FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Racing Queensland Board [2019] FCAFC 224

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| Appeal from: | *Racing Queensland Board v Commissioner of Taxation* [2019] FCA 509 |
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| File number: | QUD 275 of 2019 |
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| Judges: | **GRIFFITHS, DERRINGTON AND STEWARD JJ** |
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| Date of judgment: | 16 December 2019 |
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| Catchwords: | **SUPERANNUATION** – whether principal racing authority liable to pay superannuation guarantee charges – construction of s 12 of *Superannuation Guarantee (Administration) Act 1992* (Cth) – whether principal racing authority is “employer” of jockeys – whether principal racing authority liable to pay riding fees to jockeys – where principal racing authority stated that it would pay jockeys – where principal racing authority in fact paid jockeys – where principal racing authority prepared recipient created tax invoices reflecting liability to pay – whether payments made “on behalf of” another person – where amounts paid not reimbursed by another person  **TAXATION** – appeal from objection decision – onus of establishing that assessments excessive or otherwise incorrect – whether onus discharged  **CONTRACTS** – nature of contractual relations in regulated industry of thoroughbred horse racing – relevance of statutory instruments and rules of sport to formation of contracts – engagement by third parties to participate in races  **APPEAL AND NEW TRIAL** – whether appellable error in approach to evidence adduced on appeal from objection decision – where evidence of past events not adduced from contemporaneous witnesses – relevance of evidence relating to arrangements prior to the relevant period |
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| Legislation: | *A New Tax System (Goods and Services) Act 1999* (Cth) s 195-1  *Income Tax Assessment Act 1936* (Cth) s 80C (repealed)  *Superannuation Guarantee (Administration) Act 1992* (Cth) ss 11, 12, 16, 17 and 19  *Superannuation Guarantee Charge Act 1992* (Cth) ss 5 and 6  *Taxation Administration Act 1953* (Cth) s 14ZZO  *Racing Act 2002* (Qld) s 6 |
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| Cases cited: | *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424  *Bosanac v Commissioner of Taxation* [2019] FCAFC 116  *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* (2005) 148 FCR 68  *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256  *Clarke v The Earl of Dunraven and Mount-Earl (The “Satanita”)* [1897] AC 59  *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297  *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95  *Federal Commissioner of Taxation v Comber* (1986) 10 FCR 88  *Financial Synergy Holdings Pty Ltd v Federal Commissioner of Taxation* (2016) 243 FCR 250  *Golden v V’landys* (2016) 339 ALR 610  *Hogno v Racing Queensland Ltd* [2012] QSC 303  *Hogno v Racing Queensland Ltd* [2013] QCA 139  *Lismore City Council v Stewart* (1989) 18 NSWLR 718  *McHugh v Australian Jockey Club (No 13)* (2012) 299 ALR 363  *Mercato Sports (UK) Ltd v The Everton Football Club Co Ltd* [2018] EWHC 1567  *New South Wales Thoroughbred Racing Board v Waterhouse* (2003) 56 NSWLR 691  *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481  *NT Power Generation Pty Ltd v Power and Water Authority* (2002) 122 FCR 399  *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231  *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445  *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374  *R v Wadley, ex parte Burton* [1976] Qd R 286  *Racing Queensland Board v Commissioner of Taxation* (2019) 371 ALR 358  *Re Queensland Principal Club* (unreported, Supreme Court of Queensland, Williams J, 29 January 1999)  *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243  *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373 |
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| Date of last submissions: | 10 December 2019 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Taxation |
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| Counsel for the Appellant: | P A Looney QC and C M Pierce |
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| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the Respondent: | P G Bickford and F Chen |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | | QUD 275 of 2019 |
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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant | |
| AND: | RACING QUEENSLAND BOARD  Respondent | |

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| JUDGES: | GRIFFITHS, DERRINGTON AND STEWARD JJ |
| DATE OF ORDER: | 16 December 2019 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made below on 12 April 2019 be set aside, and in lieu thereof it be ordered that the applicant’s appeal against the respondent’s objection decision of 17 August 2017 be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GRIFFITHS AND DERRINGTON JJ:

## Introduction

1. The Racing Queensland Board is the Principal Racing Authority for Queensland and has effective control of, *inter alia*, thoroughbred horse racing in that State. For convenience, in these reasons the Board will be referred to as the QPC, being a shorthand expression for “Queensland Principal Club”. Its statutory position affords it power to control thoroughbred racing in Queensland. It does so by the application of the Australian Racing Rules (ARR) and Local Rules.
2. Coinciding with the introduction of the goods and services tax (GST) on 1 July 2000, the QPC’s progenitor entity introduced a new system for the distribution of money to industry participants. It was called the “Centralised Prizemoney System” (CPS). Through it, the QPC has paid riding fees to jockeys in respect of their participation in races and barrier trials. Such fees were separate to the prizemoney which the QPC paid to the jockeys, the trainers and the owners in their respective proportions.
3. In the quarters between 1 July 2009 and 30 September 2014, referred to in this action and in these reasons as “the Relevant Periods”, the QPC did not pay any superannuation guarantee charges pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA). It says that it was not liable to do so because it had no liability to pay riding fees to the jockeys, and was merely paying them on behalf of racehorse owners. The Commissioner issued a number of default assessments to the QPC on the basis that it had a liability to pay superannuation guarantee charges. The QPC objected to the assessments and that objection was upheld by the primary judge.
4. The central issue on appeal is whether the QPC was liable to pay the riding fees to the jockeys in respect of their participation in thoroughbred horse racing. If that question is answered in the affirmative, the QPC was obliged to pay the superannuation guarantee charges. If it was not so obliged, the appeal should be dismissed.
5. It is a matter of some curiosity and certainly worthy of comment that the QPC adduced no direct evidence of the circumstances of the payment of riding fees made by it to jockeys in the Relevant Periods. It did not adduce evidence of the actual invoices which were generated in respect of the payments, its books of account, its financial statements, or any other financial documents which expressly identified how it treated those payments in its accounting processes. No explanation was given as to why that was so. It is not said that the documents were not available. The QPC also called no person to give evidence of the events and transactions which actually occurred in the Relevant Period, although it did call a Mr Stout, who was subsequently employed by it, and who gave evidence of his opinion of what some documents from the QPC’s business records which related to the Relevant Periods meant or indicated. This is important, as the QPC’s case was that the evidence of the statements of its officers, in particular a Mr Turner, in 2000, as to the scheme which it was intending to implement, evidenced what actually occurred in the period between 2009 and 2014. Unusually, the QPC did not adduce any direct evidence that the scheme intended to be introduced in 2000 was actually put into effect or, if it was, it remained in effect in the Relevant Periods. The result was that the actual nature of the transactions and the rights and liabilities of the parties were left somewhat opaque. In these circumstances, the Commissioner submitted that the QPC did not discharge its onus of establishing that the assessment was excessive, and that the inferences drawn by the primary judge from the documents created in 2000 were inconsistent with the evidence of what actually occurred.
6. For the reasons which follow, the Commissioner’s submissions should be accepted and the appeal allowed.

## Background

1. The QPC is an entity continued in existence by s 6 of the *Racing Act 2002* (Qld) (*Racing Act*) from a number of progenitor entities. It is a legal entity created by statute and is neither an emanation of the State of Queensland nor a body corporate. It has responsibility for the thoroughbred, harness and greyhound racing industries in Queensland and has general administration over those industries. Unless otherwise required, the expression “the QPC” will refer to the present Board and its progenitor entities since 2000. It seemed to have been accepted by all parties on the appeal that, to the extent that it mattered, the acts and conduct of those earlier emanations of the QPC were appropriately regarded as the acts of the QPC for the purposes of this matter.
2. A central aspect of the QPC’s responsibility is to act as the Principal Racing Authority for Queensland pursuant to the ARR and the Local Rules. That gives it significant power to control all aspects of the thoroughbred racing industry in Queensland.
3. The ARR are made by Racing Australia Limited, a company limited by guarantee, which also administers those rules. Its purpose is to promote and manage thoroughbred racing in Australia. Its control of thoroughbred racing means it requires people who participate in that industry to agree to be bound by certain rules and conduct.
4. ARR 2 provides:

AR.2. Any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal Racing Authority to be bound by them.

[For the “Australian Racing Board”, one now reads Racing Australia.]

1. Part 3 of the *Racing Act* empowers the QPC to make local rules for thoroughbred racing in Queensland. The making of those rules is authorised by ARR 6(1) on the proviso they are not inconsistent with the rules in the ARR. Local Rules have been made and, pursuant to s 101 of the *Racing Act*, the Local Rules are a statutory instrument. In the course of submissions, Mr Bickford for the QPC submitted that the ARRs are also a statutory instrument. That, apparently, is a consequence of the Local Rules providing that they are to be “read, interpreted and construed together with the Australian Rules as amended from time to time”. No authority was submitted for that proposition, and there exists some intermediate appellate level authority to the contrary. In any event, that issue is not important to the outcome in this matter.
2. Both prior to and after 1 July 2000, all jockeys who rode in horse races or barrier trials in Queensland were required to be licenced by the QPC or its predecessors. For present purposes, in each of the relevant tax periods, jockeys had applied to the QPC for a licence by completing an application form (Jockey Licence Application). Those several forms are referred to in detail later in these reasons.
3. The Rules during the Relevant Periods were somewhat ambiguous as to the nature of riding fees payable to jockeys for their participation in races conducted under the auspices of the QPC. However, it was common ground between the parties that such fees were paid to jockeys, and that the fee was properly described as a fee paid to the rider of a horse that starts in a race, or in cases where a rider is engaged and the horse is subsequently scratched but the rider does not secure a replacement mount. A riding fee was also payable to a jockey who rode a mount in a barrier trial.
4. Prior to the introduction of the CPS and of the GST on 1 July 2000, amounts representing jockeys’ riding fees were customarily paid by the horse trainers, on behalf of the horse owners, to the race clubs. These monies formed part of what were referred to as “pay-ups” made on each race day. The amount of the pay-ups included other sums, including “nomination and acceptance fees”. It appears that the procedure was that the trainer would pay an amount of money to the clubs representing several fees, including the riding fees, prior to the day’s racing. The clubs would use some of those funds to pay the jockeys their riding fees after the conclusion of their race. So, at the end of the relevant race meeting, the jockey would look to the club holding the races for the payment of his or her fees for participating.

