



REPORT OF THE

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO

RULES OF HARNESS RACING 1999

Presented by the Hon Bob Wiese, MLA (Chairman)

and

Hon Tom Helm MLC (Deputy Chairman)

Report 47

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

November 19 1987

Terms of Reference:

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament; or*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

Members as at the time of this inquiry:

Hon Bob Wiese, MLA (Chairman)
Hon Tom Helm MLC (Deputy Chairman)
Hon Ray Halligan MLC
Hon Simon O'Brien MLC
Hon Jim Scott MLC
Mr Iain MacLean, MLA
Mr Norm Marlborough, MLA
Mr Bill Thomas, MLA

Staff as at the time of this inquiry:

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ISBN 0 7309 8958 5

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REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO:

RULES OF HARNESS RACING 199

1 EXECUTIVE SUMMARY

- 1.1 The Committee raised a number of concerns regarding the *Rules of Harness Racing 1999* ("Rules"). The Committee's concerns are set out in its correspondence to the Western Australian Trotting Association ("WATA") being "Annexure A" and "C" to this report and its letter to the then Minister of Racing and Gaming, Hon Max Evans MLC, dated November 9 1999 being "Annexure E".
- 1.2 The Committee's principal concern was with the apparent lack of legislative authority for appointed officials of the WATA to demand breath and urine samples for the purpose of obtaining evidence of offences committed under Rules 250, 251 and 252.
- 1.3 As a result of its concerns the Committee moved a "protective" motion for disallowance of the Rules. The motion was moved in the Legislative Council on Tuesday October 19 1999.
- 1.4 The Committee was satisfied with the written undertakings provided to it by the WATA in which the Association agreed to amend the Rules in a manner acceptable to the Committee. The WATA also agreed to bring to the attention of the Minister for Racing and Gaming, the Committee's concerns with the apparent lack of legislative authority for appointed officials of the WATA to demand breath and urine samples. The WATA agreed to recommend to the Minister that an appropriate amendment be made to the Act to put the matter beyond doubt. The written undertakings are contained in correspondence from the WATA dated October 27 and November 10 1999, being "Annexure B" and "D" respectively.
- 1.5 Due to the Committee's concerns being adequately addressed in the written undertakings from the WATA, the Committee resolved to seek the leave of the Legislative Council to remove its motion for disallowance of the Rules. Leave was granted and the motion was withdrawn on Tuesday November 10 1999.

- 1.6 The Committee wrote to the Minister by letter dated November 9 1999 (“Annexure E”) to draw to his attention its concerns with the apparent lack of legislative authority for appointed officials of the WATA to demand breath and urine samples. The Committee recommended that the Minister take the necessary steps to amend the Act to specifically provide for this power and to ensure that appointed officials carrying out their duties were protected from personal liability in the *bona fide* exercise of such a power.
- 1.7 The Minister, Hon Norman Moore MLC¹, responded by letter dated January 27 2000, being “Annexure F” to this report. The Minister was not prepared to amend the Act to provide stewards of the WATA with the power to demand breath and/or urine samples. However, the Minister did acknowledge that the By-laws may require amendment to clarify the power of the Controlling Body or stewards to:
- 1.7.1 Control the use of alcohol and other drugs at race meetings; and
- 1.7.2 Discipline persons, charged under Rule 238 in the event that a request to volunteer a bodily sample is met with a refusal.
- 1.8 The Committee remains concerned that the absence of a requirement contained in the Act to submit a sample of breath and/or urine on demand may result in any penalties imposed being found beyond the power of the WATA if the matter is tested in the courts.

¹ Hon Norman Moore MLC replaced Hon Max Evans MLC as Minister for Racing and Gaming on December 22 1999.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO:

RULES OF HARNESS RACING 199

2 INTRODUCTION

- 2.1 In the exercise of its scrutiny function, the Committee reviewed the *Rules of Harness Racing 1999* ("Rules") created pursuant to the provisions of the *By-laws of the Western Australia Trotting Association* ("By-laws"). The By-laws comprise the First Schedule to the *Western Australia Trotting Association Act 1946* ("Act").
- 2.2 Under the Committee's Joint Rules, if the Committee is of the opinion that a matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House. It is also the function of the Committee to consider and report on any regulation that appears not to be within the power of the enabling legislation.

3 BACKGROUND TO THE NEW RULES

- 3.1 The Rules comprise a document of 157 pages and incorporate a total of 379 rules being a combination of "Local Rules" retained from the previous Western Australian Rules and rules that have been adopted by five States. These are referred to colloquially as "National Rules". According to the explanatory memorandum provided to the Committee by the WATA in support of the Rules², the Rules:
- 3.1.1 Are essentially the same as the rules adopted by the Controlling Bodies in New South Wales, Victoria, South Australia, Queensland and Tasmania;
 - 3.1.2 Are based on the previous Rules pertaining to harness racing in New South Wales;
 - 3.1.3 Were developed over a two year period by the Australian Harness Racing Council Rules Sub-Committee ("AHRC");

² Explanatory Memorandum attached to the letter from the WATA dated October 4 1999, pp. 1-2.

