BRINGING THE 'STRANGERS' WITHIN THE RULES OF RACING

Anthony J Crocker*

One of the more interesting questions relating to the powers of racing clubs is the extent to which they can impose penalties upon persons who are not members of the clubs, who require and hold no licence from them, who have not agreed to be bound by the rules of the clubs, who have not submitted to the exercise of jurisdiction over them by the clubs, and who only desire to attend race meetings or maybe do not even want to do that.[1]

Introduction

For over seven decades it was believed the answer to that question lay in the decision of the Privy Council in *Stephen v Naylor ('Stephen')*.[2] It had been thought that a person, who had not by word or deed agreed to be bound by the rules, could nonetheless come within the Stewards' jurisdiction by doing an act that brought them within the purview of the rules.[3]

This understanding of *Stephen* was unchallenged until the 2010 Victorian Civil and Administrative Tribunal ('VCAT') decision in *Clements v Racing Victoria Limited (Occupational and Business Regulation) ('Clements')*[4] when it decided that Mr Clements, a professional punter, was not bound by AR 8 of the *Australian Racing Rules*[5] and did not have to produce various records to the Stewards as part of their inquiry. On the face of it, *Clements* was a refusal by the Tribunal to apply what, until then, had been understood to be the principle in *Stephen.*

The thesis of this article is that both *Stephen* and *Clements* were correctly decided. There is no conflict between their respective ratios. The phrase 'because he permitted himself so to act as to bring his actions within their purview'[6] has correctly been viewed as the key to the decision in *Stephen.* However, the

* Barrister, Adelaide

[1] Clifford Leslie Pannam, *The Horse and the Law* (Lawbook Company, 3rd ed, 2004) 282 [17.235]. The language of a 'stranger' is from this chapter.

[2] *Stephen* (1937) 37 SR (NSW) 127.

[3] Making it a condition to be so bound when a ticket is purchased to enter a racecourse 'could only operate in relation to the particular race meeting and not generally': Pannam, above n 1, 283, citing *Tucker v Auckland Racing Club* [1956] NZLR 1, 4.

[4] *Clements* [2010] VCAT 1144.

[5] See *Australian Racing Rules* (1 March 2013) <http://www.australianracingboard.com.au/uploadimg/Rules%20Aust%20010313.pdf> ('*Australian Racing Rules*').

[6] *Stephen* (1937) 37 SR (NSW) 127, 140.

critical issue is the conduct of the person said to be the act that brings that person's actions within the jurisdiction of the club and its rules.

This study focuses on the consideration of the relevant by-laws in *Stephen* and suggests that, properly understood, *Stephen* is an example of delegated legislation permitting the rules of racing to apply to a non-licensed person. It was not Mr Naylor's lies to the Committee of the Club investigating the allegations against him that gave the club jurisdiction over him, rather, it was his act of seeking admission to the racecourse (and thus possible refusal because he had been disqualified under the rules of racing) that brought him within the purview of the rules.

The dismissal of *Stephen*, by the Tribunal in *Clements* as an authority, was not necessary to the finding that Mr Clements was not bound by the *Australian Racing Rules*. *Stephen* was distinguishable because it created jurisdiction by delegated authority, whereas Racing Victoria Limited had no statutory power over Mr Clements. Far from representing a schism, *Clements* is an application of orthodoxy as to how a stranger can come within the jurisdiction of a racing club.

Licensing and the rules of racing

The *Australian Rules of Racing* ('AR') purport to have a very wide application:[7] 'Any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal Racing Authority to be bound by them.'[8]

A Principal Racing Authority[9] may make its own local rules to reflect and complement the *Australian Rules of Racing*. The Principal Racing Authority in the State of Victoria, Racing Victoria Limited ('RVL'), has enacted a local rule entitled 'Persons deemed to be bound by the Rules' in these terms: 'Any person

---

[7] In August 2003 the Australian Racing Board, a company limited by guarantee and incorporated under the *Corporations Act 2001* (Cth), was established and empowered by AR 208 of the *Australian Racing Rules* '[t]o make, change and administer the Australian rules of racing and otherwise do all things whatsoever that the Board considers to be conducive to developing, encouraging, promoting or managing the Australian Thoroughbred racing industry'.

[8] AR 2, *Australian Racing Rules*.

[9] The *Australian Racing Rules* defines (at AR 1) 'Principal Racing Authority' as: 'a body, statutory or otherwise, that has the control and general supervision of racing within a State or Territory (provided any Member thereof is not a direct Government appointee), and means in the State of New South Wales, the NSW Thoroughbred Racing Board; in the State of Victoria, Racing Victoria Limited; in the State of Queensland, Racing Queensland Limited; in the State of South Australia, Thoroughbred Racing SA Limited; in the State of Western Australia, Racing and Wagering Western Australia; in the State of Tasmania, the Tasmanian Thoroughbred Racing Council; in the Northern Territory, Thoroughbred Racing NT; and in the Australian Capital Territory, the Committee of the Canberra Racing Club Incorporated'. See also pars (b) and (c) of the Definition.

who takes part in any matter coming within the Rules is thereby deemed to consent to be bound by them, and to be so bound.'[10]

Stewards are appointed by and according to the local rules. They have wide ranging powers, many of which are articulated in AR 8, including the power to:

> …
>
> (b) to require and obtain production and take possession of *any* mobile phones, computers, electronic devices, books, documents and records, including *any* telephone or financial records *relating to any meeting or inquiry.*
>
> …
>
> (d) to regulate and control, inquire into and adjudicate upon the conduct of all officials and licensed persons, persons attendant on or connected with a horse *and all other persons attending a racecourse …*[11]

This rule is not the only source of the Stewards' powers: 'The Stewards may at any time inquire into, adjudicate upon and deal with any matter in connection with any race meeting or *any matter or incident related to racing.*'[12] The breadth of such powers and their potential to be engaged when the relevant person is not an official or staff, a licensed rider or responsible for the ownership, leasing, training, presentation of or contact with a horse, is obvious. It has been recognised by the RVL's Racing Appeal and Disciplinary Board ('RADB') that:

> The stewards are given extensive powers under the Rules for their assistance in the control of thoroughbred racing and the protection of the integrity of racing. To the casual observer the extent of their powers may be surprising. For instance, in the case of a licensed person stewards have the power to enter and search premises (this includes vehicles) occupied by or under the control of a licensed person and used in any manner in relation to any licence, see AR 8B, and to take possession of and remove any article or thing found as a result of the search: AR 8C.[13]

---

[10] LR 3, *The Rules of Racing Victoria* (1 May 2013) <http://www.racingvictoria.net.au/asset/cms/Rules%20of%20Racing%20PDF/Updated_Rules_of_Racing_-_1_May_13_latest.pdf> ('*The Rules of Racing Victoria*').

[11] AR 8, *Australian Racing Rules* (emphasis added). In Victoria, they are appointed pursuant to LR 7A, *The Rules of Racing Victoria*.

[12] AR 10, *Australian Racing Rules* (emphasis added).

[13] *Reasons For Decision in the Matter of Jockey Mr Danny Nikolic* (16 March 2010) 2–3 <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Reasons%20-%20D%20Nikolic%2020100316.pdf >.

The most obvious example of a person agreeing to be bound by the rules of racing is that of a licensed person, for example, a jockey or a trainer. These licences are granted by a Principal Racing Authority. A rider applying for a jockey licence from RVL must complete a written application. Section 6 of the application form (as authorised by the local rules), requires the applicant to acknowledge and agree to be bound by certain terms and conditions of the licence including:

> 1. (a) the Rules of Racing of each Principal Racing Authority in which State or Territory he/she rides as amended or varied by each Principal Racing Authority from time to time;
>
> (b) the exclusive jurisdiction of each Principal Racing Authority in which State he/she rides, its Officials and Stewards in respect of all matters arising in relation to racing in the State or Territory of that Principal Racing Authority;
>
> (c) such rules and directions as may from time to time be formed, made or given by the directors for each Principal Racing Authority ('Directors'), the stewards or the Principal Racing Authority ('Stewards') or the officials of any racing club registered by the Principal Racing Authority to conduct thoroughbred racing under the Rules ('Club').[14]

The importance of this written acknowledgement is emphasised in the form where the applicant confirms, inter alia,

> I hereby:
>
> – Declare that all particulars in my application are true and correct;
>
> – Acknowledge and agree to be subject to and bound by:
>
> • The Rules of Racing of Racing Victoria as amended or varied by Racing Victoria from time to time; and
>
> • Such rules and directions as may from time to time be formed, make [sic] or given by the Directors, Stewards or official of any Club …[15]

Although one could not suggest an applicant was purporting to reach an agreement with any person other than the corporate entity RVL, nowhere in

[14] Racing Victoria Ltd, *Replacement & New Jockey Application Form 2012/13*, 4 <http://www.racingvictoria.net.au/asset/cms/Replacement%20Jockey.pdf>. It is assumed that the omission of the words 'or Territory' in the opening words of (1)(b) is a drafting error. There appears to be no reason not to have the licencee agree to be subject to and bound by the exclusive jurisdiction of Thoroughbred Racing NT or the Committee of the Canberra Racing Club Incorporated, the Principal Racing Authorities in the Northern Territory and the Australian Capital Territory respectively.

