IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S160 of 2019

BETWEEN:

ZEKI RAY **KADIR**
Appellant

and

THE QUEEN
Respondent

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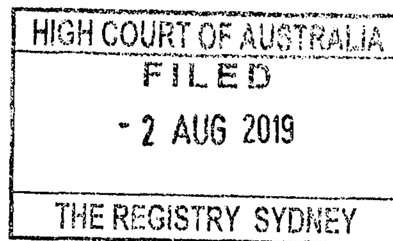

RESPONDENT'S SUBMISSIONS

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Part I: Internet Certification

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

Part II: Issues in the Appeal

2. The issues in the appeal are:

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

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

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

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

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

Part IV: Factual Matters in Contention

4. The facts which form the basis of the original charges are essentially not in dispute. The facts and the evidence upon which the Crown proposes to rely at the trial are summarised in the CCA judgment at CCA [10]-[16] and [30]-[31] (CAB 57; 60-61).[1]

5. On the Crown case, the surveillance footage unlawfully recorded on the appellant's property on 5 December 2014 ("the first recording") depicts the appellant Mr Kadir and co-appellant Ms Grech involved in perpetrating acts of serious animal cruelty, by strapping a live rabbit to a mechanical lure arm, and propelling it around the bull ring, chased by a greyhound until it is caught and seriously injured or killed. Both Mr Kadir and Ms Grech are depicted in the footage carrying out the activities and speaking to the owner of the greyhound, who is also present, about the use of a *"live one"* to train the dogs (CCA [15]; CAB 56).

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

6. Further, and aside from particular matters dealt with below, the evidence before the primary judge at the voir dire proceedings is largely not in contention. The footage was obtained by Ms Sarah Lynch on the instructions of the Chief Investigator and Campaign Manager of Animals Australia, Ms Lyn White (CCA [11]-[12]; CAB 55). In order to obtain the footage, Ms Lynch trespassed on Mr Kadir's property and a neighbouring property, and hid a camera in the vicinity of the bull ring (CCA [13]; 56). Once the first recording was obtained, Ms White instructed Ms Lynch to return, which she did: a total of 7 recordings were obtained involving 11 occasions of unlawful entry on to the two properties (CCA [14]; CAB 56). It was conceded by the Crown that each of the recordings was obtained as a consequence of the
10 contravention of an Australian law (CCA [49]; CAB 65).

7. In summary, Ms White gave evidence that she believed that police would be reluctant to become involved in investigating an anonymous complaint, and that the RSPCA did not have powers under the *Surveillance Devices Act*. In her experience, police would refer animal welfare complaints to the RSPCA in any event. She understood that the RSPCA had a memorandum of understanding with Greyhound Racing NSW ("GRNSW") which meant that information given to the RSPCA would be conveyed to GRNSW. She believed that GRNSW was a compromised organisation. Ms White knew that placing the cameras on the appellant's property and recording activities there was in breach of the *Surveillance Devices Act* (CCA [35]-[36]; CAB 62).

20 8. On 2 February 2015, Ms White took the recordings to RSPCA Chief Inspector O'Shannessy. His first knowledge that Animals Australia had made the illegal recordings was when he was presented with a letter and copies of the recordings that day (CCA [26]-[28], CAB 59-60). Another RSPCA Inspector obtained a search warrant for Mr Kadir's property which was executed on 11 February 2015 (CCA [29]-[30]; CAB 60-61). The entry and search were also authorised by powers pursuant to s. 24G of the *Prevention of Cruelty to Animals Act* 1979 (NSW) (CCA [22]-[23] and [29]; CAB 58-61). During the execution of the search warrant, a dead rabbit and rabbit remains were found in the bull ring (CCA [30]; CAB 61). The findings during the search gave rise to Count 12 on the trial indictment.

9. In January 2015, Ms Lynch contacted the appellant and falsely described herself as new to the
30 greyhound racing industry. She visited the appellant at his property by arrangement on 13 January 2015. The appellant spoke in the presence of the co-accused Ms Grech about the use of live rabbits as the best method for training the greyhounds, and said that he got 30 live rabbits a week and 1200 a year (CCA [16]; [136]; CAB 57; 93).

10. RSPCA Chief Inspector O'Shannessy gave evidence that the RSPCA would not act upon anonymous complaints, except those relating to organised animal cruelty such as in this case (CCA [47]; CAB 65). The RSPCA is not empowered to apply for a surveillance device warrant.[2] It would not make a request of police to do so based on an anonymous complaint (CCA [89]; CAB 77). Ordinarily, any investigation would involve liaising with GRNSW (CCA [45]; CAB 64). The RSPCA may also exercise its powers conferred by s.24G of the *Prevention of Cruelty to Animals Act* which included a power of entry and inspection upon an "animal trade" business (CCA [47]; CAB 65). Investigations were not normally kept confidential from GRNSW but as a result of what Ms White told the meeting on 2 February 2015 about the risk of compromise, the RSPCA did not contact GRNSW on this occasion (CCA [45]; CAB 64).