- 3.1.4 First came to the attention of the WATA in September 1998 when it reviewed the rules relating to breeding. The WATA became further involved when the Chairman of Stewards attended a meeting of the AHRC on January 17 1999; and
- 3.1.5 Were adopted by resolution of the Committee of the WATA at its meeting on July 13 1999.
- 3.2 The Rules were published in the *Government Gazette* on August 5 1999 and tabled in the Legislative Assembly on August 17 1999. The Rules became operative on September 19 1999.³

4 LEGISLATIVE FRAMEWORK

- 4.1 Section 7 of the Act provides for the making of By-laws. The By-laws are contained in the First Schedule to the Act. Although the By-laws form a part of the primary legislation as a Schedule to the Act, the By-laws can be created and amended in a manner not unlike the making of subordinate legislation and may come into force on the date of gazettal. The By-laws may be repealed, amended or created by absolute majority of the committee of the WATA without the requirement of full Parliamentary debate as would be the case with an amendment to a section of the Act. Section 7 of the Act states in part:

“7.(1) The by-laws contained in the First Schedule to this Act shall be the first by-laws of the Association.

(2) The Committee by an absolute majority in number of the Committee may from time to time amend or repeal such by-laws and make new by-laws not inconsistent with this Act which are necessary or convenient for carrying out or generally giving effect to the purposes of this Act.

(3) Any such new by-law may from time to time be repealed by any other by-law.

(4) Every such amendment or repeal of a by-law and every such new by-law shall be reduced into writing and shall be signed by the President.

(5) ...

(6) ...”

³ Explanatory Memorandum attached to letter from the WATA dated July 19 1999, p.1.

4.2 The By-laws provide for the making of Rules for the conduct of Harness Racing. By-law 59 states:

“59. The Committee shall have power from time to time to make, alter and repeal rules for –

- (a) determining the terms and conditions under which races shall be conducted, whether on property owned, leased or controlled by the Association, and/or upon any property owned, leased or controlled by an affiliated club;
- (b) determining the rules and conditions to be observed by owners, nominators, riders, drivers, competitors, trainers, and other assistants before, during or after any race meeting, including nominations;
- (c) generally determining such Rules of Racing applicable before, during and/or after the actual racing as the Committee in its absolute and unfettered discretion thinks fit to lay down or prescribe;
- (d) providing for penalties, suspensions, and disqualifications;
- (e) providing for the payment of license fees, registration fees, owners, trainers, riders, drivers and assistants’ fees; transfer fees; nomination and acceptance fees and all other fees and charges which the Committee in its absolute discretion think fit to impose;
- (f) determining the terms and conditions upon which persons shall be allowed to be and/or remain on any course whereon a trotting race is being conducted.

Every person who nominates, owns, leases, trains, rides, or drives a horse or has any share, interest, or part in the nomination, ownership, lease or training of a horse and every other class of person who purports to be referred to in and dealt with by any Racing Rule made under this by-law shall be absolutely bound thereby, whether the same is or is not irregular or is or is not ultra vires of the Committee.

The provisions of section thirty-six of the Interpretation Act 1918-1938, shall apply to and in respect of any Rule of Racing made after the commencement of this Act and to any alteration or repeal thereof and to an in respect of any alteration or repeal of any existing Rule of Racing as if such Rule of Racing or such alteration or repeal of a Rule was a new by-law made under this Act.”

- 4.3 The final paragraph of by-law 59 provides for the disallowance by either House of Parliament of any Rule of Racing as if it were a by-law made under the Act.
- 4.4 In the absence of a specific provision in by-law 59, section 42(2) of the *Interpretation Act 1984* provides that either House of Parliament may pass a resolution disallowing any “regulations”. Under sub-section (8) “regulations” include rules, local laws and by-laws. By reason of the *Interpretation Act 1984* and its Joint Rules, the Committee has jurisdiction to scrutinise and recommend disallowance of the Rules in whole or in part.
- 4.5 The Committee is of the view that the penultimate paragraph of by-law 59 in which specified persons are purportedly bound by a rule “whether the same is or is not irregular or is or is not *ultra vires* of the Committee” is clearly beyond power and is *ultra vires* the Act. This matter has previously been drawn to the attention of the WATA and is one of the issues dealt with in the Committee’s Forty-Sixth Report⁴.

