think it is put, isn't it, in that legislation, something like that.

Moore Yes it is.

Blanchard J And that Health and Safety Act am I right in thinking creates offences.

Moore Oh yes.

Blanchard J If an employer and I guess NZTC is an employer or anybody else in charge of a workplace does not comply.

Moore Yes. And there are also civil remedies as well.

Blanchard J And they are pretty strict. We had a case about an electrician/linesman who had a bit of a problem and in rough and ready terms it was pretty much strict liability.

Moore Yes. Well I think it is strict liability. The final findings are those of the Court of Appeal in the same volume under tab 6 and the paragraphs to be found are first at page 43 of the case paragraph 6, where he just records the findings of Justice Andrews. In paragraph 11 on page 45, horseracing can be viewed both as a sport and as an industry in New Zealand. Either way it requires the association of owners, trainers and officials it's a dangerous activity for participants and anyone standing nearby. And in the final reference is to be found at page 46, paragraph 19. Here Ms Cropp is participating in an activity which requires the association of a large number of individuals. That activity is dangerous if participants do not act according to a set of rules. It would be irrational for a thoroughbred horse race to be conducted without a set of rules which address safety. Its elementary that the jockeys need to be experienced horse riders whose judgment can be relied upon by their fellow riders, licensing jockeys is an obvious way to be sure standards are met. But I still need to go, on behalf of the respondent, a step further if its necessary to show the link between drug testing and safety and its been accepted as a link in at least five cases that we have been able to locate. The first is a decision of the Supreme Court of the United States. *Skinner*, now its in my bundle but unfortunately, before you look for it, I have actually got the official copy which I think you will find much easier to read. When we were preparing this material we only found the Internet version which is actually quite difficult to work your way around, but we have got the official versions of this and the next case. The case is *Skinner v Railway Labor Executive Associations* it's a 1989 case. The issue there was whether breath and urine and blood samples compulsorily taken, now this is not a random testing regime, this case is not about random testing; obtained from railway workers following major (what the Americans call railroad incidents) and empowered but didn't require the taking of bodily samples after safety violations. The question was whether this was in contravention of the Fourth Amendment, the right to be free of unreasonable search and seizure in the absence of a warrant or reasonable cause. And the facts were that the Federal Railroad Administration which I gather is a government entity charged with a responsibility of ensuring safety on railroads, most of which in the United States are privately owned, promulgated regulations under the Federal Railroad Safety Act, and they required the railroad owners to take bodily samples from employees who were involved in major train accidents or incidents.

Anderson J Didn't require, authorised but not require, looking at page 1407, beginning of Justice Kennedy's.

Moore It was my understanding that there was a requirement in relation to certain events and the power exercised at the option of a railway company in respect of others, it probably doesn't.

Anderson J You may be right, some are mandatory and some are merely authorised. Yes you are quite right, I am sorry about that.

Moore The particular passage which in my submission is relevant on the particular issue that we are dealing here. It is to be found at page 1415. There are two. The first one is to be found adjacent to the number 4 in the lefthand column. "The government's interest in regulating the conduct of railroad employees to ensure safety like its supervision of probation or regulated industries or its operation of a government office, school or prison likewise presents special needs beyond normal law enforcement, that may justify departures from usual warrant and probable cause requirements". And then further down, about an inch below the end of that last quote, "It is undisputed that these and other covered employees are engaged in safety sensitive tasks", and directly across the page in the right-hand column, "This governmental interest in ensuring the safety of the travelling public and of the employees themselves, plainly justifies prohibiting covered employees from using alcohol or drugs on duty or while subject to being called for duty. This interest also requires and justifies the exercise of supervision to ensure that the restrictions are in fact observed." Now it does talk about, later on in this judgment, about the need and the efficacy of random drug testing, and even though the case wasn't about it, it is discussed by the Court at page 14 – 19, righthand column, first paragraph, starts "By contrast the government interest in testing without a showing of individualised suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences, much like persons who have routine access to dangerous nuclear power facilities."

Tipping J That's a bit of overkill.

Moore But further down the page after the references to the cases there is a particularly interesting and pertinent quote in my submission where it says "employees who are subject to testing under FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others".

Tipping J Where is that.

Moore I am sorry this is just below, about an inch below the quote that I have just given, page 1419. "Can cause great human loss before any signs of impairment become noticeable to supervisors or others and impaired

employee the FRA found will seldom display any outward signs detectable by the lay person or in many cases even a physician". And further on the issue of deterrent just turn the page over to page 1420, just down from the top of that page. "While no procedure can identify all impaired employees with ease and perfect accuracy the FRA regulations supply an effective means of deterring employees engaged in safety sensitive tasks from using controlled substances or alcohol in the first place". And then further on the topic of deterrence, half way down that same column, "By ensuring that employees and safety sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty the regulations significantly increase the deterrent effect of the administration of penalties associated with the prohibited conduct".

Tipping J This case of *Griffin* v *Wisconsin* that is cited constantly through here, presumably is a case that was broadly to the same affect Mr Moore.

Moore That's my understanding, I have not read it. You see it cited again and again, although *Skinner* itself ends up being a case which in later authorities which I will take you through which is perhaps more directly relevant to the regime we are talking about here, *Skinner* is consistently cited with approval by the Supreme Court.

Tipping J You have very properly said this is not a random case, are there cases coming up that are random cases.

Moore Yes there are school cases, one in particular that I will be referring you to your Honour. The next case, again not random testing, and its *Von Raab* which will be in that bundle. This is another US Supreme Court case incidentally delivered on the same day as *Skinner* and somewhat oddly the judgment delivered in *Skinner* I think was delivered by Justice Scalia and he seems to be in the minority in this case which is very similar. The issue in *Von Raab* was whether a drug testing regime a bit similar to the *Air New Zealand* case which I will refer your Honours to shortly, imposed on customs officers who carried firearms and who were directly or who were directly involved in what they described as drug interdiction or who handled classified material, whether a drug testing regime imposed on them amounted to a breach of Fourth Amendment rights. The facts of that case were that the US Customs Service established a drug screening programme designed to cover all staff. That is all staff who applied for roles which required them to carry firearms or who were directly involved in drug interdiction or those who handled classified information and it was held citing *Skinner* that the Custom Commission's decision to require drug testing amounted to a search and seizure so it met or was covered by the Fourth Amendment. But the result of it was, and the Court said, a suspicion based testing is necessary for those who were applying for

promotion or those who were involved in carrying firearms or who are involved in drug interdiction, but it couldn't be justified in terms of those who had access to classified information. But there are a couple that provides you with the factual background that there were a couple of quotes which again touch on this connection between safety and drug testing. The first is to be found at page 1393. On the righthand column half-way down the page. "The public interest likewise demands effective measures to prevent the promotion of drug-users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. Customs employees who may use deadly force plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. We agree with the government that the public should not bear the risk that employees who may suffer from impaired perception and judgement will be promoted to positions where they may need to employ deadly force."

Blanchard J I hope there are not too many jockeys in that position.

Moore Carrying firearms! And then 1395, righthand column, a couple of inches down from the top of the page it starts "in light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances a services policy of deterring drug-users from seeking such promotions cannot be deemed unreasonable. The mere circumstance that all but few of the employees tested are entirely innocent of wrong-doing does not impugn the programme's validity".

Blanchard J There is an interesting sentence at the bottom of that page too.

