

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-78	
Name	Angus Garrard	
Panel	Kerry O'Brien AM (Chairperson) Peter O'Neill (Deputy Chairperson) John McCoy OAM (Panel Member)	
Code	Harness	
Rule	Australian Harness Racing Rules AHR149(2) <i>A person shall not drive in a manner which in the opinion of the Stewards in unacceptable</i>	
Penalty Notice number	PN-009450	
Appearances & Representation	Applicant	Jim Murdoch KC
	Respondent	Queensland Racing Integrity Commission Glen Rice KC
Hearing Date	25 January 2023	
Decision Date	31 January 2023	
Decision	Pursuant to 252AH(1)(c) the Racing decision is set aside and a finding of not guilty is substituted	
Case References	<i>Briginshaw v Briginshaw & Anor</i> 1938 60 CLR 336 <i>McMullen v Racing Queensland Limited</i> 2012 QCAT 286 <i>Misfud v Racing Victoria Stewards</i> 2007 VRAT 6 <i>Dixon v Queensland Racing Integrity Commission</i> 2018 QCAT 183 <i>Elkins v The Queensland Racing Integrity Commission</i> 2021 QCAT 161 <i>McMullen v The Queensland Racing Integrity Commission</i> 2021 QCAT 202 <i>Ison v Harness Racing NSW</i> , NSW Harness Racing Appeals Panel 6 September 2023 <i>Turnvell v Harness Racing NSW</i> , Harness Racing Appeals Panel 1 April 2016	

Reasons for Decision

- [1] The Applicant in this matter is Mr Angus Roy Garrard. Mr Garrard, is a licenced harness racing driver. On the 17 January 2024, following a Stewards Inquiry into the running of Race 2 at the Redcliffe Harness racing meeting, the Applicant as the driver of the horse Aqua Cruiser was found guilty of an offence against Australian Harness Racing Rule 149(2).
- [2] By way of penalty he received a licence disqualification of 21 days, commencing on and from 27 January 2024.
- [3] Pursuant to section 252AB of the *Racing Integrity Act 2016*, the Applicant now seeks a review of that racing decision as it relates to both the finding of guilt and the determination of penalty.
- [4] The particulars of the charge against the Applicant as identified in the Penalty Information Notice as follows:

Driver allowed horse Aqua Cruiser to shift up the track leaving the 800 metre point of the event, resulting in Tactfilly Miracle who was trailing to obtain an inside run, resulting in that horse gaining an advantage changing the complexity of the race.

- [5] In his Application for Review, the Applicant sets out the details of his application as follows:

As the driver of Aqua Cruiser a unique horse with a history of being intractable, I believe that I am in no way to blame for my runner allowing an inside run from approximately the 540m mark of the race. During this period of the race I took all the necessary measures I could to prevent my drive from shifting however given the horses unique racing characteristics, namely, he invariably resents significant pressure on the inside rein. My drive resented further pressure on my inside rein as he usually does therefore I was forced to 'go with' the horse to ensure the safety of myself and other drivers upon entering the tight 'top turn' at Redcliffe.⁹

Stewards Inquiry

- [6] At the outset of the Inquiry, the Stewards outlined their interpretation of the Applicants drive of Aqua Cruiser¹. The horse, they said, had been:

"...caught wide early, eventually working around outside the leader, then working forward to the top. Around the 1250 metre mark, down the back straight on the final occasion, Aqua cruiser had shifted up the track allowing Tactfilly Miracle, driven by Adam Richardson, to gain a run to his inside. At that point, Aqua Cruiser was inclined to hang back down on the corner, tightening in on Tactfilly Miracle and putting that horse over or at least making contact with the marker pegs..."