11. Another RSPCA Inspector, Flett Turner, conducted some investigations into Mr Kadir's property.[3] In the view of Inspector Turner, his business met the definition of an *"animal trade"*, and was therefore subject to inspection under the aforementioned legislative power.[4] Mr Kadir's property was approximately 5 acres in size and included kennels and greyhound training facilities.[5] When the search was carried out, the RSPCA personnel arrived at the premises to discover the front sliding gate closed and locked. Having *"jumped the fence"*, they proceeded down the driveway and towards the back of the property before encountering the bullring.[6]

12. An aerial photograph of the property, depicting the relative locations of the public road, the adjoining properties, and the bullring was tendered.[7] The locations where Sarah Lynch had placed the hidden cameras was marked on the Exhibit.[8]

Proceedings in the District Court

13. Given that the appellant places reliance upon the manner in which he asserts the Crown ran its case on the voir dire at trial (AS [19], [39] and [60]), it is necessary to briefly review the history of the proceedings.

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[2] Section 17(1) of the *Surveillance Devices Act* 2007 (NSW) empowers a "*law enforcement officer*" to apply for a surveillance device warrant. An RSPCA Inspector is not a "*law enforcement officer*" within s.4 of the Act, nor is the RSPCA a "*law enforcement agency*" as relevantly defined by the Act and Regulations.

[3] Statement of RSPCA Inspector Flett Turner dated 21 August 2015, in VD Exhibit 1 (Appellant Grech's Further Materials – "DG AFM" – at 202ff).

[4] Statement RSPCA of Inspector Flett Turner dated 21 August 2015 at [8] (DG AFM 204).

[5] Annexure to statement RSPCA of Inspector Flett Turner dated 21 August 2015 (DG AFM 207).

[6] Statement of RSPCA Inspector Flett Turner dated 13 February 2015 at [2]-[6] (DG AFM 216-217).

[7] VD Exhibit 2 (Respondent's Further Materials – "RFM" – at 169).

[8] VD transcript at 39.15-40.48 (Appellant Kadir's Further Materials – "ZRK AFM – at 40-41).

14. The appellants were arraigned on 29 April 2016 on an indictment containing 12 counts of serious animal cruelty, contrary to s 530 of the *Crimes Act* with an additional count against Mr Kadir (CAB 1-8). On 18 November 2016 the primary judge refused an application by both appellants for a permanent stay of proceedings (CCA [4]; CAB 52).[9] The matter was relisted for trial, and a foreshadowed application to exclude the unlawfully obtained recordings pursuant to s. 138 of the *Evidence Act* on 26 June 2017.

15. Prior to the hearing of the stay application, the appellant Ms Grech and the respondent Crown had filed written submissions concerning an objection by Ms Grech to the admission of the recordings at trial, should the stay application fail.[10] The appellant Mr Kadir did not file written submissions addressing the s.138 objection, although his counsel indicated at the end of the evidence on the voir dire that he *"adopted"* those filed on Ms Grech's behalf.[11] Those written submissions were directed only to the recordings, and not to the search warrant evidence.

16. The objection to the admissibility of the evidence located by the RSPCA during the February 2015 search was first raised by the appellant's counsel at the commencement of the voir dire proceedings on 26 June 2017.[12] Contrary to AS [19], the admissibility of the RSPCA search evidence *was* separately addressed in oral submissions by the Crown once it had been raised.[13] The objection to the admissibility of the admissions by the appellant to Sarah Lynch was first raised before the judge on the second day of the voir dire after the evidence had closed.[14]

Part V: Argument

Outline

17. The CCA found that the primary judge had erred by excluding the first recording of activity in the bull ring on 5 December 2014; the evidence located during the lawful RSPCA search of the appellant's property on 11 February 2015; and the evidence of the alleged admissions made by the appellant to Ms Lynch on 13 January 2015. Having found error, the CCA re-

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[9] The document entitled 'Outline of argument of the accused (Kadir)' dated 26 September 2016 (ZRK AFM 145ff) relates to the unsuccessful stay application, not the subsequent s.138 application.
[10] The appellant Ms Grech filed written submissions objecting to the admission of the unlawful recordings on 15 September 2016. It was these submissions to which the Crown responded by way of written submissions dated 26 October 2016 (ZRK AFM 173-181). ZRK AFM does not include the original September 2016 submissions of Ms Grech, rather it includes the 'Amended Submissions' dated 24 June 2017 (ZRK AFM 158). Nothing turns on this.
[11] VD transcript 71.48-72.5 (ZRK AFM 72-73).
[12] VD transcript 3.11-24 (ZRK AFM 4).
[13] VD transcript 3.44-48 (ZRK AFM 4) and 102.38-103.16 (ZKFM 104-105).
[14] VD transcript 76.31-38 (ZRK AFM 78).

determined the admissibility of the evidence under s. 138 of the *Evidence Act* and concluded that the evidence should be admitted.

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

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

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

(1) Was it necessary for the CCA to find *House* error,

(2) If so, was the CCA correct to find *House* error?

(3) Was there error in the CCA's determination under s. 138 of the *Evidence Act*.

21. Each of these issues are addressed below. For the reasons outlined, it is submitted that it was not necessary for the CCA to find *House* error. However, upon the finding of *House* error, the CCA proceeded to redetermine the s. 138 decision afresh pursuant to the power conferred by
20 s. 5F(5)(b) of the *Criminal Appeal Act*. There was no error in that redetermination. Accordingly, the appellant's appeal should be dismissed.

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

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[15] CCA [69]; CAB 71.

[16] *Grech v The Queen; Kadir v The Queen* [2019] HCATrans 106.