### The Centralised Prizemoney System

1. In around 2000, and in anticipation of the introduction of the GST and of the additional paperwork associated with it, the QPC sought to implement the CPS, with the avowed purpose of reducing the burden on race clubs, owners, trainers and jockeys of record keeping associated with the GST. The circumstances surrounding the implementation of that system are important in this appeal. They were heavily relied upon by the primary judge for his conclusion as to the manner in which payments were made by the QPC in the Relevant Periods, and it is necessary to set out that evidence at length.
2. Initially, the QPC relied upon the evidence of Mr Jeremy Turner, who was the Director of Business Management and Technology of the QPC from 1997 to 2002 and its Chief Executive Officer from 2002 to 2004. He has not held any role with the QPC since 2004. He deposed that he, and a working group of which he was part, provided advice to the QPC on issues concerning the impact of the introduction of GST in Australia from 1 July 2000. He said that “Through that working group, we discussed and collectively formed the idea of the Centralised Prizemoney System, versions of which were eventually implemented in all or most States”. He also said that “around the introduction of the GST, the QPC committee decided to pay the jockeys their proportion of prize money and riding fees under the Centralised Prizemoney System.” He said that this was intended to minimise the administrative impact that the new tax would have on the industry, and to ensure that record keeping and documentation, and the compliance burden associated with prize money and riding fees, would be taken off race clubs, owners, trainers and jockeys, and handled by the QPC on their behalf.

### Documentation from 2000 concerning the implementation of the CPS

1. Mr Turner also referred to several documents created in 2000, which were used by the QPC to notify industry participants of the proposed changes to be implemented as part of the CPS. First, he referred to an article written by him and appearing in the Queensland Racing Calendar dated July 2000. The Queensland Racing Calendar was a publication used to notify persons in the racing industry of relevant news and information. The article identified the nature of the scheme to be implemented. In particular, the following was stated:

The QPC will introduce a centralised prizemoney system on 1 July. Under the new arrangements prizemoney will no longer be paid to owners, trainers, and jockeys by individual race clubs. Prizemoney, QRIS bonuses, and jockeys riding fees for all race meetings conducted in Queensland will be paid by the QPC.

Payments will be made on a fortnightly basis for all meetings conducted during the previous two week period, and they will be accompanied by “Recipient Created Tax Invoices”, which will provide details of earnings and GST liabilities and credits. The invoices will provide owners, trainers and jockeys with the information they need to meet their GST obligations, and considerably simplify compliance with the new tax system.

The centralised prizemoney system is an important initiative that is being implemented by Principal Clubs right around the country. A national network of systems has been developed to ensure the payments and invoicing can be handled in the most efficient manner. The systems development work has involved the Registrar of Racehorses in Sydney, where details of Australian Business Numbers and the GST registration status of owners, on a national basis, will be stored, the Racing Services Bureau in Melbourne, and the systems of the State-based Principal Clubs.

It is one of the most significant initiatives that the racing industry has undertaken on a national basis, and will be a great benefit in easing the difficult transition to GST.

Letters have been forwarded to owners, trainers, jockeys and race clubs over the last month or so explaining how the new system will operate, and providing details on the format of the tax invoices.

1. The letters referred to in the last paragraph seem to have been a reference to a letter sent after the meeting of the QPC Committee on 31 January 2000. It was directed to “All licensed Queensland trainers and jockeys”, with the subject heading: “Introduction of a Centralised Prizemoney Payment System”. In part, the letter set out the following relevant information:

The QPC Committee, at its meeting on 31 January 2000, agreed to the introduction of a centralised system of prizemoney distribution, to apply from 1 July 2000.

The decision will mean that the QPC will, from 1 July, make all prizemoney payments to owners, winning percentages to trainers and jockeys, and jockeys riding fees, on behalf of race clubs for all meetings conducted in Queensland. It is expected that payments will be made on a fortnightly basis for meetings conducted during the previous two weeks, and will be accompanied by statements that meet the Australian Taxation Office’s “tax invoicing” requirements.

The decision was made by the Committee in response to the introduction of the GST on 1 July, with the aim of minimising the administrative impact the new tax will have on the industry. It will mean much of the record keeping and documentation, and the compliance burden, associated with prizemoney and riding fees will be taken off race clubs, owners, trainers, and jockeys, and handled by the QPC on their behalf.

To facilitate the payment of winning percentages to trainers and jockeys, the following information is required:

• Australian Business Numbers;

• Advice from trainer and jockey as to whether they are GST registered; and

• Bank Account details.

…

Under a centralised prizemoney payment system, the QPC will be making the payments to jockeys for riding fees and winning percentages, and to trainers for winning percentages, on behalf of owners. The QPC will therefore need from jockeys and trainer, well in advance of 1 July, their Australian Business Numbers.

1. The latter paragraph in the above quote was referred to and relied upon by the primary judge for the conclusion that riding fees were to be paid on behalf of owners. There was, however, an inconsistency in that letter, in that the second paragraph of the quote indicates that the amount was intended to be paid on behalf of the clubs. The difference is not unimportant as, prior to that time, the clubs had paid the riding fees out of the money received from the trainers as “pay-ups”. At the very least, there is a lack of identification in that document as to who had the legal liability to pay the riding fees.
2. Mr Turner had also sent letters dated 23 June 2000 to all licenced trainers in Queensland in relation to the introduction of the GST and the new CPS. The stated purpose of the letter was, *inter alia*, to confirm the procedures being put in place under the CPS. In the letter, Mr Turner wrote:

***Centralised Prizemoney Payment System***

As I have advised in previous correspondence, the introduction of the centralised prizemoney payment system on 1 July 2000 will mean that:

• all prizemoney payments to owners, winning percentages to trainers and jockeys, and jockeys riding fees, will be paid by the QPC for all race meetings conducted in Queensland;

• Jockeys workcover fees will be collected directly from trainers, and clubs will no longer include these charges in their acceptance fees;

• Nomination and acceptance fees will be collected from trainers by the QPC and be paid to clubs;

• …

• Race day pay-ups will therefore no longer be required;

• The QPC is to make payments (or send invoices) to jockeys, trainers, and owners on a fortnightly basis; and

• Payments and/or invoices will be accompanied by a remittance advice that will meet the “Tax Invoice” requirements of the GST Act, and will clearly define GST liabilities and credits associated with the various transactions.

As mentioned above, payments or invoices associated with the centralised prizemoney system will be sent to trainers on a fortnightly basis. The accompanying documentation will satisfy the requirements of the Australian Taxation Office for tax invoices, and will be structured follows [sic]:

***Credits***

* Prizemoney percentages for horses that win stakes, plus 10% GST if the trainer is registered for GST
* Unplaced Starters Rebates for horses that do not win stakes, plus 10% GST if the owner of the horse is registered for GST

***Less Debits***

* Race club nomination and acceptance fees including GST
* Jockeys riding fees, plus 10% GST if the jockey is registered for GST
* Jockeys workcover fees plus 10% GST

…

The introduction of the centralised prizemoney system represents a substantial shift from traditional practices, and has involved a considerable amount of systems development by the QPC, and nationally through the Racing Services Bureau and Registrar of Racehorses, in a relatively short period of time.

1. There are also some inconsistencies in the above letter. In the first instance, the QPC said that it would be paying the riding fees to jockeys, which indicated its assumption of that responsibility. However, the elements of the proposed invoice suggested that it would debit the amount paid to jockeys for riding fees from the amount paid to the trainers, including the amount of the GST paid. The apparent intention was that the QPC would recover the actual cost of paying the riding fees from the trainers. This too was relied upon by the QPC as indicating that the arrangement that was being put in place was that the riding fees were being paid on behalf of another person or entity.
2. Mr Turner deposed that, in the October 2000 Queensland Racing Calendar, additional information was provided by him as to the changes consequent upon the introduction of the GST and the CPS. The following paragraph from that document is relevant:

As I stated in that article, the new system has represented a considerable change from traditional practices in the industry. Its introduction has led to many phone calls over recent months to Finance staff at the QPC, with a high percentage of those from trainers concerned about the recipient created tax invoicing arrangements, and what this means for their relationship with owners and apprentices.

1. He stated that the QPC would issue recipient created tax invoices which would comply with the requirements of the GST legislation. In relation to invoices to trainers, it was stated that the QPC would issue invoices with nomination and acceptance fees, jockey riding fees and insurance deducted from the prizemoney won. The list of elements of the invoice set out in the letters dated 23 June 2000 sent to all trainers was replicated in the article. An additional list of elements of the invoice was set out which also indicated trainers would be charged an amount equivalent to that which had been paid to the jockeys as riding fees. The following was also stated:

Trainers historically paid nomination and acceptance fees, and riding fees, as part of race day pay-ups. Under the new system they continue to pay these charges, albeit after the event through the weekly invoicing cycle, and in effect, their cash flows are actually improved. Importantly, they are provided with tax invoices that assist in meeting their GST obligations, and enable them to easily identify and pass on relevant costs to their owners.

…

Charges of nomination and acceptance fees, jockeys’ riding fees, and workcover insurance fees, are processed through trainers as “agents” for their owners. As such, trainers should not account for the GST associated with these charges in their Business Activity Statements. They should simply lift the transactions off their QPC tax invoices and charge their owners through whatever accounting system they have, inclusive of GST.

1. As mentioned, the primary judge drew the (not unreasonable) inference from these documents that the QPC intended to implement a system whereby it would pay riding fees to jockeys and recover the cost of doing so from the owners. The recipient created tax invoices which they intended to issue would make that clear.
2. Mr Turner deposed that the statements in the documents annexed to his affidavit reflected his views and the relevant facts at the time. He also said that, from the commencement of the GST regime to at least the date he left the QPC in 2004, the QPC paid the relevant jockeys their riding fees under the CPS.