5 CHRONOLOGY OF EVENTS

- 5.1 The Rules were first considered by the Committee at its meeting on Monday September 20 1999. The Committee was not satisfied with the explanatory memorandum provided by the WATA which comprised two paragraphs and requested the WATA to provide a more detailed document in accordance with the requirements of Ministerial Directive 6/96.
- 5.2 The Committee also resolved to move a “protective” motion for disallowance of the Rules to provide it with sufficient time to adequately scrutinise the Rules once the more detailed explanatory memorandum had been received. Notice of the motion was given on Tuesday October 12 1999. The motion was moved in the Legislative Council on Tuesday October 19 1999.⁵
- 5.3 An adequate explanatory memorandum attached to a letter from the WATA dated October 4 1999 was received prior to the Committee considering the Rules in detail at its meeting on Monday October 25 1999. At that meeting the Committee identified several concerns with the Rules and resolved to write to the WATA requesting amendments to several of the Rules. The Committee also expressed its concerns with the apparent lack of legislative authority for appointed officials of the WATA to demand breath and urine samples for the purpose of obtaining evidence of offences committed under Rules 250, 251 and 252. A copy of the letter from the Chairman to

⁴ Forty-Sixth Report of the Joint Standing Committee on Delegated Legislation in relation to the *By-laws of the Western Australian Trotting Association – Notice of Amendment*, November 1999.

⁵ Notice Paper 19 of the Legislative Council, Wednesday October 20 1999 (Tabled Paper 98), p.8.

the WATA dated October 27 1999 detailing the Committee's concerns is attached to this report and marked "Annexure A".

- 5.4 The Chief Steward of the WATA, Mr Mathew Skipper, responded by facsimile dated October 28 1999, a copy of which is attached and marked "Annexure B". In that correspondence, the WATA provided the Committee with its written undertaking to amend the Rules in the manner suggested by the Committee. In relation to the issue of the authority to demand breath and urine samples, the WATA agreed to recommend to the responsible Minister, that amendments be made to the Act to remove any legal doubt regarding the legislative authority to carry out these duties.
- 5.5 The facsimile from Mr Skipper advised that the WATA had received legal opinion to the effect that legislative authority to require a person to undergo breath and/or urine testing was contained in by-law 59(b). This by-law provides that the Committee of the WATA may make rules "*determining the rules and conditions to be observed by owners, nominators, riders, drivers, competitors, trainers and other assistants before, during or after any race meeting, including nominations.*"
- 5.6 The Committee considered the facsimile from Mr Skipper at its meeting on Monday November 8 1999. In the Committee's opinion, by-law 59(b) does not provide legislative authority for the WATA to make rules requiring a person to provide a sample of their breath and/or urine. The by-law is expressed in broad language and makes no mention of the power to require a person to submit a sample of breath and/or urine on demand.
- 5.7 The Committee notes that similar powers exercised by, or at the direction of police, for the purpose of taking breath, urine and blood samples from drivers of motor vehicles are the subject of discrete legislative provisions enacted through Parliament. The *Road Traffic Act 1974*⁶ and the *Rail Safety Act 1998*⁷ are examples of legislation, which provide for a legal requirement to submit breath, urine and blood samples in specified circumstances.
- 5.8 The taking of bodily samples from people without their consent is a significant infringement of a person's liberty and without clear legislative authority, a gross infringement of their rights. The taking of a sample without consent would constitute an assault. In the Committee's view, the taking of bodily samples is a matter which ought properly be dealt with by an appropriately worded provision of the Act. The Committee's preference is that the Act be amended, as this will require the matter to come before the Parliament.

⁶ Section 66 of the *Road Traffic Act 1974*.

⁷ Clause 11 of the First Schedule of the *Rail Safety Act 1998*.

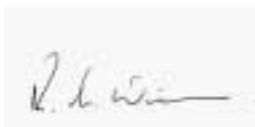
- 5.9 As the WATA agreed to recommend an amendment to the Minister so as to clarify the matter, the Committee was generally satisfied with the written undertaking provided by the WATA. One outstanding issue regarding Rule 182 was resolved by agreement with the WATA as evidenced in the Committee's letter dated November 9 1999 and the facsimile response from Mr Skipper dated November 10 1999, copies of which are attached as "Annexure C" and "Annexure D" respectively.
- 5.10 The Committee also wrote direct to the Minister by letter dated November 9 1999 to draw to his attention its concerns with the apparent lack of legislative authority for appointed officials of the WATA to demand breath and urine samples. The Committee recommended that the Minister take the necessary steps to amend the Act to specifically provide for this power and to ensure that appointed officials carrying out their duties were protected from personal liability in the *bona fide* exercise of these powers. A copy of the letter from the Chairman to the then Minister for Racing and Gaming, Hon Max Evans MLC, is attached as "Annexure E".
- 5.11 The Minister, Hon Norman Moore MLC⁸, replied to the Committee by letter dated January 27 2000, being "Annexure F" to this report. This was after the Committee's motion for disallowance had been withdrawn. In his reply the Minister advised the Committee that the Crown Solicitor's Office has confirmed that neither the Act nor the Rules of Harness Racing establish authority for WATA stewards to take bodily samples in circumstances where the person being requested to provide a sample refuses such a request.
- 5.12 However, the Minister was not convinced that it would be appropriate to amend the Act to provide for such a power. Instead, the Minister preferred to seek comment from the WATA regarding the appropriateness of charging a person under Rule 238 for declining a request to volunteer a bodily sample. This Rule states: "*A person shall not fail to comply with any order, direction or requirement of the Controlling Body or the stewards.*"
- 5.13 The Committee considered the Minister's reply at its meeting on February 28 2000. In the Committee's opinion, the "order direction or requirement" of the Controlling Body or stewards must be lawful before any sanction can be imposed under existing Rule 238. In the absence of a legal requirement similar to that contained in the *Road Traffic Act 1974* to submit a sample, the Committee's view is that any disciplinary proceedings brought under the current Rules against such a person for exercising his or her right to refuse to provide a bodily sample would be *ultra vires* the Act.