[17] The CCA noted that different views had been expressed in New South Wales as the applicability of *House* to issues under s. 138, referring to *Gedeon v R* [2013] NSWCCA 257 at [174]-[178] and *R v Rapolti* [2016] NSWCCA 264. In Victoria, *House* has been held to apply to a s. 138 decision: *Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, at [47]. However, each of those authorities predated the analysis of this Court as to the application of *House* to "evaluative" decisions in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 92 ALJR 713, which is discussed further below.

The standard of review

Section 5F of the *Criminal Appeal Act*

23. The nature of an appeal under s. 5F(3A) of the *Criminal Appeal Act* is a rehearing, rather than an appeal in the strict sense, or an appeal *de novo*.[18] So much is clear from (i) s. 5F(4), which provides that the appeal is to be determined on the evidence given in the proceedings, but which enables the CCA to grant leave to a party to "*adduce fresh, additional or substituted evidence*";[19] (ii) s. 5F(5) of the *Criminal Appeal Act*, which provides that the CCA may make another order, judgment, decision or ruling "*in place of*" the order, judgment, decision or ruling appealed against; and (iii) the absence of any limitation in the text of s. 5F which would

10 have the effect of confining the hearing to the correction of errors of law alone (cf s. 56 of the *Crimes (Appeal and Review) Act* 2001 (NSW)).[20]

24. Where, as here, an appeal is in the nature of a rehearing, the appellate court must "*give the judgment which in its opinion ought to have been given in the first instance.*"[21] In so doing, the appeal court is "*obliged to conduct a real review of the trial and* ... [of the trial judge's] *reasons*".[22] Accordingly, unless the appeal is in respect of an issue of procedure or a "*discretionary*" determination then, provided that the appellate court observes the "*natural limitations of the record*" (for example, by giving deference to any findings of fact that are based on the credibility of witnesses),[23] the appellate court "*cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions.*"[24] In such

20 a case, the appellate court is not required to find *House* error in order to intervene.

25. In other words, whilst the appellate court must be satisfied of "error" in the primary judge's decision,[25] such error will be established where the appellate court forms a different conclusion than the primary judge on the question which is the subject of the appeal. Such a

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

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

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

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

[22] *Fox v Percy* at [25]; *SZVFW* at [32] and [153].

[23] *Fox v Percy* at [23]; *Dearman* at 561; *SZVFW* at [33] and [153].

[24] *Fox v Percy* at [23]; *Dearman* at 561; *SZVFW* at [32] and [153].

[25] *Fox v Percy* at [27]; *Allesch v Maunz* (2000) 203 CLR 172 at [23], per Gaudron, McHugh, Gummow and Hayne JJ.

conclusion may result from the giving of more, or less, weight to a relevant consideration. For example, in an interlocutory appeal against a trial judge's determination that specified tendency evidence does not have significant probative value, error will be established where the appellate court concludes that the evidence has significant probative value.[26] It is not necessary for the appellate court to be satisfied that the trial judge's decision was "unreasonable" or "not open" or was infected by another form of *House* error (such as failing to take into account a relevant consideration, or taking into account an irrelevant consideration).

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

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

[26] *The Queen v Bauer (a pseudonym)* [2018] HCA 30; 92 ALJR 846 at [61]. *Bauer* concerned an appeal against conviction, rather than an interlocutory appeal. However, it may be noted that the authority cited by the Court for this proposition was *Ford*, which was an appeal under s. 5F: see *Ford* at [98] and [145]-[146].
[27] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission and Others* [2000] HCA 47; 203 CLR 194 at [18] and [21], per Gleeson CJ, Gummow, Hayne and Crennan JJ.
[28] See below at [36]-[39].
[29] Section 75A(6) of the *Supreme Court Act* provides that the powers of the Court include the "*powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning ... (b) the drawing of inferences and the making of findings of fact.*" There is no equivalent provision in s. 5F of the *Criminal Appeal Act*.

Section 138 of the *Evidence Act*

28. Whilst it is well-established that "discretionary" decisions will typically attract the principles in *House v The King*, the labelling of classes of decisions as "discretionary" (or "evaluative") may have a tendency to obscure, rather than clarify the circumstances in which *House* principles apply.[30] The underlying criterion is one of the choice of the decision maker, or of a tolerance for different outcomes. It is not necessary to demonstrate *House* error in a s. 5F(3A) appeal where the decision appealed from concerns a question which "*demands a unique outcome*".[31] It is necessary to demonstrate *House* error where the decision-maker is "*allowed some latitude as to the choice of decision to be made*".[32]

10 29. Whether a decision appealed from concerns a question which "*demands a unique outcome*" or "*allows latitude as to the choice of decision to be made*" is ultimately a question of statutory construction.[33] For the reasons outlined below, the text, context, purpose and history of s. 138 demonstrates that a decision under that provision demands "*a unique outcome*" and does not allow the trial judge a "*choice*" of the decision to be made.

