Redacted for Publication

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S160 of 2019

BETWEEN: **ZRK**
Appellant

AND: **THE QUEEN**
Respondent

APPELLANT'S WRITTEN SUBMISSIONS

Filed on behalf of the Appellant by
Michael Bowe Solicitor
Suite 42, Level 9
5 Farrell Avenue
DARLINGHURST NSW 2010
9187825_1

Dated: 5 July 2019
Tel: (0411) 422 242
Fax: 9360 6571
Email: mbowe@marsdens.net.au

Part I: Internet certification

1. This document may be placed on the internet.

Part II: Statement of issues

2. In this case the primary judge, in the exercise of his discretion, refused to admit into evidence three categories of evidence tendered by the Crown: some surveillance evidence obtained illegally by Animals Australia ("AA"); some evidence obtained on search warrants (and similar) by the RSPCA as a consequence of the receipt of that surveillance evidence from AA; and some other evidence obtained by AA as a consequence of that surveillance evidence, namely, evidence of certain alleged admissions by ZRK (procured by subterfuge).

3. On appeal, the CCA allowed the appeal, found *House v R* error in the reasoning of the primary judge and held that all of the evidence in the second and third categories should have been admitted and that one recording in the first category should have been admitted.

4. Three primary issues arise in this case. They arise in relation to all three categories of evidence:

   (i) whether the CCA was correct to find *House v R* error in the reasons for judgment of the primary judge;

   (ii) if so, whether the CCA erred in its redetermination of the discretion under s.138 of the *Evidence Act 1995* (NSW);

   (iii) if so, whether this Court should redetermine the admissibility of the evidence and, if so, how that discretion should be exercised.

Part III: Section 78B notices

5. There are no constitutional issues in this case and counsel so certify.

Part IV: Case citations

6. The judgment in the District Court is available only on transcript. The reference for the CCA is [redacted] [2017] NSWCCA 288.

Part V: Statement of facts

7. The appellant in this case was charged on indictment with 12 breaches of s.530(1) of the *Crimes Act 1900* (NSW). The indictment is set out at Core Appeal Book (CAB) 2-6.

8. Briefly stated, the Crown case is that the appellant committed acts of cruelty on rabbits (and one possum) by using them as live baits for greyhounds. Further detail on the Crown case is to be found at CCA [10].

9. Before the trial proper a *voir dire* was held by the primary judge to determine whether three categories of evidence should be excluded under s.138 of the *Evidence Act*. The three categories of evidence were surveillance evidence illegally obtained by AA, search warrant evidence obtained by the RSPCA as a consequence of Animals Australia's illegalities and various admissions obtained by an operative of Animals Australia as a result of lies and subterfuge on her part.

10. The surveillance evidence constituted video and audio recordings (seven in all: CCA [14]) as a result of 11 occasions of unlawful entry onto ZRK's property and that of his neighbour. On each occasion, the AA operative (Ms Lynch) hid a camera under cover of darkness near the bull ring on the property and retrieved the camera on the following day. Each of those occasions constituted trespasses and a breach of the *Surveillance Devices Act 2007* (NSW).

11. At CCA [15] it is noted that "the description of what is depicted on the video recordings ... involves live rabbits being strapped to a mechanical lure arm and being propelled around the bull ring chased by greyhounds until caught, resulting in the rabbits being seriously injured or killed".

12. Ms Sarah Lynch was a photographer and freelance investigator retained for Animals Australia by Ms Lyn White, the Chief Investigator and Campaign Director of Animals Australia.

13. The primary judge provides some detail on AA at pp 4, 16 and 17 of his judgment.

14. The search warrant evidence is evidence which was obtained by the RSPCA in the course of executing search warrants and exercising its powers under s.24G of the *Prevention of Cruelty to Animals Act 1979* (NSW). Details of the RSPCA's involvement are set out by the CCA at [25]-[31]. In short, having received and viewed the surveillance material from Animals Australia, the RSPCA went and obtained search warrants to enter ZRK's property. The RSPCA seized various items which are set out at CCA [30]-[31] when the search warrants were executed on 11 February 2015. Remains of rabbits were found, along with two live rabbits in a cage, a diary, a business card and an unsigned affidavit.

15. The RSPCA is a company limited by guarantee and a registered charity: CCA [17]. As a charitable organisation approved by a Minister, the RSPCA was able to exercise law enforcement powers under the *Prevention of Cruelty to Animals Act 1979* (NSW). It was also able to institute proceedings for offences under that Act or Regulations made under it: CCA [19].

16. The third category of evidence is the alleged admissions evidence. The circumstances in which this evidence was obtained are set out at CCA [16]. Shortly stated, as a

result of obtaining the surveillance evidence, Ms Lynch was instructed by Ms White to return to the premises of ZRK, where she made various false representations, designed to obtain information and admissions from him: see also CCA [136]-[137].

17. The primary judge found that these alleged admissions were obtained in consequence of the initial illegalities by Animals Australia.

18. Both ZRK and DG argued before the primary judge that the three categories of evidence should all be excluded under s.138 of the *Evidence Act*. Their arguments focused primarily on the factors referred to in s.138(3)(a)-(h) of that Act.