### The Board’s business records produced by Mr Stout

1. The other documents relied upon by the QPC were those produced by Mr Stout. He was not an employee of the QPC when the CPS was implemented, nor during the Relevant Periods. He was not in a position to give evidence as to what actually occurred in terms of the arrangements between the QPC, jockeys, owners and trainers. He was able to say, after considering the QPC’s business records, that certain documents were used during the Relevant Periods in relation to the inter-party payments, and that he had searched for other specified documents but did not locate any. The absence of those documents was said to evidence that certain transactions had not occurred.
2. Mr Stout deposed that during the Relevant Periods, jockeys were required by Local Rule 14 to apply for a licence by, *inter alia*, completing an application form, which would entitle them to ride in thoroughbred races in Queensland. He produced copies of the yearly application forms which were created and used in the Relevant Period. These are referred to below, although it is relevant to observe now that the QPC indicated in those forms that it would be paying the riding fees to the jockeys.
3. Mr Stout also said that his searches of the QPC’s business records disclosed no contracts between it and jockeys for the provision of services, labour, participation or performance of jockeys in race or barrier trials. He said:

14. During the whole of the Relevant Period, I am aware from my own experience in the racing industry that owners, in combination with trainers, were involved in the process of selecting the appropriate race, nominating the horse for the race, engaging, retaining or contracting with the Jockey to ride the horse in any barrier trial or race, and directing the jockey, through the trainer, as to how the horse should be ridden in any barrier trial or race.

15. Contracts were made between the owner/trainer and the jockey engaging the services of the jockey to ride for an owner or owners who used the services of that trainer. To the best of my knowledge and belief, based on my own experience in the racing industry, there were no standard terms in such contracts which were nearly always oral engagements.

1. Mr Stout also identified a number of fees which he said the Board charged during the Relevant Period. One was said to be a “riding fee” although how that was “charged” was not specified in his affidavit and, under cross-examination, he acknowledged that riding fees were not charged.
2. Mr Stout also gave evidence that, for the purposes of implementing the CPS, the Local Rules were amended, with a new Local Rule 3A commencing operation from July 2000. It provided:
3. The Principal Club may establish a system or systems for the payment of all prizes, rebates or similar sums to persons entitled thereto.

(2) As part of such system or systems, the Principal Club may deduct from sums payable under (1) all nomination or acceptance fees, forfeits, fines or other sums as might be payable under the Rules of Racing.

(3) Where the Principal Club establishes a system or systems in accordance with this Rule all persons and Clubs subject to the Rules of Racing shall comply with such conditions and requirements as specified by the Principal Club to support such system or systems.

1. It is relevant to note the permissive nature of LR 3A(2), in that amounts which could be deducted by the Principal Club would be discretionary. The rule also relates to amounts which “might be payable under the Rules of Racing”. *Prima facie*, riding fees were not amounts which were payable under the Rules. However, as the primary judge found (at [57]), if the CPS imposed an obligation on the QPC to pay riding fees, then the requirement in LR 3A(3) for the QPC to comply with that obligation would be sufficient to generate a “liability” for the purposes of s 12(8)(a) of the SGAA.
2. An additional rule was inserted in relation to the payment of riding fees, in the form of Local Rule 76A, which provided:

The Principal Club shall from time to time determine the fee payable to a jockey or an apprentice jockey in respect of:

(a) Riding in a race;

(b) Participating in official barrier trials.

1. That rule does not create any liability to pay the fee, merely the ability to prescribe the amount of the fee.
2. Mr Stout also produced pro-forma invoices which he said were issued by the QPC to jockeys or trainers as “recipient created tax invoices” during the Relevant Period. No actual invoices passing between the QPC on the one hand and the jockeys and trainers on the other were produced. This omission occurred, so it was said, to maintain confidentiality in the documents. That is not a very satisfactory reason for the failure to produce relevant documents in circumstances such as the present. It could be observed that copies of invoices sent, with parts redacted, would have revealed how the system actually operated.
3. In relation to the pro-forma invoices produced by the QPC in relation to jockeys, it can be observed that:
   1. the document purports to be an invoice directed to the QPC (identified as the Racing Queensland Board) from the jockey;
   2. it includes a space for the insertion of the date of the invoice as well as for ABN and GST details;
   3. it identifies that it is a “Recipient Created Tax Invoice (Jockey)”;
   4. it includes spaces for the insertion of the amounts of prizemoney and GST on prizemoney, as well as for riding fees and GST on riding fees; and
   5. there are spaces for deductions to be made, which indicate that they are for jockey association fees.
4. The pro-forma recipient created tax invoice used by the QPC in the Relevant Periods to issue to trainers was in a similar form. It identified itself as an invoice directed to the QPC from the trainer. It identified the credits payable to the trainer in the nature of a percentage of prizemoney where the trainer’s horses had success in any race. Spaces were included for the identification of the GST payable on that amount to the trainer. The deductions which would be made from the amounts payable were identified as “Non Starters” or “Feature Race” fees. This form was in stark contrast to the list of elements for the invoices identified in the QPC’s letters dated 23 June 2000 to all licenced trainers, and subsequently in the October 2000 Queensland Racing Calendar. Specifically, there was no facility whereby the QPC might make a deduction in relation to jockey fees paid on behalf of the trainer. In the light of the evidence of Mr Stout under cross-examination, that was not surprising, as he acknowledged that, in the Relevant Periods, the QPC did not make deductions from the amounts paid to trainers in respect of riding fees paid by the QPC.
5. The pro-forma remittance fee document used for remitting prizemoney to owners similarly included spaces for deductions, but only in relation to starters fees. No provision was made for making deductions for riding fees which had been paid to jockeys.
6. In his affidavit and in his oral evidence Mr Stout acknowledged that the funds used by the QPC for the payment of riding fees to jockeys are derived from the general revenues which the QPC collects. In a somewhat confused manner, he also said that barrier trial fees (being fees paid to riders in barrier trials) were also paid this way, although recovered from the barrier trial entry fees charged to the owners and trainers.

## Decision of the primary judge

1. The learned primary judge determined, from the documents produced in 2000 by the QPC and Mr Turner, that the CPS as identified in those documents was implemented, and that it remained in place in the period between 2009 and 2014. He also held that neither prior to nor during the Relevant Periods did the QPC or its predecessors engage jockeys to ride in races. The engagement of jockeys was by the trainers through an oral contract. That conclusion was based on the general evidence of Mr Stout although there was no identification in that evidence of the terms of that contract. The primary judge found that the general relationships between the several parties were founded upon contacts arising from the parties’ participation in thoroughbred racing and the effect of ARR 2. However, he also determined that separate contracts existed between trainers (or owners) and jockeys for the latter to perform the service of riding in the race for which the relevant horse was nominated. His Honour held that after the introduction of the CPS, the pre-existing “custom” continued that the contracts formed between trainers or owners with jockeys were on the basis that the riding fees would be paid by the QPC on behalf of the owners. This was said by his Honour to arise from the separate contracts entered into between the participants and the QPC when they applied for and were granted their licence, that QPC was to “pay that riding fee to the jockey *on behalf of* that owner or trainer”. He held that the conclusion that the payment would be made “on behalf of” was “made explicit from the outset of the introduction of that system”: [67]. In essence, his Honour concluded that the operation of the CPS which was identified in the documents produced in around 2000 remained unaltered, and the statements in those documents to the effect that the riding fees would be paid by the QPC on behalf of the owners was a term incorporated into the contractual arrangements between the parties. His Honour concluded at [68] that:

What follows from this is that, throughout the Relevant Periods, a jockey was a person who was paid to participate in a sport, namely thoroughbred racing, but the person legally liable to pay the riding fee, which was the payment for that participation, was always the owner or trainer who had employed or engaged that jockey to ride in that race. The Commissioner has misunderstood the nature of the Centralised Prizemoney System and the source of the legal liability to pay the riding fees. The source remained the contract between jockey and the owner or trainer but that liability was discharged by a payment made on behalf of that owner or trainer by the Board (or a predecessor) via the Centralised Prizemoney System.

1. It is not to be forgotten that the terms of the oral engagement agreement between the jockey and the trainer or owner were never clearly identified. In the course of the hearing of the appeal, the respondent’s Counsel was not able to identify the terms of the engagement.

## Relevant legislative provisions

1. Pursuant to s 5 of the *Superannuation Guarantee Charge Act 1992* (Cth) (SGCA), a charge is imposed on any superannuation guarantee shortfall of an employer for a quarter. By s 6, the amount of the charge payable is an amount equal to the amount of the shortfall.
2. The recovery of a superannuation guarantee charge is controlled by the SGAA. Section 16 of that Act provides:

**16 Charge payable by employer**

Superannuation guarantee charge imposed on an employer’s superannuation guarantee shortfall for a quarter is payable by the employer.

1. Section 17 identifies the manner in which a number of shortfalls are aggregated. It provides:

**17 Superannuation guarantee shortfall**

If an employer has one or more individual superannuation guarantee shortfalls for a quarter, the employer has a superannuation guarantee shortfall for the quarter worked out by adding together:

(a) the total of the employer’s individual superannuation guarantee shortfalls for the quarter; and

(b) the employer’s nominal interest component for the quarter; and

(c) the employer’s administration component for the quarter.

1. By s 19, an employer’s individual superannuation guarantee shortfall is worked out by reference to the “total salary or wages paid by the employer to the employee for the quarter”.
2. Relevantly for the present proceedings is s 12 which, in part, provides:

**12 Interpretation: employee, employer**

(1) Subject to this section, in this Act, ***employee*** and ***employer*** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

…

(8) The following are employees for the purposes of this Act:

(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment; …

1. Section 11 expands the concept of salary or wages to include amounts paid under subs 12(8) as follows:

**11 Interpretation—salary or wages**

(1) In this Act, ***salary or wages*** includes:

…

(d) payments to a person for work referred to in subsection 12(8); …

## Consideration

1. The Commissioner’s main submission is that the QPC did not discharge the onus on it of satisfying that the assessments were excessive. He submitted that the primary judge’s finding, that under the CPS system the QPC was required to pay the riding fees on behalf of the trainers or owners, was erroneous because he failed to take into account the terms and nature of the documents produced by Mr Stout, which were in use in the Relevant Periods. Had those documents been considered, so it was argued, his Honour could not have been satisfied the QPC was not liable to pay the riding fees.