- [7] It was apparent that the Steward's concern lay with the fact that the Applicant had shifted on the track, creating a run which was then taken by Tactfilly Miracle, the race favourite and eventual winner.
- [8] The Applicant immediately provided the following explanation²:

"Yeah, I mean my horse always gets sort of out and in, you know. There's a reason I don't sort of fight him too much when he gets out because he gets in hard, he's under warning from marker pegs I think from one or two starts ago. I didn't feel I shifted a long way from where I was at the top of the straight, it was probably half a cart there to the top of the back straight to where Mr Richardson went there, there was probably realistically only a cart from where we'd normally race and you know, it was sort

¹ Transcript of Stewards Inquiry, 17 January 2024, lines 5-13

² Transcript of Stewards Inquiry, 17 January 2024 lines 15 to 27

of – to me it was suicide going there when he did because if I didn't check off hard, he would have ended up in a really bad spot. So yeah, but like I say, the horse always sort of does it, it's just no one's willing to go there normally because they know I'm just sort of – he does that and he sort of needs that room because he gets back hard down on the tape."

[9] The Applicant said³;

"As I say, I don't disagree my horse fell up the track further than he should have, but I also said he does have a tendency to do that and he gets down hard....."

[10] The Applicant was consistent in maintaining that his movement up the track had not been significant and that the horse had behaved as he always did. – "The horse does it all the time, he gets out and gets in"⁴.

[11] The Applicant said:

"I mean I've driven him a lot and I've won a lot of races on him and you've got to go with him, you've got to keep him happy. So as I said, I don't think if I fought him he would have actually come back down the track at any point until we got to the corner and he switches over that other way and starts going in. I mean it's just him. He always does it, he always gets out down the back, he hits the turn, gets in and then finds again off the turn"⁵

.....

"As I said before, the horse consistently runs out and in. I mean as I said, I've driven him a lot and there is no way that if I'd fought him more he would have come back down the track anyway. The horse raced the exact same last week. I spoke to the driver that followed me last week, raced the exact same but they didn't elect to take that run because they didn't think they needed to and they didn't think it was the right spot to do it"⁶

.....

"I think, as I said, I couldn't do any more. I know that horse, he gets to a point and you can feel it in his mouth, the right side of his mouth, he grabs that right rein. As soon as he does that, you've got to go with him otherwise he gets worse and that's what I said to you before, he's come up, but from where his actual racing line was, his (sic) only actually moved half a cart wider, so yeah, there was room to the inside for a cart, but from his actual racing line, he's moved half a cart leading into a bend, which he was then – I knew he was then going to come back down to the fence, because he always does. Horses always do it, they run with the inside"⁷.

[12] At the request of the Applicant, the Stewards also heard evidence from Senior Driver Darren McCall who, after viewing the race footage said⁸:

"Yeah, if you watch that horse's ears there, the more he (sic) resenting to fight him, the more his ears went back, so he just completely resented what he was trying to do to crack him and come down the

³ Transcript of Stewards Inquiry, 17 January 2024 lines 120 to 122

⁴ Transcript of Stewards Inquiry, 17 January 2024 lines 315 to 318

⁵ Transcript of Stewards Inquiry, 17 January 2024 lines 320 to 326

⁶ Transcript of Stewards Inquiry, 17 January 2024 lines 387 to 393

⁷ Transcript of Stewards Inquiry, 17 January 2024 lines 409 to 418

⁸ Transcript of Stewards Inquiry, 17 January 2024 lines 540 to 564

track. Now Mr Garrard's in a bad spot here, he can't get the horse down the track, the horse is running further up the more he resents him.

.....

Now there's also another spot for Mr Garrard, if he corrects him and comes back down on top of him, you've got to give him time there too. So which way – this is a lose-lose situation for him. He's trying to fight the horse, the horse is running up the track, he can't get him down the track, the horse takes the run on the inside where there is clear...

.....

Yeah, you can see the horse with his ears back, which is a perfect sign of a horse resenting."

[13] Notwithstanding the explanation provided by the Applicant, an explanation which found some support in the evidence given to the Inquiry by Senior Driver Darren McCall, the Stewards found the Applicant guilty of the charge and proceeded to impose the penalty referred to above.

[14] The reasons for this finding were stated as follows:⁹

"..... we believe you had drove in an unacceptable manner. The unacceptable part of that is we believe that you have allowed your horse to shift wider on the track, which has afforded a run to the inside of the event to Tactfully Miracle, driven by Adam Richardson, which has changed the whole complexion of the event."