19. In written submissions the Crown also focused almost exclusively on general submissions in relation to the factors in s.138(3). Neither in oral or written submissions did the Crown separately address the search warrant evidence. In oral submissions, the Crown contrasted the first surveillance recording of 5 December 2014 with the later recordings, asserting that the Crown was in a stronger position in relation to the first recording of 5 December 2014 than in relation to subsequent recordings (in relation to the factor in s.138(3)(h), namely, the difficulty of obtaining evidence without impropriety or contravention of law). See, in particular, transcript at pp.90.30, 98.43-99.3, 99.35-99.46.

20. The primary judge exercised his discretion under s.138 to exclude all three categories of evidence. The detail of the primary judge's reasoning in relation to the three categories of evidence is dealt with below in the section on ZRK's argument.

21. The Crown brought an interlocutory appeal to the CCA pursuant to s.5F(3A) of the *Criminal Appeal Act 1912*. The grounds of appeal were as follows:

> 1. His Honour erred by excluding the evidence of seven individual pieces of surveillance footage [recorded on 5.12.14, 8.12.14, 9.12.14, 10.12.14, 11.12.14, 20.12.14 and 12.1.15], in that:
>
>   (a) when assessing the relevant factors impacting upon the admissibility of the surveillance footage pursuant to s.138(3) of the *Evidence Act*, his Honour failed to consider separately each of the seven individual pieces of surveillance footage; and/or
>
>   (b) the finding that the gravity of the contravention (s.138(3)(d) *Evidence Act*) was "very high and serious" was not reasonably open; and/or
>
>   (c) his Honour failed to properly assess the difficulty of obtaining the evidence without contravention of Australian law (s.138(3)(h) *Evidence Act*).
>
> 2. His Honour erred by excluding the evidence obtained during the search of the property of the accused ZRK on 11 February 2015

due to the erroneous exclusion of the seven pieces of surveillance device footage.

3. [in relation to ZRK only] his Honour erred by excluding the evidence of alleged admissions made by the accused ZRK to Sarah Lynch on 13 January 2015 by reason of finding that the admissions were obtained "in consequence of a contravention of an Australian law" (s.138(1)(b) *Evidence Act*).

22. At the hearing before the CCA, all parties agreed (CCA at [69]) that to succeed on the appeal the Crown needed to demonstrate error by the primary judge "in the sense referred to by Dixon, Evatt and McTiernan JJ in the well-known passage in *House v The King* (1936) 55 CLR 499 (at 504-505)":

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his, if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

23. The CCA added that "The present case was argued by the Crown (and will be determined) on that basis": [69].

24. The CCA allowed the Crown's appeal in part. In relation to the surveillance evidence, the Crown's appeal in relation to the various recordings was rejected and the primary judge's reasoning upheld except in relation to the first recording. In relation to the first recording, the CCA held that the judge had made errors and re-exercised the s.138 discretion so as to admit the first recording into evidence. In relation to the search warrant evidence, the CCA held that the primary judge had made various errors and re-exercised the discretion under s.138 so as to admit the evidence. In relation to the admissions evidence, the CCA found error by the primary judge and re-exercised the s.138 discretion so as to admit the evidence. The detail of the CCA's reasoning is dealt with in the following section of these submissions.

Part VI: ZRK's argument

25. ZRK submits that the CCA was wrong to find error in the trial judge's exercise of discretion in relation to the surveillance evidence. He also submits that the CCA's reasoning re-exercising the discretion in relation to the surveillance evidence was erroneous. He submits that the CCA were not entitled to find error in the primary judge's reasoning on the search warrant evidence. And he submits that the CCA's re-exercise of discretion in relation to the search warrant evidence was erroneous. He also submits that the CCA were not correct to find error in the primary judge's exercise of discretion in relation to the admissions evidence. Finally, he submits that
10 the CCA's re-exercise of discretion in relation to the admissions evidence was erroneous. He also submits that it would be inappropriate for this Court to attempt to re-exercise any of these discretions and that, if his appeal succeeds, any outstanding issues should be dealt with by the primary judge.

26. It is convenient to deal with the surveillance evidence, the search warrant evidence and the admissions evidence separately. In each instance an attempt is made to summarise the primary judge's reasoning, the errors found by the CCA in that reasoning, the alleged errors in the CCA's finding of error on the part of the trial judge, the CCA's reasoning in re-exercising the s.138 discretion and the alleged errors in the CCA's re-exercise of discretion.

20 *(1A) Primary judge's reasoning on surveillance evidence*

27. The primary judge's reasoning in relation to the surveillance evidence is contained at pp.23-32 of his reasons. The following is a summary of the principal points made by him in those reasons.