### Onus

1. It may well be that this case will turn on whether the QPC satisfied the onus of establishing that the assessments were excessive or otherwise incorrect: s 14ZZO(b)(i) of the *Taxation Administration Act 1953* (Cth). Satisfaction of that onus requires the QPC to demonstrate that it was not liable to pay the riding fees. That may be achieved by establishing that some other entity was liable to make them. The Commissioner did not bear an onus of establishing the real nature of the transactions as between the QPC and the jockeys or the owners and the jockeys: *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243 at 246[B] per Lockhart J and 258[G]-259[F] per Hill J. In relation to the evidence which is usually called on an appeal under s 14ZZ, the Full Court in *Bosanac v Commissioner of Taxation* [2019] FCAFC 116 said, at [47]:

As stated by Dowsett J in *Weyers v Commissioner of Taxation* [2006] FCA 818 at [146], ‘[t]he Commissioner need not justify the decision, save in response to an appropriate attack upon it’. The grounds that may be relied upon are confined to those raised before the Commissioner in the objection, unless the court otherwise orders. So, the evidence that may be led to discharge the onus is likewise confined. It is a matter for the parties whether they stipulate the correctness of factual matters before the Commissioner. However, in the absence of such matters being agreed or such matters being presented as evidence of the truth of those matters without objection, it is for the appellant to provide the necessary evidence on the hearing before the court on the ‘appeal’. The court does not simply receive the record before the Commissioner on the objection and make its decision on that basis. Nor does it consider whether there has been error demonstrated in the decision by the Commissioner. Even less so does it consider whether an amended assessment issued after the objection decision is correct. Therefore, as noted by Greenwood J in *Aurora Developments Pty Ltd v Federal Commissioner of Taxation (No 2)* [2011] FCA 1090; (2011) 196 FCR 457 at [32], ‘an appeal under s 14ZZ(c) bears some of the characteristics of an appeal by way of a hearing de novo in that the taxpayer has an extensive, though not unqualified, right to put additional evidence before the Court’.

1. As has been indicated above, the QPC did not greatly utilise its right to adduce evidence of the actual events which occurred during the Relevant Periods. It called evidence of what happened in 2000 and it called evidence from a person to adduce some generalised business records, being pro-forma templates utilised between 2009 and 2014. It did not, however, adduce any original documents which expressly identified or evidenced its payments to jockeys, and which were more than likely to have been in its possession. Importantly, it did not adduce evidence of the manner in which it treated the payments it made, including the GST, in its financial and taxation documents.

### The identification of the issue arising in respect of s 12(8)

1. In the course of the appeal, an issue arose as to whether there existed a lacuna in the legislation. Section 5 of the SGCA imposes a charge on an “employer” to pay any superannuation guarantee shortfall. Section 12(1) of the SGAA indicates that the words “employee” and “employer” have their ordinary meaning. Subsections (2)-(11) expand the meanings in the identified circumstances. In those subsections, the expansions of the terms is achieved by extending the scope of persons within the meaning of the word “employee”, but there is no express reference to the expansion of the word “employer”. Section 12(8) is a good example, where the scope of the word “employee” is expanded to include people who participate in, *inter alia*, the arts, entertainment and sport. No express expansion of the word “employer” appears, and the subsection operates by identifying the person providing the service as an “employee” of the person liable to pay them.
2. It can be accepted that the wording of s 12 is not as good as it might be but, nevertheless, it is apparent that subss (2)-(11) expand both terms “employee” *and* “employer”. That is for two reasons. First, subs 12(1)(a) identifies that subss (2)-(11) expand “those terms”, referring to both “employee” *and* “employer”. Given the word “employer” does not appear in any of subs (2) to (11), the plural “terms” *requires* that “employer” is coordinately expanded in meaning to employee. Second, subss (2)-(11) would be otiose if they did not expand “employer”. The necessary implication of the terms of the subsections is that the term “employee” is expanded, and the person with whom they have a relationship as identified in each subsection is their “employer”.
3. That being so, the issue which arises from s 12(8) in the present case is whether the QPC and the jockeys stand in relation to each other in the capacity of employer and employees because the former is liable to pay riding fees to the latter. Before the primary judge, the question was whether the QPC had discharged the onus of showing that it was not liable to pay the riding fees to the jockeys.

### Ground one — liability to pay riding fees

1. The primary judge correctly identified in his reasons the dispositive issue in this matter as being who, as between the QPC, owners or trainers, was liable to pay riding fees to jockeys. There was no dispute that this was the correct identification of the central issue, although it might more accurately have been described as whether the QPC had discharged the onus on it of establishing it was not liable to make the riding fee payments.
2. The appellant’s initial complaint is that the learned primary judge, although identifying the correct question, sought to analyse it by reference solely to the operation of the CPS and the identification of the persons who engaged jockeys to ride in races. There is force in that submission, as the real question required a consideration of whether, in the totality of the circumstances relating to the payment of riding fees, the QPC had made itself liable to pay them. Whilst there is little doubt that the CPS was significant in consideration of that issue, it was not determinative. Similarly, the identification of the person who engaged the jockeys was not insignificant, but it too was far from determinative. It was also argued that although the primary judge extensively relied on the documents produced in 2000 as establishing an intention that the Board would be paying the riding fees on behalf of the owners, he failed to determine the real question of whether, during the Relevant Periods, that was part of the arrangements between the parties. It was submitted that his Honour erred in understanding the import of the business records produced by Mr Stout and his evidence under cross-examination to the effect that, during the Relevant Periods, the arrangement which, in 2000, had been anticipated to exist under the CPS was not then operating. In fact, so it was submitted, those business records were inconsistent with the operation of the CPS as it was allegedly intended to exist. It was also submitted that they evidenced that the QPC had assumed the liability to pay the riding fees, although it was not necessary for the Commissioner to go so far.
3. It should be accepted that the primary judge erred in failing to ascertain whether, during the Relevant Periods, the obligation to pay the riding fees rested upon the QPC. Whilst it is true he concluded that “on and from the introduction of the CPS” the liability was on the owners to pay the riding fees, there was an absence of specific consideration of the position as it existed in the Relevant Periods and of the import of the documents contemporaneous to that period. The documents which related to that period were quite inconsistent with those which founded his conclusion about the responsibility for the owners to pay the riding fees as anticipated in the documents from 2000.
4. The appellants have established the existence of an appellable error in the primary judge’s reasons.

### Ground two — whether the QPC agreed to pay riding fees on behalf of the owners or trainers

1. Although the primary judge accepted that the QPC paid riding fees to jockeys as a consequence of the CPS, he concluded that it did so “on behalf of” the owners or trainers. His conclusion (at [67]) was dependent upon the continued existence of that state of affairs which he found were made explicit when the new system was put in place. In reaching this conclusion, he placed much emphasis on statements in the letters from the Board and those in articles in the Queensland Racing Calendar. The Commissioner submitted that there was, in fact, no evidence to suggest that riding fees paid by the QPC were paid on behalf of the owners and were passed on to them either directly or through the trainers. It submitted there was no evidence that the QPC agreed to pay riding fees to jockeys on behalf of the owners or trainers. Indeed, he went further and submitted there was no evidence that, prior to the introduction of the CPS, the QPC paid the riding fees and charged them back to the owners. It is necessary to carefully analyse the evidence relating to these issues.

#### “on behalf of”

1. Like much of the QPC’s case, there was a distinct lack of clarity as to what was intended by the expression “on behalf of”. It is not a precise term, and its context determines its meaning: *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, 386. In the present context of paying money it might mean using the money of another person to discharge the first person’s debt, one person using their own money to discharge another’s debt, or, as in the case of agency, a person using their own money to discharge a debt and seeking recompense from the principal. Indeed, it may also mean assuming the liability of another, with or without any expectation of being recompensed in the future. Here the expression was used in a generalised sense in the documents produced in 2000, and the exact sense in which it was used was not clarified.

### The position prior to 1 July 2000

1. Much of the QPC’s case rested upon the circumstances which existed prior to 2000 and the commencement of the CPS and the GST. The difficulty here is that there was only scant evidence of those circumstances. It appears that, prior to 2000, the actual payment of the riding fee was made by someone other than the owner or trainer. It seems that the racing clubs made the payments to the jockeys after a race had been completed. It is also apparent that, prior to the race in question, the trainer, on behalf of the owner, made a payment to the club. These payments were termed “pay-ups”. The amount of the pay-ups were said to be the sum of nomination and acceptance fees and riding fees (see [27] below and the October 2000 racing calendar). However, there was no evidence or explication of the legal nature of this transaction. It was not made clear whether the money representing that undivided amount of the “pay-ups” was held in trust for the owners or trainers and paid to the jockeys on the completion of the race on their behalf. Nor was it make clear whether the amount of the pay-ups was an amount which had to be paid to enable a horse to race such that, when paid, the money belonged entirely to the club, which would then use part of it or other funds to discharge fees to the jockeys. It may have been that an agency existed between the club and the owners or that the club was a stakeholder as between the owner and the jockeys, but whether either was the case remained ambiguous. The legal nature of the pre-2000 arrangements remained opaque at best.
2. Although it was central to QPC’s case that the system which existed prior to 1 July 2000 effectively remained in place subsequently, and that it paid the jockeys “on behalf of” the owners, the starting position was by no means clear. Nevertheless, it might be assumed that what was meant by the use of the expression “on behalf of” was that the clubs discharged the obligations of the owners or trainers to the jockey in respect of the riding fee.