Moore Sorry I have dropped the page.

Anderson J Interesting that Justice Scalia for example, joined the majority in *Skinner* and dissented in this and the distinction he drew is that experience showed that alcohol use was so common in railways that randomness was not objectionable but there wasn't that indication of common use in the customs situation to justify random testing.

Tipping J I didn't think the testing was random in either event.

Moore It wasn't. It wasn't random testing in either of those cases. In *Von Raab* it was testing of people who held those positions or people who were being promoted to those positions.

Anderson J Without specific indications.

Moore Yes that's right. There is a New Zealand case which touches on this in the employment context and it's the *Air New Zealand* case which is under tab 4 of the second respondents, its volume one of the second respondents bundle of authorities. It's a long case and it's the Full Court of the Employment Court. I don't need to go through the detail other than to give a brief description of what the case was all about.

Tipping J Where did you say we would find this.

Moore Sorry its in volume one of the second respondent's bundle of authorities, and its tab 4. I am only in this context going to be referring your Honours to quite discrete passages but this was a case where Air New Zealand decided that it was necessary for safety reasons to require certain employees in certain safety sensitive areas of Air New Zealand's operation to undergo random drug testing and not unsurprisingly the covering union objected to this. The imposition of this regime was not pursuant to a contract of employment or a collective agreement. It was imposed by Air New Zealand as a requirement and the Full Court, paragraph 248, pretty well towards the back. The Court there was involved in a balancing exercise which is obviously not unfamiliar to this Court in context of the Bill of Rights interpretation.

Blanchard J 247 is directly relevant too.

Moore Yes well that's directly relevant to the point that I was making earlier about the application of s 16 of the Act. So in fact your Honours quite right the quote should start at 247. We also accept that the Health and Safety and Employment Act and the general law impose absolute duties on employers to take all practical steps to eliminate significant hazards to employees and others. Such hazards may include temporary manifestations of behaviour resulting from the taking of alcohol or drugs. Because of the Act's accent on safety its reasonable that an employer should be able to discharge its duty by a variety of available practical means including drug testing and safety sensitive areas. We further hold that the same facility should be available where there is reasonable cause to suspect that an employee's behaviour is an actual potential source of harm and that this is the result of the employee being affected by alcohol or drugs. And then on a question of deterrents, just check whether 250 is, probably I should read paragraph 250 as well. "Where there has been an accident or an incident because of the first defendant's statutory duty to ascertain the true cause of the occurrence and the limited opportunity for obtaining relevant information, it should be able to require employees involved in the accident or incident to submit to testing for the presence of alcohol or drugs". And then they turn to question of random testing. "This brings us to the difficult question of random testing which is testing that is suspicionless. In our judgment the arguments that have weighed

with us so far do not apply with the same force so as to describe as reasonable, the random or suspicionless testing of all employees, and cannot justify the random testing of employees working outside safety sensitive areas".

Tipping J Was Air New Zealand seeking to suggest that it could have?

Moore Yes the significance of this case is that Air New Zealand was intending to roll this out, I am not sure whether it was right across the whole of the range of employees but a much wider range of occupational groups than just those who were involved in safety sensitive situations. And that was really the ratio of this decision and the limit of the random testing. "In our judgment the arguments that have weighed with us so far do not apply to the same force so as to describe as reasonable the random or suspicionless testing of all employees and cannot justify the random testing of employees working outside safety sensitive areas. It is significant in our view that Air New Zealand wishes to make testing compulsory for internal transfers to safety critical positions but not for internal transfers to other positions. That shows its distinction between safety critical and non-safety critical positions so far as the consequences of drug and alcohol consumption are concerned. The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard must give way to the overriding safety considerations. These factors take precedence over privacy concerns." So that's a case in the New Zealand context.

Blanchard J Yes interesting at 256 the Court also says that its reached the conclusion not without much hesitation, there is no evidence that Air New Zealand has employees whose work is adversely affected by drugs or alcohol. Now this of course is a point that Mr Ivory was making that I think he was saying, there is no evidence of any drug-taking problem in the horse industry.

Moore Well I can answer that. I believe *Skinner* in fact talks about that issue and I thought it was mentioned in one of the quotes, but in either or both of the cases which I will be referring your Honours to which relate to the school environment.

Blanchard J This is after lunch.

Moore Yes alright, and those cases both talk or at least one of them does anyway talk about the fact that it really just has to be accepted that drugs are out there and that I think I am fairly summarising it by saying that its simply

not realistic to believe that there are substantial components of the wider public community that are not one way or another affected.

Anderson J Isn't there something in the affidavits about the problem jockeys have maintaining weights?

Moore Yes there is.

Tipping J It would really be an argument in favour of there being no preventive medicine.

Moore I'm sorry.

Tipping J I said the argument that you shouldn't be able to move until there is evidence of a problem is really equivalent to saying well you shouldn't be able to administer the medicine until the disease has arrived.

Moore And that is absolutely right and of course the real difficulty with that is the quote from *Skinner* which has so many of the symptoms of these drugs operated at a sub-clinical level that they are not obvious to a lay observer, not even obvious to a physician and I think that is another one of the difficulties with drugs and I know there has been a suggested criticism of the regime connecting it in the prohibition to the Misuse of Drugs Act, but far from that being a criticism Parliament has decided that those are the drugs which affect us in the adverse way. Your Honour mentioned the question of lysergic but there are plenty of other drugs, methamphetamine, cannabis, they operate in different ways, but they operate in a way that affects perception and the New Zealand Thoroughbred industry concern is that it is very dangerous to have people riding horses at speed in the circumstances that we have discussed whose perception is adversely affected. The problem is we don't know who they are necessarily.

Blanchard J Alright well we are going to take the luncheon adjournment now until 2.15, I assume that after lunch at some point you are going to be addressing us on the question that has emerged about the possible overreaching by the breadth of the rule.

Moore Yes I will. I haven't found an authority which will assist the Court but I would like to think I have found a formula.

Lunch adjournment 1.04.33.
Resumes 2.15.34

Moore Your Honours just to recap where I was and to indicate where it is.

Blanchard J You were on the railway.

Moore (Laughs) Yes I was. And where it is that I propose to go. What I have covered so far is the submission that New Zealand Thoroughbred Racing is authorised to make rules regarding safety and that it gets there in terms of three routes via s 29. And then secondly through various sources I attempted to establish the link between safety and drug testing regimes whether they were random or not. And I have yet to deal with the two US Supreme Court cases which go directly to this question of random testing in schools.

And then after that I intend, because this is the way at least I apprehended the questions from Your Honours, to cover three topics. First, why does the regime need to be random, and if that's still a live question I'll confront that. Secondly, whether the specific rules that we're concerned with regarding the drug testing regime might be over-broad in that they are not limited in time and place. And thirdly whether the random drug testing regime needs to be authorised by primary legislation. That seemed to me to be the three issues that particularly concerned Your Honours.

So I might just continue on the question of these US cases and the question of random drug testing. The next case I was proposing to take Your Honours through was the *Vernonia School District v Acton* case which is in my bundle volume 1. And it's under tab 8.