⁸ Hon Norman Moore MLC replaced Hon Max Evans MLC as Minister for Racing and Gaming on December 22 1999.

- 5.14 In the Committee's opinion such a result could expose the WATA and its stewards to possible legal action in the event that disciplinary proceedings were taken against a person under Rule 238 for refusing a request to provide a bodily sample. Rule 255 creates the offence of failing to comply with a rule. Rule 256 sets out the penalties available against an individual, club or body found guilty of an offence under the Rules. The penalties can be severe and include disqualification for a period or permanently.
- 5.15 The Minister appears to acknowledge the problem when he states in his correspondence:
- "It may be that the Act should be amended to clarify the power of the controlling authority or stewards to discipline a person charged under Rule 238 for declining a request to volunteer a sample. The rule making power provided for in by-law 59(b) is in general terms and makes no reference to controlling the use of alcohol or drugs at race meetings, or more particularly the provision of bodily samples."*
- 5.16 The Committee maintains its previous view that the most appropriate and effective manner of dealing with this problem would be to amend the Act to require a sample of breath and/or urine to be given on demand by a steward. A refusal to submit a sample in accordance with the requirement would constitute an offence.
- 5.17 An alternative to amending the Act to provide for the power to demand samples would be to amend by-law 59(b) to grant the Controlling Body power to make rules to control the use of alcohol and other drugs at race meetings. The by-law would not make it a requirement to submit a sample or grant a power to demand and take a sample without consent. It could empower the Controlling Body to make rules imposing sanctions in the event that a person refuses a reasonable request to volunteer a sample.
- 5.18 The Committee's view is that the class of persons to which a request for a sample may be made and therefore potentially affected by any sanction arising from a refusal, should be limited to persons that may effect the safety of a race meeting. These persons would include those directly involved in the activity of racing such as track and club officials, drivers and persons having the care and control of horses at the race meetings.
- 5.19 The Committee is concerned that this alternative to introducing a requirement in the Act to submit a sample may not be effective. This is because without imposing a positive requirement, the refusal to submit a sample would be within an individual's right.

6 CONCLUSION

- 6.1 As a result of the Committee's concerns with the Rules being satisfactorily addressed by the WATA, the Committee resolved at its meeting on Monday November 8 1999 to seek the leave of the Legislative Council to withdraw its motion for disallowance of the Rules. Leave was granted and the motion withdrawn on November 10 1999.
- 6.2 The Committee's acceptance of the written undertaking and the withdrawal of its motion for disallowance was communicated to the WATA by letter dated November 12 1999.
- 6.3 Subsequent to the withdrawal of the motion for disallowance the Committee received a response to its concerns from the Minister for Racing and Gaming, Hon Norman Moore MLC, dated January 27 2000.
- 6.4 The Minister was not prepared to amend the Act to provide stewards of the WATA with the power to demand breath and/or urine samples. However, the Minister did acknowledge that the Act may require amendment to clarify the power of the Controlling Body or stewards to:
- 6.4.1 Control the use of alcohol and other drugs at race meetings; and
- 6.4.2 Discipline persons, charged under Rule 238, in the event that a request to volunteer a bodily sample is met with a refusal.
- 6.5 The Committee remains concerned that the absence of a requirement contained in the Act to submit a sample of breath and/or urine on demand may result in any penalties imposed being found beyond the power of the WATA if the matter is tested in the courts.
- 6.6 The Committee trusts that its observations regarding the shortcomings of the Act and By-laws relating to the taking of breath and/or urine samples at race meetings will result in the Minister taking the necessary steps to ensure that appropriate amendments are made to the Act as soon as possible.
- 6.7 The Committee expresses its thanks to the Minister, to the WATA for its cooperation and to its Chairman of Stewards, Mr Matthew Skipper, for his assistance.



Hon Bob Wiese MLA, Chairman, March 29 2000

Annexure A



Joint Standing Committee on Delegated Legislation

Our Ref: 3534/38.
3535/23&36

27 October 1999

Mr M J Skipper
Chairman of Stewards
Western Australian Trotting Association
PO Box 6025
East Perth WA 6892

By facsimile: (08) 9221 2437

URGENT

Dear Mr Skipper

Rules of Harness Racing 1999 (Gazetted 5 August 1999)
Rules of Harness Racing 1999 - Notice of Amendment (Gazetted 27 August 1999)
Rules of Harness Racing 1999 - Notice of Amendment (Gazetted 3 September 1999)

I refer to your letters dated 9 August, 20 August and 11 October 1999 addressed to the Joint Standing Committee on Delegated Legislation ('Committee') in relation to the *Rules of Harness Racing 1999* ("Rules") and the two above named amendments to the Rules ("Amendment Notices").