28. The primary judge first considered the mandatory factors in s.138(3)(a)-(h):

(a) the evidence was of very high probative value: p.24.8;

(b) the evidence was very important to the prosecution case: pp.24-25;

(c) the offences were serious with a maximum penalty of 5 years (a factor tending towards the admission of the evidence): p.25;

(d) the gravity of the contraventions was very high and serious: p.28;

30 (e) the contraventions were deliberate and repeated: p.27;

(f) ZRK's privacy was breached albeit not in relation to his home (a matter of no particular weight): pp.28-29;

(g) given that indemnities have been granted to both Ms White and Ms Lynch, further action against them was unlikely: p.29;

(h) a number of points were made in relation to the difficulty of obtaining the evidence without contravention of the law (pp.29-30):

(i) Ms White's evidence was to the effect that she formed a view that no surveillance device warrant could be obtained and that if she approached the RSPCA or the police they would inevitably involve Greyhound Racing NSW (whom she believed would not properly investigate the matter) – this was sheer speculation to a significant degree;

(ii) it was open to AA to approach both the RSPCA and the police on a confidential basis and at least obtain advice from them as to whether or not the police were prepared to apply for a surveillance devices warrant or whether they were prepared to undertake initial lawful investigating steps that might lead to such an application;

(iii) Ms White was in no position, given her limited experience in relation to the obtaining of warrants of any type, simply to make a decision that the only way to obtain the evidence was through breaching the *Surveillance Devices Act*;

(iv) no attempt to conduct other investigatory steps or approach the police or the RSPCA on a confidential basis to engage in other investigatory steps was engaged in prior to the decision being made to breach the *Surveillance Devices Act*;

(v) the evidence from the Chief Inspector of the RSPCA was that the RSPCA would have conducted an investigation into an anonymous complaint of live baiting;

(vi) no doubt given the concerns held about Greyhound Racing NSW, appropriate steps could have been taken by the RSPCA not to involve that organisation, but involve the police at a senior level and ensure confidentiality;

(vii) once the first recording was obtained, there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device: no such approach was undertaken and multiple breaches of the *Surveillance Devices Act* followed;

(viii) there was some difficulty in obtaining the evidence in some other way which did not involve a contravention, but the degree of difficulty is

not easily determined when no steps were taken to endeavour to obtain the evidence in a lawful way;

(ix) there were clearly other investigatory steps, such as by way of covert visual surveillance, that could have been attempted prior to engaging in the deliberate breach of the *Surveillance Devices Act*.

29. In addition, the primary judge had regard to a number of other factors:

(a) the evidence does not support a finding that the reason the breaches of the *Surveillance Devices Act* occurred was to gain the benefit of maximum publicity for Animals Australia; the principal reason on the evidence was to investigate a complaint about ZRK: pp.30-31;

(b) Animals Australia has as one of its functions the investigation of animal cruelty but it has no authority to carry out investigations from the legislative or investigative arms of government; the court should be reluctant to lend judicial integrity to conduct by such organisations which deliberately breach the law by allowing the admission of evidence that such an organisation obtains unlawfully: p.31;

(c) public policy issues were also relevant:

(i) the exercise of the discretion does not depend on the question of fairness to the accused or on whether the accused was induced to commit the offence in question (p.31);

(ii) the exercise of the discretion depends rather on considerations of high public policy relating to the question of whether the effect of the illegality or impropriety on the administration of justice outweighs the public interest in the conviction of the guilty (p.32);

(iii) where an organisation (*viz* Animals Australia) which claims to have an investigative role, but has no legislative or executive authority, deliberately contravenes the law to obtain evidence, the court should be reluctant to admit such evidence in criminal proceedings (p.32);

(iv) if the Courts do not adopt such an approach, they run the risk of encouraging bodies which do not have any form of legislative or executive oversight to engage in deliberate illegal conduct – such encouragement would have the capacity to undermine the rule of law in our society (p.32).

30. The primary judge concluded (at p.32) that balancing the various factors referred to, the Crown had not discharged its onus of showing that the desirability of admitting the

evidence outweighed the undesirability of admitting the evidence that was obtained in the way in which the evidence was obtained.

(1B) Surveillance evidence: errors found by CCA in judge's reasoning

31. The CCA found no error by the primary judge in relation to his treatment of any of the surveillance material except the first recording. In relation to the first recording the CCA found two problems: the first related to the factor in s.138(3)(h) ("the difficulty (if any) of obtaining the evidence without impropriety or contravention of Australian law"); the second related to the factor in s.138(3)(d) ("the gravity of the impropriety or contravention").

10 32. As to s.138(3)(h): the CCA's point seems to be as follows. Factor (h) should have been addressed separately in relation to the first recording. If that had occurred, the judge might then have been able to explain why he assessed factor (h) as being the same for all of the recordings (including the first recording): [104]-[105].

33. As to s.138(3)(d): the CCA's point seems to be as follows. Factor (d) should have been addressed separately in relation to the first recording. If that had occurred, the judge might then have been able to explain why he assessed factor (d) as being the same for all of the recordings (including the first recording): [104]-[105].

(1C) Surveillance evidence: problems with errors found by CCA in judge's reasoning

34. It is convenient to deal separately with the alleged error in relation to s.138(3)(h) and
20 the alleged error in relation to s.138(3)(d).

35. As to (h): the judge's reasoning on this point (set out at [28](h) above) was not in error. The judge correctly took into account the submission made by the Crown in relation to (h) and did deal separately with factor (h) in relation to the first recording.

36. The submission made by the Crown to the primary judge (transcript pp.98.44 following, 99 and 101) was correctly recorded by the primary judge at p.22:

> "The Crown in oral submissions accepted that once Ms White was told by Ms Lynch she had recorded footage showing activity and watched the footage, she was in a different position than she was in on 4 December 2015 in terms of the difficulty in obtaining the evidence by other means.
> 30 The Crown accepted that after Animals Australia were in possession of the first recording, the Crown was in a less strong position in terms of arguing that what was done was done because of the difficulties in obtaining the evidence in some other way."