The issue in this case was whether a condition that students participating in a school sports programme consent to a random drug testing regime was a breach of Fourth Amendment rights. And the facts were that a school in Oregon became concerned about drug abuse on its campus. And the fact that the leaders in the sporting community in the school also seemed to be at the forefront of the drug culture in the school. So it decided to impose a regime on those who wished to participate in sport. If you wished to participate in sport then you needed to consent to this regime which the school imposed. And the regime itself that was imposed is shown or described at page 650. And it starts right under the heading B. This is the policy.

"The policy applies to all students participating in interscholastic athletics. Students wishing to play sports will sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the students are placed in a pool from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day if possible."

And what the Supreme Court had to say about this regime which particularly concerns us is to be found at p 662. Interestingly enough on

the previous page on the question of balancing privacy interests, there's an interesting quote on the previous page. But the one I particularly want to draw to Your Honours attention is pretty well about a third of the way down the page. It starts in the right hand margin:

"Finally, it must not be lost sight of that this programme is directed more narrowly to drug use by school athletes where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time and a lessening of the perception of pain, the particular drugs screened by the District's policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an artificially induced heart rate increase, peripheral vaso-constriction, blood pressure increase and masking of the normal fatigue response, making them a very dangerous drug when used during exercise of any type."

And then the final case I wish to refer Your Honours to is at the beginning of the next bundle. Which is *Board of Education v Earls*. This too was a random testing regime. The facts were very similar to *Vernonia* except that the school instituted a policy which required all students engaged in competitive extra-curricular activities to undergo urinalysis drug testing. And Earls, the respondent, was a member of the school marching band and academic team. And he objected to the process on the grounds that it violated the Fourth Amendment. And the mechanism for the drug testing is to be found at p 742. This is the process that was adopted. Left hand margin, round about the middle of the page in the left hand margin.

"Under the policy students are required to take a drug test before participating in an extra-curricular activity and must submit to random drug testing while they are participating in that activity and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs including amphetamines, marijuana, cocaine, opiates, barbiturates, not medical conditions or the presence of authorised prescription medications."

And the passage that I wish to draw to Your Honours attention, and it really goes to one of the questions that was mentioned this morning and that is, what is the evidential basis of concerns about drugs and the adverse effects of drugs in the community. And at the bottom of the left hand margin on p 748 it starts there:

"Likewise the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was

allowed to institute a drug testing programme designed to deter drug use. Given the nationwide epidemic of drug use and the evidence of increased drug use in (whatever school it was), it was entirely reasonable for the school district to enact this particular drug testing policy. We reject the Court of Appeal's novel test that any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem. Among other problems it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing programme for school children we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a drug problem."

And then they went on to do the balancing reasonableness test.

So those are the authorities that the respondent wishes to place before Your Honours on the question of the connection of safety and drug use and deterrence.

I turn now to the first of the additional propositions that I signalled I would be raising this afternoon. First of all why does it need to be random? Well in actual fact I think from an analysis of those cases, that question has been answered. It is clear that the authorities are of the view that for deterrence purposes the random drug testing regime in the question of safety is the most effective and more effective than a suspicion based regime. And in fact some of the authorities, and I haven't cited them, note that one of the dangers of a suspicion based regime are the dangers of arbitrariness, the dangers of discrimination and those sorts of issues which are not necessarily evident but I accept could intrude in the random drug testing regime.

So unless there are particular questions which Your Honours have in relation to that, I turn to the second of the questions which I flagged and that is whether specific rules in question might be over-broad because they are too broad in time and place.

There are the four headings that I raise in this context because as I understood the apprehensions of Your Honours is that it was a concern that the rule or rules as presently expressed are over-broad because there is no limit as to time and place.

The first point I would make is to the extent that the Court is concerned that rules ought to contain a limitation, the preferable course is to read those limitations into the rules. And that's not a process or a task which is

actually unfamiliar to courts. For example search warrants. A search warrant which is executed by the police at the residence of a family with small children at 3 am in the morning might be unreasonable.

Anderson J I held it was.

Moore Yes, but I'm sure that was circumstance driven Your Honour.

Anderson J Well, they waited for two weeks before they executed it without any explanation and then executed it at 3 o'clock in the morning in a house that had young children in it.

Moore That's exactly my point.

Blanchard J In Northland?

Anderson J New Lynn.

Blanchard J New Lynn.

Tipping J You're saying that an individual instance of misuse of a power doesn't damnify the power?

Moore No, what I'm saying is that the exercise, that the Court is well-used to defining the limits of the power in individual cases. So that if this rule is considered to be too broad in individual instances where it may be applied in circumstances which are unreasonable, the Court can intervene.

Anderson J That's not the search warrant type of case where there was a lawful warrant with an unlawful execution of it. What we're concerned with here is the scope of the rule, not the scope of any conceivable occasion of it.

Moore Yes.

Anderson J Slightly different.

Moore It is slightly different. I accept that.

The second point that I make is the rules can be read consistent with Parliamentary intention. If the Court was to consider that Parliament's intention was to limit testing to particular times and place, or related to ensure safety, the rules as they are presently drafted in my submission can be read in that way.

Tipping J It would not be easy would it to put in any limit to the rule other than one defined by reference to purpose and reasonableness of individual instance.

Moore That's my third point.

Tipping J Oh, yet again I'm troubling you.

Moore No you're not at all. But that's my third point. It's the practical difficulties of defining there which allow us to read it in the way that we do. And the fourth point.

McGrath J Well couldn't you for a start read in a limit by reference to a racecourse or a place where activity preliminary to racing takes place.

Moore Not only can you do that, but my fourth point is that the protocol itself does in fact do that.

McGrath J Perhaps we ought to be looking a bit more closely at the protocol.

Moore Well, I'm going to ask you to. It's in volume C of the materials.

Anderson J The protocol can't define the scope of the rule.

Moore No but what it can do, if constitutionally it is part of the rules, is that it can define the conduct of those who are exercising powers under the rules.

Anderson J Yes but that's not really the issue. The issue is what was the scope of the rule. And I see the attraction of an argument that the scope of the rules is defined by law in terms of reasonableness and purpose and other really public law type concepts I suppose as well as statutory. But the protocol is merely a regime for ensuring compliance with those parameters.

Moore Yes. The place pursuant to the protocol, or places is as defined under the collection site.

Anderson J Yes.

Moore And the time, inferentially, must be the time when jockeys and riders are present at a racecourse.

Blanchard J Well why couldn't that have been written into the rule.

Moore Well, I'm not sure what the answer to that.

Tipping J Well it could have been.

Moore Yes.

Tipping J It's as simple as that, it could have been.

Moore Yes, it could have been.

Blanchard J So is the rule over-broad because that wasn't done.

Moore I think for the others reasons, it isn't. I mean it does get down to the question of reasonableness in its application.

Blanchard J But the problem with that approach is that the person who is being subjected to the rule doesn't know absent the protocol what they have to comply with.

Moore No.

Tipping J I think there's good in this protocol for you Mr Moore but there's also quite a lot of bad in it, in that it demonstrates, contrary to the earlier discussion, that a degree more specificity is more than possible. If they take the view that this is the right way to administer the rule, why don't they limit the rule accordingly.

Moore Well I can see that. But the protocol is, and I'm not sure that this is an answer at all, but the protocol is a document which is published and so those who are subject to it are aware of its content. So it's not a question of those who are subject to it and to the rule not knowing what the limits are because the protocol has defined those limits and they have notice of it because of the published nature of it.

McGrath J And they know it's an order.

Moore Mm.

McGrath J As Justice Gault pointed out this morning.