30. First, s. 138 does not provide for the Court to fashion orders from amongst a "*range of outcomes*". Rather, s. 138 requires a determination that involves a binary determination rather than a choice of outcomes on a spectrum: the illegally obtained evidence is either admissible (subject to other evidentiary provisions), or inadmissible.[34] In this way, the character of a s. 138 determination is very different from the broad discretions considered in decisions such as

20 *House v The King*[35] (sentencing), *Norbis v Norbis*[36] (the alteration of assets under the *Family Law Act* 1975 (Cth)), *Gronow v Gronow*[37] (custody of a child), *Pennington v Norris*[38] (apportionment legislation); *Precision Plastics v Demir*[39] (damages); and *Coal and Allied Operations* (the setting of a workplace bargaining period).

31. Second, there is no textual indication that the legislature intended that the trial judge be allowed "*latitude as to the choice of decision to be made*" in making a determination under s. 138 of the *Evidence Act*. The text of s. 138 provides that evidence that was improperly or

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[30] *SZVFW* at [49], per Gageler J; [143], per Edelman J.
[31] See *Coal and Allied Operations* at [19] and *SZVFW* at [49], per Gageler J.
[32] See *Coal and Allied Operations* at [19] and *SZVFW* at [47], per Gageler J and [144], per Edelman J.
[33] *SZVFW* at [151], per Edelman J.
[34] *R v Ford* [2009] NSWCCA 306 at [75].
[35] At 504-505, per Dixon, Evatt and McTiernan JJ.
[36] [1985] HCA 17; 161 CLR 513.
[37] [1979] HCA 63; 144 CLR 513 at 516-517, per Stephen J.
[38] [1956] HCA 26; 96 CLR 10 at 15-16, per Dixon CJ, Webb, Fullagar and Kitto JJ.
[39] [1975] HCA 27; 132 CLR 362 at 369, per Gibbs J.

illegally obtained "<u>*is not to be admitted*</u> *unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*" (emphasis added).[40] In this way, s. 138 echoes the text of provisions such as ss. 56, 59 and 76 of the *Evidence Act*, each of which concern forms of evidence that are stated to be "*not admissible*" unless falling within exceptions specified in other provisions of the Act.

32. Section 138 also stands in stark contrast to other provisions of the *Evidence Act*, such as s. 135, which provides that a court "*may*" refuse to admit evidence if the probative value of the evidence is substantially outweighed by the danger that the evidence might be unfairly prejudicial, misleading or confusing, or cause or result in an undue waste of time.[41] The text of s. 138 also differs in fundamental respects from the text of s. 192 of the *Evidence Act*; cf AWS at [54]. In its terms, s. 192 only applies to provisions which are expressed to confer a choice upon the trial judge ("*If, because of this Act, a court* <u>*may give leave, permission or direction*</u>", emphasis added). The absence of clear language of discretion or choice as seen in other provisions of the *Evidence Act* is a strong indication that the legislature did not intend to allow latitude to the trial judge in a determination under s. 138.

33. Third, the history of s. 138 indicates that the provision was deliberately intended to differ in important respects from the common law *Bunning v Cross* "*discretion*" from which it was derived.[42] In particular, it may be noted that in 2007 the heading to Part 3.11 and the introductory note to Ch. 3 was amended "*to clarify that s. 137 of the* Evidence Act *is a mandatory exclusion.*"[43] Like s. 138, s. 137 is expressed in mandatory, rather than discretionary, language.

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[40] See similarly *Parker v Comptroller General of Customs* [2009] HCA 7; 252 ALR 619 at [162], per Heydon J (dissenting); cf *Em v R* [2007] HCA 46; 232 CLR 67 at [95], per Gummow and Hayne JJ.

[41] See also s. 38 (a party "*may*", with leave of the court, question the witness as though the party were cross-examining the witness); s. 46 (the court "*may grant leave*" to a party to recall a witness); s. 53 (a judge may, on application, order that a demonstration, experiment or inspection be held); s. 56 (the court "*may*" find that the evidence is relevant: (a) if it is reasonably open to make that finding, or (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding).

[42] *Uniform Evidence Law* (ALRC Report 102) at [16.81]. See also NSW Law Reform Commission, *Illegally and Improperly Obtained Evidence* (NSWLRC, 1979) at [2.3]; *Evidence* (ALRC, Interim Report 26, 1985) at Ch. 20; *Review of the Uniform Evidence Acts* (ALRC DP 69, NSWLRC DP 47, VLRC DP) at [14.67].

[43] *Uniform Evidence Law* (ALRC Report 102) at [16.50]; *Evidence (Amendment) Act* 2007 (NSW).

34. Fourth, it is to be observed that the evaluation which is to be made under s. 138 is one in which the CCA is *"in as good a position to decide as the trial judge"*.[44] Further, the trial judge does not hold any *"special expertise"* in the area of adjudication to which s. 138 applies.[45]

35. That s. 138 requires the *"weighing"* of various considerations does not signify a legislative intent to allow the trial judge a *"choice"* in the decision to be made. *Warren v Coombes* established that the mere fact that a decision can be characterised as *"evaluative"* in nature is not sufficient to engage the principles enunciated in *House v The King.*[46]

36. As Gageler J observed in *SZVFW, Warren v Coombes* concerned the conclusion that a defendant had not failed to exercise reasonable care. Other evaluative determinations which do not engage *House* principles include findings of unconscionability,[47] whether specified tendency evidence has significant probative value,[48] the proper construction of a contract, and the correct interpretation of a statute.[49] Further, and of particular relevance in the present case, various intermediate appellate courts have held that a decision in respect of public interest immunity does not attract *House* principles.[50]

