HIGH COURT OF AUSTRALIA

Heatley

Vs.

Tasmanian Racing And Gaming Commission

Barwick C.J.(1), Stephen(2), Mason(3), Murphy(4) and Aickin(5) JJ.

7 July 1977

BARWICK C.J.

1. The applicant for special leave was served with a notice given Commission") by s.39 of the Racing and Gaming Act, 1952 (Tas.) ("the Act") requiring him to refrain from entering any racecourse in the State of Tasmania during the currency of the notice which was stated to be until its rescission by the Commission. No notice of an intention to issue and serve the abovementioned notice was given to the applicant. The grounds upon which it was given were not stated, nor was any opportunity afforded to the applicant to make any representation prior to its issue. The question is whether, upon its proper construction, the power granted by s.39 of the Act is qualified by the necessity to observe the requirements of natural justice before the notice is served. (at p490)

2. I have recently attempted to state the effect of the case law on the basis on which the courts require that a statutory authority, having power to affect a citizen in his rights or property, is bound to hear him before exercising the granted power. In Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106 , I described the action of the court when deciding that the repository of the power was so bound to observe natural justice as a process of supplementing the legislation where the court was of opinion that such a course was not inconsistent with the terms of the statute. More recently, in Salemi v. MacKellar (No. 2) (Salemi's Case) [1977] HCA 39; (1977) 137 CLR 487 at p 396 , I have emphasized that the court's function in this connexion is to construe a statute by which the power is granted and to educe the qualification of the power by construction of the statute. The court thus, if it is of opinion that the statute properly construed does require, though not expressly but implicitly, the observance of natural justice, does supplement the express language of the statute by effecting the qualification of the grant of power. (at p491)

3. It has become quite clear that this qualification may be found in a statute although the granted power is not a power judicial in its nature but purely administrative. Because the legislature is not presumed to authorize injustice, it is easier to imply the qualification where the statute is silent. But this does not mean, in my opinion, that because the statute is silent, the provision of natural justice is presumed. It remains always a question of construction, bearing in mind the subject matter of the power, the repository of the power and the terms of the statute as a whole. (at p491)

4. It is important to bear in mind that the common law rule as to natural justice related to powers by the exercise of which legal rights could be affected. The doctrine as to natural justice is fundamentally that powers should not be used to affect rights either of property or of person without according natural justice. It is the existence of a legal right which has excited the law to seek the

qualification of the power which, being exercised, may affect the legal right. Latterly there has been what on first impression may appear to be an extension of the doctrine by including powers which do not affect rights but which may affect what has been called a "legitimate expectation". I have expressed in Salemi's Case [1977] HCA 39; (1977) 137 CLR 487 at p 396 my own opinion that the use of this expression should not be regarded as adding to the rule in any respect. The presence of the word "legitimate" in the expression emphasizes that the expectation must spring from or be associated with legal right. (at p491)

5. A person with no right to enter my house but whom I have frequently admitted, indeed welcomed, can, in my opinion, have no legitimate expectation of continuing to do so. He may, of course, have a reasonable expectation or he may have an expectation which is justifiable in human terms, but it will not be a lawful expectation. So, in the case of a member of the public in relation to entry to a proprietary racecourse, he has no right and, in my opinion, he can have no lawful expectation of being admitted, though it can properly be said that he has a reasonable expectation or it is to be expected that the proprietor will wish to permit entry for his own interest and profit and that a member of the public presenting himself at the turnstile is justified in human terms in hoping or expecting to be admitted. But it seems to me that it is a very considerable departure from legal principle to say that he has such a lawful expectation as is to be protected by the rules of natural justice. (at p492)

6. The sole problem in this case is whether, on its proper construction, the Act conditions the power given by s.39 to issue the notice to any person upon the observance of what natural justice would require in the circumstances. If it does, the least that the rules of natural justice would require in the circumstances would be an opportunity on the part of the person to whom it was intended to give the notice to make representations as to why the notice should not be given. As I have formed the opinion that the statute does not so condition the power I have no need to examine the question what would be required in this case to satisfy the rules of natural justice. I very much doubt as at present advised whether if those rules did apply the Commission would be bound to inform the intended recipient of the reason or reasons which had prompted the Commission to form an intention to give the notice, though I realize there may be only a limited scope for making representations against the issue of the notice if there is no knowledge of what is prompting the Commission to action. However, as I have said, that matter remains an open question as far as I am concerned. (at p492)

7. In considering the construction of the statute, I think the first question is whether the applicant had any legal rights which may be affected by the issue of the notice. The applicant had no relevant legal right other than the right, if any, which a member of the public has to enter or to remain upon a privately owned racecourse. If a member of the public has, with the consent and indeed at the invitation of the racecourse proprietor entered the course he has but a revocable licence, terminable without reason, and instanter. So much has clearly been decided. Also, clearly enough, no member of the public has a right of entry to such a course. Thus, the giving of the notice under s.39 does not affect any legal right of the person who, being a member of the public, seeks entry or having been admitted has no legal right to remain. (at p493)

8. It was pointed out in argument that the power under s. 39 is large enough in terms to include members of the proprietary company or other persons having a lawful right to enter or to remain. The section uses the expression "a person" and it may be granted that those who have a lawful right to enter or to remain would prima facie fall within that word. But it seems to me that it does not follow that because the section may embrace persons who have a legal right to enter or to remain upon the course, that what is applicable in their case must be applicable to all persons including

those who have no legal right to enter or to remain. As to those whose rights are likely to be affected, the qualification of the power will be universal. But this does not mean that the qualification is applicable in relation to those whose rights would not be affected. (at p493)

9. However, there are alternative approaches which may be made to accommodate the terms of the section to the rights of the members or others who have a legal right to enter or to remain. One approach is by construction to reduce the universality of the word "a person" so as to exclude from it those who have legal rights to enter or to remain. Following this approach, it would be necessary to observe that in sub-s. (1) the committee or controlling body is given a power with respect to "a person". If this is to include members then the sub-section must be allowed to operate as an addition to the rules of the club, so that membership becomes subject to it. (at p493)

10. The other alternative is to limit by construction of the statute the qualification of the power to those who have a legal right to enter or to remain. Thus, s. 39 would be read as giving a power to issue a notice but on condition that those who had a legal right to enter or remain should first be accorded whatever the principles of natural justice may require. (at p493)

11. In my opinion, therefore, even if the power granted by s. 39 ought to be construed as being conditioned on the observance of natural justice towards those who have a right to enter or remain, it cannot properly be conditioned by the observance of natural justice to those who have no such legal right. Indeed, if one observes legal principles strictly, affording natural justice to one who has no rights which can be affected by the exercise of the power is in the nature of a contradiction in terms. Natural justice is required for the protection of rights. (at p493)