[15] Ibid.

the application form is the RVL actually described.[16] A person applying for a trainer's licence from RVL must make a similar acknowledgement and agreement to be subject to the rules of racing and such 'rules and directions as may from time to time be formed, make [sic] or given by the Directors, Stewards or official of any Club'.[17]

The facts behind two inquiries

To understand the *Clements* inquiry, it is necessary to understand the parallel inquiry into Mr Nikolic.

The Nikolic Inquiry

Mr Danny Nikolic is a licensed jockey in Victoria who had expressly agreed to be bound by the *Rules of Racing of Victoria*. The content of those rules is clear:

> The Australian Rules of Racing made by the Australian Racing Board apply uniformly in each State. Additionally, Local Rules, provided they are not inconsistent with the Australian Rules, can be adopted by each State. In Victoria the Australian Rules of Racing, Local Rules and Rules of Betting constitute the Rules of Racing of RVL.[18]

On 13 January 2010, RVL Stewards commenced an investigation into the ride of Mr Nikolic on *Finishing Card* at Mornington on 8 January 2010. The interview focussed on betting activities on the race. During February 2010, the initial inquiry was expanded to include nine other rides, then subsequently further expanded to cover some 21 rides by Mr Nikolic between October 2009 and February 2010, and ultimately it was:

> [f]ocussed on alleged associations and regular communications between Mr Nikolic and several other persons who regularly bet on the Betfair betting exchange. It was alleged that following communications between Mr Nikolic and these associates, the associates backed various of Mr Nikolic's mounts to lose. In essence the Stewards' enquiry was about whether Mr Nikolic had

[16] All references are to 'Racing Victoria'; a phrase that is not defined within the document nor the local rules. The correct name of the entity to whom the application is made is 'Racing Victoria Ltd'. If the document is amended to correct the earlier drafting errors, this deficiency could also be addressed.

[17] Racing Victoria Ltd, *Trainer Licence Application Form 2012/13*, 5 <http://www.racingvictoria.net.au/asset/cms/Licensing/New%20Trainer%20Licence%20Application%20Form%20-%20updated%20May%202012.pdf>

[18] *Reasons For Decision in the Matter of Jockey Mr Danny Nikolic* (16 March 2010) 2 <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Reasons%20-%20D%20Nikolic%2020100316.pdf >.

> conveyed information to his associates (one of whom was said to be Mr Clements) about the prospects of his mounts and these associates then bet on those mounts to lose.[19]

The Stewards directed that Mr Nikolic produce certain of his telephone records. He was then advised the production was incomplete and the request was renewed. It was not satisfied.

Mr Nikolic was re-interviewed by the Stewards on 23 February 2010 'in relation to matters considerably broader than the [8 January 2010] ride and betting activities on [that] race'.[20] Mr Nikolic was asked about the content of his telephone conversations with Mr Clements and another person.[21] During this second interview, a written request was made of Mr Nikolic by the Stewards that he produce his telephone records for the period September 2009 to January 2010 inclusive.[22]

During the interview on 23 February 2010, the Stewards directed Mr Nikolic to produce his mobile telephone in order that the contact list in that device could be examined and compared with the telephone numbers on the records which Mr Nikolic had produced. He declined and proposed a compromise. The Stewards rejected the proposed compromise and insisted on the production of the mobile telephone.[23] Mr Nikolic continued to refuse to produce his mobile telephone.

The Clements Inquiry

On 3 February 2010, Mr Clements attended before the Stewards in relation to an inquiry by the Stewards into his betting activities. He agreed he was a professional punter. On 12 February 2010, the Stewards gave Mr Clements a direction pursuant to AR 8(b) to produce his telephone records for the period September 2009 to January 2010 inclusive. The direction required the records to be produced by 16 February 2010 but he failed to comply.

---

[19] *Clements* [2010] VCAT 1144, [2]. Betfair International plc is a betting exchange which enables participants to 'back' an event to occur or to 'lay' that it will not occur: see *Betfair* (2013) <http://www.betfair.com/>.

[20] *Reasons For Decision in the Matter of Jockey Mr Danny Nikolic* (16 March 2010) 1 <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Reasons%20-%20D%20Nikolic%2020100316.pdf >.

[21] The telephone numbers of this other person and Mr Clements were detailed in the telephone records that Mr Nikolic had already produced to the Stewards.

[22] It is unclear from the published reasons of the RADB and the VCAT if, and when, these additional records were provided. In the absence of an adverse comment, it has been assumed they were produced. Thus, there could be no complaint by the Stewards against Mr Nikolic on this account.

[23] The authority of the Stewards to make the request of Mr Nikolic in relation to the production of his mobile telephone is AR 8(b) *Australian Racing Rules*; see above n 12 and accompanying text.

On 26 February 2010, the Stewards charged him with a breach of AR 175(p), alleging a failure to comply with a direction of the Stewards, namely, a failure to produce his telephone records as directed. On the same day the Stewards also charged Mr Nikolic with a breach of AR 175(p), namely, that he had failed or refused to comply with any order, direction or requirement of the Stewards.[24]

Referral to the RADB

The directors of RVL, pursuant to the *Rules of Racing of Victoria*,[25] referred both matters to the RADB for hearing and determination. Mr Nikolic pleaded not guilty and the matter was heard. On 16 March 2010, the Board published its reasons for finding the charge proved and imposed a fine of $5000 on Mr Nikolic.[26]

When Mr Clements' matter first came before the RADB[27] on 5 March 2010, a preliminary objection was taken on his behalf to the effect that he was not bound by the rules of racing.

The RADB found that he was so bound and published a short set of reasons for so finding. Those reasons are set out below in full:

> The question of the application of the Rules of Racing to Mr Clements arises in this matter. Mr Clements, who is a non-licensed person, disputes that he is bound by the Rules of Racing. The question involves consideration of the nature of the right or power which is sought to be exercised and what is the extent of the power. Many persons who frequent racecourses, although they have not given any express undertaking to do so, are bound by the Rules of Racing and may become subject to the disciplinary powers exercised by persons controlling the racecourses while races are being held. The courts have established as a matter of general principle that persons who in one way or another take part in racing are prima facie bound by the rules. Given that betting is an integral part of racing and a number of the rules regulate betting, people who are engaged in betting would generally be regarded as taking part in racing. Interviews

[24] The particulars of the alleged breach was the refusal by Mr Nikolic to comply with the direction of the Stewards given to him during the second interview on 23 February 2010 that he produce his mobile telephone for inspection of the contacts list therein.

[25] LR 6A(2)(e), *The Rules of Racing Victoria*.

[26] *Reasons For Decision in the Matter of Jockey Mr Danny Nikolic* (16 March 2010) 2 <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Reasons%20-%20D%20Nikolic%2020100316.pdf >.

[27] The charge in relation to Mr Clements had been referred to the RADB for hearing and determination by the RVL directors as they had done in relation to the charge concerning Mr Nikolic. Given that the charge against Mr Nikolic and the charge against Mr Clements both arose in the context of an inquiry into the same issues, it was appropriate that both charges be referred to the RADB pursuant to LR 6A(2)(e), *The Rules of Racing Victoria*.