37. The primary judge dealt with this submission at pp.29-30 of his judgment (under a heading related to (h)) and particularly at p.30:

> "No attempt to conduct other investigatory steps or approach the police or the RSPCA on a confidential basis to engage in other investigatory

steps was engaged in prior to the decision being made to breach the *Surveillance Devices Act*. The evidence from the Chief Inspector and the RSPCA was that the RSPCA would have conducted an investigation into an anonymous complaint of live baiting. No doubt, given the concerns held about Greyhound Racing New South Wales, appropriate steps could have been taken by the RSPCA not to involve that organisation, but involve the police at a senior level and to ensure confidentiality. *Once the first recording was obtained, there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device. No such approach was undertaken and multiple breaches of the Surveillance Devices Act were then engaged in.* I am satisfied that there was some difficulty in obtaining the evidence in some other way which did not involve a contravention, but the degree of difficulty is not easily determined when no steps were taken to endeavour to obtain the evidence in a lawful way." (emphasis added)

10

38. In short, the judge took into account the submission which was put to him by the Crown on factor (h) and noted the difference between the first and later recordings in that regard. The captious approach of the CCA on this issue is particularly apparent when one has regard to three passages in the CCA judgment:

20

(i) at [100] it is noted that the primary judge "did not treat the recordings as a single piece of evidence, insofar as his Honour clearly noted the distinction between the position which Ms White was in before and after the first video recording had been made";

(ii) at [101] the CCA stated that the primary judge "also noted the Crown's acceptance of the fact that Ms White was in a different position after she was aware that criminal activity had been recorded than she had been before the first video recording was obtained, in terms of the difficulty in obtaining the evidence by other means (see at p.22) and the Crown's acceptance that it was in a less strong position as to the subsequent recordings in terms of arguing that what was done was done because of the difficulties in obtaining the evidence in some other way";

30

(iii) at CCA [102] it is noted that the primary judge had stated "that there was no reason why the police through the RSPCA could not have been approached once the first recording was obtained (see at page 30)".

39. As to (d): there was no error by the trial judge. None of the submissions made to his Honour drew any distinction between any of the recordings on the question of the gravity of the contraventions of the law: a party cannot assert on appeal a failure to take a matter into account if that matter was not drawn to the attention of the primary judge: *Macedonian Orthodox Community Church v Eminence Petar* (2008) 237 CLR 66 at [120]. Nor is there any basis for drawing such a distinction. At both [108] and

40

[110] the CCA notes that the contravention in relation to the first recording was "very high and serious". That was the same finding made by the primary judge who held (p.25) that all the contraventions were "very high and serious". There was no error and certainly no material error by the primary judge.

(1D) Surveillance evidence: CCA reasoning on re-exercise of discretion

40. At [107]-[112] the CCA re-exercised the discretion under s.138 and concluded that the first recording should be admitted into evidence: [112]. At [108]-[110] the CCA referred to the various factors at paragraphs (a)-(g) of s.138(3) and held that the primary judge's assessment of these factors was correct. However, the CCA disagreed with the primary judge in relation to (h) ("the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law"). The reasoning of the CCA on this point is as follows (at [111]):

> "The factor which here tips the balance in favour of admission of the first recording is the difficulty of obtaining that evidence without more than an anonymous complaint – i.e, here, the difficulty of obtaining the evidence without a contravention of the *Surveillance Devices Act.* 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). Although vigilantism (taking the law into one's own hands), even for laudable reasons, cannot and should not be encouraged and, as the trial judge said, condoning such conduct risks undermining the rule of law, nevertheless, there were real concerns as to the likelihood of an anonymous complaint being able to be properly and effectively investigated (not least because of the risk that an official investigation or even the lodgement of a complaint might lead to a tip-off by people associated with the greyhound racing industry) and the suspected criminal activities was [sic] of a high degree of seriousness."

(1E) Surveillance evidence: errors by CCA in re-exercising discretion

41. It is respectfully submitted that there are substantial difficulties with the CCA's redetermination. One key error is that there is no account taken of the onus on the Crown to demonstrate that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence (etc).

42. Another problem with the CCA's approach is that it ignores the findings made by the primary judge in relation to s.138(h), none of which were held (or even alleged) to be erroneous. The central portion of the primary judge's reasoning (having heard the witnesses) on (h) is as follows (pp.29-30):

> "The effect of Ms White's evidence was that she formed a view that no surveillance device warrant could be obtained and that if she