### The introduction of the Centralised Prizemoney System

1. The primary judge placed overwhelming reliance on the several statements emanating from Mr Turner and the QPC in 2000 as to the intended operation of the CPS. There are two difficulties with this. The first is that the statements as to the intended operation of the system were unclear. Although the change was an “important” or a “significant initiative”, a “substantial shift from traditional practices”, and a “substantial change”, the exact nature of the changes was not elucidated. Nevertheless, these statements by the QPC as to the substantive nature of the changes tends against accepting that the legal relationships which existed prior to 1 July 2000 remained the same after that date. As identified above, the letter sent sometime after the meeting of the Queensland Principal Club Committee on 31 January 2000 inconsistently asserts that the riding fees will be paid “on behalf of race clubs” and “on behalf of owners”. In the Queensland Racing Calendar dated July 2000, Mr Turner indicated that the QPC would take over the responsibility for paying prizemoney to the owners, trainers and jockeys. It also identified that it would, henceforth, be paying QRIS bonuses and jockeys’ riding fees for all race meetings conducted in Queensland. As part of that process it identified that it would send invoices to the relevant racing participants, including the jockeys.
2. The substantial changes to existing practices were identified as including the invoicing of trainers for the amount paid in jockey fees. In the letters to all licenced trainers dated 23 June 2000, and in the article published in the October 2000 Queensland Racing Calendar, the intended new system was said to involve the recovery from the trainers of the amount paid in riding fees as well as an amount representing the GST paid by the QPC. To some extent that suggested the QPC was discharging a liability owed by the trainers (or owners) to the jockeys.

### The CPS as it operated in the Relevant Periods

1. Whatever may have been the intended operation of the CPS in 2000, it is apparent that the system in place in the Relevant Periods between 2009 and 2014 was not as originally contemplated.

#### The engagement of jockeys for races and barrier trials

1. The QPC founded much of its case on the identity of the person who engaged a jockey to ride in a particular race or barrier trial. Whilst consideration of that issue was no doubt relevant, it did not answer the essential question of the identity of the person who was obliged to pay the riding fee.
2. The evidence concerning the engagement of jockeys was slightly diffuse. Prior to the introduction of the CPS, a jockey was engaged by an owner, although often through the trainer, and the owner would pay money to the relevant racing club, some of which might have been used by the club for paying the riding fees. Usually, the engagement was *ad hoc*, in the sense that jockeys were engaged for particular races. Otherwise, there existed jockeys who were referred to as “stable jockeys”, who were employed or engaged by a particular trainer’s stable. The terms of that particular retainer might have varied from jockey to jockey in the sense that the jockey may or may not be free to accept other rides from external owners or trainers whilst so retained.
3. Nevertheless, in a general sense, the manner of the engagement of a jockey to ride in a particular race did not alter after the introduction of the CPS. As the primary judge found, “at no stage during the Relevant Periods, did the Board or its predecessors either employ or engage jockeys”. To the extent to which the reference to employ is not determinative of the application of s 12(8) of the SGAA, that statement is correct.
4. The rules under which thoroughbred racing was conducted had provisions relating to the engagement of jockeys. Local Rule 36 and ARR 8 facilitated the resolution of disputes by authorising stewards to adjudicate on claims by jockeys that a nominator or trainer of a horse had refused to honour a riding engagement. The steward was entitled to make an order regarding the engagement and any compensation thought to be appropriate. ARR 57 provided that only a manager of a horse might engage a jockey to ride a horse under their management. Local Rule 52 made provision for where a horse had been scratched:

**Local Rule 52. Engagement to ride**

(1) If a Rider claims to have been engaged to ride a horse in a race and the engagement is withdrawn by the connections or if the horse is scratched for any reason, on application by the Rider, if the Stewards find that the Rider was so engaged, they shall determine whether or not the Rider should be paid a fee and, if so, the amount.

(2) The Stewards may require that a Rider make himself available to ride in a race, in work or in Trials.

1. However, none of these rules nor any others referred to by the primary judge imposed any obligation on the owner to pay the riding fee. They are silent on such matters. Indeed, the existence of LR 52 reveals that the terms of an engagement of a rider by an owner by no means dictated the totality of the obligations which exist between them.

#### The payment and invoicing of riding fees

1. One starts from the uncontroversial proposition that the actual payment of riding fees to jockeys was by the QPC. Prior to the introduction of the new system, the clubs paid the fees and, it might be accepted, out of the money collected from the “pay-ups”. It may also be accepted that the riding fees were paid out of money collected from the “riding fees” collected by the clubs. However, under the new system, the clubs no longer paid the jockeys, and the system of “pay-ups” was abandoned. The QPC adopted the role of paying riding fees directly to the jockeys. This was made clear by the Jockey Licence Application forms which were used during the Relevant Periods which all stated “RQL will pay your riding fees etc via the Centralised Prizemoney System”. There was no suggestion in that document that the riding fees were being paid on behalf of any other party.
2. In these application forms the applicant for a licence also made certain declarations concerning their participation in thoroughbred racing. Some were apparently directed to meeting some of the requirements for recipient created tax invoices identified in the various *Recipient Created Tax Invoice Determinations* issued by the Commissioner (or his delegates). The declarations included the following:

8. For GST purposes relating to the supply of services by me (the Supplier), to QRL [the QPC] (the Recipient):

a. I, (the Supplier) acknowledge that I am registered for GST purposes and I will notify QRL in writing if I ceased to be registered for GST purposes;

b. I (the Supplier) will not issue tax invoices in relation to any prize money (supplies) that QRL may have to pay me;

c. QRL (the Recipient) can issue tax invoices in respect of prize money (supplies) that it has to pay me;

d. I (the Supplier) will not issue tax invoices in respect of the supplies;

e. I understand that QRL is registered for GST purposes and that it will notify me in writing immediately if it ceases to be GST requirements established under legislation.

1. Those declarations appear to acknowledge the jockey as providing services, in the nature of a taxable supply, to the QPC, which would be paying for those services. That is significant as it appears to be reflective of an agreement whereby the jockeys were providing services to the QPC amounting to a taxable supply, in return for which they would receive payment. It also appears to acknowledge that the QPC would issue an invoice to the jockey for the purposes of the GST legislation. That is not insignificant, as, in s 195-1 of the *A New Tax System (Goods and Services) Act 1999* (Cth) (GST Act), an “invoice” was defined as “a document notifying of an obligation to make a payment”. That is some indication that the parties contemplated the existence of an “obligation” or “liability” to make payment. Although the declaration did not, in that respect, refer to riding fees, the requirement in the form for bank details and notification if the jockey was not registered for GST is indicative that the declaration was to cover the payment of those fees as well.
2. During the Relevant Period the QPC issued invoices to jockeys, although none were adduced in evidence for the purposes of the appeal against the Commissioner’s decision. A pro-forma document was produced. It is titled “Recipient Created Tax Invoice (Jockey)”, and is an invoice directed to the recipient of the taxable supply, QPC, from the jockey. Its content is referred to above, and it includes provision for the QPC to set out the amounts of riding fees and prizemoney which are the subject of the invoice, along with the GST payable on each. In the ordinary course, an invoice is a statement or assertion that the recipient is liable for the amount stated in it for the goods or services identified. That is coherent with the definition in the GST Act. In this case, where it is produced by the QPC, the invoice can be taken as an assertion that it has an obligation to pay the amounts stated in it to the jockey identified. In the ordinary course of commerce it would be regarded as an acknowledgement or admission of the indebtedness stated in the document.
3. Although in his submissions the Commissioner did not press the point that the invoice constituted an admission, he did observe that the document reflected a payment of GST by the QPC to the jockeys in respect of the services provided. This was said to be important, given the cross-examination of Mr Stout, who appeared to admit that the QPC claimed the amounts paid as GST on riding fees as input credits for the purposes of its Business Activity Statements. The following questions and answers appear in the transcript of Mr Stout’s evidence:

And the GST that is recorded on these invoices for jockeys is taken into account by Racing Queensland in its appropriate forms with – that it supplies to the Commissioner each relevant period in accounting for GST?---That is my understanding, yes.

Effectively, treating this as GST paid by Racing Queensland?---That is my understanding, yes.

1. *Prima facie*, that evidence indicates that, in the Relevant Periods, the QPC was merely discharging its liability to make payment of the riding fees to the jockeys including GST in respect of a service received by it. It appears to have placed itself in a position wherein it was liable to make those payments as the recipient of the taxable supplies. That payment included GST, in respect of which it apparently claimed entitlements to input credits. The terms of the Jockey Licence Application forms, where the QPC indicated that it would pay the riding fees and the jockeys declared they were making taxable supplies to QPC, and the fact of making of payments including GST directly to the jockeys, tend to suggest that QPC was liable for the making of those payments.

#### Invoices issued to trainers

1. The QPC relied upon the statements made by it in 2000 in relation to the invoicing of the trainers in respect of riding fees, including GST, as establishing that, in the Relevant Periods, the trainer remained liable to pay them. In some of those documents an example was given of the nature of the invoices which, under the CPS, were intended to be issued to trainers. Those examples specified that the invoices would include a debit in respect of jockey riding fees, including 10% GST if the jockey was registered in that respect. Credits were made of the trainers’ percentage shares of prizemoney. As the evidence before the trial judge demonstrated, during the Relevant Periods the invoices sent by the QPC to the trainers did not include any deduction relating to the riding fees, but only of starters fees. There was no attempt in the invoices sent to the trainers to impose upon them, or the owners whom they represented, the liability or obligation for payment of riding fees.
2. The contrast between that and what was contemplated in the several statements by the QPC in the documents from 2000 is important. The inference from those documents was that the QPC’s burden of paying the riding fees would be directly passed on to the trainers, who would be specifically charged for them. That may have been reflective of an agreement that the QPC was paying the jockeys on the trainers’ behalf. However, as the documents contemporaneous with the Relevant Period disclose, that inferred intention no longer existed at that time. The QPC paid the jockeys, and recognized in the tax invoices its obligation to do so. The omission to specifically charge the trainers for those costs indicated that it did not regard them as being liable for their payment. In this respect it is apt to note that it was not suggested, when the CPS was established, that the QPC would make *ex gratia* payments to jockeys on behalf of the owners.
3. The evidence before the primary judge revealed there was no charging of the trainers or owners for the riding fees which the QPC paid. Under cross-examination, Mr Stout agreed that the QPC did not charge back those fees to the owners. Although he indicated there was a “measure of some recovery”, he accepted that was only in an economic sense. He agreed that the owner was not charged for the riding fee which the QPC had paid to the jockey. In that respect, the following exchange occurred in cross-examination:

In fact, there’s no relationship between the charging that you [the Board] make to the owner and the particular riding fee that’s been paid, except that there might be a charge in relation to that race, that’s charged to the owner? --- Yes. Yes.