The Committee considered the Rules and the Amendment Notices at its meeting on Monday 25 October 1999. The Committee had no concerns with the Amendment Notices. However, the Committee did have some concerns with some of the Rules and resolved to write to you expressing its concerns and requesting your urgent response.

Rule 23

The Committee is concerned that there is no time limit in relation to the prohibition in sub-rule (6) on the nomination for a race of a donor mare from which a fertilised ovum has been removed. As it currently stands, such a horse could never be nominated for a race once it has had a fertilised ovum removed. Is this the intent of the rule? If not, the Committee suggests that a specific time limit be provided.

Rule 52

There appears to be a minor typographical error in this rule in which the word steward is misspelt. The Committee requests that this be corrected.

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Joint Standing Committee on Delegated Legislation

Rule 90

The Committee is concerned that sub-rule (3)(c) requires an applicant to provide a copy of his or her police record to the Controlling Body. The same requirement is provided for in LR 90(3), LR 90B(3), LR 90C(3), LR 274(3)(b), LR282(2) and LR 284(3).

The Committee's experience with other subsidiary legislation is that it is usual for an applicant to provide a police certificate (formerly known as a "police clearance") which will include a record of criminal convictions with specific exceptions. These exceptions from disclosure will include childrens' court convictions, most spent convictions, probation, *nolle prosequi* and some matters dealt with under section 669 of the Criminal Code (WA). If no convictions are recorded then the certificate will indicate that no record exists of any criminal conviction in relation to that applicant.

The provision of a police certificate would avoid the problem that would appear to result from the above rules which require the production of a police record in circumstances where no such record exists. The Offender Information Bureau of the Police Department has indicated to the Committee's Advisory/Research Officer that a complete record of criminal convictions will only be provided to individuals who require their own personal record for court purposes. In all other cases, other than for police business and court purposes, a police certificate is provided.

Due to the fact that an applicant cannot readily obtain a copy of his or her complete record of criminal convictions, other than perhaps under the provisions of the *Freedom of Information Act 1992*, the Committee is of the view that the requirement for a police certificate should be sufficient for the purposes of the above rules. This could be achieved by a simple amendment to sub-rule 90(3)(c) by replacing the words "police record" with "police certificate".

Rule 182

The Committee accepts the denial of legal representation at a hearing subject to the discretion of the Stewards. However, the Committee is of the view that the rule should make it clear that if one party is given permission to have legal representation, then the other parties to the inquiry should also have this option as a matter of procedural fairness.

Local Rule 252

Under what legislative head of power are officials able to take a sample of breath, blood or urine for testing? The Committee is concerned that in the absence of clear legislative authority, the taking of or attempt to take such samples is *ultra vires* the *Western Australian Trotting Association Act 1946* ("Act") and may constitute an assault and subject the official and/or the WATA to an action in tort for damages and possible criminal prosecution. The Committee is concerned that the indemnity against claims provided for in LR 314B may not protect an official who has committed a criminal act.

The Committee strongly recommends that, in the absence of clear legislative authority, the Act be amended at the earliest opportunity to provide for the power for properly qualified officials to take samples and that these persons be protected from individual liability in the *bona fide* exercise of these powers by an appropriately worded section of the Act.

Local Rule 252E

Sub-rule (c) of this local rule deems that a person is taken to be "under the influence of alcohol or a drug" in circumstances "where the body tissue, gases or fluids of the person contain alcohol or drug." This would mean that **any** detectible level of alcohol or drug would result in the person being deemed to be "under the influence" and subject to penalty. This sub-rule has significant consequences in relation to rules 250, 251 and 252 and appears not to be the intent of the Rules given the Rules include the prescribed percentage of alcohol in LR 252B, the prescribed quantity of cannabis in LR 252C and the definition of "percentage of alcohol" in LR 252E(b). The Committee suggests that sub-rule (c) be clarified so that it is only when the levels exceed those set out in LR 252B that a person is taken to be "under the influence of alcohol or a drug."

Rule 267

The Committee is concerned with the very broad scope of this rule. The Committee understands the need for the Controlling Body to have the power to exclude undesirable persons from participating in harness racing in Western Australia including those persons who have been "warned off" in other jurisdictions. This power is provided in section 10 of the Act.

Section 3 of the *Criminal Code* (WA) defines offences as being of three kinds, crimes, misdemeanours, and simple offences. Crimes and misdemeanours are indictable offences. A person guilty of a simple offence may be summarily convicted by 2 justices in petty sessions. An offence not otherwise designated in the Code is a simple offence.

The Committee accepts that the Controlling Body should have the power of disqualification in relation to persons convicted of indictable offences. However, the Committee is concerned that even simple offences such as a conviction for minor traffic offences and the like may result in disqualification. The Committee is of the view that it would be prudent to make it clear in the rule what level of offence will trigger a disqualification upon conviction.