12. In my opinion, the application for special leave to appeal should be granted and the appeal should be dismissed. (at p493)

STEPHEN J. I have read and agree with the reasons for judgment of Aickin J. For those reasons I would grant special leave and would allow the appeal. (at p494)

MASON J. I agree with the reasons given by Aickin J. to support the conclusion that the provisions of the Racing and Gaming Act, 1952 (Tas.) on their true construction do not exclude the requirements of natural justice in their application to the exercise of the power conferred by s. 39 (3) of the Act and for the further conclusion that these requirements were attracted in the instant case because the applicant as a member of the public had a legitimate expectation that he would be admitted to race meetings on racecourses in Tasmania on payment of the stipulated charge, whatever that might be, an expectation that would be defeated by the issue of a valid notice under the sub-section. (at p494)

2. I also agree with the observations made by his Honour with respect to the sub-section and the manner of the exercise of the power which the sub-section confers on the Tasmanian Racing and Gaming Commission. (at p494)

3. Because the question at issue cannot be resolved by a mere application of principles already enunciated and established and the question is one of general importance, I would grant special leave to appeal and allow the appeal. (at p494)

MURPHY J. On 4th June 1975, the Tasmanian Racing and Gaming Commission, relying on s. 39 (3) of the Racing and Gaming Act, 1952 (Tas.), issued a "warning-off notice" to Mr. Heatley, which requires him to refrain from entering any racecourse in Tasmania and which is in force until the

Commission rescinds it. Before issuing the notice, the Commission did not notify him of its intention to consider warning him off or of any allegations against him and did not give him any opportunity to be heard. This was a denial of natural justice. Mr. Heatley then applied to the Supreme Court of Tasmania for certiorari to quash the order but the Commission contended successfully that it may exercise the power in s. 39 (3) without observing natural justice. He now seeks special leave to appeal against the dismissal of his application. Section 39 (3) of the Act states:

> "The Commission may, by notice in writing, require a person to refrain from entering any racecourse or racecourses specified in the notice, or from racecourses generally, on any specified day or days, or generally, while the notice is in force."

Section 39 (8) states:

"No person who is served with a notice under this section shall -
(a) fail, on payment or tender of his entrance money, forthwith to depart from the racecourse to which the notice relates; or
(b) enter contrary to the notice any racecourse or racecourses specified therein, or, if the notice relates to racecourses generally, enter any racecourse in this State.
Penalty: For a first offence, $100; for a subsequent offence, $200 or 3 months' imprisonment." (at p495)

2. Section 39 (3) does not express any restriction on the exercise of the power to warn-off. It applies to persons generally. Members of racing clubs and their committees and controlling bodies are not exempt. But the power in s. 39 (3), like other powers, must be exercised in good faith, for the purpose for which it is conferred, and with due regard to the persons affected. Its purpose is to enable the exclusion of "undesirable persons" from racecourses as a measure in the control of racing (see Stephen v. Naylor (1937) 37 SR (NSW) 127). The power could not lawfully be used to exclude persons for reasons unconnected with racing, such as their religious or political views. It could not be used arbitrarily or capriciously, for example, to exclude a person without any basis. (at p495)

3. The exercise of the power will probably have an adverse effect on the person and his reputation and possibly his livelihood. It will seriously alter his legal position. If he enters a racecourse, he becomes liable to the penalties in s. 39 (8). He may not lawfully enter a racecourse even if the club or owner of the racecourse wished him to enter and did all it could to confer on him a proprietary right to do so. (at p495)

4. The strong presumption is that the legislature did not intend to authorize the Commission (in exercising its power of warning-off) to depart from the standards of official behaviour towards individuals which are basic to every civilized society. These standards referred to as natural justice, due process, or the rule of law, require that when such public power is exercised, the person affected should be given an opportunity to be heard before the order is made to show why it should not be

made. This involves notice of the proposed order and of the matters alleged against him, and an opportunity to refute or explain or advance reasons against making the order. (at p495)

5. Only language of unmistakable meaning could displace this presumption (Commissioner of Police v. Tanos [1958] HCA 6; (1958) 98 CLR 383) but there is no such language in the Act. (at p496)

6. The respondent contended that the inconvenience which would result from this construction of the similar power in s. 39 (1) tells against this construction. (at p496)

7. Section 39 (1) provides:

> "A committee or a controlling body may, by notice in
> writing under the hand of its secretary, require a person -
> (a) to depart from; or
> (b) to refrain from entering,
> any racecourse that is under the control of the club or
> controlling body, on any specified day or days, or generally,
> while the notice is in force." (at p496)

8. The inconvenience claimed is that the committee or controlling committee could not speedily remove persons for drunkenness or offensive behaviour. For this purpose, s. 39 (1) is not necessary, and it is difficult to imagine such a formal procedure being invoked for it. But if the power in s. 39 (1) is used (with the penal consequences under s. 39 (8)), natural justice must be observed. (at p496)

9. The respondent also contended that, as the Act expressly provides for appeals and other procedures to ensure natural justice in use of powers such as revocation of bookmakers licences, Parliament had considered the question of natural justice and must be taken to have excluded its application from s. 39. This resort to the maxim expressio unius exclusio est alterius does not even begin to meet the test of unmistakable language. (at p496)

10. The respondent also argued that power to warn off without observing natural justice should be implied in s. 39 because of the nature of racing and the necessity to exclude undesirables. This argument would apply with equal or greater force in many other areas, for example, share trading and stock exchanges. Yet without unmistakable language, one would not attribute to Parliament an intention to authorize a Securities and Exchange Commission to order a person not to deal in shares or attend a stock exchange without observing natural justice. (at p496)

11. The Commission requested that regard be had to the Report of the Select Committee of the Tasmanian House of Assembly on Horse Racing, Trotting, Dog Racing and Betting in Connection Therewith. I find nothing in the Report to displace the presumption. (at p496)

12. The applicant was denied the natural justice to which he was entitled. The Commission's decision was invalid. (at p496)

13. It is immaterial that the decision would have been made if natural justice had been observed (General Medical Council v. Spackman (1943) AC 627, at p 644). (at p497)

14. Special leave should be given. The appeal should be allowed. (at p497)

AICKIN J. On 9th July 1975 the appellant Ronald Thomas Heatley was served with a "warning-off notice" issued by the respondent Commission on 4th June 1975 pursuant to s. 39 (3) of the Racing and Gaming Act, 1952 (Tas.). The notice was in the following terms:

> "The Tasmanian Racing and Gaming Commission
> pursuant to the powers conferred on it by s. 39 of the Racing and
> Gaming Act, 1952 requires you to refrain from entering any
> racecourse in the State of Tasmania while this notice is in
> force, that is to say, until it is rescinded by the Commission
> in writing."