> with Stewards established that Mr Clements is a professional punter, betting on thoroughbred horse racing in Victoria and to a lesser extent, interstate. Mr Clements bets on his own account and 'for a few mates'; transcript of 3 February 2010, page 7.
>
> The Board is satisfied that Mr Clements, by his actions as outlined in paragraph 5 of the written submissions on behalf of the Stewards, brings himself within the purview of the rules. In saying that, we adopt the principle established in Stephen v Naylor and subsequent cases. Consequently, the Board finds that the rules relevantly apply to Mr Clements.[28]

Having found that Mr Clements was bound by the rules of racing, it extended the time for Mr Clements' compliance with the direction of the Stewards for a further seven days, namely to 12 March 2010. Mr Clements did not comply with the direction by that due date, or at all.[29]

Mr Clements is found guilty by the RADB

Mr Clements' matter came on for further hearing before the RADB on 24 March 2010.[30] The charge alleged a breach of AR 175(p), namely, a failure to comply with a direction of the Stewards. However, the particulars of the charge, when the matter came before the RADB on this occasion, were different from when the matter came before the RADB on the first occasion.[31]

Mr Clements pleaded not guilty. The RADB found the charge to be proved:

> At the resumed hearing [counsel] for Mr Clements submitted that the request for telephone records was too broad, lacking in particulars, and an exercise of power beyond the scope of AR 8(b) and therefore invalid.
>
> The Board does not accept this submission. On any reading of the material before the Board, including transcripts of interviews by Stewards with Mr Clements the subject matter of the enquiry was made known to Mr Clements and his legal advisor.

[28] *Reasons For Decision in the Matter of Neville Clements* (5 March 2010) <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Reasons%20-%20N%20Clements%2020100305.pdf>.

[29] Mr Clements was the subject of concurrent investigations into his conduct in Victoria and Queensland. Both involved the Nikolic family. The striking similarity between the chronology of the Stewards' inquiries in both states is illustrated by the Table in the Appendix.

[30] Being the extended date for compliance as fixed by the RADB when it ruled that Mr Clements was required to comply with the direction.

[31] This was inevitably so because the period for Mr Clements to comply with the direction made by the Stewards had been extended by the Board when it ruled on 5 March 2010 that the rules of racing applied to Mr Clements.

> Telephone conversations between Mr Clements and other persons which were or may have been material to the enquiry were sufficient to establish a nexus between the telephone records and the enquiry. See also the discussion in the Reasons for Decision delivered 16 March 2010 in the Matter of Danny Nikolic.
>
> The Board is satisfied that the direction to produce telephone records was related to an enquiry as the requisite link between the request for the telephone records and the enquiry has been established. The Board is also satisfied that the direction was not an improper use of power and was lawfully made. The charge of failing to comply with the direction is proven.[32]

No mention was made of *Stephen,* nor was there any discussion of the principle said to be established by that case. The only published consideration by the Board of *Stephen* (and what it may establish), was in the reasons published by the RADB on 5 March 2010.

When the matter returned to the RADB on 24 March 2010, it did so against a background that the Board had already determined AR 8(b) applied to Mr Clements.[33]

Having found the charge proved, the RADB heard submissions in mitigation and imposed a penalty on the same day. The decision of the RADB was that Mr Clements was 'warned off' indefinitely, effective from 6 April 2010.

The review by the VCAT

Mr Clements applied for a review[34] of the RADB's decision to the VCAT[35] seeking to challenge three aspects of the RADB's decision, namely:

- The finding that he was subject to the rules of racing;

[32] *Reasons For Decision the Matter of Mr Neville Clements* (29 March 2010) [2] <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Written%20Reasons%20-%20N%20Clements%2020100324vcat%20updated.pdf>.

[33] The language of the Board on 5 March 2010 was 'the Board finds the rules relevantly apply to Mr Clements'. On 29 March 2010, the Board spoke of having previously 'made a ruling that Mr Clements was subject to the Rules of Racing'. Although there may be a theoretical distinction between a person being bound by the rules of racing (which presumably would mean such a person was bound by all of the rules of racing) as opposed to finding that a particular rule applies to a person in a given situation, the practical effect in this case was the same.

[34] Section 83OH(1), *Racing Act 1958* (Vic) provides: 'A person whose interests are affected by a decision made by a Racing Appeals and Disciplinary Board may apply to VCAT for review of that decision'.

[35] The function of the Tribunal is not appellate, rather it must stand in the shoes of the original decision maker in order to determine the correct decision, having regard to the material before the original decision maker and any fresh evidence: *Clements* [2010] VCAT 1144, [21] citing *Davidson v Victorian Institute of Teaching* (2006) 25 VAR 186 and *Van Lan Ha v Pharmacy Board of Victoria* (2002) 18 VAR 465.

- The finding that the charge was proved; and
- The penalty imposed by the RADB.[36]

The VCAT began its consideration of whether the Stewards[37] had jurisdiction over Mr Clements by noting the Stewards and the RADB were domestic tribunals, whose disciplinary powers derived from the law of contract and concluded its analysis with the question: 'Absent an agreement to be bound or the application of statutory force, how is it said that AR8 (b) applies to Mr Clements?'[38]

The VCAT found in favour of Mr Clements, determining that he was not subject to the rules of racing. It held the Board did not have jurisdiction to record any adverse finding against Mr Clements. Accordingly, it was not necessary for it to consider the second and third aspects of the RADB's decision that Mr Clements had agitated upon review. Both the finding and the penalty were set aside.[39]

It was expressly found that:

- Mr Clements had not agreed, either by implication or expressly, to be bound by the Rules;[40]
- The rules were given no statutory force by the *Racing Act 1958* (Vic), or any other Act; and
- Mr Clements had not by his conduct submitted to the jurisdiction of the RADB such that it could be said he had impliedly agreed to be bound by any finding of the RADB.[41]

In the light of these findings, the VCAT concluded Mr Clements was not bound by the rules of racing and thus the powers of the Stewards in AR 8 (to require the production of various items) were not engaged in relation to Mr Clements.[42]

The VCAT did not refer to Mr Nikolic in its consideration of the Clements' review other than to note the Stewards' investigation concerning him was

---

[36] Ibid [22].
[37] If the Stewards did not have jurisdiction, neither would the RADB.
[38] Ibid [26]–[35].
[39] Ibid [75].
[40] The VCAT expressly noted the RVL did not contend otherwise: Ibid [33].
[41] Ibid.
[42] As noted above, the stated reasoning of the RADB as to why the Stewards had jurisdiction over Mr Clements was very brief. There was no discussion of the jurisdictional issue by the Board in its decision on 29 March 2010, although there was a passing reference to its earlier decision on 16 March 2010 in the Nikolic matter. See *Reasons For Decision in the Matter of Jockey Mr Danny Nikolic* (29 June 2010) <http://www.racingvictoria.net.au/asset/cms/RAD%20Board/RAD%20Board%20Hearing%20Result%20and%20Reasons%20-%20D%20Nikolic%2020100629.pdf>.

essentially about whether he had inappropriately conveyed information to Mr Clements.[43]

Before the VCAT, RVL submitted that Mr Clements had, by his actions, brought himself within the *purview of the rules*.[44] It was submitted that the notion of a person's actions bringing them within the purview of the rules was the relevant test and had been so since the Privy Council decision in *Stephen*.[45]

The logic of the argument of RVL, as gleaned from the Tribunal's reasons, appears to be:

- Mr Clements is not a licensed person and has not expressly agreed to be bound by the Rules;
- Express agreement is but one way the Stewards may have jurisdiction over a person;
- Such jurisdiction may vest if the person has, by his or her conduct, done something so as to bring themselves within the purview of the Rules;
- This approach to the issue of jurisdiction has been applied by courts and tribunals many times since the Privy Council decision and is well accepted;
- It is a correct statement of principle, because if it was not so, there would be 'a clear gap in the operation of the Rules. You'd have people not being subject to the Rules of Racing, even though their actions are intricately bound up with them';[46] and
- The principle flows from a Privy Council decision which is binding upon the VCAT and thus must be applied.

---

[43] The Stewards' investigation of Mr Nikolic resulted in him being charged with two sets of charges. The first was with failing to produce his mobile telephone for inspection. This was determined on 16 March 2010. The second set was nine further charges which were heard at the end of June 2010. Mr Nikolic pleaded guilty to five minor charges and was fined. He pleaded not guilty to the remaining four charges which were far more serious. They involved allegations of improper conduct whereby he had communicated about the chances of his mounts with Mr Clements and two other professional punters. Given the nature of the allegations, the RADB had regard to the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Although the Board was suspicious about what had transpired, it was not prepared to reject Mr Nikolic's evidence that he denied discussing the chances of his respective mounts. Accordingly, the charges were dismissed.