> approached the RSPCA or the police they would inevitably involve Greyhound Racing New South Wales, which she believed would in effect not properly investigate the matter. To my mind, this involved to a significant degree, sheer speculation. It was open to Animals Australia to approach both the RSPCA and the police on a confidential basis and at least obtain advice from them as to whether or not the police were prepared to apply for a surveillance devices warrant or whether they were prepared to undertake initial lawful investigatory steps that might lead to such an application. Ms White was in no position, in my view, given her limited experience in relation to the obtaining of warrants of any type, to simply make a decision that the only way to obtain the evidence was through breaching the *Surveillance Devices Act*. No attempt to conduct other investigatory steps or approach the police or the RSPCA on a confidential basis to engage in other investigatory steps was engaged in prior to the decision being made to breach the *Surveillance Devices Act*. The evidence from the Chief Inspector of the RSPCA was that the RSPCA would have conducted an investigation into an anonymous complaint of live baiting. No doubt, given the concerns held about Greyhound Racing New South Wales, appropriate steps could have been taken by the RSPCA not to involve that organisation, but involve the police at a senior level and to ensure confidentiality. Once the first recording was obtained, there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device. No such approach was undertaken and multiple breaches of the *Surveillance Devices Act* were then engaged in. I am satisfied that there was some difficulty in obtaining the evidence in some other way which did not involve a contravention, but the degree of difficulty is not easily determined when no steps were taken to endeavour to obtain the evidence in a lawful way. There clearly were other investigatory steps, such as by way of covert visual surveillance, that could have been attempted prior to engaging in the deliberate breach of the *Surveillance Devices Act*, in my view."

43. The CCA was not entitled to ignore the (highly relevant) findings made by the primary judge, particularly when they had not been the subject of challenge. And that is particularly so when those findings are inconsistent with the reasoning of the CCA. Nor were the factors relied on by the CCA put by the Crown in submissions to the CCA. Nor are the findings of the CCA related to the evidence.

44. Further, there are problems with each of the findings made by the CCA.

45. The suggestion that a fact "might be inferred" is irrelevant in the absence of the drawing of an inference. Nor is the suggested inference or the basis for the inference clear. If the CCA is suggesting that repeated illegal trespasses on the neighbour's property would ground an inference that it was not possible to conduct covert but lawful visual surveillance of the bull ring, that inference is impossible.

46. The suggestion that "there were real concerns as to the likelihood of an anonymous complaint being able to be properly investigated" is also problematical. The mere existence of such "concerns" is irrelevant. If those concerns were established by evidence to be well based, that might be relevant. But they were never held to be well-founded. And the CCA's reasoning ignores the "evidence from the Chief Inspector of the RSPCA ... that the RSPCA would have conducted an investigation into an anonymous complaint" (p. 30).

47. The suggestion that there was a "risk" that an official investigation or complaint might lead to a tip-off has similar difficulties. The judge found that "given the concerns held about Greyhound Racing New South Wales, appropriate steps could have been taken by the RSPCA not to involve that organisation, but involve the police at a senior level and to ensure confidentiality" (p.30), a finding not challenged by the Crown in the CCA.

48. The statement that "[t]here is nothing to suggest that covert but lawful visual surveillance would have enabled evidence to have been obtained of activity in the bull ring" is also flawed. In truth (as the judge found), "there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device" (p.30). If that had occurred "[t]here clearly were other investigating steps, such as by way of covert visual surveillance, that could have been attempted" (ibid). Again, these findings by the primary judge were not challenged in the CCA.

49. The key problem in relation to s.138(3)(h) (a problem identified by the primary judge but ignored by the CCA) was that AA's suggestions about difficulty in obtaining the evidence without illegality were "speculation", not established by the evidence and contrary to the evidence.

(2A) Search warrant evidence: primary judge's reasoning

50. The primary judge's reasoning in relation to the search warrant evidence appears at pp.32-33 of his reasons. The primary judge held that the provision of the surveillance material by AA on 2 February 2015 caused the RSPCA to apply for the search warrant and to exercise its powers under s.24G of the *Prevention of Cruelty to Animals Act*: p.33.2. The primary judge added that he was of the view that the relevant causal connection existed between the contravention of law by AA and the obtaining of the search warrant evidence: but for the contravention of the *Surveillance Devices Act*, no application for a search warrant would have been made and there would have been no exercise of a power under s.24G. The primary judge added that the findings he had made in relation to the factors concerning the exercise of the discretion in s.138 in relation to the surveillance evidence were directly applicable to his consideration of

the search warrant evidence. Accordingly, he refused to admit the search warrant evidence into evidence.

51. Thus, the primary judge's reasoning on the search warrant evidence in relation to the factors set out at s.138(3)(a)-(h) was as follows (in summary):

(a) the search warrant evidence was of very high probative value;

(b) the search warrant evidence was very important to the prosecution case;

(c) the offences were serious, with a penalty of 5 years;

(d) the search warrant evidence was obtained as a consequence of a very grave and serious contravention of the law by Animals Australia;

10 (e) the search warrant evidence was obtained as a consequence of deliberate and repeated contraventions of the law by Animals Australia;

(f) the search warrant evidence was obtained as a consequence of a breach of privacy (a matter of no particular weight);

(g) the search warrant evidence was obtained as a consequence of contraventions of the law by Animals Australia in relation to which no further action was likely because of indemnities granted by the Attorney-General;

(h) (see the detailed summary at [28(h)] above).

52. In addition, the primary judge took into account the matters raised at pp.30-32 of his judgment (as summarised in detail above at [29]-[30]).

20 *(2B) Search warrant evidence: errors found by CCA in judge's reasoning*

53. The CCA discusses the alleged errors in the primary judge's decision on the search warrant evidence at [116]-[126]: see particularly [121], [124] and [125]. In short, the CCA finds one error in the primary judge's approach and then gives three particulars of that error.