Moore Mm.

Tipping J The first sentence under collection site defines both time and circumstance, and place. Time by inference and place directly.

Moore Yes, yes it does.

McGrath J I don't know if it does stipulate time by inference really.

Tipping J Well it's got to be when people – I suppose you could get them somewhere else and bring them to this.

McGrath J Well you could tell them to come.

Tipping J Well you could tell them to come, yes.

McGrath J It's a charitable inference.

Tipping J (Laughs) I'm full of charity. But.

Blanchard J I suppose the problem I've got is that even if, contrary to the suggestions that have just been put to you, and I'm not commenting on those, it is possible to say well this limits time and circumstance, does it really limit the rule. What if a racecourse inspector decides to ask for a random sample outside of that. The rule still exists. This doesn't say, at least I don't think it says, this is the exclusive procedure.

Moore Well this Court can limit that interpretation if it wishes.

Anderson J What I have difficulty understanding, and perhaps there's an easy answer to it, is why they call this a protocol instead of just calling it a rule and saying it was a rule made pursuant to the Act.

Moore Yes.

McGrath J It's a little unwieldy from the point of view of certainty as to what the obligations on jockeys and stable personnel are to say that the precise form of this rule can be established merely by going along to the High Court to do that.

Moore Look, I realise that immediately. And I accept that.

McGrath J One of the things that's just in my mind is that there doesn't seem to be any authority on whether we should, if we think the rule is overstated, read it down or quash it, leaving it to the appropriate authority to make a new rule. Just without having any view on the elements of that, I suppose the latter course would certainly encourage the racing authorities to make a precise, appropriate new rule.

Moore I think this very discussion would made the racing authorities interested in changing the rule.

Tipping J But the really difficult issue is if it were quashed but the actual individual incident if you like was clearly within the confines of any reasonable rule, what is the result in those circumstances. If the rule's quashed, there's no rule to prosecute under I suppose, would be the strict view. But if the individual incident is clearly within any manifestation of what a reasonable

rule would be, then it would trouble me the rule we quashed with the obvious consequence.

Moore Yes, I would have thought that the most, certainly the way in which I would exhort the approach to be adopted is to read it consistent with the Parliamentary intention. And the Parliamentary intention obviously in my submission is to ensure that safety in the racing context is met by a drug testing regime.

Blanchard J But we appear to have a rule that is broader than is actually necessary. Because you're not arguing that Thoroughbred Racing needs a rule going wider than this protocol.

Moore Correct.

Blanchard J Which makes the rule somewhat problematic.

Moore The fact that New Zealand Thoroughbred Racing has chosen to limit it in that way is one thing one can think of.

Blanchard J Well have they limited it in that way?

Moore Well.

Blanchard J If they had limited it in this way, in other words if there was an express limitation somewhere found in the protocol or in another rule, that might be a different situation, particularly where the rule and the protocol existed when the new Act came into force. But I haven't seen at the moment that it has been so limited. And therefore it would seem to me that on the literal wording of the rule, the natural meaning I guess Mr Ivory would say, the racecourse inspector can step outside the protocol and say, I'm doing some random testing, not necessarily using a different process perhaps, but at a different time and place.

Moore Mm.

Anderson J Who makes the rules, is that the board.

Moore Yes.

Anderson J So if they'd said we're acting pursuant to s 129, and providing that what is the content of the protocol is a rule, it would have more authority than making it pursuant to the constitution which is inferior to the regulatory status of a rule. They may have chosen the wrong horse.

Moore Yes. Well, in terms of the remedy, the first remedy is to, in my submission, for the rule to be read down consistent with the extent to which the questions of reasonableness and other require the rule to be applied.

Tipping J Are you asking effectively that the rule be read down so it is limited by the protocol.

Moore In the event that.

Tipping J If we were otherwise of the view that it needed to be.

Moore Yes I would.

Blanchard J Is that a procedure which is legally acceptable.

Moore Well.

Blanchard J I mean obviously it would be acceptable to you but is it legal.

Moore Is there authority which?

Blanchard J Yes.

Moore Yep. In the limited time that I've had to look at this issue, I have not found authority. But if the Court would like some examination of that particular point.

Anderson J It doesn't sound right to me because the rule has to be read in terms of objective controls, not subjective statements of how people are going to impose it. And the objective controls are purpose, bona fides, reasonableness, all of those things. The protocol may exemplify those constraints but it doesn't define them.

Blanchard J It might be a different circumstance, a different situation if the argument that you were making was, look we need to have this as a fairly broad provision, we accept it can't apply at all times, but it's just to difficult to define the times and places where it wouldn't be appropriate. Let that be done by the normal implication of purpose.

Moore Mm.

Blanchard J It's connection with purpose and with a test of reasonableness although there's still the argument that Mr Ivory makes about what's it look like from the point of view of the person being subjected to it. But I must say I do have a concern at the moment when it emerges that in fact the

Thoroughbred Racing people really only want random testing in the circumstances and place contemplated by the protocol. That seems to me to leave the rule over-broad.

Moore Well if the purpose of the rule is to ensure that safety is maintained, and the fact that New Zealand Thoroughbred Racing chooses to limit it in a particular way doesn't mean to say that this Court is obliged to limit it in that way and there may well be circumstances, practical examples of situations where it may be necessary to go beyond testing just at tracks and at race meetings. It just so happens that as far as NZTR is concerned it doesn't see that need now. But if we take for example a jockey who consistently fails to pass at least 15 mls of urine in a test, and the reason that the jockey is refusing or failing to do that is because they know they will in fact, the urine on being tested will be found to be positive. But if they frustrate the process on every race day, saying because of the wasting conditions that I operate under, because I'm not drinking water because I'm very concerned about the very narrow weight limits that operate in racing, that can be the answer that's given. But if the purpose of refusing or failing to supply a sample on race day or at the racetrack is in fact because they know that if they do that their urine will be found positive for a controlled drug, then one might have thought there was a real reason available for NZTR to go to that rider at a time and place when they are not wasting and take a sample when they can pass more than 15 mls and where that excuse is not going to provide them with an opportunity to avoid the effect of the rules.

Now that's an example of how it is necessary to approach the application of these rules with more flexibility than perhaps at the moment NZTR thinks inecessary in terms of the protocol.

Tipping J There is another point Mr Moore that's just occurred to me. It may be too easily assumed that this protocol is designed to cover the whole ground. It may be, and maybe there's evidence on this, I don't know, but it may be that this is just designed to cover the normal circumstances in which you'd do the testing but it's not intended to signal that the testing is necessarily going to be limited to these circumstances.

Moore Well I mean that's. I can't.

Tipping J It's a similar point to the one.

Moore Yes it is a similar point.

Tipping J Is there any evidence that says to us one way or the other that this protocol was passed in order to cover the whole ground or just to cover the normal circumstances I which you'd.

Moore There is no evidence – the evidence of the protocol is covered in the affidavit of Mr McKenzie. And what he says about it, we should probably have a look at it.

Tipping J Because this seems to be becoming the absolute fulcrum of this case, this protocol now.

Moore I'm sorry, it's Volume B tab 10.

Tipping J Thank you.

Moore There is no evidence one way or the other. I suppose my point is that the rules need to be given the flexibility to meet other situations or situations which may arise on occasions other than race days or at training tracks.

Tipping J I think it emerged this morning that there was a protocol before the Act was passed.