[44] *Clements* [2010] VCAT 1144, [41].

[45] Mr Clements had made no express agreement with RVL to be bound by the rules of racing. He had made no contract with, nor received a licence from, RVL. What had he done to bring himself within the purview of the Rules? Unfortunately, the VCAT reasons do not record what conduct of Mr Clements was said by RVL to have brought him within the purview of the rules. One assumes it was because he was a professional punter.

[46] Ibid [52], citing the oral submissions of counsel for RVL.

The Privy Council decision in *Stephen v Naylor*

The Background

This decision was announced in February 1937 in respect of litigation commenced by Mr Naylor against the Australian Jockey Club[47] ('AJC') in April 1934. It involved two decisions at first instance,[48] majority[49] and dissenting[50] judgments in the Full Court[51] and then the Privy Council decision[52].

In February 1933, *Movado* raced at a meeting under the control of the AJC. The Stewards inquired into its performance and concluded it had not been permitted to run on its merits. On appeal, the Committee of the Club reached the same conclusion and disqualified the horse, jockey and lessee. An inquiry was then commenced as to whether the purported registered owner of the horse ('one F J Punch, a very young man'[53]) was in fact the true owner and lessor of the horse, or whether he was 'dummying' for the true owner.

Mr Naylor was a former bookmaker turned professional punter. He was suspected of being the true owner of the horse and summoned to the inquiry to give evidence. He was subsequently charged with a breach of rule 171(h) of the rules of racing of the AJC in that he was a 'person who has given at any enquiry held by the Committee or Stewards any evidence which in their opinion is false or misleading in any particular.'[54]

The Committee found the charge proved and disqualified Mr Naylor.[55] He sought a declaration from the Supreme Court of New South Wales that the purported disqualification was invalid and injunctive relief restraining the Club from acting upon its decision.

In the course of this interlocutory application, Mr Naylor 'admitted in evidence that for reasons which are quite indefensible he deliberately lied to the Committee on many matters during such an inquiry'.[56]

The relevant by-laws

The *Australian Jockey Club Act 1873* (NSW) empowered the Committee to make by-laws:

---

47 Mr Stephen was the Chairman of the Australian Jockey Club.
48 *Naylor v Stephen* (1934) 34 SR (NSW) 231 (Long Innes J); *Naylor v Stephen (No 2)* (1934) 51 WN (NSW) 110 (Street J).
49 Davidson and Maxwell JJ.
50 Harvey CJ in Eq.
51 *Naylor v Stephen* (1934) 35 SR (NSW) 71.
52 *Stephen v Naylor* (1937) 37 SR (NSW) 127.
53 *Stephen* (1937) 37 SR (NSW) 127, 136.
54 Ibid 134–5.
55 This had the effect of warning him off all racecourses in Australia.
56 *Naylor v Stephen* (1934) 35 SR (NSW) 71, 91.

> The Committee … may from time to time subject to the special provisions of this Act make such by-laws as they think fit for regulating all matters concerning or connected with any lands authorised by this Act to be leased to the said Chairman on behalf of the Club or any lands which may hereafter be vested in the Chairman of the said Committee and the admission thereto and expulsion therefrom of members of the Club or any persons respectively and the rates or charges to be paid for such admission and for the general management of the said racecourse and may from time to time by any other by-laws alter or repeal any such by-laws. Provided that no such by-laws be repugnant to the laws for the time being in force in NSW, and every by-law shall be reduced into writing and shall be signed by the Chairman.[57]

The Committee had made various by-laws including By-Law IX:

> IX The following persons shall not be permitted into any of the said divisions [that is, of the racecourse]
>
> (1) any person proved to the satisfaction of the Committee to have been at any time guilty of any malpractice or dishonourable conduct in connection with racing;
>
> (2) any person found to the satisfaction of the Committee to be a defaulter;
>
> (3) any person under disqualification by the Club;
>
> (4) any person who in the opinion of the Committee is not a desirable person to be admitted.

The Club asserted the combined effect of rule 171(h)[58] and By-Law IX(3)[59] meant that Mr Naylor, who had been found guilty of giving false evidence, could be prohibited from attending upon the racecourse.

At first instance, Long Innes J identified 'the first question for determination is whether the Committee of the Club had jurisdiction to disqualify the plaintiff under Rule 171(h) of the Rules of Racing'.[60] His Honour concluded that unless the plaintiff had expressly or impliedly agreed to be bound by the rules of racing or he was estopped from asserting the contrary, he was not bound by those rules. Accordingly, the purported disqualification was made without jurisdiction.[61]

---

57 *Australian Jockey Club Act 1873* (NSW), s 12, set out in *Naylor v Stephen (No 2)* (1934) 51 WN (NSW) 110, 111.
58 Which provided for a person to be disqualified.
59 Which stated a disqualified person shall not be admitted onto the racecourse.
60 *Naylor v Stephen* (1934) 34 SR (NSW) 231, 242.
61 Ibid 244.

His Honour noted that neither in the statute establishing the AJC nor in any by-law made by the Committee pursuant to that Act, was there any reference to the making of rules of racing.[62] His Honour concluded:

> I think the Rules of Racing, unless incorporated by by-law, have no greater effect upon a person who has not agreed to be bound thereby, or who is not estopped from asserting that he is not so bound, than the rules of any club or voluntary association.[63]

Accordingly, his Honour granted Mr Naylor the interlocutory relief he sought:

> In this case I have held that the evidence as it now stands is insufficient to establish that the plaintiff was bound by the Rules of Racing, and it follows that, if at the hearing the evidence remains as it now is, the plaintiff will be entitled to the declaration he claims.[64]

The reasons of Long Innes J conclude with what was clearly interpreted by the defendant as an invitation:

> In the result there will be an injunction until the hearing to the effect already indicated; but it must be understood that the injunction is so limited. *In order to make that quite clear I see at present no reason why the order should not contain a statement to the effect that nothing therein contained shall prevent the Australian Jockey Club from taking such action in all other respects or exercising any right it may possess under the Statute and any valid by-law on any other footing.*[65]

Two days after this decision was published, the secretary of the Club wrote to Mr Naylor advising him that in light of the evidence he had recently given before Long Innes J,[66] the Committee of the Club required him to attend before it 'to show cause why you should not be refused admission to Randwick Racecourse under the Club's by-law 9(4) [sic]'.[67]

Mr Naylor immediately commenced fresh proceedings seeking a declaration that By-law IX(4) was ultra vires and injunctive relief preventing the Committee from acting under that by-law so as to exclude him from the racecourse. This second interlocutory application for an injunction came before Street J who held

---

[62] Ibid 243.
[63] Ibid.
[64] Ibid 257.
[65] Ibid 259 (emphasis added).
[66] Namely, admitting he had given false evidence to the Stewards.
[67] *Naylor v Stephen (No 2)* (1934) 51 WN (NSW) 110, 111.

the by-law to be valid and dismissed the application.[68] The note of the decision records his Honour as stating:

> [i]t was necessary to consider the nature and constitution of the by-law making authority, the subject matter which was entrusted to them for their regulation, and the general circumstances and surrounding conditions in the light of which their power in that respect had to be exercised.[69]

His Honour noted the 'very wide power of making by-laws so as to protect not only the sport, but the interests of members of the public who resorted to the course for the purpose of recreation'[70] and that in particular circumstances the Committee may conclude a particular person was an undesirable person to be admitted to the racecourse.

> There was little difficulty for the ordinary individual so to conduct himself as not to come within the category of undesirable persons. The word in one sense might have a wide and uncertain meaning, *but in its setting in the by-law it obviously meant undesirable from the point of view of the management for horseracing on Randwick racecourse, as a sport which attracted large numbers of people.*
>
> It would be difficult, if not impossible, to provide in advance a complete code of all matters and things which would render a person undesirable as an attendant at the racecourse.
>
> In the interests of the public and of the sport itself [Street J] *could not regard it as unreasonable that a discretion should be conferred upon the Committee to exclude or expel from the course such persons as that body might decide to be undesirable in the interests of the sport,* and of all concerned therewith.[71]

Street J concluded that upon its proper construction, By-Law IX(4) was regulating rather than prohibiting admission and thus was within the scope of the by-law making power conferred by section 12 of the *Australian Jockey Club Act 1873* (NSW).