54. The error found by the CCA in the primary judge's reasoning is that the CCA takes issue with a statement at p.33 of the judge's reasons. The passage at p.33 reads as follows:

> "The findings I made in relation to the factors concerning the exercise of the discretion in s.138 of the *Evidence Act* in relation to the recordings [i.e. the surveillance evidence] are directly applicable to my consideration of the evidence seized as a consequence of the execution of the search warrant and the execution of the power under s.24G."

30

55. At [121] the CCA says that in so reasoning his Honour fell into error because the findings in relation to the surveillance evidence were not directly applicable to the exercise of the discretion to exclude the search warrant evidence.

56. The CCA then gives three particulars of this alleged error.

57. The first is that at CCA [123]-[124] reference is made to a portion of the primary judge's reasons at pp.31-32 where he refers to the deliberate contravention of the law by AA and observes that AA does not have any form of legislative or executive oversight and that there should be no encouragement of such bodies to engage in deliberate illegal conduct. Having quoted that passage from the primary judge's reasons concerning AA, the CCA say that this reasoning cannot be directly applicable to the search warrant evidence obtained by the RSPCA because the RSPCA has legislative authority and the RSPCA had no prior knowledge of or even reason to suspect a contravention of law: [124].

58. The second is that at [125] the CCA notes that the search warrant evidence and the surveillance evidence were not obtained in the same way (the former having been obtained by search warrant as a consequence of the obtaining of the surveillance evidence). It followed (the CCA asserts) that this material difference needed to be assessed in determining the undesirability of admitting the search warrant evidence.

59. The third particular is at [126] where reference is made to the s.138(3)(h) factor ("the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law"). The CCA at [126] quote page 30.4 of the judge's reasons where he states that "[o]nce the first recording was obtained there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device". The CCA states that that finding could not be applicable to the search warrant evidence.

(2C) Search warrant evidence: errors in CCA findings of error by judge

60. As to the general point noted at [54] above, the factors noted at [51] above are directly applicable to the search warrant evidence. There is no basis for suggesting otherwise: see the discussion of the matters relied upon by the CCA at [61]-[63] below. Moreover, the omnibus manner in which the Crown formulated its written and oral submissions explains the format of the judge's reasons.

61. As to the first particular, this misstates the primary judge's reasoning. That the search warrant evidence was obtained in consequence of deliberate illegal activity by AA (which lacked any legislative or executive oversight) is obviously highly relevant to the admissibility of the search warrant evidence by the RSPCA (which was itself obtained as a direct consequence of the obtaining of the surveillance evidence). It cannot be suggested that the primary judge is stating at p.33 (quoted at [54] above) that the RSPCA has no legislative authority and that it engaged in deliberate illegality: he is saying that his findings to that effect in relation to AA are directly relevant to his

exercise of discretion in relation to the search warrant evidence obtained as a consequence by the RSPCA

62. As to the second particular: the primary judge does not say that the surveillance evidence and the search warrant evidence were obtained in the same way. In the key passage at p.33 of his reasons, the judge says that the search warrant evidence was obtained as a consequence of the surveillance evidence (and adds detail on the manner in which the search warrant evidence was obtained). The relevant differences between the two categories of evidence are expressly part of his core reasoning at p.33.

63. As to the third particular, where the search warrant evidence was obtained by the RSPCA as a direct consequence of the contravention of the law by AA, the court is obliged to consider the difficulty of obtaining the search warrant evidence without contravention of the law by AA: s.138(3)(h). The finding at p.30.4 by the judge that "[o]nce the first recording was obtained, there was no reason why the police through the RSPCA could not have been approached and requested to apply for a warrant to install an optical surveillance device" is directly relevant to the question of whether the search warrant evidence could have been obtained without the contraventions of the law which occurred.

(2D) Search warrant evidence: CCA reasoning on re-exercise of discretion

64. The CCA's reasoning on redetermination of the discretion in relation to the search warrant evidence is contained at [127]-[130].

65. At [127], the CCA asserts that it has already addressed a number of the s.138(3) factors, namely, (a), (c), (d), (e), (f) and (g). However, these factors are not otherwise given any adequate evaluation by the CCA in relation to the search warrant evidence. Nor is there any reference at [127]-[130] to mandatory factors (b),[1] (f) and (h) in s.138(3).

66. At [128] the CCA makes a number of points:

(i) the search warrant evidence supports the guilt of at least ZRK and possibly DG in respect of serious offences of animal cruelty;

(ii) the admission of the search warrant evidence supports the public policy of bringing wrongdoers to conviction;

(iii) against that there is a degree of undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained, given that the search warrant was in turn based on evidence procured by deliberate illegality;

[1] The search warrant evidence is described as "important in that it provides strong support for the case against ZRK " but this confuses the importance of the evidence in the proceedings (factor (b)) with its probative value (factor (a)).

(iv) the search warrants were obtained by a body vested with legislative responsibility for animal welfare, which conformed with the limits of its legislative authority, was not found to have breached Australian law and had no prior knowledge of or involvement in the relevant contravention of an Australian law;

(v) the rejection of the search warrant evidence obtained by the RSPCA in circumstances where it did not contravene the law "has the potential to undermine the legislative policy of vesting it with regulatory functions".