1. Significantly, the owners were charged fees in relation to the entry of their horses into races, and these were identified in receipts issued by QPC to them. They were not *charged* *for reimbursement* of the amount paid to the jockeys in riding fees.
2. Mr Stout also acknowledged that the Board considered itself obliged to pay the riding fees. Although he initially said that was to be “on behalf of” the owners and trainers, he accepted that there was no agreement with an owner about the payment of riding fees, and the owners are not charged for them.
3. Mr Stout also agreed with the proposition that whilst, prior to the introduction of the GST in July 2000, riding fees were paid by owners to jockeys, that process never became a feature under the CPS. He agreed there was “a complete departure from this nexus between owners paying riding fees and jockeys receiving riding fees after the introduction of the GST”.

#### Barrier trials

1. The QPC submitted that even if it did not recover riding fees from owners, the circumstances of the barrier trial fees paid to jockeys were different. However, whatever system existed in relation to riding fees existed in relation to barrier trials. It was not clear there was any difference in the nature of the fee paid to a jockey for races and that paid for barrier trials. The owner engaged the jockey in relation to each and the QPC paid the jockey the relevant fee. The recipient created tax invoice produced by the QPC did not differentiate between the two types of payments. The documents created in 2000 also did not differentiate the payment of riding fees to jockeys for races, barrier trials or other track work. Mr Stout agreed there was no specific charge made by the QPC to the owners for the fees paid to jockeys who rode in barrier trials.
2. Reference was made to advertisements by the QPC during the Relevant Periods in industry magazines, identifying the riding fees payable in respect of barrier trials and the level of fees paid by owners. A barrier trial riding fee in excess of the amount which was paid to the jockeys to participate in it was charged, but it was not specified as being reimbursement for the riding fees. Mr Stout agreed that the barrier trial fees were not paid to the QPC as money which was to be used to pay the riding fees. There was no correlation between the barrier fees paid by owners or trainers and the amount paid in riding fees. Certainly, there was no suggestion that the fees paid to jockeys were being paid on behalf of the trainers or owners.
3. There was some evidence by Mr Stout that the accumulated revenue received by the QPC was spent on paying barrier trial riding fees, although such fees were recovered from barrier trial entry fees charged to owners and trainers. However, the mere fact that some of the money received from owners and trainers for barrier trials may have been used to discharge the obligation to pay fees to riders in those trials did not establish any basis for concluding that the fees paid to riders were paid as agent for or to discharge the liability of the owners or trainers.

#### Conclusion as to the operation of the CPS during the Relevant Periods

1. Whatever may have been the intention of the QPC in 2000 when the several documents relied upon by it were written, the evidence before the primary judge disclosed that what in fact occurred in the Relevant Periods was significantly different. Were it to have been the case that, having paid the riding fees to the jockeys, the QPC deducted an equivalent amount from the prizemoney paid to the owners, it might be accepted that the riding fees were being paid on behalf of the owners. However, that was not the case. There was no recovery of the riding fees from the owners or trainers. Further, the QPC held itself out as being the entity which would pay the riding fees, admitted in the recipient created tax invoices that it had an obligation to pay those amounts, did so, along with the GST, and then claimed as against the Commissioner that it was entitled to input tax credits in respect of the GST paid. The actions of the QPC only pointed towards it having the obligation or liability to pay the riding fees to jockeys.
2. Much of the above evidence was not referred to by the learned primary judge, whose attention was focussed on what the QPC, by its officers, indicated would be happening on the introduction of the CPS.
3. The Commissioner submitted that the evidence before the primary judge of the events which occurred in the Relevant Periods negated the suggestion that the QPC paid the riding fees on the owners’ behalf. He submitted that, if the QPC’s central submission were correct, then:
   1. There would have been no reason for the QPC to issue recipient created tax invoices in relation to riding fees. It would not have received a taxable supply in respect of which it had made a payment.
   2. Further, the QPC would not have been entitled to claim input tax credits for the payments made to jockeys for riding fees. It would not have paid the GST amount to the jockeys and, therefore, would not have been entitled to the input credits.
   3. Only GST-registered owners (or trainers) would be entitled to claim the input tax credits on payments of riding fees to the GST-registered jockeys.
   4. The QPC would not have issued a recipient created tax invoice directed to itself from the jockey for payment. Such a document would have been otiose because the QPC, itself, would have had no liability to pay.
   5. Finally, the QPC would have issued an invoice to the owners deducting the riding fees paid to the jockeys. The invoices or receipts actually issued to trainers or owners did not purport to make deductions from payments owed in respect of riding fees of any kind. The costs of paying the riding fees were accounted for as expenses of the QPC. They were absorbed into the general cost of running thoroughbred racing, and no recompense was sought from the owners for them.
4. Had the primary judge’s attention not been focused upon the documents created in 2000 by the QPC, and weight given to the evidence derived from the events which occurred in the Relevant Periods, the inferences drawn could not have been sustained. Those inferences arising from the QPC’s stated intentions in 2000 were displaced by evidence of the transactions which actually occurred between 2009 and 2014.
5. In light of the above, the QPC did not discharge the onus of establishing that the assessments were excessive. It is to be remembered that it was not necessary for the Commissioner to identify before the learned primary judge the exact manner in which the Board became liable to pay the fees to the jockey. Here, the QPC attempted to discharge its onus by asserting the existence of a contractual arrangement whereby the owners were liable to pay the riding fees to the jockeys and not it. The material relied upon, being the documents created in 2000 at or around the time of the establishment of the CPS, was insufficient to give rise to the alleged contractual arrangements.
6. Necessarily, the Commissioner’s assessment ought not to have been disturbed, and the appeal should be allowed for that reason.

## The contractual arrangements between industry participants

1. The Court was informed that the present appeal was in the nature of a “test case” and, that being so, it is appropriate to deal with some of the additional arguments advanced concerning the nature of the relationship between the participants in the thoroughbred racing industry.
2. It is to be recalled that the primary judge ascertained that the nature of the relationships between the QPC, the owners and trainers, and the riders, was founded in contract. In the course of the appeal, the QPC submitted that his Honour’s conclusion was erroneous. It submitted that the relevant relational rights and obligations rested in the subordinate legislation created by the Rules becoming statutory instruments.

### The contractual relationship argument

1. The argument that the relationships between persons who participate in the thoroughbred racing industry are contractual in nature is well-founded in authority. It has its origins in ARR 2, which provides that any person who takes part in any thoroughbred racing “thereby agrees with the Australian Racing Board” and the Principal Racing Authorities to be bound by the rules. It creates a standing offer to persons intending to participate in the industry to the effect that, if they choose to participate, then they are agreeing to be bound to comply with the prescribed rules. The acceptance by the person choosing to participate in the race forms the agreement between them and other participants to be bound to each other to comply with the rules.
2. In Queensland, this approach was given approval by Wanstall SPJ (Hanger CJ and Stable J agreeing) in *R v Wadley, ex parte Burton* [1976] Qd R 286. In that case a jockey, who had been disciplined by a Committee of the Queensland Turf Club, challenged the Committee’s authority and the manner in which it had proceeded against him. Wanstall SPJ identified that the authority exercised by the committee derived from a contractual relationship between the parties (at 292):

The Rules of Racing constitute a contract between the Principal Club, in this case the Queensland Turf Club, and ‘any person who takes part in any matter coming within these Rules’, who ‘thereby agrees to be bound by them’ (A.R.2). By A.R. 5, ‘These Rules apply to all races held under the management or control of a Principal Club, and shall, together with such Rules … as may from time to time be made by the Principal Club in its territory be read and construed as the Rules of the Principal Club in such territory and … shall apply to all races held under the management of a Principal Club or any registered Club and to all meetings registered by a Principal Club.’ In the circumstances of this matter there is no doubt that the prosecutor, by his riding in the race at Gympie, made himself subject to the Rules and amenable to the Committee’s jurisdiction to charge him, to inquire into the charge and to hear and determine it.

1. The decision in *R v Wadley* was applied by Martin J in *Hogno v Racing Queensland Ltd* [2012] QSC 303, where the plaintiff, Mr Hogno, caused a horse to participate in a rural race meeting despite not being licenced to do so. The QPC held an inquiry by the stewards, who disqualified him from further participation in the industry. That disqualification was overturned, and Mr Hogno sought damages from the stewards, caused by the decision to disqualify him and in relation to the publishing of its decision. That claim failed because, *inter alia*, by ARRs 197 and 198, the stewards were immune from liability for damages for anything done by them arising out of their exercise of power in good faith. Martin J held that those rules imposed a bar to Mr Hogno’s damages claim. At [94] his Honour said:

The Australian Rules of Racing were recognised in *R v Wadley, ex parte Burton* to constitute a contract between the principal club and, in that case, Mr Burton. The court said it was a contract “… that the legislature has recognised and endorsed, thus putting the relationship between the contracting parties on a higher plain than that which would arise from a mere contract”. There is no difference in substance between the act considered in *Wadley* and the Act which applies in this case. Consequently, AR 197 and AR 198 operate between Mr Hogno and the QPC by virtue of their statutory force.

(footnotes omitted)

1. That decision was upheld in *Hogno v Racing Queensland Ltd* [2013] QCA 139. The Court seemingly found it unnecessary to determine whether the rules applied by contract or through force of the statutory regime. That said, the Court (at [31]) held that the Australian Racing Rules were probably not part of the subordinate legislative regime established in Queensland and, it would seem to follow, they applied in that case as contractual terms.
2. In *Re Queensland Principal Club* (unreported, Supreme Court of Queensland, 29 January 1999), Williams J considered a matter arising out of the same race which was the subject of the decisions concerning Mr Hogno. His Honour relied upon the decision in *R v Wadley* when he expressly identified the relationship between parties in the racing industry as arising in contract and the parties binding themselves to the rules of racing by engaging in activities within the scope of the rules.
3. This view also dominates in other states. In *New South Wales Thoroughbred Racing Board v Waterhouse* (2003) 56 NSWLR 691, Hodgson JA (with Handley and Santow JJA concurring in this respect) observed (at 698):

35 It is to be noted that the Board is not an instrument of government (see the Board Act s 4–s 6). The Rules of Racing are rules to which participants in racing become contractually bound; but they are also given statutory consequences, for example by s 14 of the Board Act.