The Full Court Appeal

The Club appealed against the decision by Long Innes J to grant the injunction and Mr Naylor appealed against the decision of Street J to refuse the injunction

[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid 112 (emphasis added).

he sought in respect of By-Law IX(4). Both appeals were heard together by the Full Court.[72]

A majority[73] of the Full Court reversed the decision of Street J, holding that By-Law IX(4) was void for uncertainty. The same majority upheld the conclusion of Long Innes J that Mr Naylor could not be disqualified under the rules of racing because he was not a person who came within the jurisdiction of the Club by agreement or by his conduct.

The Randwick racecourse was land that had, in 1863 by Crown Grant, been made the object of a trust to permit its use, inter alia, as a racecourse open to the public. Ten years later in 1873, an Act of the New South Wales Parliament[74] empowered the trustees to grant a lease to the Australian Jockey Club.[75]

The majority of the Full Court considered the terms of the *Australian Jockey Club Act 1873* (NSW). They noted the express language of the Act[76] that the demised land 'must be used for a public racecourse or other purposes specified and subject to the provisions of the Act and of any by-laws made thereunder'[77] and concluded the public had been given rights 'which were only to be controlled or affected in the manner specified',[78] that is, within the provisions of the *Australian Jockey Club Act 1873* or the by-laws made thereunder. Since the rules of racing were not made pursuant to the Act or a by-law enacted under the Act, they could not affect Mr Naylor, absent his agreement by words or conduct.[79]

The majority held that By-Laws IX(3) and IX(4) were both invalid because they were too widely expressed and so uncertain as to be ultra vires the Act:

> For these reasons, in my opinion, whilst I think it would be advisable that the Committee of the Australian Jockey Club should have very wide powers to control the sport of racing, the present by-law under which they act is too uncertain to fall within the powers granted by the Act and there is nothing to prevent the plaintiff although he is practically devoid of merit on the facts as distinct from the strictly legal point of view from having relief.[80]

---

[72] *Naylor v Stephen* (1934) 35 SR (NSW) 71.
[73] Davidson and Maxwell JJ, Harvey CJ in Eq dissented.
[74] *Australian Jockey Club Act 1873* (NSW).
[75] Historically such leases have been granted to the chairman of the club and have been periodically renewed to the current day.
[76] *Australian Jockey Club Act 1873* (NSW), s 10.
[77] *Naylor v Stephen* (1934) 35 SR (NSW) 71, 89.
[78] Ibid.
[79] This reasoning was expressly rejected by the Privy Council when construing the relevant by-laws.
[80] *Naylor v Stephen* (1934) 35 SR (NSW) 71, 93–4 (Davidson J).

Maxwell J was of a like mind:

> In order that the Club should be enabled under By-law IX(3) to refuse the plaintiff admittance … he must be 'a person under disqualification by the Club'. That can mean in this case only disqualification under the Rules of Racing. Nor is it suggested that the Club has the power to impose any other kind of disqualification. *If it is sought to say that the by-law means that admittance may be refused to any person in fact disqualified under the Rules of Racing, irrespective of whether that person is bound by such rules, by contract, or by estoppel or by consent, then in my opinion the by-law is bad, as not within the by-law making power of the Club, or at any rate has not been made in accordance with the provisions of ss12 to 18 of the Act.*[81]

The effect of the Full Court decision was to grant Mr Naylor injunctive relief in both his actions. The Club appealed to the Privy Council which allowed the appeal and set aside the injunctions in both matters.

Appeal to the Privy Council

The Privy Council identified four cumulative sources of the rights, powers and duties of the AJC. These were the Crown grant of 1863, the *Australian Jockey Club Act 1873* (NSW), the by-laws made by the Club and the rules of racing adopted by the Club.

The Privy Council initially considered the validity of By-Laws IX(3) and IX(4). If the by-laws were invalid, the Stewards had no jurisdiction over Mr Naylor. If the by-laws were valid, and the specific terms of either by-law engaged, the Stewards had jurisdiction.

The Privy Council acknowledged that the Full Court had correctly identified the relevant legal issues when considering the validity of the by-laws.[82]

> Their Lordships think it wholly unnecessary to review the numerous authorities dealt with in the Courts below on the subject of by-laws – the more as the law was stated with precision and accuracy in the judgments under appeal. *The question is as to the correct application of the law to the facts of the case.*[83]

---

[81] Ibid 94 (Maxwell J) (emphasis added).

[82] Thus, there is no need to consider those principles to be applied in assessing delegated legislation. See generally Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012).

[83] *Stephen* (1937) 37 SR (NSW) 127, 138 (emphasis added). In the Full Court, Davidson J had articulated the relevant principles: *Naylor v Stephen* (1934) 35 SR (NSW) 71, 85–6.

By-Law IX(3) purported to give the Committee power to exclude from the racecourse a person who had been disqualified by the Club. The Privy Council rejected the proposition, accepted by the majority in the Full Court, that the *Australian Jockey Club Act 1873* permitted the Club to regulate admission by by-law but not to refuse it.[84] The relevant disqualification was held to be a disqualification under the rules of racing.[85]

By-Law IX(4) had been found by the Full Court to be too broad and uncertain to be a valid exercise of the power to make by-laws as found in section 12 of the Act. The Privy Council expressly rejected the conclusion of Davidson J that the terms of By-Law IX(4) 'would amount to a power to exclude anyone they wished'.[86] Their Lordships noted the by-law spoke of excluding a person who 'is not a desirable person *to be admitted*'.[87]

> These last and very important words in their natural meaning convey that the undesirability in question is undesirability with regard to the consequences and effect of the presence of the person in question upon the racecourse. Reference to moral character or qualities unconnected with racing and racecourses is not in their Lordships' opinion intended or conveyed by the by-law and it means no more and no less than it would have meant if it had been couched in less formal language and had conferred a right to refuse admission to those who in popular language are sometimes known as 'racecourse undesirables'.[88]

By-Law IX(3) was interpreted to permit the exclusion of a person if that person had been disqualified for a breach of the rules of racing. With respect, this is the correct analysis of that by-law. There was no doubt the subject matter of By-Law IX(3) fell within the by-law making powers in section 12 of the Act. The critical issue was identified by the Privy Council in its rhetorical question: 'The question then is what is a disqualified person?'.[89] The answer to that question provides the ratio of the decision:

> The dictionary to which reference is to be made, as everyone knew, is the Rules of Racing. The meaning there given is clear and includes one in the respondent's case. It is not a question whether he consented to any adjudication or submitted to any jurisdiction. The Club properly undertook to regulate racing within its territorial limits and properly announced the rules by which it would regulate it

[84] Ibid 138.
[85] Ibid 139. This was not in dispute because even the majority in the Full Court had so concluded.
[86] *Naylor v Stephen* (1934) 35 SR (NSW) 71, 88 (Davidson J); *Stephen* (1937) 37 SR (NSW) 127, 140 (Lord Roche).
[87] *Stephen* (1937) 37 SR (NSW) 127, 140 (emphasis added).
[88] *Stephen* (1937) 37 SR (NSW) 127, 140–1.
[89] Ibid 139.

> and properly also satisfy the claims of justice gave an opportunity to anyone whose conduct called for enquiry in connection with racing within those limits to attend and proffer explanations.[90]

This passage commences the discussion which concludes with the frequently cited words 'because he permitted himself so to act as to bring his actions *within their purview*'.[91]

Mr Naylor was within the jurisdiction of the Club because the enabling Act[92] permitted the Club to make by-laws for particular purposes,[93] including who could be granted or denied permission to attend a race meeting conducted by the Club having regard to certain criteria.

One criterion was whether the person had been disqualified for a breach of the rules of racing.[94] Another was whether the person was a 'racecourse undesirable'.[95] The valid conferral of these powers upon the Club within the by-laws carried with it the ability of the Club to inquire into those matters.