37. In each of these contexts, a decision maker may draw upon a range of relevant considerations and different decision makers may give different weight to competing considerations in determining the correct outcome. Notwithstanding this degree of indeterminacy, each of these issues are recognised to admit of only *"one correct answer."*[51]

38. The fact that *"reasonable minds may differ"* as to what that *"answer"* should be does not suggest a legislative intention to require judicial restraint in the appellate process.[52] As the majority justices in *Warren v Coombes* explained:

> "The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to us in itself to be a reason why no narrow view should be should be taken of the appellate function. The resolution of these questions by courts of appeal should lead ultimately not to uncertainty but to

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[44] *Warren v Coombes* (1979) 142 CLR 531 at 54, per Gibbs CJ, Jacobs and Murphy JJ.
[45] See similarly *SZVFW* at [153], per Edelman J.
[46] *SZVFW* at [46], per Gageler J, at [85], per Nettle and Gordon JJ (with whom Kiefel CJ agreed).
[47] *Australian Competition and Consumer Commission v C G Berbatis Holdings* [2003] HCA 18; 214 CLR 51.
[48] *Bauer* at [61].
[49] *SZVFW* at [150], per Edelman J.
[50] *Victoria v Brazel* [2008] VSCA 37; 19 VR 553 at [38], followed in *Ryan v Victoria* [2015] VSCA 353 at [50] and *ASIC v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; 169 FCR 227 at [21]; *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at [15]; cf *New South Wales Commissioner of Police v Nationwide News Pty Ltd* [2007] NSWCA 366; 70 NSWLR 643 at [26].
[51] See, in the context of tendency evidence, *Bauer* at [61].
[52] *Bauer* at [61].

consistency and predictability, besides being more likely to result in the attainment of justice in individual cases."[53]

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

10 **Conclusion**

40. For the reasons outlined above, a decision under s. 138 of the *Evidence Act* is a decision for which there "*can only ever be one correct answer*".[54] There is no basis to require an implication of judicial restraint in the text, context, history or purpose of s. 138 of the *Evidence Act*.

41. In these circumstances, the Crown was not required to demonstrate *House* error to succeed in the appeal. It was unnecessary for the CCA to make the findings of *House* error. However, upon the finding of *House* error, the CCA proceeded to redetermine the admissibility of the evidence under s. 138 afresh pursuant to s. 5F(5)(b) of the *Criminal Appeal Act*. For the reasons outlined at [57]ff below, there was no error in that redetermination. Accordingly, the
20 appellant's appeal should be dismissed.

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

Outline

42. The CCA held that the primary judge committed three related *House* errors. These were, first, that the primary judge erred in failing to assess the admissibility of the first recording in isolation from the subsequent recordings (CCA [105], [107]; CAB 81, 82); second, that his Honour erred in failing to separately assess the admissibility of the RSPCA search evidence (but instead applied his assessment of the recordings "directly" to the search evidence) (CCA [125],[126]; CAB [89],[90]); and third, that his Honour similarly erred in failing to separately
30 assess the admissibility of the admissions (CCA [138]; CAB 94).

[53] *Warren v Coombes* at 552, per Gibbs ACJ, Jacobs and Murphy JJ. See also *Bauer* at [61].
[54] *Bauer* at [61].

43. For the reasons outlined below, the CCA correctly found that the primary judge did not consider the evidence separately in each case and further, that this was an error of principle. Accordingly, Grounds of Appeal 1 and 2 should be dismissed.

The first recording (Ground 1)

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

45. Having set out a summary of facts and evidence, and the submissions of the parties, his
10 Honour's determination commenced as follows: "*There are essentially three pieces of evidence to which the voir dire was directed. I propose to deal with them separately*".[55] The first "piece of evidence" considered was "the recordings".[56] Thereafter the primary judge grouped "the recordings" together in his consideration, and did not differentiate between them when addressing each of the subparagraphs of s 138.

46. When considering the gravity of the contravention (s. 138(3)(d)), the primary judge referred to "repeated deliberate breaches", rendering the conduct of Animals Australia more serious.[57] When read in context, this is clearly a reference to the repeated incursions on to the property to obtain further recordings without instead taking some other lawful step once the first recording was obtained: see also CCA [104]; CAB 81.

20 47. In this respect, contrary to AS [39], the Crown Prosecutor submitted generally that the primary judge should treat the recordings as separate pieces of evidence because the s. 138 considerations changed over time,[58] and in particular, drew a distinction between the first recording and the subsequent recordings in terms of the gravity of the breach, observing in submissions before the primary judge that the unlawful conduct could not be considered to be "repeated" conduct at the time that the first recording was obtained.[59] On the other hand, both appellants submitted to the primary judge that in assessing the gravity of the contravention, the Court should take into account that there were repeated trespasses and repeated recordings

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[55] VD Judgment 22.48-50 (CAB 31).
[56] VD Judgment 23.49-52 (CAB 32).
[57] VD Judgment 27 (CAB 36).
[58] VD transcript 90.17-25 (ZRK AFM 92).
[59] VD transcript 98.43-49 (ZRK AFM 100).

made over a period of almost two months.[60] This is ultimately what the primary judge did. (In the CCA, the appellant accepted that the primary judge had treated the recordings as a single piece of evidence, submitting that this was the correct approach: CCA [74]; CAB 72.)