The appellant was given no prior notice of the intention to issue this notice and no opportunity to make any representations to the Commission about it prior to its service upon him. No reasons were given for the issue of the notice. (at p497)

2. The appellant applied to the Supreme Court of Tasmania for a writ of certiorari to have the notice quashed for illegality. Chambers J. refused the application and the appellant appealed to the Full Court of the Supreme Court of Tasmania, which by majority dismissed the appeal. The appellant then sought special leave to appeal to this Court and on that application the matter was fully argued. (at p497)

3. Two questions were raised before this Court, the first whether the respondent in exercising its powers under s. 39 (3) of the Racing and Gaming Act was obliged to act in accordance with the principles of natural justice, and second, if so what procedures should be followed in order to comply with those principles. In the Supreme Court at first instance Chambers J. dismissed the application, partly upon the ground that under s. 75 of the Supreme Court Civil Procedure Act, 1932 (Tas.) the Supreme Court could issue certiorari only to a person or a tribunal charged by law with the duty, or invested by law with a power, to determine judicially and not merely ministerially any question or matter, and he took the view that decisions in other jurisdictions should be applied only in so far as they are consistent with that basic principle. He relied upon the decision in R. v. Betting Control Board; Ex parte Stone (1948) Tas SR 4 in which it had been held that the Betting Control Board established under the Bookmakers Act, 1932 was acting as an administrative body and was not under any obligation to give reasons for the refusal of an application for registration as a bookmaker. The Court had there said that the Board was not a judicial body nor exercising judicial functions in considering applications for registration as a bookmaker, and further said (1948) Tas SR, at p 19 :

> "It is an administrative body as to all its functions other
> than cancellation and suspension of licences, and,
> consequently its decision cannot be removed into this Court by
> writ of certiorari" (per Gibson A.J.).
> He also relied on the decision in Reg. v. McArthur;
> Ex parte Cornish (1966) Tas SR 157 (at p498)

4. In the Full Court Neasey J. and Rex A.J. agreed with the decision of Chambers J. Neasey J. said however that he did not regard s. 75 as imposing any significant restriction upon the power of the Supreme Court because of the general saving provision in s. 86 (1) in relation to the common law jurisdiction in respect of the writ of certriorari. He said that the previous cases had not placed reliance upon s. 75 and that in argument before the Full Court no reliance had been placed on that

section. He based his decision upon an analysis of the Act and concluded that the nature of s. 39 was such that it was a "wholly executive, ministerial power able to be exercised free of the restraints imposed by the rules of natural justice". Rex A.J. agreed with the reasons of the trial judge and of Neasey J. and concluded by saying, "I agree that the issue of the warning-off notice involved an act of a purely administrative or executive character". Green C.J. dissented. (at p498)

5. The basic principles concerning the occasions when the principles of natural justice must be complied with are not in doubt and have recently been restated in the House of Lords and in this Court. It has been established at least since Cooper v. Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB (NS) 180, at pp 189, 194-195 [1863] EngR 424; (143 ER 414, at pp 418, 420). that the obligation to observe the principles of natural justice attaches whether the authority is judicial or administrative. See also Municipal Council of Sydney v. Harris (1912) 14 CLR 1, at p 15 . Notwithstanding that, there has been a tendency to hold that there is no such requirement in what are sometimes called "purely" administrative or executive powers. The decision of the House of Lords in Ridge v. Baldwin [1963] UKHL 2; (1964) AC 40 re-emphasized that this distinction does not exist. The cases were recently reviewed by this Court in Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106 and it is sufficient for present purposes to quote from the judgment of Barwick C.J. the following passage (1976) 136 CLR, at pp 109-110 :

> "The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal: see Cooper v. Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB (NS) 180 (143 ER 414) and R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd. (1924) 1 KB 171, at p 205 . But the legislature may displace the rule and provide for the exercise of such a power without any opportunity being afforded the affected person to oppose its exercise. However, if that is the legislative intention it must be made unambiguously clear. In the event that the legislation does not clearly preclude such a course, the court will, as it were, itself supplement the legislation by insisting that the statutory powers are to be exercised only after an appropriate opportunity has been afforded the subject whose person or property is the subject of the exercise of the statutory power. But, if the legislation has made provision for that opportunity to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court, being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme. But,

> if it appears to the court that the legislature has not addressed itself to the appropriate question, the court in the protection of the citizen and in the provision of natural justice may declare that statutory action affecting the person or property of the citizen without affording the citizen opportunity to be heard before he or his property is affirmed is ineffective. The court will approach the construction of the statute with a presumption that the legislature does not intend to deny natural justice to the citizen. Where the legislation is silent on the matter, the court may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice. In my opinion, this statement of relevant principle is in accord with the authorities, including particularly the case of Wiseman v. Borneman (1971) AC 297 ."

The particular circumstances of that case bear no resemblance to the present case because there is no real similarity in the nature of the legislative provisions. It is plain that each statute must be separately examined as a whole and that, as Barwick C.J. said, "There is no rule which can provide in every case an answer by its mechanical application" (1976) 136 CLR, at p 111 . (at p500)

6. It is important also to bear in mind the well-known passage from the joint judgment of Dixon C.J. and Webb J. in Commissioner of Police v. Tanos (1958) [1958] HCA 6; 98 CLR 383, at pp 395-396 :

> "For it is a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard. In Cooper v. Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB (NS) 180 (143 ER 414) Byles J. said that a long course of authority established 'that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature' (1863) 14 CB (NS), at p 194 (143 ER, at p 420)

. The older authorities ever

recur to the lines from Seneca's Medea which apparently were introduced into the subject by Boswel's Case [1572] EngR 48; (1583) 6 Co Rep 48 b, at p 52 (a) [1572] EngR 48; (77 ER 326, at p 331) : Quicunque aliquid statuerit, parte inaudita altera, Aequum licet statuerit, haud aequus fuerit; cf. Bonaker v. Evans [1850] EngR 923; (1850) 16 QB 162, at p 171 [1850] EngR 923; (117 ER 840, at p 844); In re Hammersmith Rent-Charge [1849] EngR 726; (1849) 4 Ex 87, at p 97 [1849] EngR 726; (154 ER 1136, at p 1140). The General principle has been restated in this Court with a citation of authority in Delta Properties Pty. Ltd. v. Brisbane City Council [1955] HCA 51; (1955) 95 CLR 11, at p 18 . It is hardly necessary to add that its

application to proceedings in the established courts is a matter of course. But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment. In the present statute no such evidence of a contrary intention is discoverable. But it is in a broad sense a procedural matter and while the general principle must prevail it is apparent that exceptional cases may be imagined in which because of some special hazard or cause of urgency an immediate declaration is demanded". (at p500)

