

DECISION

Racing Integrity Act 2016, section 252AB

Review application number	RAP-26	
Name	Shane Graham	
Panel	Mr Peter O'Neill (Acting Chairperson) Ms Lyndsey Hicks (Panel Member) Mr Daryl Kays (Panel Member)	
Code	Harness	
Rule	Australian Harness Racing Rule 156(2)(a) A driver shall only apply the whip and/or the rein in a wrist only flicking motion whilst holding a rein in each hand with the tip of the whip pointed forward in an action which does not engage the shoulder.	
Penalty Notice number	PN-008311	
Appearances & Representation	Applicant	Jim Murdoch KC Michael O'Connor
	Respondent	Norm Torpey David Farquharson
Hearing Date	30 June 2023	
Decision Date	5 July 2023	
Decision	Confirmed	
Panel Penalty	Fourteen day suspension	
Case References	<i>Australia Building Construction Commissioner -v- Pattinson</i> [2022] 96 ALJR 426. <i>Berriman v QRIC</i> (2023) RAP-10, 12 May 2023.	

Mark Currie v QRIC (2023) RAP-22, 5 June 2023.

New South Wales Stewards' Inquiry re Les Kelly, 15 June 2023.

Xuereb v Harness Racing NSW, Unreported, 8 August 2022.

Reasons for Decision

- [1] The Applicant in this review, Mr Shane Graham is a licensed harness racing driver.
- [2] On Friday 23 June 2023 the Applicant was the driver of the horse Hasty Bid in Race 11 the Selective Motors Albion Maiden Pace at Albion Park. Hasty Bid finished second in that race.
- [3] The Queensland Racing Integrity Commission ('QRIC') Stewards allege that over the last 200 metres of the race that the Applicant applied his whip in more than a flicking action in contravention of Australian Harness Racing Rule 156(2)(a).
- [4] Australian Harness Racing Rule ('AHRR') 156(2) relevantly provides that:
- (a) *A driver shall only apply the whip and/or the rein in a wrist only flicking motion whilst holding a rein in each hand with the tip of the whip pointed forward in an action which does not engage the shoulder.*
 - (b) *For the purposes of sub-paragraph (a), "wrist only flicking motion" means:*
 - (i) *Ensuring no force is generated by the use of the elbow or shoulder when applying the whip.*
 - (ii) *The forearm is not raised beyond forty-five degrees relative to the racing surface.*
 - (iii) *Not applying the whip with overt force.*
- [5] A Stewards' Inquiry was convened on Friday 23 June 2023 and following that Inquiry the Applicant was charged with a breach of AHRR156(2)(a).
- [6] The charge was particularised as follows:
- 'Applied the whip with more than a flicking motion, over the last 200m'.*
- [7] The Applicant entered a plea of guilty to the charge and the Stewards imposed a 14-day suspension in accordance with clause 1.3 of Schedule 1 of the *QRIC Harness Racing Penalty Guidelines 2023* ('the Guidelines').
- [8] In clause 1.3 the Guidelines indicate that for a sixth breach and any further breach of AHRR156 committed during a twelve-month period from the first offence will incur an automatic 14-day suspension.
- [9] On 26 June 2023 the Applicant lodged an Application for Review with the Queensland Racing Appeals Panel seeking a review of the Stewards' penalty decision.
- [10] In the Application for Review the Applicant outlined the following grounds for review:
- The penalty is manifestly excessive in the circumstances.*
- ...
- I submit the breach of Rule 156(2)(a) AHR was a technical breach in that at all relevant times of the race, I used a flicking motion whilst holding a rein in each hand with the tip of the whip pointed forward on an angle. At no time did I engage my shoulder in use of the whip.*

In those circumstances, I submit the penalty of two (2) weeks suspension is excessive when I average between 1000 to 1200 drives each season. I am currently one of the top three drivers in Queensland and I regularly drive in New South Wales in feature events.

[11] Before this Panel, the whole of the materials provided to the Stewards' Inquiry including videos of the race in question were admitted into evidence and considered by the Panel.

[12] In the review application the Applicant only challenges the penalty imposed by the Stewards.

SUMMARY OF THE RELEVANT EVIDENCE AND SUBMISSIONS

[13] The Applicant provided an Affidavit affirmed on 29 June 2023.

[14] The Applicant in the Affidavit states that Hasty Bid has a wide hind leg action (near and off). He then notes that because of this he used a medium sulky to increase the gap between the horse's hind legs and the sulky wheels as a safety measure. He alleges that depending on the horse, this can alter his whip action.¹

[15] The Applicant exhibits to the Affidavit a photograph of a small and medium sulky side by side to emphasise the difference in length between the two sulkies.²

[16] The Applicant then describes a conversation he had with the Chief Steward, Mr Farquharson, in May 2023 in which he alleges that when he was returning to the enclosure following a race Mr Farquharson warned him to '*watch your whip*'. Following this conversation, the Applicant alleges that he was conscious of this and altered his whip action by keeping his right arm tucked into his side at rib height to prevent any engagement of his shoulder in the whipping action but using a flicking action with his right wrist. He alleges that in doing so this caused a minor sideways movement of his whip.³

[17] On the night of 23 June 2023, the Applicant deposes that he drove the horse in the manner described in the preceding paragraph from the top of the straight for about 70 metres. He then alleges that he ceased use of the whip as the tip of his whip became caught in the horse's tail.⁴

[18] The Applicant was cross-examined on his Affidavit. The Applicant firstly confirmed that he had five drives at the meeting on 23 June 2023. The Applicant was then asked whether he had used the medium sulky in any of his other drives on that day. The Applicant indicated that he could not recall, but it was possible.