The VCAT'S treatment of Stephen

The submission of RVL

It was put by RVL to the VCAT that *Stephen* should be applied because it had been adopted by courts and tribunals. The VCAT said it did not 'find this submission particularly persuasive for two reasons'.[96] The first was that some of the decisions predated the abolition of appeals to the Privy Council from that jurisdiction and thus at the time of the decisions, those courts were bound to follow decisions of the Privy Council.[97] The second reason was that some of the cases did not in fact rely upon the principle in *Stephen*, either because the rules were given statutory force or because the person concerned was licensed and thus bound by the rules.

Although not articulated as a third reason, the VCAT did assert[98] the Privy Council decision had expressly not been followed by the Full Court of the

---

[90] Ibid.
[91] Ibid 140. (emphasis added).
[92] *Australian Jockey Club Act 1973* (NSW).
[93] Ibid s 12.
[94] By-law IX(3).
[95] By-law IX(4).
[96] *Clements* [2010] VCAT 1144, [57].
[97] As the thesis of this article is that *Stephen* (1937) 37 SR (NSW) 127 was distinguishable from the facts in *Clements* [2010] VCAT 1144 and it was not necessary for VCAT to decline to follow it, there is no need to explore the principle of *stare decisis* and its possible application in *Clements* [2010] VCAT 1144.
[98] Ibid [60].

Supreme Court of British Guiana in *Demerara Turf Club v Phang* ('*Demerara Turf Club*').[99]

It is respectfully suggested this is an over reading of the decision from British Guiana. The VCAT summarised the facts and reasoning of the Full Court as follows:

> [60] In that case the Demerara Turf Club (the 'Turf Club') had 'warned off' Phang, a person who was a partner in a business which operated pool betting on races run in British Guiana. Phang was not a member of the Turf Club and there was no contractual relationship between him and the club.
>
> [61] Phang filed a writ against the Turf Club claiming, among other things, that the decision to warn him off was null and void, and sought damages for libel. An interlocutory injunction was granted at first instance restraining the Turf Club from publishing any statement that Phang had been 'warned off' until the determination of his action. The Turf Club appealed to the Full Court.
>
> [62] One of the issues on appeal was whether there was a serious issue to be tried as to the Turf Club's right to exercise jurisdiction over Phang. The Full Court determined that issue in favour of Phang.[100]

Mr Phang had obtained an interlocutory injunction in order to maintain the status quo, pending trial of his action. The Full Court was not prepared to disturb those orders because it found he had *locus standi* to seek a declaration that the 'warning off' was null and void.

The only discussion by the Full Court of *Stephen* was in the context of standing to obtain the interlocutory relief. It did not discuss *Stephen* in the context of whether Mr Phang had brought himself within the purview of the rules.

It is respectfully suggested that far from the Full Court not following *Stephen*, it made observations consistent with the principle in *Stephen*.

The significant rule in *Demerara Turf Club* was rule 9 which, relevantly provided:

> The Stewards and Directors have power to regulate, control, take cognisance of, and adjudicate upon the conduct of all officials, and of all owners, nominators, trainers, jockeys, grooms, persons attendant upon horses, *and of all persons frequenting the stands*

[99] *Demerara Turf Club v Phang* (1961) 3 WIR 454.
[100] *Clements* [2010] VCAT 1144, [60]–[62].

> *or other places used for the purpose of the meeting*, and they have power to punish at their discretion any such person subject to their control with warning off, disqualification, a fine …[101]

The critical issue in *Demerara Turf Club* was whether Mr Phang could maintain an action based on a claim that he should have been heard in his own defence, in accord with the principle reflected in the maxim *audi alteram partem,* prior to the Committee sitting in judgment and warning him off; and if so, whether the interlocutory injunction should remain until the trial.

The following passage from *Demerara Turf Club*, none of which has been reproduced by the VCAT, rather suggests that if a person attended the race meeting (that is 'frequented the stands'), a contractual nexus may be established between that person and the racing club, but that in itself would not permit any adverse finding to be made or penalty to be imposed until that person had been heard by the Turf Club in accord with the usual principles of natural justice.

> If, however, we adopted the arguments made by the appellant C Lloyd Luckhoo, to the effect that the respondent is a person within the province of r 9 being either one who frequented the stands or being an owner of a horse, *it would seem that as a consequence of becoming thereby subject to the control of the stewards and the directors there then existed a sufficient contractual nexus between the parties* for the penalty of warning off to be inflicted *but only* after an adjudication by the stewards and directors. It does not appear from the affidavits that any adjudication was made in the sense that a decision was arrived at after the respondent had been informed of the complaint against him and was given an opportunity to make some answer to the allegation. It is not an answer to say that the respondent would not have attended in any event. That belief, if established at the trial, may negative malice but would not diminish the obligation to fulfil the requirements of natural justice. *Upon the strength of the authorities relating to the principles of natural justice it seems to us that even if the respondent was a person within the scope of r 9 there was a duty to observe the principles of natural justice.*[102]

There is no suggestion that Mr Phang could not be under the jurisdiction of the Stewards if he 'frequented the stands'. Rather, the Full Court appears to acknowledge that if he did attend the race meeting, he would bring himself

[101] *Demerara Turf Club* (1961) 3 WIR 454, 457G (emphasis added).
[102] Ibid 475A–C (emphasis added).

within rule 9, but that of itself did not mean he was no longer entitled to natural justice.[103]

What is the ratio of Stephen?

Asking whether a person has agreed by word or deed to be bound by the rules of racing is approaching the matter from the wrong end of the factual analysis. The correct factual and legal analysis of *Stephen* is that a person wishes to enter a racecourse and the club is authorised to decide whether to grant or withhold its permission. In making that decision the club can consider the desirability, in terms of the integrity of racing, of having that person on the racecourse. It can also consider whether the person is currently disqualified under the rules of racing. It is implicit in a by-law which allows a club to consider the latter, that such a person must come within the rules of racing; for how else could he or she be disqualified under the rules unless the rules have been engaged?

Mr Naylor came within the 'purview of the rules' by being a person whom the by-laws contemplated could be a disqualified person.[104] The by-laws had statutory force. When the Committee of the club exercised its jurisdiction over Mr Naylor, it did so pursuant to by-laws authorised by statute. It did not suffer from the problem identified by Denning LJ in *Lee v Showmen's Guild of Great Britain*[105] that 'outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorises it or the parties agree to it'.[106]

The ratio of the VCAT decision in *Clements* was that the source of the Stewards' power is contractual and because Mr Clements had not agreed to be bound by the rules, which gave the Stewards certain powers, the Stewards had no jurisdiction over him. In remarks that are *obiter*, the Tribunal declined to follow *Stephen* which it interpreted as standing 'for a broader proposition – that rules such as AR 8 applied to persons who, by their actions, bring themselves within the purview of the rules'.[107]

Stephen is properly distinguishable from the facts in *Clements* and there was no need for the VCAT, as part of its reasoning process, to decline to follow *Stephen.* It is a misreading of *Stephen* to extract from it the principle that the acts of a person on a racecourse or in activities associated with racing, per se, are what

[103] This observation is fortified when one notes that Mr Phang did not physically attend the racecourse. He was conducting a pool betting operation off course which the Club wanted to stop. Mr Phang was using the race results in his own business. He was not directly betting on the Club's races. The issue was whether, in the absence of a contractual relationship with the Club, Mr Phang was entitled to be heard before being warned off.

[104] Any person who wanted to attend the racecourse could potentially be prohibited as a disqualified person or as a 'racing undesirable'.

[105] *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

[106] Ibid 341.

[107] *Clements* [2010] VCAT 1144, [73].

brings that person within the rules of racing and thus within the jurisdiction of the Stewards. Once the true ratio of *Stephen* is discerned, the apparent tension between it and *Clements* is resolved. The decisions are not irreconcilable, quite the contrary.

In *Stephen*, the Privy Council reached a different conclusion than that of the majority in the Full Court. There was no dispute as to the facts nor the law. The difference lay in the Privy Council's rejection of Mr Naylor's contention as to how the settled law should be applied to the undisputed facts.

> His contention was that he was not subject to the Rules of Racing and that they were ineffective to bring about his disqualification and therefore his exclusion from the course. It is this contention which has found favour with Long Innes J and the majority of the Full Court. They held that the respondent had not submitted to the jurisdiction of the Committee acting under the rules. It was also held by Davidson J that the Committee could not impose a sentence of disqualification otherwise than in pursuance of a by-law as distinct from the Rules of Racing. Their Lordships are unable to agree with these conclusions. *The by-law is clear enough and gives power to exclude disqualified persons.*[108]

The two conclusions that were not accepted by the Privy Council were, first, that Mr Naylor could not be disqualified under the rules of racing because he had not submitted to the Stewards' jurisdiction created by the rules and secondly, that a disqualification could only be imposed in pursuance of a by-law rather than under the rules of racing.