7. The Racing and Gaming Act, 1952, as amended, is a consolidation and amendment of a series of Acts dealing with bookmakers, totalizators and gaming introduced in the period 1932 to 1951, namely the Bookmakers Act, 1932, as amended, the Gaming Act, 1935, as amended, and the Totalizator Act, 1935, as amended, and the Act itself has been amended almost every year since 1952. The general scheme of the Act is to establish the Racing and Gaming Commission in Pt II. Part III makes a variety of provisions relating to the regulation of horse racing, coursing and betting, Pt IV deals with totalizator betting and Pt V with betting by and with bookmakers. Part VI deals with unlawful gambling, including unlawful lotteries and unlawful betting and gaming, and Pt VII contains miscellaneous offences and provisions relating to powers of entry, search, arrest and the like. (at p501)

8. In Pt II, Div. III, the Commission's powers, functions and duties are set out. It is required to investigate and make recommendations to the Minister on such matters as are referred to it and also to undertake research and investigations in respect of matters relating to horse racing, coursing, breeding of horses and dogs and to report to the Minister periodically on any matter investigated. It is empowered to limit the number of bookmaker's clerks and to do all such things as may be necessary for the proper regulation and control of betting by and with bookmakers and by means of the totalizator, and it has like powers with respect to lotteries. It may give directions with respect to the discontinuing of race meetings, the amalgamation of clubs and the use of particular racecourses. In relation to those directions the relevant committee or owner may refer the matter to the Minister with the request that the Minister should disallow the direction and the matter is then dealt with by the Minister. (at p501)

9. Part III, Div. I, deals with race meetings and provides that meetings conducted by a registered club, or under a permit, are "authorized race meetings" and there is a prohibition of unauthorized race meetings. (at p501)

10. Division IA deals with the registration of clubs and empowers the Commission to register a club if it meets the requirements set out in s. 21. Section 22 provides that the Commission may in its absolute discretion grant or refuse the application and that its decision is to be final and not subject to appeal. Under s. 23 registration is to be renewed annually "in the absolute discretion of the Commission". Under s. 24 the Commission may "in its absolute discretion" suspend a certificate of registration and may, after an inquiry in accordance with the section, cancel a certificate. The section requires notice in writing to be given to a club of the grounds of proposed cancellation and a hearing by the Commission at which the club is entitled to legal representation. All decisions of the Commission under s. 24 are to be final and not subject to appeal. There are comparable provisions

with respect to registration of racecourses in Div. 11. Under s. 30 (2) the Commission is not to cancel a certificate of registration except after an inquiry and there are like provisions dealing with the serving of notice specifying grounds and permitting representation at such inquiry. Again the decision of the Commission after such inquiry is to be final. (at p502)

11. Division 111 of Pt 111 contains a number of general provisions relating to the regulation of horse racing and coursing. Section 31 provides that it shall be lawful to bet on a racecourse or in a totalizator. Section 32 prohibits derivation of profits by a club which are divisible amongst the individual members. Section 33 prohibits a club from purchasing a racecourse without the approval of the Commission and from undertaking the improvement of a racecourse without the approval of the Commission unless the expenditure does not exceed $1000 in any one year. Under s. 34 racing days for racing clubs and coursing clubs are to be allocated by the Commission after consultation with all the clubs. Sections 35 to 37 require certain returns to be made and records to be kept by clubs. Section 38 provides that it is to be the duty of a committee of a club to ensure compliance with the provisions of the Act. Section 39 contains the power now in question and so far as material reads as follows:

> "(1) A committee or a controlling body may, by notice in writing under the hand of its secretary, require a person -
> (a) to depart from; or
> (b) to refrain from entering,
> any racecourse that is under the control of the club or controlling body, on any specified day or days, or generally, while the notice is in force.
> ...
> (3) The Commission may, by notice in writing, require a person to refrain from entering any racecourse or racecourses specified in the notice, or from racecourses generally, on any specified day or days, or generally, while the notice is in force.
> (4) Where the Commission exercises the power conferred on it by subsection (3) it shall cause a copy of the notice referred to in that subsection to be served on each club that conducts race meetings on the racecourse or racecourses specified in the notice, or if the notice relates to racecourses generally, shall cause a copy thereof to be served on every club.
> (5) A notice under this section shall be served personally on the person for whom it is intended.
> (6) If, at the time of the service on him of a notice under this section, the person to whom the notice applies is on a racecourse there shall be paid or tendered to him any sum he may have paid for entry thereon.
> (7) A notice under this section shall take effect according to its tenor and shall continue in force until rescinded by the committee or controlling body in writing, or, in the case of a notice under subsection (3), until rescinded by the Commission in writing.
> (8) No person who is served with a notice under this

section shall -
(a) fail, on payment or tender of his entrance money, forthwith to depart from the racecourse to which the notice relates; or
(b) enter contrary to the notice any racecourse or racecourses specified therein, or, if the notice relates to racecourses generally, enter any racecourse in this State.
Penalty: For a first offence, $100; for a subsequent offence, $200 or 3 months' imprisonment." (at p503)

12. Section 40A entitled the Commission to appoint stipendiary stewards for "controlling bodies", which expression is defined as meaning certain specified racing clubs and associations. Such stewards are not to be removed or suspended except by the Commission itself. The Commission, or the controlling body with the approval of the Commission, may dismiss or dispense with the services of "any other stipendiary steward" (that is, other than the chairman of the stipendiary stewards of the relevant controlling body). The Commission is empowered to fix the remuneration of the stipendiary stewards and amounts to be paid towards the reimbursement of expenses incurred by stipendiary stewards. (at p503)