48. When considering the difficulty of obtaining the evidence without the contravention (s. 138(3)(h)), the primary judge again gave simultaneous consideration to the position before and after the first recording had been obtained. The primary judge made observations about the position *prior to* the first recording being obtained; and to the position *once the first recording was obtained* in the same short passage of the judgment dealing with s. 138(3)(h).[61] However, the different positions were neither considered sequentially nor separately. Having reviewed the position both before and after the first recording was obtained, the primary judge made a single finding: that there was "some difficulty" obtaining the evidence in another (lawful) way. As the CCA correctly held, on an overall reading of the reasons, the primary judge did not assess the first recording in isolation from the subsequent recordings in determining the difficulty of obtaining the evidence in some other way: CCA [105]; CAB 81.

49. Failure to do so was an error of principle, as the CCA correctly held: CCA [104], [107]; CAB 81, 82. Section 138 of the *Evidence Act* requires consideration of whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. The application of s. 138 requires the analysis and balancing of the characteristics, and circumstances of the particular item of impugned evidence.

50. By way of analogy, when addressing the admissibility of a hearsay representation pursuant to s. 65 of the *Evidence Act*, this Court held that the question of the reliability of the representation is not to be approached on a compendious basis whereby an overall impression is formed of the general reliability of the representations .[62] Similarly, in the present case, each recording was a separate item of evidence to which objection was taken, and ought to have been considered as such. The *way in which* the first recording was obtained was critically different from the way in which the second and subsequent recordings were obtained. The compendious approach taken by the primary judge to all of the recordings together obscured the important differences.

[60] VD transcript 86.17-50 (oral submissions on behalf of Ms Grech) (ZRK AFM 88) and pp79.51-80.15 (oral submissions on behalf of Mr Kadir) (ZRK AFM 81-82).
[61] VD Judgment 30 (CAB 39).
[62] *Sio v The Queen* [2016] HCA 32; 259 CLR 47 at [57]-[61].

51. For the reasons set out above, the CCA was correct to find that his Honour did not assess the recordings separately. This was an error of principle. Accordingly, Ground 1 of the appellant's Notice of Appeal should be dismissed.

The RSPCA search evidence (Ground 2)

52. The RSPCA entered the appellant's property on 11 February 2015 pursuant to a lawful search warrant and pursuant to independent powers of entry and search conferred by s.25G of the *Prevention of Cruelty to Animals Act.* A dead rabbit and rabbit body parts were found in the bull ring. A diary listing costs of boarding dogs and the cost of rabbits was also found (CCA [30]-[31]; CAB 60-61). The RSPCA Chief Inspector gave evidence that, "but for" the provision of the unlawful recordings to him by Animals Australia, he would not have arranged for a search warrant application (CCA [113]; CAB 84). He also gave unchallenged evidence that he had no involvement with, nor prior knowledge of the conduct of Animals Australia in unlawfully obtaining the recordings (CCA [28]; CAB 60).

53. The appellant does not dispute that the primary judge, having made a finding that the search evidence was obtained "in consequence of" the original illegality carried out by Animals Australia, then "directly applied" the s.138 factors to the question of the admissibility of the search evidence: AS [54]. Rather, what is now argued is that the s.138 factors *are directly applicable* to the search warrant evidence and, furthermore, there is no basis for suggesting otherwise: AS [60].

54. Contrary to AS [61], the CCA did not hold that the circumstances in which the recordings were obtained, which led to the search warrant, were not at all relevant to the question of admissibility (plainly they were: see CCA [127]; CAB 90). The error was in applying the factors "directly", with no further analysis, once the primary judge had held that there was a causal connection between the recordings and the search. It may be noted that in the CCA, counsel for the appellant conceded that the assessment of the task [of applying s.138] was different as between the search warrant material obtained by the RSPCA and the unlawfully obtained recordings.[63]

55. The RSPCA had engaged in lawful conduct for which it had legislative authority in obtaining the search evidence. In contrast to the recordings, which were obtained as the direct result of illegal acts, the RSPCA had not itself engaged in deliberately unlawful conduct. The considerations must necessarily be different, as demonstrated by the careful reasoning of the

[63] CCA transcript 19.46-20.1 (ZRK AFM 201-202).

CCA at [121]-[126] (CAB 87-90). The CCA correctly found that the primary judge erred in principle.

The Admissions (Ground 2)

56. The CCA found that the primary judge had similarly erred in his determination of the admissibility of the admissions. After concluding that "but for" the original recordings, Ms Lynch would not have returned to the property to seek further information and elicit admissions from the appellant, the primary judge held that the admissions would be excluded "*for the reasons I have given in relation to the recordings and the [search warrant material]*".[64]

10 57. Again, as the CCA observed, the admissibility of the admissions raised very different issues from those raised by the original recordings: CCA [138]ff; CAB 94. Ms Lynch's conduct was not illegal. Nor was it relevantly "unfair".[65] The CCA correctly concluded that error was demonstrated by the failure of the primary judge to separately assess the admissibility of the admissions under s.138 of the *Evidence Act*.