Moore That was this.

Tipping J That was this one?

Moore Yes.

Tipping J Was there a protocol before this one.

Moore I don't.

Tipping J In aid of the earlier rules.

Moore No, I don't believe there was.

Tipping J Right.

Moore This protocol was developed I think really to provide a degree of consistency in terms of standards of collection and testing and what New Zealand Thoroughbred Racing wanted to be able to achieve was to have a drug testing regime not unlike the workplace drug testing regime that other industries have. The difficulty was that, because of the particular wasting requirements of jockeys and the need for them to dehydrate and keep their weights down low, there was a real concern that they would not be able to meet the requirement to provide at least a 30 ml sample which would allow 15 to be used as a A sample and 15 to be used as a B sample for independent analysis.

Tipping J It seems from the evidence of Mr McKenzie, paragraph 8 on page 63 of volume B, that the protocol was at least in part generated in order to satisfy ESR's requirements if you like so that they could vouch for the accuracy of the test and the standards they require from workplace drug testing.

Moore Yes.

Tipping J But I don't know that that necessarily implies that the rule was intended only to apply to workplace drug testing.

Moore No, no that wasn't what I was trying to convey.

Tipping J No, no I'm not saying it was Mr Moore, I'm just thinking aloud almost. And I'm thinking well the idea that the rule is too broad because it looks from the protocol that they don't need it more widely, may be perhaps not quite as persuasive as it appears at first sight.

Moore Well, obviously I'm going to embrace that. But the example that I gave about the jockey who consistently is the kind of example where testing on days other than a race day is necessary. But there are other examples.

McGrath J Mr Moore, whatever this Court does, it's not in a position to do any drafting of appropriate rules in this highly complex industry. But I would have thought that the particular incident you mention could be covered by, if you like, a special circumstances type of situation where just it's proving impractical in accordance with particular, time, place and circumstance associated with a racecourse, a race day and so forth to get the appropriate sample. In other words, at the moment you've certainly persuaded me that the particular type of incident you mention is a genuine concern but I'm not necessarily satisfied that it justifies a broad rule in terms of the present rule to cover that sort of situation. I would have thought a more precise rule with some flexibility, and that's what you're seeking, could be readily framed to meet it.

Moore Yes. I mean there are other examples of the sort of thing where it would be necessary to be able to test on occasions other than race days or in training tracks. I mean for example, you know, trials is an example. At the moment I'm not sure that this covers trials. Whether it covers barrier trials. Whether it covers the situation which might arise where the latent effects of the drug are of concern.

McGrath J Those sort of considerations may point to definition of place being more important than time. But there are.

Moore Well I'm not sure about that because if you're concerned about the effects of a particular drug and the need in fact to have testing at a particular time

when say outside the regime of randomness, you're of the view that there is a particular window of opportunity within which you must test, then time does become relevant and it can.

McGrath J In that sense yes.

Blanchard J The trials might be a bit problematic because 29 2 D links safety requirements to the conduct and control of race meetings and a race meeting is a defined term. A meeting held on a day for the purpose of conducting races and for which a betting licence has been granted.

Moore That's only if you conclude that the only way in which a random or drug testing regime can be authorised is under paragraph D, because that's where that word comes from. But what about for example, let's just move away for a moment from drugs, surely it's incumbent on New Zealand Thoroughbred Racing to make sure that jockeys wear appropriate headgear and vests. And there's a provision that relates to heels on boots so they don't get their feet caught in the irons. If that was limited to race days and the definition or the power to make rules relating to safety was confined only to paragraph D, that would mean that New Zealand Thoroughbred Racing would have no control in terms of safety on days other than race meetings and that can't be right. They have to have jurisdiction in terms of safety on other occasions: trials, barrier trials.

Blanchard J Well it certainly would seem highly desirable that they do.

Moore Well that, I mean that's very much the reason why I submitted right at the beginning that the rule making power to make rules for safety needed to be read beyond just limited to paragraph D. It's much wider than that. And if it was limited to paragraph D then it would mean that NZTR could not regulate for safety in relation to events not covered, well yes, to events not covered by the definition of race meeting. That can't possibly have been the intention in my submission.

Tipping J Just could you, and I'm afraid I wasn't paying enough attention this morning Mr Moore when there was that discussion about the protocol and the constitution and so on, I'm sorry to trouble you, but would you mind just going back to the section 11 of the constitution under which the protocol is said to have been made or adopted. It's volume C at p 279 is, unless I'm misleading myself, is where the relevant part of the constitution is found. Which part of all that was it that they were acting under to make this or adopt this protocol?

Blanchard J Right at the bottom of the page.

Tipping J Right at the bottom of the page.

McGrath J (g)(ii).

Tipping J (g)(ii).

Blanchard J (g)(ii), it's an order.

Tipping J Such orders.

Blanchard J It says it is.

Tipping J Does it.

Blanchard J Yes, at the, it says at the beginning of the drug testing protocol this order /directive replaces all previous protocol/s.

Tipping J Protocols.

Blanchard J And it's stated that the Thoroughbred Racing ordered that the following protocol be adopted.

McGrath J That's your position is it Mr Moore, because I think at one stage you were putting some, a bit of emphasis either separately or as well on D and L of 11(2) but (g)(ii) looks as if it's more of a fit doesn't it.

Moore It does doesn't it. Yes.

McGrath J Yes.

Tipping J It's not inconsistent.

Gault J What status does that give the protocol when we have the rules of which the constitution forms part as having the effect of regulation and that authorises the making of the order which constitutes the protocol, it's a sort of substantial-delegation isn't it. What status does that give the protocol if any.

Moore Well I must say I having thought this through, I've always been of the view that it was, it had, it has no status as either a secondary or tertiary piece of legislation.

Gault J The power of delegation is recognised by the statute in that it designates the rules as the rules of racing. And so the authority to make it would seem to have been recognised statutorily.

Moore Yes.

McGrath J What's the charge here, if that's the appropriate term to use.

Moore We're very careful not to use that word.

McGrath J Well okay, it's not the appropriate term, but what is the nature of the misdemeanour that's alleged against her.

Moore The misdemeanour.

McGrath J Is it in relation to disobedience of an order.

Moore No, no.

McGrath J Or is it in relation to disobedience of a rule of racing.

Moore It's a breach of a rule of racing and the rule of racing is rule 528.

McGrath J Yes that's right. So it might be worth looking at that.

Moore 528 you will find at p 345 of the case. Should do, yes.

McGrath J Yes.

Blanchard J It would seem to me that the protocol does have legal significance because it was made under rules which were in force immediately before the commencement of the new Act. And s 29(3) says those rules must be regarded as having been made for the purposes of subs (1). So they are the rules of the racing code and those rules of the racing code authorise the making of the protocol.

Moore Yes.

Blanchard J Authorise the making of orders.

Moore Yes.

Blanchard J Just where that takes us I'm not quite sure. But I think because it was there beforehand it may well have some standing.

Gault J It certainly meets to some extent the concern that people don't know where they stand.

Moore Yes.

Tipping J It would be very ironic if your client would have been better off without the protocol.

Moore The significance of the protocol, at least one of the aspects of the significance of the protocol is that it does provide notice anyway to jockeys as to what generally can be expected of them. There will be occasions, even if NZTR through the protocol doesn't anticipate them, when there may be a need to go beyond it. And those are the examples that I've given. But it certainly serves that purpose in terms of notice.