13. Under s.41 appointment of officers of clubs or controlling bodies is to be subject to the approval of the Commission and any appointment without that approval is to be void. Under subs. (3) the Commission may in its absolute discretion refuse to approve any appointment and under sub-s. (4) "if it considers it in the public interest so to do, the Commission may by notice in writing require the committee or controlling body to dispense with the services of any prescribed officer (that is, a stipendiary steward) who is specified in the notice, and the committee or controlling body shall then dispense with the services of that officer within the time specified". Under sub-s.(6) the committee or controlling body is prohibited from dispensing with the services of a prescribed officer without the prior approval of the Commission. Under sub-s.(8) no action shall lie by any person against the Commission or against the club or controlling body for any loss or damage sustained by reason of a refusal of the Commission to approve of the appointment of that person or the dispensing with his services as a prescribed officer. (at p503)

14. Under s.42 persons who are aggrieved by a prescribed decision of a steward, a committee or a controlling body may appeal to the Commission which is then to conduct a hearing. The term "prescribed decision" is defined in sub-s.(10) as meaning a decision with respect to the suspension or disqualification or the registration or licensing of a galloping-horse, a trotting-horse or a dog used for coursing or the owner or trainer thereof or the rider or driver of a galloping-horse or a trotting-horse. The decision of the Commission is to be final and without appeal. Under s.45 the Commission may in certain stated circumstances declare that a club is to be wound up in accordance with the section. There is no procedure prescribed and there are no express provisions for challenging any such declaration. Under s. 45AA the Commission may approve amalgamations of two or more clubs. (at p504)

15. Under Div.IV the Commission is to maintain a "Racing Assistance Fund" out of which it is authorized to make payments to racing clubs and coursing clubs, subject to such conditions as it thinks fit. (at p504)

16. Part IV in its present form deals with totalizator betting and sets up the Totalizator Agency

Board, of which the Chairman of the Commission is to be the chairman. That Board is given a variety of powers and appears to function independently of the Commission, save for the provision relating to the common chairman. However, under Div. III the Commission has power to grant a committee (that is, a club) a totalizator licence authorizing the committee to conduct totalizator betting on racecourses as specified. A committee of a registered club which holds such a totalizator licence may request the Board to conduct totalizator betting on its behalf. Under s. 57ZF the conduct of totalizator betting on a racecourse (not being conducted by the Board) is to be under the direct supervision of such persons as the Commission appoints. There are various provisions relating to offences by persons who conduct totalizator betting except as authorized and various offences which may be committed by persons employed in totalizators. The Totalizator Agency Board is entitled to make rules regulating its practice and procedure and prescribing terms and conditions with respect to making of bets on totalizators. In earlier legislation corresponding powers with respect to totalizators were conferred upon the Commissioner of Police and later on the Commission. (at p504)

17. Part V deals with betting by and with bookmakers. By s. 59 the Commission is authorized to grant or refuse applications for registration as a bookmaker or a bookmaker's clerk. Bookmakers' certificates of registration are automatically cancelled upon conviction of certain specified offences, and under s. 60AA, if the Commission is satisfied upon an inquiry that a bookmaker has contravened any of the provisions of the Act or has failed to obey certain other rules, it may cancel or suspend his registration, and under sub-s. (7) a person aggrieved by the cancellation or suspension of his registration may appeal to a stipendiary magistrate. Under s. 61 (1) the Commission is obliged to give reasons for refusing to renew the registration of a person who holds a subsisting certificate of registration as a bookmaker and then under sub-s. (3) there is a right to appeal to a stipendiary magistrate. Save in the case of refusal to renew, the Commission is not obliged to assign any reasons for refusing an application. (at p505)

18. Part VI deals generally with unlawful gaming and Div. I of that Part contains certain exemptions. Division II deals with lotteries and the sale in Tasmania of tickets in lotteries conducted elsewhere, and arrangements with respect thereto appear to be under the control of the Treasurer and not the Commission. Under other sections provisions are made with respect to football pools and these also appear to be under the control of the Treasurer and not the Commission. The Commission however may authorize persons to conduct raffles and other kinds of gaming activities or gambling games. (at p505)

19. Each part of the Act seems generally to stand upon its own feet as a separate legislative scheme for the regulation of a particular kind of gambling. In this legislative context it appears to me that the proper approach must be to look separately at the powers conferred upon the Commission in relation to each separate topic, although for some purposes reference may legitimately be made to other parts of the Act. For example, it does not seem to me that, whatever the proper construction of s. 39 might be, the Commission could give a warning-off notice to a member of the committee of a club or to a bookmaker consistently with the specific provisions with respect to such persons. That does not however necessarily throw much light upon the general question whether in relation to other persons the power given must be exercised subject to compliance with the principles of natural justice. (at p505)

20. In the Act as introduced in 1952 ss. 66 and 67 authorized the Commission to approve premises in any city or town at which bookmakers might carry on their business, in effect as betting shops. Section 68 contained provisions giving powers with respect to such premises to the Commission in

substantially the same terms as s. 39 (3), (5) , (7) and (8) . Section 66 came from s. 9 of the Bookmakers Act, 1932 where the power to approve premises was given to the Commissioner of Police and in 1934 the supervision and control of such premises was given to the Betting Control Board. There was in the Bookmakers Act, 1932, as amended, no counterpart to s. 68. Sections 66, 67 and 68 were repealed in 1974. (at p506)

21. Sections 100 and 101 of the Racing and Gaming Act contain further provisions concerning the powers of committees or governing bodies of clubs having control of premises where sporting events are held. Under s. 100, if the committee has reasonable grounds for believing that a person is an unlawful bookmaker or is engaged in betting unlawfully, it may cause that person to be removed. Under s. 101 a club may by notice in writing warn a person known to the committee to be, or suspected by it of being, an unlawful bookmaker, or known to it to make, or suspected by it of making, a practice of betting unlawfully, not to attend at any sports promoted by that club and that he will not be admitted. It is an offence for such person to enter the premises and he may be arrested by a police officer without warrant. Section 102 provides that ss. 100 and 101 extend to any ground of which the club has control, whether or not it is owned by the club or is at any other time subject to a right of public use or entry, and that those sections are to be in addition to and not in derogation of any other powers of the club. These provisions are taken directly from ss. 24, 25 and 26 of the Gaming Act, 1935, though they have an earlier history. They would have a wider operation than s. 39, which applies only to racecourses. (at p506)

22. The provisions which are now s. 39 (1), (5) , (6), (7) and (8) are derived from s. 29 of the Totalizator Act, 1935. Since the decision in Cowell v. Rosehill Racecourse Co. Ltd. [1937] HCA 17; (1937) 56 CLR 605 there has been no doubt that a member of the public, admitted to such places as theatres or racecourses, has only a revocable licence from the owner or lessee of the premises, and that revocation, even in breach of contract, is effective so that such person may be required to leave the premises. Needless to say the owner of such premises may refuse to admit any person without assigning any reason. Members of clubs which own or occupy premises are in a special position. That case however was decided after s. 29 of the Totalizator Act was enacted and its provisions may have been thought necessary to ensure that degree of control: cp. Hurst v. Picture Theatres Ltd. (1915) 1 KB 1 ; moreover the section created a new criminal offence. (at p506)