67. At [129] reference is made by the CCA to a number of additional factors:

10 (i) it would be undesirable if a practice were to develop whereby private bodies with altruistic objectives deliberately breached the law to obtain evidence of illegal conduct and then provided it to regulators who then used that evidence to obtain the same or other evidence by lawful means;

(ii) it can be accepted that the admission into evidence of the latter has the potential to confer curial approval or even encouragement to the unlawful conduct;

(iii) the extract from the letter from AA set out at CCA [26] confirms that AA decided illegally to gather evidence because the RSPCA could not do so;

(iv) in this case a sanction for the unlawful conduct has already been imposed by
20 the rejection of all of the surveillance evidence other than the first video recording – that rejection to a significant extent diminishes the suggestion that any curial approval has been given to the unlawful conduct of Animals Australia;

(v) to some extent, the rejection of that evidence undermines the general efficacy of the approach outlined in AA's letter if it were to be pursued in other cases;

(vi) if most of the illegally obtained evidence was rejected, then by the time evidence is sought to be obtained lawfully, the illegal practice may have ceased or at least been covered up, rendering a prosecution that much more difficult.

30 68. At [130] the CCA concludes 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.

(2E) Search warrant evidence: errors in CCA re-exercise of discretion

69. It is respectfully submitted that there is a number of difficulties with the CCA reasoning in relation to the admission of the search warrant evidence.

70. One problem is that no regard is given to the onus which the Crown had of persuading the Court that the desirability of admitting the evidence outweighed the undesirability of admitting it. A second problem is that none of the matters relied upon by the CCA (at [128]-[129]) were the subject of submissions before the CCA by the Crown on redetermination.

71. Further, the CCA paid no regard to a number of mandatory factors prescribed by s.138(3). The CCA makes no evaluation of the importance of the search warrant evidence in the proceeding (para (b)) – but note the footnote to [65] above. Nor does the CCA in its redetermination reasons deal with questions of the difficulty of obtaining the search warrant evidence without impropriety or contravention of an Australian law (para (h)).

72. There are also difficulties with the statements at CCA [128] that the RSPCA was not "found to have breached Australian law" and had no "prior" knowledge of or involvement in the contravention of the law by AA. Although lack of *prior* knowledge may be accepted, some account must be taken in this context of a number of matters. First, s.12 of the *Surveillance Devices Act* provides that it is an offence to possess certain material knowing that it has been obtained directly or indirectly by the use of a listening or optical surveillance device in breach of that Act. Second, the RSPCA were given material obtained by AA which was obtained in breach of the Act and thereafter possessed such material. Third, it is clear from that material that it is (or is likely to have been) the product of a breach of the Act. Fourth, no evidence was given by the RSPCA on the voir dire except by Mr O'Shannessy whose affidavit did not assert lack of knowledge as to the illegal provenance of the material. In the circumstances, inferences adverse to the Crown case on s.138 could more readily have been drawn: see *Commercial Union v Ferrcom* (1991) 22 NSWLR 389 at 418-419.

73. There are also difficulties with CCA [129]: factors (iii), (v) and (vi) (noted at [67] above) are difficult to follow and irrelevant. Moreover so far as (iv) is concerned, a decision to admit the first piece of illegally obtained evidence plus any evidence obtained as a consequence of receipt of *all* the illegally obtained evidence provides substantial curial approval of the unlawful conduct and clear curial encouragement of such conduct in the future. Those matters should have been taken into account by the CCA if (iv) was taken into account. The CCA judgment gives carte blanche to groups such as AA to break the law by taking illegally obtained evidence to the authorities who may then gather consequential evidence, even when they are (or should be) on notice of the prior illegalities and themselves become party to illegality.

(3A) Admissions evidence: primary judge's reasoning

74. The primary judge's reasoning in relation to the admissions evidence is to be found at pp.33-34 of his reasons.

75. At p.34 the judge first addressed the question of whether the admissions evidence was "obtained in consequence of … a contravention of an Australian law" (s.138(1)(b)) by Ms Lynch and Ms White. He concluded that "the evidence established a sufficient causal connection between the admissions that were made and the contraventions". He added that but for the watching of the illegally obtained videos, Ms Lynch would not have been asked (by Ms White) to return to the property to seek admissions. Accordingly, his Honour held that the admissions were obtained as a consequence of

10 the contraventions (s.138(1)(b)).

76. The primary judge then indicated that for the reasons he had given in relation to the surveillance evidence and the search warrant evidence, "the balancing test I am required to perform under s.138 results in the evidence of the alleged oral admissions of 13 January 2015 not being admitted": p.34.

(3B) Admissions evidence: error found by CCA in judge's reasoning

77. At [138]-[142] the CCA finds one error in the primary judge's reasoning in relation to the admissions evidence.

78. The only error which seems to have been found by the CCA relates to the degree of causal connection found by the primary judge between the illegalities and the

20 obtaining of the admissions. The primary judge (page 34) had found that there was "a sufficient causal connection" between the admissions and the contraventions and that the "but for" test was satisfied. However, the CCA found error with the judge's reasoning on the basis that the causal connection was only "bare" (at [139] and [141]) and "tenuous" (at [141]) and that the admissions were "barely affected" by the contraventions (at [140]).