As you are aware from my letters to you dated 24 September, 13 October and 21 October 1999, the Committee has moved "protective" motions for disallowance against the three pieces of subordinate legislation. As indicated above, the Committee has no concerns with the two Amendment Notices and has resolved to seek the leave of the Legislative Council to withdraw the motions for disallowance of these Amendment Notices.

In relation to the Rules, the Committee may consider also seeking leave to withdraw its motion if its concerns with the Rules are satisfactorily addressed in your reply and a suitable written undertaking is received in which the WATA agrees to amend the Rules in a manner acceptable to the Committee as soon as possible. Such an undertaking should include an agreement that the rules of concern to the Committee will not be relied upon in the interim as the basis for a prosecution. I suggest that you include in your reply the amended wording of the rules of concern. The Committee also requests that you indicate what action the WATA intends to take regarding the amendments to sections of the Act suggested by the Committee

Joint Standing Committee on Delegated Legislation

As the Committee has only a limited time to consider the Rules and determine whether it will report to Parliament, I request that you provide your response by no later than 4:00pm on **Wednesday 3 November 1999**.

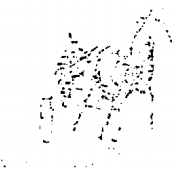
If you have any questions regarding the above, please contact Nigel Pratt, the Committee's Advisory/Research Officer, on 9222 7406.

Yours sincerely



Hon Bob Wiese MLA
Chairman

Annexure B



28 October 1999

The Hon. Bob Wiese MLA
Chairman
Joint Standing Committee on Delegated Legislation
Legislative Council Committee Office
Parliament House
PERTH WA 6000



Dear Mr Wiese

Rules of Harness Racing 1999

I am instructed to write to you advising that the WATA Committee undertakes to take appropriate action to amend the Rules to address the concerns of the Joint Standing Committee as detailed below.

This undertaking includes an agreement that the Rules of concern (with the exception of Local Rule 252 - for the reasons explained below) will not be relied upon in the interim as the basis for a prosecution.

Rule 23

The WATA Committee agrees that, in its current form, clause 23(6) is inappropriate. As the Rule is a National Rule, and, in deference to the Australian Harness Racing Council which is the author of the National Rules, it is proposed to consult with the AHRC over an appropriate change. The WATA Committee considers that there are a number of options. One of those is, as you have suggested, to introduce a reasonable time limit. Other alternatives include the repeal of Rule 23(6) altogether or the possible introduction of a new rule preventing a mare, which is capable of running a full term of pregnancy, from becoming a donor mare.

Rule 52

The Committee will take prompt action to correct the minor typographical error in this Rule.

Rule 90

The Committee agrees that the recommended amendment would be appropriate and will replace the words "police record" with "police certificate" in LR90(3)(c).

Rule 182

The Committee agrees with the recommended change and will amend Rule 182(a) by the addition of the following words at the end of the sentence:

"and the Stewards shall permit such a representative where the Stewards have a legal representative present."

.../2

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PLEASE ADDRESS ALL CORRESPONDENCE TO THE CHIEF EXECUTIVE OFFICER

-2-

Local Rule 252

The Joint Standing Committee has referred to a possible absence of clear legislative authority for LR252.

Legal advice provided to the Association points to legislative authority, for the Rule, being set out in by-law 59(b) which provides that the Committee may make rules *"determining the rules and conditions to be observed by owners, nominators, riders, drivers, competitors, trainers and other assistance before, during or after any race meeting including nominations"*.

The Joint Standing Committee has also expressed a concern that the taking of samples may constitute an assault. In practice however, samples are provided by the person concerned without any force or physical contact being made by the Stewards. The possibility of an argument as to assault therefore seems remote.

Certainly, however, the WATA Committee would wish to see an amendment made to the Act so that if any legal doubt exists that doubt is put beyond question. An appropriate recommendation will be made to the responsible Minister.

In the interim however, the WATA Committee wishes to continue to implement current alcohol and drug rules as they are vitally important to the integrity of the industry and the safety of the participants. The WATA Committee also wishes the Joint Standing Committee to know that the current alcohol and drug rules, and their implementation, are fully supported by the relevant industry Body, the Breeders, Owners, Trainers and Reinspersons Association.

Local Rule 252B(c)

The Committee agrees with the recommended amendment and will amend LR252B(c) by the addition of the words *"of levels equal to or higher than those referred to in LR252B and LR252C"*.

Rule 267

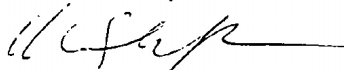
The Committee agrees that Rule 267 should be limited in its application to more serious crimes and offences and, accordingly it is proposed to introduce a new local rule as follows:

"LR267 Crimes and Offences

For the purpose of Rule 267, a crime or an offence is one where the convicted person is liable to any period of imprisonment."

I trust that the above undertakings adequately address the concerns of the Joint Standing Committee. If however I may be of any further assistance you should not hesitate to contact me.