23. In the Racing and Gaming Act, 1952 sub-ss. (2), (3) and (4) were introduced to give s. 39 its present form. It does not however follow that the Commission's powers are to be treated for all purposes, or for any purpose, as being of the same nature as those which a club as owner or occupier may have, whether under the statute or at common law. Their mere co-existence now in the same section would not warrant such a conclusion in view of the history of the legislation. (at p507)

24. In what I have said above concerning the structure of the Act and the history of the legislation I have not attempted to follow in detail all the changes that have been made but what I have set out is I think sufficient to demonstrate that one cannot find a common theme running through the Act or a common scheme with respect to each of the several functions of the Commission. (at p507)

25. The detailed procedural requirements which one finds with respect to clubs, racecourses and bookmakers all have a separate origin in earlier individual Acts. Their aggregation in the present Act does not appear to me to warrant the conclusion that, where in other parts of the Act powers are conferred upon the Commission without specific procedural requirements, the Commission is free in such cases to disregard the ordinary principles of natural justice. (at p507)

26. A member of the public who enters upon a racecourse with the consent of the owner or lessee of the land is vis-a-vis the owner no more than the holder of a revocable licence, which even in breach of contract the owner may revoke effectively so as to entitle him to eject the licensee. However that is not a complete description of the position of such a member of the public, because so long as he is present with the permission of the owner he does have a right as against all the world other than the owner to continue upon the premises and remain there in accordance with whatever the terms may be of the licence originally granted to him. Other persons attempting to eject him from the premises or to interfere with his permitted user would be guilty of trespass to the person and of assault. As against all the world, including the Commission, such a person is lawfully upon the land and entitled to remain there, but for whatever overriding statutory powers may be conferred upon the Commission as an organ of the government. (at p507)

27. Under s.39 the Commission is given power to order such a person to stay away from a specified racecourse or all racecourses for a specified or an indefinite period and the service of such a notice on him at a racecourse makes it an offence to remain thereon. It is also true to say that any member of the public has a legitimate expectation that upon payment of the appropriate charge he will be admitted to racecourses. They are in a practical sense "open to the public" and indeed by announcements and advertising their owners invite and seek to encourage the public to attend. This is not an expectation that the Commission will act in some particular way but an expectation by members of the public that they will be able to enjoy the right or liberty granted to them by the owner to go onto the racecourse, i.e. that they will be permitted to enter along with other members of the public in response to the owner's implied invitation. That expectation exists by reason of the nature of the premises and the fact that members of the public are invited to attend and freely admitted on payment of a stated charge. The fact that the owner may eject them even in breach of contract, though no doubt known to some racegoers, does not detract from that expectation, nor does the fact that the owner may refuse to admit any particular person without giving any reason. Section 39 (3) provides as it were an overriding exception or control which sets aside those rights and expectations. If an appropriate order is made it destroys the right of the member of the public presently upon a racecourse to remain there and if it is made at a time when he is not on a particular racecourse then it destroys his expectation of being entitled on payment of the appropriate charge to enter on the next appropriate occasion. If, like the present order, it is expressed in general terms in respect of all racecourses (including dog-racing courses) and for an indefinite period in the future, it puts the addressee at the disadvantage of being deprived of the opportunity available to all other members of the public of going upon such racecourses on payment of the usual charge. It is of course only an opportunity or an expectation and not a legally enforceable right in the sense that the individual member of the public cannot insist upon entering or remaining contrary to the will of the owner, though they may of course be entitled to damages for breach of contract and in that sense have some enforceable right. (at p508)

28. The concept of a "reasonable expectation" of some entitlement, i.e. an expectation that some form of right or liberty will be available, or will not be taken away without an opportunity for the subject to put his case to the relevant governmental authority armed with the compulsory power in question is a relatively recent development. It was first expressed by Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch 149 . In that case both Lord Denning M.R. and Widgery L.J. were disposed to regard a "legitimate expectation" as sufficient to confirm an entitlement to treatment in accordance with the principles of natural justice by the relevant governmental authority. This same view was repeated by Lord Denning M.R. in Breen v. Amalgamated Engineering Union (1971) 2 QB 175, at p 191 and with that view Edmund Davies L.J. agreed (1971) 2 QB, at p 195 . Again in Reg. v. Liverpool Corporation; Ex parte Liverpool Taxi

Fleet Operators' Association (1972) 2 QB 299, at p 304 Lord Denning M.R. referred in argument to a "settled expectation" as something which conferred relevant rights, and again in Reg. v. Barnsley Metropolitan Borough Council; Ex parte Hook (1976) 1 WLR 1052, at p 1058; (1976) 3 All ER 452, at p 457 , Scarman L.J., after quoting from Professor de Smith's work Judicial Review of Administrative Action, 3rd ed. (1973), p.197, said that what is there suggested with respect to the duty to observe principles of natural justice in respect of the non-renewal of licences because of the existence of an expectation applies with equal force to revocation of such licences. (at p509)

29. It cannot be said that the true extent of the notion that an expectation may be the foundation of a right to compel observance of the relevant principles of natural justice has yet been fully worked out or stated with precision. However we are not here concerned with an expectation of the kind that is referred to in those cases, i.e. an expectation that the relevant governmental authority will exercise its statutory power in a particular manner. What we are concerned with is an expectation on the part of members of the public that they will continue to receive the customary permission to go on to racecourses upon the payment of a stated fee to the racecourse owner. Members of the public do, it seems to me, expect that if they present themselves at the gate of a football ground or a racecourse or a dog-racing course and tender the stated entrance fee that they will be admitted, because generally speaking it is in the interests of the owner or occupier that they should in fact attend the relevant game or meeting, and upon receiving such permission they then have what is properly called a right as against all the world (save the owner) to remain there for the duration of the relevant event. (at p509)

30. The statutory power which s. 39 (3) gives to the Commission is one which enables the Commission to destroy that right, as well as to destroy the expectation that they will on future occasions be granted the like right in respect of subsequent race meetings. (at p509)