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

58. The respondent submits with respect to this ground that (i) on a proper reading of the CCA judgment as a whole, it is plain that the CCA understood and applied the onus correctly; (ii) the CCA's decision to admit the first recording, the RSPCA search evidence and the admissions, was in conformity with and not contrary to the evidence; and (iii) no error is otherwise demonstrated.
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The onus

59. A proper reading of the CCA reasons as a whole makes it clear that the onus was correctly applied: cf. AS [41]. The CCA referred, without criticism, to the primary judge's express statement that "the onus" was on the Crown (CCA [49], [63]; CAB 65, 69). Given that the Crown had at all times accepted that the recordings were unlawfully obtained, there was no question concerning "onus", and the proceedings in both courts were conducted on the express basis that it was for the Crown to satisfy the Court that the evidence should be admitted. It was not necessary for this proposition, which was not in contention, to be restated. The CCA correctly stated its conclusion in the terms of s.138, namely that it was satisfied that "*the*

[64] VD Judgment 34 (CAB 43).
[65] VD Judgment 34 (CAB 43).

desirability of admitting the first recording in this case does outweigh the undesirability of admitting the evidence in the way that it was obtained" (CCA [107]; CAB 82).

The first recording

60. Underpinning the primary judge's approach was his view that Ms White's opinion that it was not possible to obtain the evidence lawfully (because no surveillance device warrant could be obtained; and the RSPCA or police would involve GRNSW; and because GRNSW was compromised the matter would not be properly investigated) "*involved, to a significant degree, sheer speculation.*"[66]

61. Contrary to AS [43], this finding, was not unchallenged by the Crown,[67] nor was it "ignored" by the CCA. The CCA found that no error was disclosed with respect to "*his Honour's comments about the speculation involved in Ms White's assessment of what would have happened had the complaint been referred to the authorities or had an application been made for a search warrant without the footage*" (CCA [110]; CAB 83). It is to be borne in mind that the CCA was at this point addressing the Crown's contention that the finding of "speculation" disclosed error in the *House* sense. The CCA characterised Ms White's opinion not as "*sheer speculation*", but as "*informed speculation*": CCA [106]; CAB 82. This difference assumed some significance when the CCA came to re-determine the admissibility of the first recording.

62. When the CCA held at [111] that there were "*real concerns as to the likelihood of an anonymous complaint being able to be properly and effectively investigated*" (CAB 84), the Court was not only referring to concerns subjectively held by Ms White: cf. AS [46]. Reference was made to the risk that even the lodgement of a complaint might lead to a "tip-off" by persons associated with the greyhound industry. Such matters had been discussed at the Special Commission of Inquiry into the greyhound racing industry: CCA [106]; CAB 82. Further, whilst the RSPCA Chief Inspector said that he would have conducted an investigation into an anonymous complaint; importantly his evidence included the fact that such an investigation would have included liaising with GRNSW: CCA [90]; CAB 77.[68] At the

[66] VD Judgment 29 (CAB 38).
[67] Crown written submissions in CCA at [95] (ZRK AFM 240).
[68] See also Affidavit of David O'Shannessy sworn 9 June 2017, at [7]-[11] (not reproduced by this appellant but included in DG AFM 199); VD transcript 65 (ZRK AFM 66).

relevant time, the RSPCA regularly liaised with GRNSW with respect to complaints involving the greyhound industry.[69]

63. Contrary to AS [47] and [48], the primary judge's findings that it would have been possible for Ms White to "*approach the police through the RSPCA*", at a "*high level*" and to "*ensure confidentiality*", were expressly challenged in the CCA: CCA [94]-[95]; CAB 78-79.[70] The confidentiality that was employed on the occasion of the execution of the search warrant by the RSPCA in this matter was a special case.

64. In assessing the difficulties which faced Ms White in terms of the prospect of obtaining the evidence some other way, the primary judge held no relevant advantage by having "heard the witnesses" (cf. AS [42]). No findings were made about Ms White's credibility in the sense of truthfulness, but only the reliability of her opinions or concerns (CCA [80]; CAB 74), a matter which the CCA was in an equivalent position to evaluate.

65. Whilst the primary judge considered that "*there clearly were other investigatory steps, such as by way of covert visual surveillance, that could have been attempted*", the CCA qualified this finding at [111] by observing, correctly, that that "*there is nothing to suggest that covert but lawful visual surveillance would have enabled evidence to have been obtained of activity in the bull ring (and it might be inferred from the fact that access to the bull ring was only obtained through a neighbouring property that this would not have been available)*": CAB 84.

66. Contrary to AS [43], the CCA did not contradict the finding of the primary judge that covert visual surveillance could have been attempted but, rather, observed, critically, that there was no evidence to suggest that such surveillance could have obtained evidence of *activity in the bull ring*. Indeed, the evidence is to the contrary. Exhibit 2 on the voir dire (the aerial photographs)[71] demonstrates that covert visual surveillance from a position on the public road would not have enabled evidence to have been obtained of activity taking place in the bull ring: see RS [12] above. The CCA was correct to find that there were real difficulties in obtaining the evidence – the first recording – without a contravention. No error is demonstrated in the analysis nor the conclusion reached by the CCA.

[69] Affidavit of David O'Shannessy at [11] (DG AFM 199).
[70] See also Crown written submissions in CCA at [102]-[103] (ZRK AFM 243-244) and CCA transcript at 11 (ZRK AFM 193).
[71] See in particular RFM 170.

