

**RACING APPEALS AND DISCIPLINARY BOARD  
(Original Jurisdiction)**

*Racing Victoria Stewards*

*v*

*Tony Vasil, Trent Pennuto & Others*

**RULING No. 1**

Judge Bowman	Chair
Mr B Forrest	Deputy Chair
Mr G Ellis	Member

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**RE: Objections to Admission of Evidence**

We apologise at the outset for an error in our email of 19 April 2018. As pointed out by Mr Poulton on behalf of the Stewards, there had been a correction to the ruling concerning objections to admissibility of evidence and the timetable for so doing, clarifying that the opportunity so to do was not confined to Mr Vasil, but extended to all charged persons. All such parties had the opportunity to provide a table of specific references in relation to the proposed evidence to which objections is taken, along with supporting submissions by 9 April 2018.

As matters eventuated, only two objections were received. These were from Mr Hannebery on behalf of Mr Vasil and Mr Croxford on behalf of Mr Pennuto. Each was a little late, but no point is taken in that regard. Neither had a table of specific references, so we take each objection to be to the totality of the evidence set out in the spreadsheet which the Stewards seek to tender and which concerns those persons.

We should also point out that, considerably earlier on 22 February 2018, a defence on behalf of Mr Birchley had been received from his solicitor, Mr Schultz. Apart from denying each of the charges, the defence raised issues of the hearsay nature and admissibility of the evidence against Mr Birchley. It was further pleaded that the text message evidence is of little or no probative value and could not discharge the required onus of proof. Whilst no further submissions have been received from Mr Birchley, we take it that he also challenges the admissibility of the spreadsheet evidence.

To complete the picture, Mr O'Sullivan, on behalf of Mr and Mrs Nelligan has indicated that they will effectively be taking no further part in the proceedings. Mr  
25 McHenry is to argue a jurisdictional point on 24 April for Mr Smerdon. He has also stated that Mr Webb and Mr Garland will be pleading "not guilty". They have no objection to the matter proceeding as one overall hearing.

At the second Directions Hearing on 1 March 2018, we stated that there would be no separate hearing in advance in relation to any "strike out" application. However, it  
30 was suggested that there could and should be a determination "on the papers" of the issue of admissibility of evidence generally, so that the parties had some idea of what they were facing or what items of evidence were to be excluded. A table of specific references would have assisted in that regard. In any event, it was a suggestion which was adopted.

35 In his letter of 18 April 2018, Mr Poulton, on behalf of the Stewards, suggested that matters such as the inability to cross-examine the senders or recipients of text messages and what weight should be attached to them should be dealt with in the running of the case, but that objections to the status or provenance of the contents of the spreadsheet should be dealt with in advance "on the papers". This effectively  
40 repeats a longer submission contained in a letter of 16 April 2018, in which it was emphasised that the Stewards were not seeking any ruling as to the truth of any statement or representation contained in text messages recovered from Mr Nelligan's phone. As we understand this, the preliminary ruling sought related to the admissibility of the spreadsheet evidence generally or as a concept or mode of  
45 presentation of such evidence.

We are of the view that the spreadsheet generally should be admitted into evidence. Objections to individual text messages concerning what weight, if any, should be attached to them can be dealt with as they arise. Arguments, cross-examination and the like as to the truth of individual messages can be dealt with in the same way.

50 When all is said and done, what is the spreadsheet? From a total of some 70,000 text messages found on Mr Nelligan's phone, basically it is the setting out of the messages upon which the Stewards rely in presenting their case. The Stewards have made it clear, via Mr Poulton, that the parties charged are free to examine part or all of the 70,000 messages if they so desire and indeed they have been in the possession  
55 of those parties for in excess of two months – see the letter of Mr Poulton of 16 and 18 April and the references to the sending of the complete telephone data to the parties on 8 February.

Perhaps of less significance for present purposes, the spreadsheet also contains what is referred to as race information – dates and times of races, results of blood tests,

60 results of races and the like. This is effectively public information and, as we understand the objections, are not of particular concern to Mr Vasil or Mr Pennuto in the context of the present dispute.

Why should the spreadsheet not be admitted into evidence, subject to the provisos concerning truth, weight and the like that have been discussed?

65 The objections of Mr Vasil and Mr Pennuto (and, to some extent, the earlier defence of Mr Birchley) focus on issues such as the inability to cross-examine Mr Nelligan and others, the absence of any means to compel the attendance of the Nelligans or Mr Smerdon, prejudice, the inability to test the material, hearsay, lack of probative or persuasive value, that at least some of it is third hand and cannot be tested and the  
70 like.

We would point out the following. As has been said several times, this is a Board hearing not one in a court of law. Pursuant to S.5G of the *Racing Act 1958* (Vic), this Board is bound by the rules of natural justice but may otherwise regulate its own procedure. In a case of this nature and with this magnitude of material, the  
75 admission of evidence in a general form and subject to subsequent arguments concerning weight, truth, individual admissibility and the like seems to us to breach no rule of natural justice. Where the messages upon which the Stewards will rely have been identified and set out (and the totality of the messages long since provided), it seems to us a sensible and fair way to conduct the case.

80 Even if this was a matter being heard in a Court of Law and the rules of evidence applied, it seems to us that the spreadsheet could well be admissible, particularly given the provisos that are operating in respect of individual messages.

Apart from anything else, Mr Nelligan and others who sent the messages set out in the spreadsheet were engaged in the carrying on a business as defined in Part 2 of  
85 the Dictionary contained in the *Evidence Act 2008* (Vic). They were engaged in carrying on a profession, calling, occupation, trade or undertaking. For the purposes of S.69(1) of the Act, the document (the spreadsheet) contains previous representations made or recorded in the course of, or for the purposes of, the business. The persons involved might reasonably be supposed to have had, directly  
90 or indirectly, personal knowledge of the asserted facts. The exceptions are not relevant. Accordingly, the hearsay rule would not apply. Thus, in a Court of Law the contents of the spreadsheet might well be considered an admissible document.

In summary, bearing in mind the prevailing circumstances and the provisos that have been discussed, we are of the view that the spreadsheet is admissible in  
95 evidence.