The Rule AHR149(2)

[15] AHR149(2) is contained within Part 8 of the Australian Harness Racing Rules. Part 8 is headed Required Racing Standard and consists of AHR 147, 148, 149 and 150. Rules 147 and 148 deal with Racing on Merits and Rule 150 deals with the imposition of penalties under that part of the Rules.

[16] Rule 149 bears the subheading "Race to win or for best position" and provides, in full, as follows:

Race to win or for best position

149.

(1) A driver shall take all reasonable and permissible measures during the course of a race to ensure that the horse driven by that driver is given full opportunity to win or obtain the best possible placing in the field.

(2) A person shall not drive in a manner which in the opinion of the Stewards is unacceptable.

(3) A person who fails to comply with sub-rule (1) or (2) is guilty of offence.

(4) The connections of a horse shall not give a direction or instruction to the driver of a horse if in the opinion of the Stewards that direction or instruction may prevent the driver from giving the horse full opportunity to win or obtain the best possible placing.

(5) A person who fails to comply with sub-rule (4) is guilty of an offence.

(6) If a driver receives a direction or instruction that infringes sub-rule (4) he shall prior to the race notify the Stewards.

(7) A driver who fails to comply with sub-rule (6) is guilty of an offence.

⁹ Transcript of Stewards Inquiry, 17 January 2024 lines 374 to 379

[17] Although AHR149(2) makes reference to the "opinion of the stewards" as constituting an element of the offence, the approach to the application of the Rule should be as set out by the Queensland Civil and Administrative Appeals Tribunal in *McMullen v Racing Queensland Limited*¹⁰:

"We would make the general point that any offence which is committed if someone forms the opinion that it has been committed needs to be approached with some caution. There is a distinct danger that a driver can be convicted of an offence on the subjective view of the particular stewards involved, when if other stewards had been involved there would be a different result.

It is important therefore for the stewards making a decision to endeavour to be as objective as possible. Whilst there is no requirement in the Rules for the stewards to give reasons for their decision, it is preferable for them to demonstrate this objectivity by doing so. If such reasons are given for an offence under rule 149(2), they would explain why the stewards formed the opinion that the drive was unacceptable."

[18] The test to be applied when considering AHR149(2), has been accepted as that set out by Judge Williams, sitting as the Victorian Racing Appeals Tribunal in *Misfud v Racing Victoria Stewards*¹¹. His Honour there said:-

The rule in question is as I have stated, a person shall not drive in a manner which in the opinion of the Stewards is unacceptable. This rule is not intended to penalise what might be described as mere errors of judgment or split-second mistakes. The Tribunal is well aware of the authority constituted by the previous decision in 1983 by Judge Goran in a case of Honan where it was thought desirable to bring into focus the sort of considerations that lie behind rules such as Rule 149(1) and (2) and Judge Goran made a number of observations.

It is certainly relevant to restate here that the first, second and fourth of the observations that he made apply. I will read those:

"(a) the rule does not permit the mere substitution of the Stewards' view as to how a particular horse should have been ridden for the view of the rider;"

Of course in the harness racing world we would substitute "driven for the view of the driver":

"(b) the rule does not seek to punish a mere error of judgement during the race on the part of the driver; and

(d) the driver's conduct must be culpable in the sense that objectively judged it is found to be blameworthy."

I will not include (c) here because it is more relevant to a breach of Rule 149(1) and we are dealing with 149(2) ..

Perhaps to throw my own interpretation into the mix I might view it this way, that the sort of culpable action that is required to amount to a breach of this rule might be such that in normal circumstances a reasonable and knowledgeable harness racing spectator might be expected to exclaim with words to the effect, "What on earth is he doing?" or "My goodness look at that" or some such exclamation.

¹⁰ *McMullen v Racing Queensland Limited* [2012] QCAT 286 paragraphs 13 to 14

¹¹ *Misfud v Racing Victoria Stewards* [2007] VRAT 6

[19] The observations of Judge Williams and Judge Goran have been expressed with approval in a number of decisions in this state and elsewhere.¹²

[20] It is important to note that the Rule is focused expressly upon the “manner” of driving. It is not the result or consequence of the driving which itself creates the offence. There can be no offence unless the “manner” of the driving is shown to be unacceptable.