(3C) Admissions evidence: problems with error found by CCA in judge's reasoning

79. There are substantial difficulties with the CCA's reasoning. The issue of whether the relevant connection could be labelled "tenuous" etc had not been raised by the Crown before the primary judge, was not put in submissions to the CCA by the Crown and

30 did not appear in the notice of appeal. Before the CCA the only argument put by the Crown (relevantly) was that the primary judge should not have held that the admissions evidence was obtained in consequence of the contraventions by AA: see, for example Crown written submissions at [112] and the notice of appeal at [3] (see [21] above). Nor is the failure of the primary judge to place the labels of "bare" and "tenuous" on the connection an error within the principles in *House v R*. Nor is it correct in fact to say that the connection was bare or tenuous: the connection was

clearly substantial. In that regard, it is notable that the CCA did not dispute that the "but for test" was satisfied or otherwise find error in the primary judge's findings on connection and causation. The CCA seems to have considered that if they had been in the position of the primary judge, they would have taken a different course in appraising the degree of connection. But that is insufficient to ground a *House v R* error.

(3D) Admissions evidence: CCA reasoning on re-exercise of discretion

80. It is respectfully submitted that the CCA's reasoning on re-exercise of the discretion is exiguous. At [142] the CCA simply states that "the above analysis leads to the conclusion that the desirability of admitting the alleged admissions outweighs the undesirability of admitting that evidence in the way in which it was obtained".

10

81. It is not clear what "the above analysis" is unless it simply refers to [138]-[141], which discuss the degree of connection between the contravention and the obtaining of the admissions. Accordingly, it would seem that the relevant "analysis" by the CCA in redetermining the exercise of the discretion amounted to little more than pointing to the alleged tenuous or bare connection between the contraventions and the making of the admissions.

(3E) Admissions evidence: errors in CCA's re-exercise of discretion

82. It is respectfully submitted that the re-exercise of discretion by the CCA is problematical. No account is taken of the onus of proof being on the Crown. Nor is any account taken of any of the mandatory relevant factors in s.138(3)(a)-(h) in assessing the admissions evidence. Nor are any adequate reasons given by the CCA for its redetermination. The various matters referred to by the primary judge in relation to the exclusion of the admissions evidence (which were not found to be in error) are also not taken into account. Those matters (which the CCA did not state to be irrelevant) should have been considered. There is also an error of fact: the connection between the contravention and the admissions is not "tenuous" or "bare". Nor was the applicability of those two epithets raised by the Crown in submissions to the CCA. And the knowledge garnered from obtaining the surveillance evidence put Ms White in a position where she was in a better position to attempt to elicit admissions (and other information) than she would otherwise have been (contrast the last sentence of CCA [139]). In the circumstances, it is submitted that the re-exercise of discretion was unreasonable.

20

30

(4) Redetermination by High Court

83. It is submitted that if this Court held that the CCA had erred in its redetermination of the admissibility of any of the three categories of evidence, it would remit the

redetermination of that issue to the primary judge rather than redetermine the matter itself. This is an interlocutory appeal from a pre-trial determination by the trial judge who heard the evidence. He is best placed to determine admissibility questions and to take into account any matters which have occurred (or will occur) subsequent to the voir dire. New material may arise which requires the primary judge to revisit the issues the subject of this appeal. And difficulties can arise where a trial judge is put in the position of re-evaluating a matter the subject of an earlier determination made by a higher court. In the present case the primary judge will almost certainly need to evaluate the nature and extent of the RSPCA's knowledge of and involvement in
10 criminal activity (a matter so far not fully or adequately explored). If this Court wishes to redetermine the issues, that may well entail a lengthy examination of all of the relevant facts and circumstances. The space occupied by the submissions made above precludes a full examination of those matters in this document.

Part VII: Relevant legislation

84. See Annexure.

Part VII: Orders sought

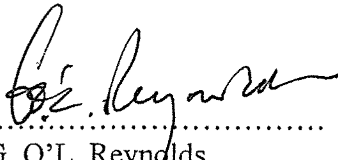
85. It is submitted that the following orders should be made:

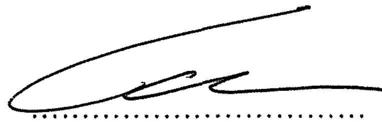
(1) Set aside the orders made by the CCA.

(2) In lieu thereof, order that the appeal to the CCA be dismissed.

20 **Part IX: Time estimate**

86. It is estimated that the oral submissions for ZRK will take no longer than 1 hour and 45 minutes. The only caveat is that if this Court wishes to redetermine the admissibility of any of the three categories of evidence, an additional 40 minutes may be required.





G. O'L. Reynolds
Counsel for the appellant
Tel: (02) 9232 5016
Fax: (02) 9233 3902
Email: guyreynolds@sixthfloor.com.au

D. P. Hume
Counsel for the appellant
Tel: (02) 8915 2694
Fax: (02) 9233 39902
Email: dhume@sixthfloor.com.au

Dated: 5 July 2019

30

Annexure – relevant legislative provisions: *Evidence Act 1995* (NSW)

138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained:

(a) improperly or in contravention of an Australian law, or

(b) in consequence of an impropriety or of a contravention of an Australian law, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in
10 consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

20 (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence, and

(b) the importance of the evidence in the proceeding, and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and

(d) the gravity of the impropriety or contravention, and

(e) whether the impropriety or contravention was deliberate or reckless, and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political*
30 *Rights*, and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note. The *International Covenant on Civil and Political Rights* is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.