1. That view was recently confirmed by the NSW Court of Appeal in *Golden v V’landys* (2016) 339 ALR 610 at [60]. It was also confirmed by Robertson J in *McHugh v Australian Jockey Club (No 13)* (2012) 299 ALR 363, although his Honour correctly emphasised that the nature and scope of the rights and liabilities of parties *inter se* will depend upon a construction of the relevant rules.
2. More generally, it is accepted that persons engaging in sporting pursuits under the general control of established sporting bodies are taken to be bound by the rules of the sport in which they engage. The primary judge referred to the House of Lords’ decision in *Clarke v The Earl of Dunraven and Mount-Earl (The “Satanita”)* [1897] AC 59, which included a claim for damages resulting from a collision between two yachts which were entered in a club race. In entering the race each owner had undertaken to comply with the club’s sailing rules, one of which provided that any yacht disobeying the racing rules would be liable for “all damages arising therefrom”. The yacht alleged to have been in breach of the rules was sued in respect of damage caused to the other. The House of Lords concluded that the action was correctly brought in contract, and that the effect of the parties entering for the race and undertaking to be bound by the rules to the knowledge of each other was sufficient to create a contractual obligation to discharge the liabilities for which they agreed to be bound.
3. The contractual relations *inter se* of persons engaged in sporting activities were discussed in *Mercato Sports (UK) Ltd v The Everton Football Club Co Ltd* [2018] EWHC 1567. In that case, Judge Eyre QC (sitting as a judge of the High Court) identified the manner in which contractual relations may exist between participants in sporting associations and as between participants or clubs and governing bodies:

41. … Participation in a sport or in activities connected with that sport does not of itself mean that those participating have as between each other the rights and obligations provided for in the rules of that sport’s governing body. Whether there is an implied contract between such participants to the effect that they have as against each other those rights and obligations is to be determined by a fact sensitive analysis undertaken by reference to the general principles of contractual formation. In particular the court has to consider whether a given participant is a party to a vertical contract making him subject to the rules of the sport’s governing body and whether the circumstances as a whole are such as to give rise to consequent and corresponding horizontal contracts with other participants. That approach is correct both by reference to authority and as a matter of principle and is to be adopted here.

42. In many cases the court will readily conclude that there were both vertical contracts with the relevant governing body and horizontal contracts with other participants. Thus those engaging in a sporting event organised under the auspices of a particular governing body are likely to be held to have agreed with those organising the event to be bound by the rules of that body and to have entered horizontal contracts to the same effect with the other participants. However, such a conclusion will be less readily reached the further removed the activity in question is from the actual playing of the sport concerned.

#### The determination of the primary judge as to the parties’ contractual relations

1. The primary judge held that, when the applications for licences from jockeys, trainers and owners to participate in thoroughbred racing were accepted, relationships of a contractual character, of a vertical and horizontal nature, were created. In relation to the arrangement which ensued for the riding of horses and the payment of fees, his Honour said:

65 Accepting this to be the background position, when a jockey was employed or engaged by an owner or trainer to ride a horse in a race, they entered into another, separate contract with that trainer or owner, and only that trainer or owner, to perform that service. Each also had, via a contract, separate (vertical) contractual rights and obligations with the Board (or a predecessor) and horizontal contractual rights with each other by virtue of having applied for a licence and being granted one. Insofar as those rights and obligations arose under the Local Rules, their source was also in a subordinate instrument.

66 On close analysis, the Centralised Prizemoney System did not alter these separate relationships. Neither, materially, did it create some different source in respect of the liability to pay a riding fee to a jockey.

1. At [67] his Honour found that, on the introduction of the new system, when the owners, trainers and jockeys became bound to the rules they also agreed that the QPC was to pay the riding fee to the jockeys “on behalf of” the owner or trainer. This, his Honour found, was made explicit on the introduction of the systems. His Honour found that the new agreements were formed on the basis that payment in discharge of the owner’s or trainer’s riding fee liability to the jockey would be made on behalf of the owner or trainer by the QPC under the CPS. He also found that a jockey who was not paid would have a contractual cause of action to recover the riding fee against the owner or trainer, and the latter would be entitled to join the QPC so as to seek contribution or indemnity for failure to abide by the terms of the separate contract that the owners or trainers had with it whereby it agreed to pay the riding fee on behalf of that owner or trainer. His Honour held at [68]:

What follows from this is that, throughout the Relevant Periods, a jockey was a person who was paid to participate in a sport, namely thoroughbred racing, but the person legally liable to pay the riding fee, which was the payment for that participation, was always the owner or trainer who had employed or engaged that jockey to ride in that race. The Commissioner has misunderstood the nature of the Centralised Prizemoney System and the source of the legal liability to pay the riding fees. The source remained the contract between jockey and the owner or trainer but that liability was discharged by a payment made on behalf of that owner or trainer by the Board (or a predecessor) via the Centralised Prizemoney System.

1. Putting aside the terms of the obligations to pay riding fees, the underlying nature of the contractual relations between the parties as identified by the primary judge should be accepted. On participating in thoroughbred racing, by acquiring a relevant licence or exercising the rights under it, the jockeys, trainers and owners agreed to be bound by the rules of racing, including the ARRs. The Queensland rules, at least, have statutory effect, although that does not diminish the parallel contractual relationships. To the extent that the rules are applicable, they govern the rights of the parties between themselves and between them individually and the QPC. The clubs which also participate in matters under the rules are similarly bound.
2. Further, as was found by the primary judge, not all rights and obligations which might exist between jockeys, trainers, owners, clubs and the QPC are governed by the rules. There is no rule in the ARRs or in the Queensland rules which governs the obligation to pay riding fees. Outside the rules to which the parties were bound, the primary judge held that, in the circumstances of the introduction of the CPS, there was an agreement or agreements to the effect that, although the trainers or owners agreed to pay the riding fees, the QPC would discharge that liability to the jockeys on their behalf. However, as has been demonstrated above, the inferences necessary to support those implied contractual rights could not be drawn from the evidence as it existed in relation to the Relevant Periods.

#### The obligation to pay racing fees

1. Although it is not strictly necessary to do so, it is appropriate to identify the contractual relations between the parties during the Relevant Periods, at least to the extent they were evidenced by the material before the Court. In doing so, it is apt to observe that whether a contractual relationship existed as between the QPC and the owners, trainers and jockeys on the granting of a relevant licence is irrelevant to this issue. The rights of the parties arise through their acts and conduct in the context of the framework put in place by QPC for the purposes of paying riding fees and in the context of the rights and obligations under the rules. As was identified in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105 [25], the search for an intention to create contractual relations requires an objective assessment of the state of affairs between the parties. Here, that state of affairs included the following:
   1. The QPC had established the CPS, under which it dispensed amounts payable on the completion of races to the participants.
   2. The QPC held itself out in the Jockey Licence Application form as indicating that it would pay riding fees to jockeys who rode in races conducted under the rules.
   3. The jockeys declared in their application forms that they would be providing services to QPC. The content of the form strongly indicated they expected to be paid by the QPC in return for the provision of their services.
   4. The understanding evinced by the jockeys’ declarations was that they would receive an “invoice” prepared by and from the QPC identifying the amount paid by the QPC, including the amount of GST, which represented their riding fees for participating in races.
   5. The invoice itself was an acknowledgement by the QPC that it was obliged to make the payments to the jockeys.
   6. The QPC made the payments to the jockeys.
   7. The QPC did not recover or seek to recover the amount of the riding fees from the trainers or owners.
   8. The QPC accounted for the GST paid by it in its returns to the Commissioner.
   9. The absence of any express agreement between the jockeys and the trainers, or documents evidencing the same, that the trainers would pay riding fees; and the absence of any express agreement with the QPC that it would pay on behalf of owners or trainers.
2. In the light of the framework put in place by the QPC for paying riding fees, the inference must be that there was a standing offer from the QPC that, if an owner or trainer engaged a licenced jockey to participate in a race conducted by the QPC, and the jockey did participate, the QPC would be liable to pay the riding fee to the jockey. Performance of the engagement to ride in the race was acceptance of the offer: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231, 255.
3. The same applies in relation to riding fees paid for barrier trials.
4. The QPC focused attention on the engagement of the jockeys by the trainers and, so it seems, an implied promise to pay for the services provided. Whilst that may be a legitimate implication in many cases, it was not so in the highly regulated thoroughbred racing industry, where most rights of the parties *inter se* are controlled by the rules, and those which are not exist in the context of the rules and the QPC’s control of the industry. To the extent to which there was an agreement between the trainer and the jockey on the making of an engagement to ride a horse in a particular race, it was a promise by the jockey to ride in the race in return for the promise by the trainer to allow (or nominate) him or her to ride. A breach by either might, in the absence of any rules, give rise to a claim, including a claim for a loss of opportunity in respect of prizemoney. In any event, in the circumstances where the QPC had held itself out as being liable to pay the riding fees of jockeys, the inference that the trainer or owner would pay is unlikely.