Evidence before this Panel

[21] This Panel has had the opportunity of viewing the footage of the relevant race on numerous occasions. We have found the head on footage, that described as document 12 in the Index of Documents as being the most helpful. We have also had the development of the race dissected by evidence from Mr Matthew Greentree, who was the Head Steward deciding this matter and from the Applicant himself.

[22] It is apparent that the horse Aqua Cruiser does shift out, though not markedly so, but sufficiently far that an opening exists for the horse Tactfilly Miracle to pass through on the inside. Shortly afterwards on the bend, Aqua Cruiser lays back down on the corner, with the result that Tactfilly Miracle make contact with the marker pegs.

[23] The Chairman of Stewards, Mr Matthew Greentree, provided his interpretation of the manner in which the race was conducted. He describes Aqua Cruiser moving out and creating room for Tactfilly Miracle to move through on the inside. On the turn, Aqua Cruiser is inclined to hang back down, resulting in the Applicant checking off to avoid further pressure to Tactfilly Miracle.

[24] In the view of Mr Greentree, the Applicants hands remain in the same position when his horse begins to shift. If the horse had been wanting to shift out, said Mr Greentree, he would expect the hands of the Applicant to be further back. In Mr Greentree's view, the horse started shifting when the Applicant removed the deafners and commenced to use his whip. He considers it significant that the Applicant, in his opinion, did not try to stop driving the horse or to manoeuvre it back down the track.

[25] The account of the race given by the Applicant differed significantly from the interpretation of Mr Greentree. It was essentially consistent with the account which he had given at the Stewards Inquiry.

[26] The Applicant described Aqua Cruiser, a horse which he had driven on numerous occasions and with whom he was familiar, as being “a unique horse”. He said that the horse has his quirks, he has a difficult mouth and you have to work with him. He tends to fight you when you try to steer him where he doesn't want to go. It is necessary, he said, to work with the horse and to be as kind as you can to get him to perform to race truly. He described how Aqua Cruiser has a habit of latching onto the outside rein or the right-hand side of the bit. It is necessary to work with him to steer him around, if you try to fight him with the left rein, he wants to fight against you and to go further and overreact. He said that it is difficult to get the horse to release the outside rein without causing further interference in the race.

[27] So far as the specific race is concerned, he said that in the back straight Aqua Cruiser had adopted his usual habit with the outside rein and had taken hold of the bit. He kept the left rein tight to prevent the horse fighting and endeavoured to keep the horse travelling straight. He is adamant that he did all he

¹² *McMullen v Queensland Racing and Integrity Commission* SUPRA
Dixon v Queensland Racing Integrity Commission 2018 QCAT 183
Elkins v The Queensland Racing Integrity Commission 2021 QCAT 161
McMullen v The Queensland Racing Integrity Commission 2021 QCAT 202
Ison v Harness Racing NSW, NSW Harness Racing Appeals Panel 6 September 2023
Turnvell v Harness Racing NSW, Harness Racing Appeals Panel 1 April 2016

could without forcing the horse to a point where he may have created greater problems for others in the race.

- [28] In relation to the position of his hands, he did not accept that he was not applying pressure with his left hand. He said that he did apply pressure with the left rein, although no more than was necessary based on his experience to ensure that the horse straightened without causing a more serious incident.