Tipping J In essence we could either use the protocol to damnify the rule or we could use it in aid of the rule if you can see what I'm saying Mr Moore.

Moore I absolutely see.

Tipping J Yes.

Moore I absolutely see.

Tipping J It's a very ironical situation.

Moore Well I suppose the answer to that, and certainly the drum which on behalf of my client I beat, is the status of the protocol which certainly we would submit has a status akin to a rule or a subrule.

Tipping J Yes.

Moore And secondly that, in doing so, it defines the limits in terms of time and place. It also gives notice to those who may be affected by it as to time and place.

Tipping J One thing that is not entirely clear if one reads the rule and the protocol together is whether, on a non-race day, a jockey could be required to attend the collection site.

Moore Yes.

Tipping J For the purpose of then…

Moore Well I understand that that's a difficulty for me if I am obliged to make the submission that the protocol has the status of a rule because in doing so it removes the opportunity or makes it more difficult anyway for a racecourse inspector to test at times other than that if there is seen to be a need.

Gault J Without further order.

Moore Yes. Yes.

Gault J You haven't seemed to me to advance argument Mr Moore with reference to the scope of the rule on the basis of purpose, the whole scheme and purpose of the rulemaking is for the conduct of racing or the safe conduct of racing. Any rule must be read subject to that purpose. And any rule that goes beyond that purpose, action under it could not be upheld.

Moore Yes.

Gault J Just the same as in that *Payn* case. The power of the police was to require people to accompany, but having regarding to purpose and competing values, it was held they couldn't exercise that on private property. It was just a construction on an interpretation point.

Moore Yes, well that's what this is.

Tipping J The fact that you can't use a discretionary power in some circumstances under a modern approach doesn't I think mean that you can't use it in any circumstance because the power itself is invalid.

Moore Yes, that's right.

Tipping J I mean I'm saying that *ex cathedra* and I'm not able to put my finger on any sort of direct authority but that would seem a very harsh approach to say that if the discretionary power is capable of being misused, it must be bad altogether.

Moore Mm.

Tipping J But there is the countervailing line of authority which says that if a rule or delegated legislation is couched in terms that are broader than is necessary to effect the statutory purpose, and that's where you join issue, it's bad altogether. So we've got to resolve that conundrum apropos of the circumstances of this case I think.

Moore Mm.

Tipping J It seems to me where the real crunch comes.

Blanchard J Well, can you take that any further.

Moore No, I don't think I can. I may wish to come back to it if there's a particular aspect which I feel I can develop better.

Blanchard J I'm not sure where this would fit into the overall scheme of things but I noted in your written submissions an argument that the Bill of Rights Act didn't apply to the regime in any event.

Moore Well, I'm not pushing that necessarily. I don't, I think the reality of it is that it doesn't probably matter much because.

Blanchard J Same result could be arrived at outside the Bill of Rights.

Moore That's my view.

Blanchard J Mm.

Moore In terms of reasonableness and all of those balancing exercises, intrusions of privacy, expectations of privacy, whatever way you look at it. I certainly approach this on the basis that it was necessary to read it consistently with the Bill of Rights.

McGrath J I certainly don't want you to go into that argument if on reflection there's another route that you prefer to take but I certainly wouldn't want to leave you with the impression that I was satisfied there was no public element in terms of s 3(b) of the Bill of Rights Act in this context.

Moore Well I think one.

McGrath J Which I think was your argument, yes.

Moore One has to be a pragmatist.

McGrath J Yes.

Moore In these things. And, you know, while one can weigh up the various *Ransfield* criteria and measure it against those criteria, and there are some which go for us and there are some which go against us, at the end of the exercise, I think realism means that it actually doesn't make a difference.

McGrath J Yes, thank you.

Anderson J It's difficult to think of a body that has the power to make regulations that isn't caught by the Bill of Rights.

Moore Yeah.

Anderson J When making them.

Moore Yes. Yes or a body which has licensing powers or compulsive powers. I think it is difficult to accept that and so I don't argue it vigorously. It's included in the submissions and…

Blanchard J Well I raised my eyebrows when I saw that. But I do accept that the question of what bodies are and are not caught by the Bill of Rights and for what purposes is a very difficult one.

Moore Mm.

Blanchard J But it did seem to me that it was likely that in exercising its power to make rules, it would be trammelled by the Bill of Rights.

Moore Well there are some cases where it's a determinative issue. This is not one.

Tipping J No, that's exactly right.

Moore The final issue which my friend raised was whether the drug testing regime ought to be authorised by primary legislation. And there are three primary points that I raise in relation to that. The first one is that there is a variation or a spectrum of examples, some at one end which are highly regulated when it involves blood testing and bodily samples, and at the other end hardly regulated at all. And it's a question of where, bearing in mind that spectrum and the sorts of duties that New Zealand Thoroughbred Racing is engaged in, as to where it fits or should fit. And I suppose the overriding question, the primary question in all of that is to what extent should Parliament be involved in rulemaking.

So if you look at examples at one end of the spectrum you've got your Criminal Investigations Bodily Samples Act which Parliament has seen fit to get involved in in terms of declaring what needs to be done and what doesn't need to be done at every, absolutely every level. So every aspect of that is regulated by Parliament. And the reason for that, in my submission, is quite obvious. Because that is a very substantial intrusion. It has the potential to apply to every person in the country. And the consequences are extreme. Because if the bodily sample ends up with a DNA match which ends up being linked to a crime scene, we're talking about penalties of life imprisonment and that sort of thing. So it's at one end of the spectrum and very probably in my submission Parliament has seen fit to regulate every aspect of it.

Further along that spectrum is the breach alcohol regime. And just like the Blood Samples Act, the agent of the state is the police and it's the police who have to administer it. So in quite a different paradigm from the one that we are in the present case. And as far as breath alcohol is concerned,

it's less prescribed with the procedures themselves mostly contained in secondary legislation like notices. However, it still needs to be prescribed by Parliament and Parliament has a hand in it. Because it is administered by the police and affects all people who are in charge of motor vehicles.

At the other end of the spectrum is the *Air New Zealand* example where there is no involvement by Parliament. It's arguable as to whether *Air New Zealand* is a public entity which would be covered by the Bill of Rights but that was largely an employment situation involving employment contracts and collective agreements.

McGrath J It was really I think, wasn't it, in the way you explained the case, just the exercise of employer power.

Moore Power.

McGrath J I think you said it wasn't in any agreement.

Moore It was not contained in any collective agreement.

McGrath J Yes. Just part of the employer's ability to decide how to run his business.

Moore To unilaterally impose a condition that it believed was necessary. The US cases I cited involved intrusions, a good number of them not involved or requiring primary legislation although I accept some do. And in my submission the present case is somewhere between the two. And Parliament has seen fit to leave it to New Zealand Thoroughbred Racing to develop the rules because it's in the best position to determine what is best for its industry.

Which leads me to the second point under this heading which is the scheme of the Act. Now I've touched on that already. I've taken Your Honours through to the Explanatory Note which emphasised the importance which Parliament has given to the industry regulating its own processes.

Anderson J I've just been looking Mr Moore at another analogous rule dealing with medical fitness. This comes under rule 307 subrule 5 for example in rules 538 to 541. And that requires as a condition of a licence a written consent to undergo a medical examination which of course can be far more intrusive than giving a urine sample.