Stephen is a case concerned with the construction of a species of delegated legislation.[109] The Privy Council approved the legislative technique of using a by-law, validly created under statutory force, to identify, by reference to another document (the rules of racing), the criteria of disqualification.

Once this is understood, the decision in *Stephen* is unremarkable. It is not a decision that binds a person to a set of rules created by a private club just because the club so desires it. Rather, it is a decision that permits the club to judge a person's conduct by reference to that set of rules, not because the club says so, but because Parliament has said so. The action by Mr Naylor that brought him within the jurisdiction of the Committee of the Club was his act of seeking admission to the racecourse. Once that action was undertaken by Mr Naylor, By-Law IX was engaged and the Committee was empowered to consider whether he should not be admitted having regard to the four specific criteria in the sub-paragraphs of By-Law IX.

---

[108] *Stephen* (1937) 37 SR (NSW) 127, 139 (emphasis added).
[109] Also known as subordinate legislation.

Mr Naylor came within the purview of the rules of racing once he sought admission to the racecourse, as did every other person who similarly sought admission on the same day. The great majority of these people came within the purview of the rules, were assessed having regard to those rules and came out of that process with 'a clean bill of By-law IX health'; but not so Mr Naylor. When he was assessed against the rules of racing, he failed and was punished. He was punished with disqualification 'because he impeded by lying the course of a necessary and proper enquiry'.[110]

Mr Naylor's punishment, the reason 'he has to suffer [is] not because he consented to be bound by the rules, but because he permitted himself so to act as to bring his actions within their purview'.[111]

It was not Mr Naylor's lying to the Committee that brought him within the purview of the rules, it was his act of seeking admission to the racecourse that brought him within those rules. By the time Mr Naylor was before the Committee he was within the purview of the rules, that is, within the jurisdiction of the Committee. The existence or otherwise of such jurisdiction must be capable of determination at the commencement of any attendance before the Committee. The existence of jurisdiction cannot be dependent upon Mr Naylor's words or deeds before the Committee, nor can it be reliant upon any finding of the Committee.

If the existence or otherwise of jurisdiction was so reliant, the process would be circular. A challenge by Mr Naylor to the Committee as to its authority to compel his attendance or require him to answer questions, would be met with the nonsensical response that jurisdiction may or may not exist and that will not be ascertainable until the challenged summons and challenged questions have been answered.

If Mr Naylor had not lied to the Committee (or engaged in other disentitling conduct under the rules of racing) he is unlikely to have fallen foul of By-Law IX. That does not mean he has not been subjected to an assessment against the criteria in By-Law IX. Rather, he has come within the purview of the rules and the jurisdiction of the Committee, been assessed and received 'a clean bill of health'.

If Mr Naylor had refused to attend before the Committee and answer its questions, that is, challenge its jurisdiction in the same manner as Mr Clements, would the Privy Council decision be the same? Undoubtedly yes, and with those more confined facts, the published reasons may have highlighted the paramount importance to the decision of the by-law making power in the enabling Act and the validity of the impugned by-laws. The reasons would be read without the

[110] *Stephen* (1937) 37 SR (NSW) 127, 140.
[111] Ibid.

distraction of Mr Naylor's indefensible conduct before the Committee. There is a temptation to read *Stephen* as grounding the Committee's jurisdiction in the fact of the lies told to the Committee and how appropriate it is, for the self-evident reason of integrity within the industry, that such conduct should be punished by disqualification. Yet the true reason Mr Naylor failed before the Privy Council was that his fitness, in the eyes of the Committee, to come onto the racecourse had been determined by Parliament to be a matter for the Committee, having regard to the standards of conduct articulated in the rules of racing.

This is the critical distinguishing feature between *Stephen* and *Clements*. In *Stephen*, the enabling Act gave statutory force to the by-laws. In *Clements* there was no such legislative imprimatur. In both cases, it was recognised that for reasons of good governance and integrity it was crucial that the Committee or the Stewards be able to exercise such powers of investigation and discipline.[112]

The VCAT reached the correct decision in *Clements* but partly for the wrong reasons. The Tribunal erred in failing to apply *Stephen* because it misunderstood the ratio in *Stephen.* It wrongly thought *Stephen* supported the argument of RVL that it had jurisdiction over Mr Clements. With great respect to counsel for RVL, the oral submission, as reproduced in the Tribunal's decision that *Stephen* '[w]as "clearly correct" because "otherwise you'd have a clear gap in the operation of the rules. You'd have people not being subject to the rules of racing, *even though their actions are intricately bound with them*" '[113] is a misreading of *Stephen.*

To focus upon acts that are 'intricately bound up with the rules of racing' fails to acknowledge the statutory link to those rules in *Stephen*. The Privy Council spoke of the rules of racing being the dictionary to construe the meaning of the by-laws.[114] In *Stephen,* one had regard to the rules of racing not because Mr Naylor's lies were intricately bound up with the rules of racing but because the validly enacted by-laws that did empower the Committee not to admit Mr Naylor onto the racecourse, when properly construed, required the Committee to consider the By-law IX criteria having regard to the rules of racing.

As noted earlier, the VCAT in *Clements* did not find 'particularly persuasive' the submission of RVL that *Stephen* should be followed because it had been adopted by subsequent courts and tribunals in the context of racing matters.[115] It considered and correctly distinguished *Zucal v Harper*[116] because there was no issue whether the rules of racing applied to Mr Harper; he was a licensed

[112] Ibid 141; *Clements* [2010] VCAT 1144, [74].
[113] *Clements* [2010] VCAT 1144, [52] (emphasis added).
[114] *Stephen* (1937) 37 SR (NSW) 127,139.
[115] See above n 98.
[116] *Zucal v Harper* (2005) 29 WAR 563.

person.[117] However, it erroneously had regard to the decision of Williams J in the case of *In the Matter of Queensland Principal Club*.[118]

That case concerned a picnic race day which had not been registered by the Queensland Principal Club ('QPC'), the relevant racing authority. The organisers had, however, been granted a 'combined sports meeting permit' pursuant to the *Racing and Betting Act 1980* (Qld). A number of persons who rode or trained horses at the meeting were subsequently disqualified by the QPC for participating in the purported unregistered meeting. One person held a licence issued by the QPC and was clearly bound by the rules of racing. The other persons were not licensed by the QPC but it was held the combined effect of the *Racing and Betting Act 1980* (Qld) and the rules of racing meant they came within the jurisdiction of the QPC.[119]

It would seem the VCAT was not referred to the successful appeal against this decision wherein the Queensland Court of Appeal reversed the decision of Williams J and declared the picnic meeting not to be an 'unregistered meeting'; consequently declaring the purported disqualifications to be unlawful and quashing them.[120] The Court of Appeal did not refer to *Stephen,* although it was cited in argument. It undertook a statutory construction exercise in relation to the relevant legislation and 'with some hesitation'[121] came to a different conclusion than that reached by Williams J.

Similarly, the VCAT appears not to have been referred to the South African Full Court decision in *Jockey Club of South Africa v Symons.*[122] Mr Symons, a bookmaker, who had breached the rules of racing by having an interest in a horse, was warned off. The club had no contractual relationship with him nor did it license him. His licence was issued by another body pursuant to a statutory Ordinance.

---

[117] Ibid 571. The issue was the construction of the rules. The Full Court did not accept that the relevant rule, which provided that a person in the harness racing industry shall not behave in a manner detrimental to that industry, should be read narrowly and confined to behaviour which of itself is connected in some way to the harness racing industry.

[118] *In the Matter of Queensland Principal Club* [1999] QSC 12.

[119] The rules of racing were defined under s 5 of the *Racing and Betting Act 1980* (Qld) to mean '[t]he rules for the time being governing and relating to horseracing under the control of the Thoroughbred Racing Board, being with respect to the Thoroughbred Racing Board an amalgamation of the Australian rules of racing as adopted by the board and the local rules of racing of the board together with the regulations made thereunder'.