Discussion

- [29] In the cross examination he said that he considered that he had done as much as he could safely do to prevent the horse shifting up the track. He had hit the horse from the outside with a view to pushing him down to the track. He said that he considered he had done everything he could to keep forward momentum without causing problems for other runners in the race.
- [30] Aside from the evidence of Mr Greentree and the Applicant, the Panel also had access to footage of the previous two starts by Aqua Cruiser at Redcliffe on the 3 January 2024 and the 10 January 2024.
- [31] It was contended for the Respondent that the footage of those races showed that Aqua Cruiser raced in a similar pattern of finding a lead but maintaining a position clear of the marker pegs on those occasions.
- [32] That interpretation was not accepted by the Applicant, who contended that on each of those occasions, Aqua Cruiser had in fact adopted his practise of moving up the track and then descending on the turns.
- [33] The Applicant's evidence, based on still footages of those races, was that there had been sufficient room for another horse to have passed on the inside had there been a horse with the necessary ability to do so. It is almost trite to observe that each race is different and the Panel has found footage of those races to provide little assistance in the resolution of this matter.
- [34] Reliance was also placed by the Respondent on the so-called Form History¹³ of Aqua Cruiser. The Form History is a document completed by Stewards which is said to provide, inter alia, a record of the racing characteristics and habits of individual horses as noted by a designated Steward after each race. Mr Greentree said that he viewed this and went back through the record of Aqua Cruiser and "could not find any race where the horse had shifted out or hung out."
- [35] Mr Greentree was clearly mistaken in giving this evidence and doubt must exist as to whether he did have proper regard to the Form History. There are in fact several instances where Aqua Cruiser is recorded as hanging out or shifting out during races. Moreover, there is the unchallenged of the Applicant of another occasion at Marburg in April 2023 where the fact that the horse had "hung out badly" is simply not recorded.
- [36] The document does not serve to disprove the Applicant's evidence as to the racing manners of the horse. The evidence would support a conclusion that the document may not be as rigorously completed as it perhaps should be, but in so far as it can be relied upon it would tend to confirm the traits of a horse who does not race truly.
- [37] Mr Murdoch KC who appears for the Applicant submits that Part 8 of the rules, which contains Rule 149, is concerned with protecting the integrity of the race. As there is no integrity issue involved here,

¹³ Document 21 of the index of documents

the Applicant should have been charged under one of the specific offences contained within Part 9 of the rules which deals with driving offences.

- [38] Mr Rice KC, who appears for the Respondent, submits however that the mere fact that several other possible charges are available under the rules, does not mean that the chosen charge is for that reason, improper or impermissible.
- [39] The essence of the charge in this case is that the Applicant allowed his horse to shift back up the track. It is that act which is said to constitute the unacceptable driving, the advantage which resulted for Tactfully Miracle is really no more than an unintended consequence of that driving there being no suggestion that the Applicant intended to provide an advantage to any competitor.
- [40] There may be some force to counsel's submission that a charge under Part 9 may have been more appropriate in the circumstances of this case. By way of example, under AHR162(1)(www), it is an offence if a driver allows his horse to shift ground in a manner which advantages another horse. There are other provisions in Part 9 which might also better suit the circumstances of this case. However, in the Panel's view, that should not of itself prevent a charge being levelled under AHR149. The question ultimately remains as to whether the evidence is sufficient to establish the charge.

Conclusions

- [41] Notwithstanding that this is a case which involves an assessment of the opinions of Stewards. It is accepted that this Panel must form its own view of the driving in question.
- [42] It is accepted also that the responsibility of proof in a matter such as this lies with the Respondent, and that the appropriate standard of proof is that enunciated in cases such as *Briginshaw v Briginshaw & Anor*.¹⁴
- [43] The Applicant has been consistent throughout in his evidence as to the racing habits of Aqua Cruiser and to his reason for driving the horse as he did in this race.
- [44] The Applicant presented to this Panel as an honest and impressive witness prepared to make reasonable as appropriate. There is, in the Panel's view, no reason whatever to doubt his account of what transpired during the race in question.
- [45] He bears no responsibility of proof, but we find no reason to doubt his evidence as to the racing manners of this horse and as to the way in which the horse performed as he did on this occasion.
- [46] The Applicant is a very experienced and highly accomplished driver. He had driven Aqua Cruiser on many occasions and was totally familiar with its traits and characteristics. The decisions which he made in this race, and in particular at the critical time in the back straight on the final occasion, were informed not only by his knowledge of the racing characteristics of the horse, but also by the way the horse felt to him at the relevant time.
- [47] Even if the Applicant's driving could be said to constitute an error of judgement, it is not of such a nature as to be regarded, when judged objectively, as blameworthy.
- [48] Applying the *Mifsud* test, this Panel is not satisfied to the requisite standard that the Applicant drove in an unacceptable manner.

¹⁴ *Briginshaw v Briginshaw & Anor* 1938 60 CLR 336

[49] Pursuant to section 252AH(1)(c) the decision of the Panel is to set aside the racing decision and substitute a determination of not guilty of the offence charged.

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