Moore Yes.

Anderson J And makes it a breach of the rules if one is required to go for a medical examination and does not do so. Now if the drug testing rules are out, that rule's out. Because then the same considerations would apply.

Moore Mm.

Anderson J It's the breach of, on the face of it, or it's an intrusion on privacy and personal autonomy. It could be far more invasive than providing a urine sample. And it seemed to me that that would be out as well. Yet it's obviously directed to safety.

Moore Yes.

Anderson J I mention that so Mr Ivory can pick it up and reply if there's something to be said.

Moore The third point under this heading is that Parliament has not released its complete autonomy or abandoned complete autonomy to New Zealand Thoroughbred Racing. And I refer Your Honours to s 32(2) of the Racing Act which is under tab 1 in the appellant's bundle.

This was an innovation for the 2003 Act because under the previous rules they were not deemed to be regulations. But under s 32, particularly subs (2), the Regulations Disallowance Act applies to rules made under s 29. What that means, therefore, is that the rules are subject to the Regulations Review Committee and the powers that that committee has.

Blanchard J Would that apply to existing rules.

Moore Yes I would imagine.

Blanchard J When the Act came into force.

Moore Yes.

Tipping J The old rules are deemed to or regarded as having been.

Moore Yes, the old rules pursuant to s 29(3) are validated.

Blanchard J Yes. I haven't looked at the Regulations (Disallowance) Act but it's got time limits in it hasn't it.

Moore Well I did look at it and I don't remember the time limits. What I do remember is.

Blanchard J There aren't?

Moore I'm not saying there are not.

Tipping J But your simple point is that there is some control left to Parliament.

Moore Yes, yes there is.

Tipping J That's the essence of the point.

Moore And more significantly that the disallowance, sorry the Regulations Review Committee invites, in fact it's on its website, those who wish to make submissions to it in issues that unduly trespass on individual rights and liberties.

Tipping J So it's inviting business.

Moore It's inviting business and it's inviting business particularly in the context of those who may feel by virtue of a particular regulation they are adversely affected. Including.

McGrath J Of course it applies to all rules doesn't it including.

Moore Yes it applies to all rules.

McGrath J Those made by Cabinet made through the Executive Council.

Moore Yes.

McGrath J Courts have never felt that the fact this procedure is available should constrain them in dealing with the legality of rules.

Moore Certainly not.

Tipping J On this primary legislation point Mr Moore, I have to say that I'm, and maybe it'll be clarified in reply, but I would have thought it would come to the same thing in the end. It would have been very simple, if they had done it by primary legislation. We no doubt wouldn't be here. The question whether the racing people are allowed to do it either at all or in this form is surely back to the question with which the whole case starts, is it within or without the rulemaking power given to your people.

Moore Yes, yes.

Tipping J And I don't quite understand how this point adds anything. They're either allowed to do it or they're not.

Moore Well.

Tipping J Whether they ought to have done it, whether Parliament ought if you like to.

Moore Look I do take your point. And I understand what you're saying.

Tipping J I'm not trying to downplay the points you've helpfully made under this but I just signal that I personally can't see how this elucidates the issue at all.

Moore But I quite agree, it does get down to the breadth of the power under s 29. That is the essential issue here. And it's very broad. Particularly under subs (1) of s 29. That's what I propose to say under that heading. And I think that covers the submissions that I was proposing to make unless there are particular issues.

Blanchard J Yes thank you Mr Moore. Mr Ivory.

3.29 pm

Ivory I fancy unless I'm rudely interrupted, that I'll only take 15 minutes at the most.

Blanchard J We'll try to restrain ourselves. (Laughter). But you know we're not very good at that.

Ivory We'll give you marks at the end of the day for how good you are at that. My primary focus will be on the status of the constitution, the status of the rules and the status of the protocol because I think that may be where I can be the most helpful to you.

The constitution and the rules are not a single document. They're published on Thoroughbred Racing's website as a single pdf which is why they appear the way they do. But in fact the constitution is a constitution of an incorporated society under the Incorporated Societies Act. And I glance at the table of contents at the beginning of volume C of the case, p 262 following. One sees that the constitution is a single document with its contents finishing at p 266.

Blanchard J Is your point then that s 29(3) doesn't apply in relation to the constitution.

Ivory The constitution.

Blanchard J Therefore doesn't save the protocol.

Ivory That's not the way to save the protocol, that's right.

Blanchard J Mm.

Ivory The constitution is not part of the rules of racing. The rules of racing are, as Your Honours will by now well know, are made under s 29. They have a particular character by reason of s 32. They are deemed regulations so under s 29 of the Interpretation Act they are regulations. They're required to be gazetted. And they're subject to the Regulations Review Committee. The method of making is a procedure set down in the rules, particularly rule 18 beginning at page 282 of the case on appeal. At the very bottom of the page, alteration of the rules, there is a procedure to follow.

Blanchard J I notice 18(5) says every regulation rule order, and then a few other things, whatsoever in force pursuant to the rules as at the commencement date shall continue in force.

Ivory Indeed, pursuant to the rules. But of course the protocol is not made pursuant to the rules.

Blanchard J What are orders.

Ivory It is made pursuant to the constitution.

Blanchard J Yeah but what are orders pursuant to the rules.

Ivory I have no idea. I'm bound to say I haven't got as far as, I'm not a horse person so I don't know about riding crops and all those sorts of things. There are a thousand rules covering a mass of things.

Blanchard J Yes but do the rules themselves provide for orders.

Ivory For the making of orders, I don't know but the protocol is not one because it's specifically an order made pursuant to s 11 of the constitution.

Blanchard J Yes.

Ivory Self-described, so it's not an order made under the rules.

Blanchard J No I was just curious about what that was referring to.

Ivory I want to lure you away from that distraction Sir. Whatever the protocol was intended to do when it was made, if it was intended to be a rule or a set of rules, it's failed. It's not, it's an order under s 11 of the constitution. And the random drug testing rules remain those which are described in my written submissions. Although I hasten to say the written submissions suffer the gremlin either of my failing mind or of my failing computer

because they are misdescribed in a couple of places where I refer to rule 226(d) where it should be rule 226(2)(d) and if you're relying on my written submissions, in places there's an error there.

Tipping J It must have some defect though, this protocol mustn't it Mr Ivory. Are you suggesting, and I apologise if I'm jumping ahead, but are you suggesting it should be ignored.

Ivory I'm afraid I think it should be because s 29 and s 33 of the Act operate together and 33 requires all racing to be conducted under rules, not orders made under constitutions.

McGrath J Sorry, you've got this in s 33.

Ivory Section 33 of the Racing Act.

McGrath J Requires all racing to be conducted under rules.

Ivory Must comply with relevant racing rules, s 33.

McGrath J Well it must comply with them but there's no suggestion, that's all, that's as far as it goes. It doesn't say there aren't other, other orders can't be given that must be complied with.

Ivory Well that would completely defeat the point wouldn't it though Sir. If you want to know what the rules of racing are you go to the rules. And s 33 entitles you to rely on them and say those are the rules. I don't have to go shopping looking for other extra-regulatory documents. The advantage of the rules is they're regulations. They're gazetted, they can be found, they can be reviewed. Before they're made they're subject to a process. Section 33 makes sure that anything that happens in relation to racing happens under rules. There's not a set of extraneous documents which you're going to have to go looking for.