#### Absence of an agreement arising from the granting of a licence

1. The QPC submitted that it was not possible for an agreement to arise on the making of an application for a licence because that right arose under a statutory instrument, and the owners, trainers and jockeys were obliged to make an application, as otherwise their participation in thoroughbred racing would be unlawful. In that respect it was submitted that the contractual relationship asserted by the Commissioner could not exist. However, as mentioned above, the case advanced was not that there was a contract which was formed on the granting of the licence, but that the statement in the Jockey Licence Application Form became a contractual obligation.
2. In support of its argument the QPC relied upon *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373. In that case, the suggestion was that, by the process of applying for and being granted a licence to engage in fishing activities, a contract was formed between the licensee and the State, whereby the State impliedly agreed to maintain the fisheries in the manner existing at the time of the granting of the licence. That submission was rejected on the basis that no contractual intention existed. No similar situation is contemplated in this case. Reliance was also placed on *NT Power Generation Pty Ltd v Power and Water Authority* (2001) 184 ALR 481 at 570, and the appeal: (2002) 122 FCR 399, 452-453. Again, that decision concerned whether some contractual arrangement was created by reason of the granting of a licence which would oblige the statutory licensor to perform obligations to give the licensee the maximum benefit from the licence granted. At first instance, Mansfield J correctly observed that a licence granted under a statutory power is not in a real sense an agreement reached between parties involving an exchange of promises. It is an authorisation under statutory power to enable the grantee to undertake some task. His Honour found that the granting of a licence does not carry with it a covenant from the grantor that it will do all that is necessary to allow the grantee the full benefit of the licence.
3. Reliance was placed on the decision of the Court of Appeal of New South Wales in *Lismore City Council v Stewart* (1989) 18 NSWLR 718, where a person who obtained a certificate in relation to certain land from the relevant city council claimed that the council had provided a contractual warranty in relation to the information in the certificate. However, the Court noted that there was no intention to be contractually bound arising from the manner in which the certificate was issued. At 726, Hope A-JA (with whom Kirby P and Samuels JA agreed) said:

In my opinion no contract arose in the present case. Where a person has applied and paid the prescribed fee, councils are required to give a certificate under subs (2). There is no question of negotiation. The Council has no option in the matter and no right to negotiate about the fee or about what information it shall provide. No question of contractual intent in either party would arise. The advice given under subs (5) is not given in any separate certificate; it is included in the certificate given pursuant to subs (2). Thus the plaintiffs must submit that, although no contract exists in respect of one part of the certificate, it does exist in respect of another part of the certificate, and this because the Council may elect not to give the additional advice and may require a fee for giving it.

In these circumstances and in the light of the provisions of s 149 and reg 68, I am satisfied that there was no contractual intent on the part of either party in the transaction. There was no evidence of actual contractual intent on either party.

Again, this is not relevant to the present circumstance, where the claimed contractual relationship giving rise to the QPC’s obligation to pay the riding fees was not alleged to have been created by the application for and granting of a licence. The contractual relationship which existed did depend upon the terms of the application form, but the granting of the licence was not said to give rise to the liability.

1. The QPC also referred to *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445 at 560-562 and on appeal at (2005) 148 FCR 68 at 115-118 [174]-[195], in support of the proposition that no contract was manifested by the application for a licence and its grant by a licensor. In that case it was held that, as there was no choice by either party for one to provide a pilot to a vessel owned by the other, no contractual rights were created when one was provided. The absence of any free will in the making of the agreement negated any contractual intent.
2. In the present case, the issue was as to the obligation to pay the riding fee. That did not come from any obligation arising because the relevant jockeys applied for and were granted licences. It arose *dehors* of the licensing of the jockeys. To the extent to which that process was relevant, it was limited to the statements the QPC put in the application form indicating that it would pay riding fees and the declarations it required the jockeys to make. No obligation arose between the QPC and the jockey until the latter was engaged to ride in a relevant race and did so.
3. It can also be said that the above authorities are distinguishable in this case. Here, the parties engaged in their activities in the context of ARR 2, which has the effect that, when a party participates in thoroughbred racing, they agree with the other participants and the QPC to be bound by the rules. Nothing in the nature of ARR 2 existed in the cases on which the QPC relied. The regulatory framework which the legislature permits to exist in this case includes that provision which generates the necessary contractual intention of the parties when they do participate.

#### Conclusion on contractual relationships

1. It follows that the QPC’s submission that no contractual relationship existed between the QPC and the jockeys should be rejected. Contrary to the findings of the primary judge, the agreement in relation to riding fees was that the QPC agreed to pay the riding fee if the jockey participated in a regulated race, and the acceptance of that offer occurred when the jockey fulfilled that condition.
2. This conclusion is necessarily inconsistent with that of the primary judge. It also means that the Commissioner’s conclusion that the QPC was liable to pay riding fees to jockeys was correct.

### Ground three — no entitlement of the QPC to seek contribution from owners or trainers for unpaid riding fees

1. The primary judge held that if a jockey sued the owner or trainer for an unpaid riding fee pursuant to the contract with the owner or trainer, the latter party would be entitled to “seek contribution or indemnity for a failure to abide by the terms of the separate contract that the owner or trainer had with the [QPC]”. His Honour did not identify what that contract was or what its terms were. However, as has been identified above, there was no — or insufficient —evidence to permit a determination that the QPC was not obliged to pay the riding fees which it did to the jockeys. On the contrary, the structure established by the QPC rendered it — and it alone — liable for payment of those fees.
2. It cannot be accepted that the trainers or owners would have some right of indemnity or contribution against the QPC were it to happen that the latter did not pay riding fees.
3. It can also be observed that the conclusion that the QPC was liable to a claim for “contribution” carried with it the unavoidable conclusion that it had a liability (albeit coincidental with the owners) owed directly to the jockeys. His Honour’s conclusion that the QPC was obliged to “contribute” appears to be inconsistent with the view that it was not obliged to make the payment.

## Conclusion on appeal

1. There is no need to specifically deal with the remaining grounds of appeal, as the answers to these grounds flow from what has been said above.
2. It suffices to identify that the primary judge ought to have held that the QPC had not discharged the burden of establishing that the assessments were excessive. It did not demonstrate that it was not liable to pay the jockeys riding fees for races and barrier trials. The primary judge ought to have ordered that the QPC’s appeal against the Commissioner’s objection decision of 17 August 2017 be dismissed.
3. The orders of this Court should be to allow the appeal and set aside the orders below and in lieu thereof order that the appeal against the objection decision be dismissed.

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| I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Griffiths and Derrington. |

Associate:

Dated: 16 December 2019

REASONS FOR JUDGMENT

STEWARD J:

1. I am regrettably, and with very great respect, unable to agree with the conclusion reached by the learned primary judge. I otherwise respectfully agree with the decision of Griffiths and Derrington JJ. and with their Honours’ reasons for judgment.
2. I only wish to add an observation about the construction of s 12(8)(a) of the *Superannuation Guarantee (Administration) Act* *1992* (Cth) (the “Act”) in support of Griffiths and Derrington JJ.’s reasons. The provision is set out in the joint judgment. It is a deeming provision, and, as such, would ordinarily be construed strictly and only for the purpose which it serves: *Federal Commissioner of Taxation v Comber* (1986) 10 FCR 88 at 96 per Fisher J.; *Financial Synergy Holdings Pty Ltd v Federal Commissioner of Taxation* (2016) 243 FCR 250 at 259 [34] per Middleton and Davies JJ.
3. Section 12(1)(a), as observed in the joint judgment, states that subss (2) to (11) of s 12 expand the meaning of the terms “employee” and “employer”. Strikingly, however, none of subss (2) to (11) express any person or thing to be deemed to be an “employer”. Rather, each deems a person in defined circumstances to be an “employee”. Yet the liability to pay the superannuation guarantee charge is imposed, not on the “employee”, but on the “employer”. Section 16 of the Act, for example, provides as follows:

**Charge payable by employer**

Superannuation guarantee charge imposed on an employer’s superannuation guarantee shortfall for a quarter is payable by the employer.

1. Read literally, s 12(8)(a) would fail to deem the Racing Queensland Board to be an “employer”. That problem is not, however, without a solution. In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, a majority of the High Court declined to give a literal interpretation to former s 80C(3) of the *Income Tax Assessment Act 1936* (Cth) because to do so would result, in the circumstances of that case, in an absurd result. Gibbs C.J. said at 304-305:

There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in *Connaught Fur Trimmings Ltd. v. Cramas Properties Ltd.* [[1965] 1 W.L.R. 892, at p. 899; [1965] 2 All E.R. 382, at p. 386]. Examples of that sort of case may be found in *Maxwell on the Interpretation of Statutes*, 12th ed., (1969), at p. 228 et seq., and *Craies on Statute Law*, 7th ed., (1971), at p. 520 et seq. However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that “it may degrade into mere judicial criticism of the propriety of the acts of the Legislature”, as Lord Moulton said in *Vacher & Sons Ltd. v. London Society of Compositors* [[1913] A.C. 107, at p. 130]; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute. On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice. Since language, read in its context, very often proves to be ambiguous, this last mentioned rule is one that not infrequently falls to be applied.

1. After examining the legislative history and context, Gibbs C.J. concluded that it was permissible to depart from the literal meaning of the words used in s 80C(3). Similarly, Stephen J. decided that it was “clear beyond question” that a literal construction of s 80C(3) would not give effect to the intention of the legislature (at 310-311).
2. Mason and Wilson JJ. observed that departure from the ordinary grammatical sense of the language used in a provision was not restricted to cases of absurdity or inconsistency. Their Honours said at 321:

… when the judge labels the operation of the statute as “absurd”, “extraordinary”, “capricious”, “irrational” or “obscure” he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

1. The construction of s 80C(3) favoured by Mason and Wilson JJ. arose from “a necessary implication to be deduced from the legislative scheme as a whole” (at 322).
2. I am of the view that a necessary implication to be deduced from the terms of the Act is that the person who, for the purposes of s 12(8)(a) is liable to make the payment, should be deemed to be an “employer”. In my opinion, it would be an absurd outcome if subss (2) to (11) of s 12 only operated to deem certain individuals to be employees and no more. That conclusion flows from the imposition of liability on the “employer” and also by the reference in s 12(1)(a) to subss (2) to (11) expanding *both* the ordinary meaning of “employee” as well as the ordinary meaning of “employer”. It follows that where in those subsections, there is a reference to a person who is deemed to be an “employee” of another person or entity, that other person or entity should be deemed to be the “employer” of that “employee”.
3. The appeal should be allowed.

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| I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 16 December 2019