[120] *Willey v Queensland Principal Club* [2000] 2 Qd R 210. Two of the disqualified persons were subsequently unsuccessful in an action alleging negligence, against the successor of QPC and two of the Stewards, in making the initial decision to disqualify and negligent misstatement in giving effect to that decision and publishing the decision: see *Hogno & Lee v Racing Queensland Ltd& Ors* [2012] QSC 303.

[121] *Willey v Queensland Principal Club* [2000] 2 Qd R 210, 214 [21].

[122] *Jockey Club of South Africa v Symons* [1956] 4 SA 496 ('*Symons*').

There was a statutory basis for the Stewards' jurisdiction in *Symons* which empowered the Club. The bookmaker's licence had been issued to him against the statutory framework that it did not prevent the Club from prohibiting him carrying on his business.

Symons is consistent with the thesis of this article. There was a statutory framework in place. It was at the Ordinance (statute) level rather than of delegated legislation, namely, a by-law. The 'act' of Mr Symons that brought him within the purview of the rules was his fielding at the club's race meeting. This act permitted the club to inquire into his conduct.

Conclusion

Approximately three-quarters of a century lapsed after the Privy Council decision before Mr Clements succeeded in persuading the VCAT to reach the conclusion that:

> To the extent that *Stephen v Naylor* stands for a broader proposition – that rules such as AR 8 apply to persons who, by their actions, bring themselves within the purview of the Rules – we respectively decline to follow that decision.[123]

As discussed above, this is a misunderstanding of *Stephen.*

No appeal was instituted by RVL in *Clements* and it is not necessary to speculate why. However, the Appendix chronicles the parallel inquiry in Queensland. As a result of that inquiry and his appeal, Mr Clements was disqualified for three years[124] and 'warned off' all race tracks in Australia.

In March 2011, Mr Clements sought an exemption from RVL. This exemption was granted thereby permitting Mr Clements to return to the Victorian race tracks but still prohibit him from attending a track in any other Australian jurisdiction.[125]

The wheel has come full circle for Mr Clements. He has defied the request of the RVL Stewards to produce certain records, subsequently been disqualified for his refusal to co-operate, successfully challenged the assertion by the Stewards that he was bound by the rules of racing, been disqualified in Queensland (and thus

---

[123] *Clements* [2010] VCAT 1144, [73].
[124] *Clements v Queensland Racing Ltd* [2010] QCAT 637.
[125] The RVL Chief Steward, Mr Terry Bailey, has been reported as commenting that 'exceptional circumstances' were involved in considering the request by Mr Clements. Mr Bailey indicated Mr Clements had executed a written document agreeing to be bound by the rules of racing: Adrian Dunn, 'Neville Clements Allowed Back at the Track', *Herald Sun* (online), 5 March 2011 <http://www.heraldsun.com.au/sport/superracing/clements-allowed-back-at-the-track/story-fn67siys-1226016321248>.

all of Australia), only to have the ban lifted in respect of Victorian race tracks, provided he now acknowledged he was bound by the rules of racing.

The VCAT concluded its reasons in *Clements*:

> We acknowledge the public importance of the disciplinary functions exercised by the Stewards and the Board in protecting the integrity of racing. But such a public benefit does not alter the contractual source of their powers. *To the extent that our decision creates a regulatory gap, it can be addressed by the legislature.*[126]

The decision in *Clements* did not create a regulatory gap. It was the correct application of well established legal principles and was not, contrary to popular understanding, in conflict with *Stephen*. The decision in *Clements* has not created a regulatory gap, it has exposed it. The analysis of *Stephen* in this article demonstrates that such a gap cannot be filled by a dismissal of the decision in *Clements* as an aberration and a re-embracing of *Stephen* as a return to the true and time honoured principle of how one can be brought within the purview of the rules. The gap cannot be filled by an application of *Stephen* because, when properly understood, *Stephen* is entirely consistent with the existence of such a gap, unless there is the appropriate statutory imprimatur in place.

Is the result of the VCAT decision in *Clements* a desirable outcome? No one doubts the importance of the Stewards having the power to investigate, determine and punish in respect of these important issues of governance, discipline and integrity. It may be possible to control the conduct of unlicensed persons by way of a contractual licence whereby there are express terms that the licencee agrees to be bound by the rules of racing. However, such an agreement would only operate for the particular race meeting and would not engage the person who remains off course.[127]

It must be remembered that Mr Clements was not 'warned off' because he was generally 'a racing undesirable'. His alleged wrongdoing was specifically articulated, it was a breach of the rules. Quite reasonably, he took the point that he could only breach something if he was bound by it.

The lacuna in Victoria has been long standing and again exposed.[128] It is capable of a simple remedy, namely, the creation of a statutory source of power by an Act legislating that all persons involved in the industry shall be bound by the rules of racing or delegated authority establishing a valid by-law that expressly

[126] *Clements* [2010] VCAT 1144, [74] (emphasis added).
[127] Pannam, above n 1, 283, citing *Tucker v Auckland Racing Club* [1956] NZLR 1, 4.
[128] It also existed prior to the formation of RVL when the Victoria Racing Club was responsible for thoroughbred racing: *Vowell v Steele* [1985] VR 133. The position in Victorian harness racing is different: *Dornauf v Stewards of the Harness Racing Board* [1994] 2 VR 302.

incorporates the rules of racing.[129] This would be a sound basis for asserting jurisdiction. It would also be consistent with the current extensive role of Parliament in controlling the racing and gaming industries. These are significant industries, at a variety of different levels, and it is entirely in keeping with the present extensive regulatory racing regimes, for Parliament to prescribe that all persons involved in the industry shall be bound by the rules of racing.

That statutory framework did exist in *Stephen* and, thus, Mr Naylor came within the jurisdiction of the Committee. Absent such a statutory framework, Mr Clements had done nothing to bring himself within the purview of the rules. The self-evident need to maintain transparency and integrity within the industry requires that persons in the position of Messrs Naylor and Clements be within the jurisdiction of the Stewards in order that necessary matters can be investigated. The (again) recently exposed gap must be legislatively filled.

[129] Some Australian jurisdictions have done so: *Racing and Wagering Western Australia Act 2003* (WA), ss 45(1), 46(6)(g); *Racing Act 1999* (ACT), s 19(3); *Racing and Betting Act 1983* (NT), s 44; *Racing Regulation Act 2004* (Tas) ss 11(k), 51, 54; *Racing Act 2002* (Qld), s 79.

APPENDIX

Date	Victorian Inquiry	Queensland Inquiry
3.1.10		*Baby Boom* raced at Sunshine Coast. Started odds on but unplaced. Stewards' inquiry opened. Baby Boom trained by John Nikolic, brother of Danny Nikolic.
8.1.10	*Finishing Card* raced at Mornington. It was ridden by Danny Nikolic.	
13.1.10	Stewards' inquiry opened.	
28.1.10	Mr D Nikolic interviewed by Stewards.	
3.2.10	Stewards interview Mr Clements.	
12.2.10	Stewards direct Mr Clements to produce his telephone records.	Stewards' inquiry reconvened.
16.2.10	Mr D Nikolic provided his telephone records to the Stewards.	
23.2.10	Mr D Nikolic re-interviewed by the Stewards and directed to produce his mobile phone. He declined.	
26.2.10	In separate charges, both Mr Clements and Mr D Nikolic were charged with failing to comply with a direction of the Stewards.	
2.3.10	RVL refer Mr D Nikolic's charge to the RADB.	
4.3.10		Stewards direct Mr Clements to produce his telephone and financial records.
5.3.10	RADB hears charge against Mr D Nikolic.	
5.3.10	RADB rule Mr Clements is bound by the Rules of Racing and his time to comply with the direction of the Stewards is extended until 12 March 2010.	
15.3.10		Stewards repeat earlier request to Mr Clements. He asserts Stewards have no jurisdiction over him.
16.3.10	RADB finds Mr D Nikolic guilty. He is fined $5000.	Stewards issue a 'Show Cause Notice' to Mr Clements as to why he should not be warned off.
24.3.10	RADB concludes hearing of charge against Mr Clements and finds it proved. Mr Clements is warned off all racecourses in Victoria (and thus all racecourses in Australia).[130]	
1.4.10		Mr Clements warned off all racecourses in Queensland.

[130] This is the effect of AR 182, *Australian Racing Rules*.