31. I have so far spoken only of members of the public but it is clear enough that members of a racing club which owns or operates a racecourse have a proprietary interest in the premises and, subject to the rules of the club, a right to go upon and use the premises. If an order were made under s. 39 (3) directed to a member of a club, that would destroy, or suspend, that proprietary right. It is not to be supposed that it is in the intention of the legislature merely by the use of general words such as this to enable the Commission to destroy or suspend proprietary interests properly so called without compliance with the principles of natural justice. (at p510)

32. I do not think that this is a case in which one can properly say that the legislature has in fact so dealt with the manner in which this particular power is to be exercised as to exclude the requirements of natural justice. In relation to bookmakers, e.g. there is a series of express provisions dealing with the manner in which the statutory powers of suspension, cancellation and renewal of registration may be exercised adversely. However in relation, e.g. to initial registration of bookmakers, it would not be possible to say that it could not be refused save in accordance with the principles of natural justice. One would there have an express selection of some powers concerning bookmakers in respect of which detailed requirements were made and other powers in respect of which no procedural requirements were provided. That is the kind of situation which might warrant a conclusion that the legislature had expressly adverted to the matter and provided for adherence to the principles of natural justice in some circumstances though not in others. It is however not possible to treat the provisions of Pt III in that way. It contains a miscellaneous collection of provisions bearing no common quality and not linked in any way with provisions with respect to particular persons such as bookmakers, racecourse owners or the like. This particular paragraph gives to the Commission a power applicable, at least prima facie, to all persons including members

of the public generally. The fact that particular procedural requirements apply with respect to the cancellation, suspension or renewal of bookmakers' registration does not throw any light upon the question of whether the legislature has expressed a clear intention that the power in s. 39 (3) is not subject to the observance of the relevant principles of natural justice. (at p510)

33. It was urged in argument that racing, presumably including trotting and dog-racing, is particularly prone to attracting undesirable persons who engage in improper activities and that the public are entitled to protection from those various activities and that powers of this kind were essential for the protection of the public and that, if they were limited by the requirement to observe the principles of natural justice, the public would be exposed to the nefarious activities of some persons who customarily attend race meetings. It appears to me that this argument substantially overstates the matter. No doubt occasions occur on racecourses as well as at other sporting events where objectionable behaviour by some members of the public or others who attend has to be dealt with promptly, but basically that is a matter in the hands of those controlling the relevant premises. It is scarcely to be supposed that the Commission's powers would ordinarily be used for that purpose. It is indeed somewhat fanciful to suppose that all the members of the Commission could be found on the one racecourse, could be gathered together upon notice so as to hold a properly constituted meeting and direct the secretary of the Commission to draw up a written order to be served upon some person whose behaviour was objectionable to the public generally. No doubt it is theoretically possible that this could happen, but it is so remote a contingency that it cannot in my view influence the conclusion as to whether the Commission in the exercise of this power is subject to the allegedly onerous requirements of compliance with the provisions of natural justice. (at p511)

34. There is no doubt that the owner of a racecourse, whether a club or some other person, may lawfully refuse admission to any person at all, save a member, and that in accordance with the decision in Cowell v. Rosehill Racecourse Co. Ltd. [1937] HCA 17; (1937) 56 CLR 605 may subsequently effectively rescind or terminate the licence granted and thereupon eject or cause to be ejected such person. In deciding to exclude or to terminate the licence of any such person the owner of the premises is under no obligation to provide reasons or give the person concerned any opportunity to make representations or provide any kind of a hearing. The principles of natural justice do not apply to the exercise of private rights in respect of property. They apply to the exercise of governmental powers and particularly to the exercise of statutory powers, and also to the powers of committees of clubs in respect of members. The fact that this statutory power has been inserted in a section which previously dealt only with matters supplementary to private rights of property, does not appear to me to alter the character of the Commission's power. The committee of a club is given by the statute no more than the same rights which it would otherwise have had at common law, or at most it may be said that those rights have been modified by the requirement of written notice which would not be necessary for the exercise of their common law rights, and that failure to comply with such notice is made a criminal offence, which again it would not be at common law. It is not necessary for present purposes to decide whether the committee, if all that it has now is a statutory power, would be limited to its exercise in accordance with the principles of natural justice, but even if it were not, that would not in my view warrant a like conclusion with respect to the Commission's powers, even so far as they overlap the powers of the Committee. (at p512)

35. It was said on behalf of the applicant that his position was adversely affected by this order, in the first place, because the issue of such a warning-off notice casts a serious aspersion on his character. As Neasey J. pointed out in his judgment it has been held that to say of a person that he has been "warned-off" a racecourse is defamatory (see Cookson v. Harewood (1932) 2 KB 478 (n),

at p 482). It was also said that the applicant had suffered in that, being a man who both obtained pleasure and financial reward from betting, he was now excluded from the right enjoyed by members of the public of betting with bookmakers on racecourses. That is properly to be described as a right because the statute has made lawful betting by members of the public with bookmakers, but only on racecourses and to that extent the applicant is denied the opportunity which other members of the public have. It should be observed that the power given to the Commission by s. 39 (3) is primarily a right to forbid persons entering any particular racecourse or all racecourses including trotting and greyhound-racing courses. There is no right in the Commission to order that person to leave such premises, although it is made an offence for a person upon whom an order has been served when he is on a racecourse, to remain there. There is indirectly a power to require such a person to depart in the sense that if he is served when upon a racecourse there must be paid or tendered to him any sum paid by way of entrance money and if he does not then depart he commits an offence. That power is quite different from that of the owner of the premises who may use reasonable force to eject a person whose licence to remain has been revoked. (at p512)

36. The judgments of the majority in the Court below err in my opinion in placing too much emphasis upon the administrative and non-judicial character of the Commission and its functions and in drawing from the presence in other parts of the Act of express procedures with respect to hearings and the like in relation to the licensing of bookmakers, clubs and racecourses, an inference that where other powers are given to the Commission no such requirements are to be implied. That approach appears to me to be contrary to the principles as stated in Twist's Case [1976] HCA 58; (1976) 136 CLR 106 and as stated in the joint judgment of Dixon C.J. and Webb J. in Commissioner of Police v. Tanos (1958) 98 CLR, at pp 395-396 . This is especially so when one bears in mind the history of this legislation and the separate origins of the various sets of provisions. Such an approach is one likely to be fraught with difficulty and danger. It is perhaps an over simplification to regard that process of reasoning as an application of the maxim expressio unius est exclusio alterius but it nonetheless has the same kind of dangers and calls for the same kind of caution as does the use of that maxim. The fact that in provisions dealing with one topic, e.g. bookmakers, one finds that the legislature lays down a procedure for giving grounds of proposed action and providing an opportunity for hearings and legal representation before action is taken, may be a basis for concluding that, where in relation, e.g. to the initial granting of licences to bookmakers, no such provision is made, there is no requirement to comply with the principles of natural justice in the exercise of that particular power. It is quite another thing to infer from the fact that provision is made for hearings in relation to the three kinds of licensing to which I have referred and that none is made in respect of the power to order persons to refrain from entering upon a racecourse, either for a specified meeting or indefinitely in respect of all racecourses in Tasmania, but the legislature has intended to exclude the principles of natural justice. It does not appear to me that there is any safe basis for inferring from such provisions that the legislature was dealing exclusively with the subject of the obligation of the Commission to adhere to the principles of natural justice and that accordingly they were not applicable elsewhere. It cannot in my opinion be said that such intention "satisfactorily appears from express words of plain intendment". (at p513)