McGrath J The only point I'm making is that the statutory requirement is that racing comply or the racing clubs comply with the rules.

Ivory Yes I appreciate that.

McGrath J And what you're saying is that it's a necessary inference from that that.

Ivory You're entitled to look there.

McGrath J Orders under rule, I suppose it is, 11.

Ivory Yes of the constitution.

McGrath J Can't be part of the rules, is that right.

Ivory No, that's right, they can't be part of the rules of racing.

Tipping J So your client would rather fight on the basis the protocol didn't exist than on the basis it does.

Ivory Well if Your Honours find it exists, I've already listed my objections to it.

Tipping J I just wanted to know clearly.

Ivory My first argument is that it doesn't exist.

Tipping J Doesn't.

Ivory If it does exist, it's deficient. It's so deficient it's invalid. That's the second position.

Tipping J So you want us to hold that it doesn't exist.

Ivory At first, it doesn't exist, it's not part of the rules. That was the position held by the Judicial Committee also. It was discussed with them and at paragraph 67 I think it is, 71. The Committee after a discussion.

Tipping J Well I must confess this case will no doubt help the racing people to tidy up their act.

Ivory Well there's no question it's a boring job to write random drug testing rules. But it's only boring. There are plenty of models to choose from. It's not going to be difficult, merely tiresome.

McGrath J Do you mind just telling me again where I can find para 71.

Ivory Yes it's in volume B of the case, page 91, and it's volume B of the case, page 91. That's the Judicial Committee's Ruling No. 5.

McGrath J Thank you.

Ivory Paragraph 71.

McGrath J Yes.

Ivory They describe it as a best practice guideline. The problem with that of course is that it runs both ways. The tester may choose to depart from it but what if the testee asks to depart from it. In this case there were I think

28 mls sample taken and it wasn't split. What if the appellant had asked for the 28 mls sample to be split. If it's a best practice guideline, it's not inflexible. Do we have a stand-off, don't know. It's completely unsatisfactory in a context of random drug testing in my submission.

Blanchard J Anyway, your main argument is the protocol has no legal standing.

Ivory Yes Sir. With regard to the Health and Safety in Employment Act I would urge upon Your Honours some caution in the way it's handled. First of course the appellant is not an employee of Thoroughbred Racing. Nor is she a member of it. She's a professional jockey. She is a licensee. A licensed jockey. She's subject to their regulatory licensing regime and that's her situation. So they have no responsibility to her. Secondly race meetings.

Blanchard J Is the Health and Safety in Employment Act only directed to situations of employment however. I don't know the answer to this question, I'm seeking information.

Ivory Well it's health and safety in employment, so one has to allow for.

Blanchard J Yes I'm aware of that. But I had a feeling it might be wider than that and deal with particular sites.

Ivory Yes.

Blanchard J Because I think there's a requirement on an employer to appoint somebody to be in charge of looking after safety on a site.

Ivory Yes, there's certainly, people.

Blanchard J Well does that obligation extend only to employees.

Ivory No, no, no it doesn't.

Blanchard J What about other people coming onto the site.

Ivory No it doesn't. But unfortunately Sir you haven't allowed me to finish. The next point's the killer and that's this. It's not Thoroughbred Racing which runs race meetings. It's the clubs. The structure of racing is that we have a Racing Board, we have the three codes of which one is Thoroughbred Racing and then we have the clubs. And the clubs run the race meetings.

McGrath J But the clubs have to comply with the rules and you expect the rules to deal with these matters wouldn't you.

Ivory The clubs have their own obligations don't they. And their obligations under health and safety in employment are their own obligations.

McGrath J I accept that but wouldn't you expect the clubs, wouldn't you expect those fixing the rules for the way racing is conducted, to deal with these matters so that the clubs operate within a rule framework that addresses it.

Ivory Well I would have expected those who have the duty to comply with the Act to take responsibility for that. If they're given assistance by another body all to the good. But the obligation lies with the club, not with Thoroughbred Racing. I only alert Your Honours to these points because it just requires care in addressing the Act in due course in your judgment. I'm not hoping to save my planet on these propositions.

Tipping J The object of this Act is to promote the prevention of harm to all persons at work and other persons in or in the vicinity of a place of work by. So I think it goes beyond employees. But you've made your point clear and it's not a planetary point as you say.

Ivory Yes, that's right. I just don't want to be the cause of collateral damage in respect of that statute arising out of this judgment.

That addresses the points that I had in reply. Oh there was the single matter that Your Honour raised before lunch and again after lunch with regard to the question of whether, if rules are capable of being read, of being applied wrongly, but also being applied lawfully, whether the rule goes or whether the rule stays. We haven't prepared on that point. I don't think my friend had either. If Your Honours want assistance in that regard, we'd be very happy to provide memoranda. I speak for myself but I'm sure my friend would want the opportunity too.

Blanchard J I think it would be helpful if we had something on that from counsel.

Ivory Yes.

Blanchard J But we would want to get it reasonably soon. How long would you need.

Ivory Two weeks.

Tipping J Easter, are you alright with that.

Ivory Oh.

Tipping J Three weeks?

Ivory Three I think yes, because of course I have other commitments too. Yes.

Blanchard J We'll make it three weeks to allow for Easter. And what, a week to reply?

Moore Yes, that's fine thank you.

McGrath J Mr Ivory can I just ask, what's the current status of the proceedings before this body.

Ivory They're stayed.

McGrath J By Court order.

Ivory No, by agreement.

McGrath J So the.

Ivory So they're effectively adjourned.

McGrath J The Judicial Committee agreed not to proceed.

Ivory No they've agreed to await the outcome of Your Honours' judgment.

McGrath J Thank you.

Gault J Just in relation to this last point, sorry to come back to it Mr Ivory, about the protocol but you were drawing a distinction between the constitution and the rules.

Ivory Yes.

Gault J And you said the constitution is that of an incorporated society. But I was just having a look at the definitions in the Act and the outline of the Act and the rules must be made by the Racing Code and the relevant Racing Code is the New Zealand Thoroughbred Racing Incorporated.

Ivory Yes.

Gault J So the constitution is that of the Code which fixes and modifies the rules of racing. Is that right.

Ivory The constitution doesn't, the code, the code which is Thoroughbred Racing, Thoroughbred Racing makes the rules.

Gault J Yes, well it must act in accordance with its constitution in doing anything mustn't it.

Ivory Yes, it must act in accordance with its constitution, yes.

Gault J And it made the rules in s 18 of the Constitution which also provides for their modification.

Ivory Yes.

Gault J So it doesn't seem to me there's a huge distinction between the rules and the society as you drew.

Ivory Fundamental. The society is the entity which makes the rules.

Gault J Yes.

Ivory It's the rulemaking entity.

Gault J That's right.

Ivory My proposition is the constitution of the society is not part of the racing rules.

Gault J I understood that point.

Ivory Yes. But the importance of the point was that.

Gault J It is the authority by which they're made.

Ivory Well yes, the importance of the point is that therefore orders made under s 11 of the constitution are not orders made under the racing rules.

Gault J I understood that point.

Ivory That's the proposition.

Blanchard J That completes your reply?

Ivory Yes, thank you Sir.

Blanchard J Thank you counsel. It, like so many of the cases that come here, is a difficult and important case and we've been much assisted by argument.

Court adjourns 3.46 pm.