Yours sincerely



**MATTHEW SKIPPER
CHAIRMAN OF STEWARDS**

Annexure C



Joint Standing Committee on Delegated Legislation

Our Ref: 3534/38

9 November 1999

Mr M J Skipper
Chairman of Stewards
Western Australian Trotting Association
PO Box 6025
East Perth WA 6892

By facsimile: (08) 9221 2437

URGENT

Dear Mr Skipper

Rules of Harness Racing 1999 (Gazetted 5 August 1999)

I refer to your facsimile dated 28 October 1999 addressed to the Joint Standing Committee on Delegated Legislation ('Committee') in relation to the *Rules of Harness Racing 1999* ("Rules").

The Committee considered your correspondence at its meeting on Monday 8 November 1999 and resolved to accept the written undertaking of the Western Australian Trotting Association ("WATA") in relation to changes agreed to be made to rules 23, 52, 90, 267 and local rule 252B(c). Although generally satisfied with the amendments to the Rules agreed to by the WATA, the Committee resolved to write to you in relation to the amendment proposed to rule 182 and in relation to local rule 252.

Rule 182

In its letter to you dated 27 October 1999, the Committee was of the view that rule 182 should make it clear that if one party is given permission to have legal representation, then the other parties to the inquiry should also have this option as a matter of procedural fairness. The amendment proposed by the WATA only goes part of the way to satisfying the Committee's concerns with the rule. This is because it only provides that if the stewards have legal representation then they shall permit persons appearing before them to also have legal representation.

The Committee are of the view that if several persons are appearing before the stewards at an inquiry, then if one of the parties is permitted legal representation then all parties should be permitted legal representation whether or not the stewards are legally represented.

This intent could be achieved by adding to the end of the suggested wording of the WATA the words, "...or other persons appearing before the stewards at the same inquiry have been permitted

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Joint Standing Committee on Delegated Legislation

to have a legal representative present.” Any alternative wording which would achieve the same result would be acceptable to the Committee.

Local Rule 252

In relation to local rule 252 and the related issue of the taking of breath and urine samples, the Committee resolved to write to the Minister requesting his urgent response to its concerns regarding this matter. The Committee has recommended to the Minister that the Act be amended at the earliest opportunity to provide for the power for properly qualified officials to take samples and that these persons also be protected from individual liability in the *bona fide* exercise of these powers by an appropriately worded section of the Act.

Despite its concerns, the Committee acknowledges the need for the continued implementation of the current alcohol and drug rules in the interim to ensure the integrity of the industry and the safety of its participants. It has therefore resolved to accept the undertaking provided by the WATA that an appropriate recommendation will be made to the Minister to amend the Act to remove any legal doubt surrounding the authority to conduct testing.

Subject to the satisfactory resolution of the wording to rule 182, the Committee may seek the leave of the Legislative Council to remove its motion for disallowance of the Rules. If not dealt with earlier, this motion will be put to a vote on Wednesday 17 November 1999. To enable the matter to be dealt with at the Committee's next meeting, I request that you provide your response by no later than 12:00 noon on Monday 15 November 1999.

If you have any questions regarding the above, please contact Nigel Pratt, the Committee's Advisory/Research Officer, on 9222 7406.

Yours sincerely



Hon Bob Wiese MLA
Chairman

Annexure D



WESTERN AUSTRALIAN TROTTING ASSOCIATION

10th November 1999

Hon Bob Wiese MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Wiese

RULES OF HARNESS RACING 1999

Further to your correspondence regarding the above subject dated 9th November 1999.

Please be advised that Rule 182(a) will be amended in accordance with the Committee's wish as follows -

Rule 182(a) - add the words at the end of the sentence *"and the stewards shall permit such representative where the stewards have a legal representative present or other persons appearing before the Stewards at the same inquiry have been permitted to have a legal representative present."*

Yours faithfully



MATTHEW SKIPPER
Chairman of Stewards

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PO BOX 6025 EAST PERTH WA 6892
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PLEASE ADDRESS ALL CORRESPONDENCE TO THE CHIEF EXECUTIVE OFFICER

Annexure E



Joint Standing Committee on Delegated Legislation

Our Ref: 3534/38

9 November 1999

The Hon G M Evans MLC
Minister for Racing and Gaming
11th Floor
216 St. George's Terrace
Perth WA 6000

By facsimile: (08) 9481 4613

URGENT

Dear Minister

Rules of Harness Racing 1999

The Joint Standing Committee on Delegated Legislation ('Committee') is conducting an inquiry into the *Rules of Harness Racing 1999* ("Rules").

As you are aware from my letter to you dated 23 September 1999, the Committee has moved a "protective" motion for disallowance of the Rules. The motion was moved to provide the Committee with sufficient time to consider a reply to its concerns from Mr Matthew Skipper, Chairman of Stewards of the Western Australian Trotting Association ("WATA").

The Committee considered Mr Skippers reply at its meeting on Monday 8 November 1999. Although generally satisfied with the amendments to the Rules agreed to by the WATA, the Committee resolved to write to you in relation to its continuing concerns with local rule 252 and the related issue of the taking of breath and urine samples under the Rules.