37. It was urged upon us that occasions would arise when urgent action would have to be taken by the Commission to protect the public and those engaged in legitimate racing activities from the nefarious activities referred to above. I am prepared to assume that occasions may arise where urgent action is necessary by the Commission, as distinct from the committee of a club, but I do not think that that is a sound basis for excluding altogether all the requirements which natural justice would otherwise require. (at p513)

38. The cases show clearly that the principles of natural justice do not comprise rigid rules, but the requirements of compliance with those principles will depend upon the particular circumstances. "Fairness" may require, or be satisfied by, different procedures even by the same statutory authority in different circumstances. Some of the earlier authorities for this view are referred to in the following passage from the judgment of Kitto J. in Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation (1963) 113 CLR 475, at pp 503-504 :

> "Even if the Board is bound in law to act 'in the spirit and with the sense of responsibility of a tribunal whose duty is to mete out justice' (to quote Lord Haldane's words in Local Government Board v. Arlidge (1915) AC 120, at p 132) it does not follow (and his Lordship proceeded immediately to say so) that the procedure of each such tribunal must be the same: 'what that procedure is to be in detail must depend on the nature of the tribunal' (1915) AC 120, at p 132 . And notwithstanding what Lord

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said in Board of Education v. Rice (1911) AC 179 about 'always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view' (1911) AC, at p 182 , the books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject-matter: cf. Ridge v. Baldwin [1963] UKHL 2; (1964) AC 40, at p 73 . As Tucker L.J. said in Russell v. Duke of Norfolk (1949) 1 All ER 109 , in a passage approved by the Privy Council in University of Ceylon v. Fernando (1960) 1 WLR 223, at p 231; (1960) 1 All ER 631, at p637, there are no words which are of universal application to every kind of inquiry and every kind of tribunal: 'the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth' (1949) 1 All ER, at p 118. What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances." (at p514)

39. It would not I think be in accordance with the requirements of natural justice to meet an emergency situation by an order such as was made in the present case, that is, an order made without notice and without opportunity to make representations, but which has the effect of excluding the applicant from all racecourses in Tasmania for an indefinite period. That which is truly an emergency situation can properly be dealt with by short-term measures which are themselves sufficient and appropriate to cope with such an emergency - see the passage from Commissioner of Police v. Tanos (1958) 98 CLR, at pp 395-396 quoted above. If one postulates such a person as the Solicitor-General contemplated in argument, i.e. one engaged in doping, bribery and rigging of races, it may, in circumstances of likely immediate detriment to the public, be appropriate for the Commission to issue a warning-off notice without notice or stated grounds but limited to a particular meeting or meetings over a short period of time, coupled with a notice that the Commission proposed to make a long-term order on stated grounds and giving an opportunity for the person concerned to make representations on the matter to the Commission. There would then be a true opportunity for the person affected to bring forward any material to the Commission which he thought helpful to him and to seek to disabuse the Commission of any misapprehensions which he thought it entertained. Courts may issue ex parte injunctions and that involves an order affecting the rights of defendants without giving them an opportunity to be heard. The power is of course used sparingly and is always so exercised that the earliest practicable opportunity is given to the defendants to appear before the court to urge that the order be rescinded. No one has ever doubted that that is a proper exercise of judicial power in accordance with all the requirements applicable to a court properly so called. By way of analogy emergency situations could be similarly dealt with by the Commission, cp. the observation of Lord Wilberforce in Wiseman v. Borneman (1971) AC, at p 318 . There is no basis in my opinion for saying, as was submitted by the Solicitor-General, that the public interest requires that a person being warned-off should not be accorded an opportunity of speaking in his own defence. That opportunity can readily be provided without endangering the public interest in any way. (at p515)

40. This is not to say that the Commission is obliged to adhere to the rules of evidence or conduct formal hearings or to be satisfied according to any stated onus of proof. It is clear that the Commission has an "absolute discretion", in the sense that they may devise their own criteria and no appeal is available against their decision, whether it be mistaken or not. They are of course not protected by the absolute nature of their discretion in a case where their decision is affected by bias or interest. (at p515)

41. The very width of the power given by s. 39 (3) enables it to be used for the protection of persons legitimately engaged in racing activities and of the general public, while at the same time adhering to the principles of natural justice. Fairness requires that the person affected should, save in an emergency, be given notice by the Commission of its intention to issue a warning-off notice and of the grounds for that proposed action and should be afforded an opportunity to make representations to the Commission on his own behalf, which it must consider before taking action. A notice effective for an indefinite period should not be issued without compliance with at least those procedural requirements. I do not think that fairness requires in this context an oral hearing though in some circumstances the Commission may well find that it cannot resolve inconsistencies between its information and written submissions from the person concerned without such a hearing. It is however for the Commission itself to devise its own procedures in the light of its obligation to act fairly. It should however not act on information the general nature of which is not revealed to the person affected. (at p516)

42. I have dealt above with the merits of the matter because counsel for both the applicant and the

respondent agreed that the question of whether this was a case for special leave depended to some extent upon an analysis of the merits. I am of opinion that it is a case in which special leave should be granted because it was conceded it raised a matter of importance in the administration of the Act not confined in its application to this particular case and because it raises what is, at least in some respects, a novel point in relation to the principles of natural justice. (at p516)

43. I am therefore of opinion that special leave should be granted and the appeal allowed. (at p516)

ORDER

Application for special leave to appeal granted.

Appeal allowed. Order of the Full Court of the Supreme Court of Tasmania set aside and in lieu thereof order that the application for a writ of certiorari be granted.

Matter remitted to the Supreme Court of Tasmania there to be dealt with according to law.

Respondents to pay applicant's costs of the application to this Court, of the appeal to the Full Court of the Supreme Court of Tasmania, and of the application before Chambers J.

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