The RSPCA search evidence

67. Contrary to AS [71], the CCA correctly observed at CCA [127] (CAB 90) that a number of the s. 138(3) factors had already been addressed in the course of dealing with the ground of appeal and there was no need to repeat them. The appellant's submission that the CCA "*makes no evaluation of the importance of the search warrant evidence in the proceeding*" (AS [65]fn1 and [71]) does not advance the argument. It was uncontroversial that the evidence was important in supporting the guilt of the appellant in respect of a serious offence of animal cruelty (CCA [128]; CAB 90). In the present case, the probative value of the evidence and the importance of the evidence in the proceedings, were closely related factors, and were not in
10 dispute. The appellants had conceded that the Crown case on Count 12 on the indictment would be eliminated without the admission of the evidence (CCA [1]; CAB 52). Plainly then, the evidence was important.

68. With respect to the difficulty of obtaining the evidence without impropriety or contravention of the law (s. 138(3)(h)), this factor operated differently in the case of the RSPCA search evidence than it did with respect to the obtaining of the first recording. In dealing with Ground 1 on the appeal, the CCA had not disturbed the primary judge's finding that the level of difficulty in obtaining evidence lawfully was not high enough to prevent the onus being discharged for admission of the evidence, with respect to all recordings other than the first recording. The reasoning with respect to the distinction was based, at least in part, upon the
20 primary judge's finding that *once the first recording was obtained*, Animals Australia could (and should) have taken the recording to the RSPCA to seek that the RSPCA lawfully investigate the criminal offences. Given that this is precisely what the RSPCA then did; it followed that the difficulty factor did not tend against the admission of the evidence obtained during the lawful search: CCA [126]; CAB 90.

69. The submissions made by the appellant at AS [72] concerning subsequent breaches of the *Surveillance Devices Act* by the RSPCA possessing the material were correctly rejected by the CCA: CCA at [7]; CAB 53-54. Possible subsequent breaches of the legislation by possession and viewing of the material by those acting in a *bona fide* capacity with respect to the investigation and prosecution of serious criminal offences, and the broadcast of the
30 material by the ABC (matters upon which substantial reliance was placed by the appellant) are not relevant features of the way in which the evidence was obtained.

70. Furthermore, this submission must be evaluated in the context of the way the case was run by the appellant.

71. The appellant made submissions to the primary judge and the CCA as to the illegalities which may have been involved in possessing, viewing, and disseminating unlawfully obtained surveillance material by third parties (ie. not Animals Australia). However, the appellant did not cross examine the RSPCA Chief Inspector about his knowledge in this regard, nor suggest to him that he was knowingly involved in illegal conduct *after* he came into possession of the recordings (CCA [117]; CAB 86): cf. AS [72]. Indeed, the ultimate submission on behalf of the appellant was that there was "*no criticism of the RSPCA in the way they acted*".[72]

10 72. Appropriately, what assumed importance in the consideration of the admissibility of the search evidence by the CCA were the broader policy considerations underpinning the balance of considerations pursuant to s. 138: CCA [128]-[129]; CAB 90-91.[73] Contrary to the appellant's submissions, the fact that the RSPCA was not involved in any impropriety must have a bearing on the question of whether the integrity of the justice system would be undermined if the evidence were admitted. The "way in which the evidence was obtained" was through the execution of a lawful search warrant (albeit in turn obtained based on evidence procured by deliberate illegality by Animals Australia) by the RSPCA, a body vested with legislative responsibility for animal welfare. The evidence was highly probative of serious animal cruelty offences of a particular nature which had been difficult to investigate

20 and to prosecute. The CCA took into account the consideration that the admission into evidence of even the search evidence has the potential to confer "curial approval" of the original unlawful conduct: CCA [129]; CAB 91; cf AS [73]. However, when appropriately balancing all considerations, the CCA correctly concluded that the "*desirability of admitting the search warrant evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*": CCA [130]; CAB 92. No error has been demonstrated.

The admissions

73. The CCA did not err in taking into account the absence of any direct relationship between the unlawful recordings and the obtaining of the admissions: cf. AS [81]-[82]. These features

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[72] CCA transcript 17.6-9 (ZRK AFM 199).

[73] Contrary to AS [70], the Crown in the CCA made submissions about the different policy considerations applicable to the RPSCA search evidence (CCA transcript 14.44-15.17; ZRK AFM 196-197). In any event, the matters addressed in CCA [128]-[129] (CAB 90-91) were raised with the appellant's counsel in argument and were the subject of detailed submissions on behalf of the appellant (CCA transcript 19-20; ZRK AFM 201-202).

were all aspects of "*the way in which the evidence was obtained*". This ground of appeal should be dismissed.

Remittal or redetermination

74. If contrary to the above, error is found in the CCA's redetermination of the admissibility of the evidence under s. 138, the admissibility of the evidence should either be determined by this Court,[74] or remitted to the CCA. Section 5F(5) of the *Criminal Appeal Act* empowers the appellate court to determine questions of admissibility. Contrary to AS [83], there is no new evidence, nor any foreshadowed new evidence, which requires consideration by the primary judge.

10 **Part VI: Notice of Contention**

75. The respondent filed a Notice of Contention on 7 June 2019 (CAB 116). The respondent's submissions in support of this Notice of Contention are set out at RS [23]-[40] above.

Part VI: Estimate

76. It is estimated that the Respondent's oral argument will require 1.5 – 2 hours to present.

Dated

2 August 2019

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