Local rule 252 deems that the analysis of samples taken in the form of breath and/or urine taken within two hours of an alleged offence to be the levels at the time of the offence. The local rule indicates that WATA officials take samples of breath and urine for the purpose of analysis to provide evidence of offences provided for in rules 250, 251 and 252. This has been confirmed to be the case by Mr Skipper. There appears to be no specific rule, by-law or provision of the *Western Australian Trotting Association Act 1946* ("Act") authorising officials of the WATA to take such samples.

The Committee is concerned that in the absence of clear legislative authority, the taking of or attempt to take such samples is *ultra vires* the Act and may constitute an assault and subject the official and/or the WATA to an action in tort for damages and possible criminal prosecution. The

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indemnity against claims provided for in local rule 314B does not appear to extend to the protection of an official who has committed a criminal act.

In his reply to the Committee's concerns, Mr Skipper advised that legislative authority for the local rule is provided for in By-law 59(b) of the By-laws of the Western Australian Trotting Association ("By-laws") which states that the Committee may make rules "... determining the rules and conditions to be observed by owners, nominators, riders, drivers, competitors, trainers and other assistants before, during or after any race meeting including nominations".

The By-laws comprise a Schedule to the Act but are made and amended pursuant to section 7 of the Act in a manner not unlike subsidiary legislation and without the requirement of full parliamentary debate as would be the case with an amendment to the Act. The Committee notes that similar powers exercised by or at the direction of police for the purpose of taking breath, blood and urine samples from drivers of motor vehicles are the subject of discrete legislative provisions enacted through Parliament. Section 66 of the *Road Traffic Act 1974* is an example of an enactment authorising a police officer to take a preliminary breath test, obliges the person to give a urine sample and also provides for the taking of blood samples by a medical practitioner. Clause 11 of the First Schedule to the *Rail Safety Act 1998* also specifically provides for regulations to include procedures for breath, urine and blood testing of railway employees.

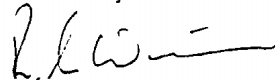
The power to take samples from people without their consent is a significant infringement of a person's liberty and without clear legislative authority, a significant infringement of their rights. In the Committee's view, such a power is a matter which ought properly to be dealt by an appropriately worded provision of the Act or the By-laws which, as a Schedule, form part of that Act. The Committee's preference is that the Act be amended as this will require the matter to come before the Parliament.

Given the above, the Committee strongly recommends that the Act be amended at the earliest opportunity to provide for the power for properly qualified officials to take samples and that these persons also be protected from individual liability in the *bona fide* exercise of these powers by an appropriately worded section of the Act.

The Committee asks that you give this matter your urgent attention and advise what action you intend to take in relation to its concerns. I look forward to receiving your reply by **Tuesday 16 November 1999**.

Should you have any questions regarding the above please contact the Committee's Advisory/Research Officer, Nigel Pratt on **9222 7406**.

Yours sincerely



Hon Bob Wiese MLA
Chairman

Annexure F



OFFICE OF THE MINISTER

Hon B. Wiese, MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH 6000

Your ref:3534/38

Dear Mr Wiese

Rules of Harness Racing

I refer to your letters of 9 November and 20 December 1999 regarding the taking of bodily samples by officials of the Western Australian Trotting Association (WATA).

The Crown Solicitor's Office has confirmed that neither the Western Australian Trotting Association Act 1946 nor the Rules of Harness Racing establish authority for WATA Stewards to take samples. Accordingly, if a person, upon being requested by the stewards, declines to provide a sample, as is his/her right, the stewards are not authorised to enforce the taking of a sample.

I am advised that in such a situation, the usual course of action would be for the stewards to lay a charge under Rule 238 which states: "A person shall not fail to comply with any order, direction or requirement of the Controlling Body or the stewards."

The issue, therefore, is whether or not a person can be properly charged under Rule 238 for declining to volunteer a sample when requested to do so by the stewards. This is a matter that can be tested on appeal to the Racing Penalties Appeal Tribunal, as can the efficacy of any request or direction made by the stewards.

Given the "sporting" nature of the WATA relative to the "public order/safety" concerns of the Road Traffic Act 1974 and the First Schedule to the Rail Safety Act 1998, I am not convinced that it would be appropriate to amend the Western Australian Trotting Association Act to provide properly qualified officials with legislative authority to take bodily samples. It may be that the Act should be amended to clarify the power of the controlling authority or stewards to discipline a person charged under Rule 238 for declining a request to volunteer a sample. The rule making power provided for in by-law 59(b) is in general terms and makes no reference to controlling the use of alcohol or drugs at race meetings, or more particularly the provision of bodily samples.

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I have asked the Office of Racing, Gaming and Liquor to seek comment from the WATA regarding the appropriateness of charging a person under Rule 238 for declining a request to volunteer a bodily sample.

Your Committee's interest in this important matter is appreciated.

Yours sincerely

A handwritten signature in black ink, appearing to be 'nm', followed by a long horizontal line extending to the right.

NORMAN MOORE MLC
MINISTER FOR RACING AND GAMING

27 JAN 2000

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