[19] It was then put to the Applicant that Hasty Bid had five previous starts which was confirmed by the Applicant. The Applicant was asked whether Race 11 on Friday 23 June 2023 was the first time that he had used the medium sulky with Hasty Bid. The Applicant again responded that he could not specifically recall but it was quite possibly not the first time.

[20] The Applicant was also questioned whether he had used the medium sulky in any other races and he confirmed that he possibly could have.

[21] The Applicant was then challenged in cross-examination about his failure to raise this explanation either at the Stewards' Inquiry on 23 June 2023 or on the following evening on Saturday, 24 June 2023

¹ Paragraph 3 of the Affidavit of Shane Graham, affirmed on 29 June 2023.

² *Ibid*, paragraph 4 and Exhibit '*SRG1*'.

³ *Ibid*, paragraph 5.

⁴ *Ibid*, paragraph 6.

when he attended the Stewards' room to discuss Hasty Bid receiving a reprimand. The Applicant confirmed that he did not raise the medium sulky on either occasion.

- [22] In relation to the Stewards' Inquiry on 23 June 2023 the Applicant noted that it was after 11:00 pm at night and he had been up since around 5:00am. In relation to the second occasion the Applicant provided the explanation that he went to the Stewards' room to specifically speak to them about the reprimand.
- [23] The Panel considers that the Applicant was endeavouring to answer the questions honestly, however he had difficulty recalling with any specificity the extent to which he had used the medium sulky in the past. Given the Applicant's responses, the Panel considers that it is likely that the Applicant had used the medium sulky in the past.
- [24] The Respondent has provided an Affidavit from the Chief Steward, Mr David Farquharson, sworn on 30 June 2023. Mr Farquharson confirms that the Harness Penalty Guidelines were first published on 2 February 2023, and subsequently released on 31 March 2023.⁵
- [25] Mr Farquharson exhibits to the Affidavit a media release issued by the Respondent about the Guidelines.⁶
- [26] The media release relevantly provides the following information:

...For the first time the Harness racing participants will have clear and prescribed penalties set out for breaches of the rules of racing in Queensland.

...

Chief Harness Steward David Farquharson said the Commission has established penalty guidelines to assist harness racing participants with information regarding a breach of the AHR rules and includes embargoes that may be placed against a horse from racing.

"Harness racing participants will know where they stand when it comes to breaches of the rules and it represents a change in process also providing time periods for suspensions for everyone to see," he said.

...

Mr Farquharson said a good example for harness racing drivers is the whip rule – AHR 156.

"This rule is now clearly prescribed with penalties and time periods set out in the guidelines," he said.

"The whip rule has various subsections to ensure drivers use the whip correctly and in line with animal welfare and community expectations. These guidelines clearly define penalties that are associated with the misuse of the whip and the timeframes for penalties that will be imposed."

- [27] Mr Farquharson also exhibits to his Affidavit a video provided by Harness Racing Australia (dated September 2020) about the operation of AHRR156 which he notes had been published on the Respondent's website, to educate licensees on the operation of AHRR156.⁷
- [28] The Panel has viewed the video being Exhibit `DF-2'. The Panel further notes that although the Guidelines were only recently released earlier this year, AHRR156 has been in place for a number of

⁵ Paragraph 2 of the Affidavit of David Farquharson, sworn on 30 June 2023.

⁶ *Ibid*, paragraph 3 and Exhibit `DF-1'.

⁷ *Ibid*, paragraph 4, Exhibit `DF-2'.

years and both Harness Racing Australia and QRIC have undertaken education campaigns to inform licensees about the whip rule.

- [29] Mr Farquharson goes on to provide evidence regarding the meeting he held with the Applicant. Mr Farquharson deposes that on 14 June 2023, he chaired the panel of Stewards at the Redcliffe Harness Club.⁸
- [30] Mr Farquharson deposes that the Applicant drove No Doubt NZ in Race 2 at that meeting. Following the race, Mr Farquharson states that he spoke to the Applicant about his concerns regarding his use of the whip during that race.⁹
- [31] Mr Farquharson goes on to state that although he cannot recall the exact words that he used, he recalled speaking to the Applicant about his action in applying the whip and that his action required further modification to comply with the rules. He goes on to note that he warned the Applicant that as he had already breached this rule five times within the last twelve months, he was reminded that if he was to breach AHRR156 again, he would receive a fourteen-day suspension.¹⁰
- [32] There is a dispute between the Applicant and Mr Farquharson both as to when this conversation occurred and as to the contents of the conversation.
- [33] The Panel notes that Mr Farquharson was not required for cross-examination and therefore his version has not been challenged.
- [34] Mr Farquharson has been able to nominate a specific race meeting where the conversation occurred and further to place the timing of that conversation after Race 2 at the meeting at the Redcliffe Harness Club on 14 June 2023.
- [35] Further, Mr Farquharson has been able to provide a far more detailed version of what was said during the conversation with the Applicant. To the extent that there is a conflict in the versions of the Applicant and Mr Farquharson, the Panel prefers the evidence of Mr Farquharson.
- [36] The Panel therefore accepts that Mr Farquharson placed the Applicant on notice of the consequences of a further breach of AHRR156, and that such a breach would result in a fourteen-day suspension.
- [37] The further contents of both Affidavits will be referred to as the Panel addresses the respective submissions of the Applicant.
- [38] In the Applicant's written submission, it is noted that Race 11 was a maiden, over 1660m, the \$1.45 favourite, and winner, Sweet Georgia Brown, led all the way from a good draw.
- [39] The Applicant's drive, Hasty Bid, the \$3.40 second favourite, was slow to take its place in the score up behind the mobile barrier. The stewards' report records that the applicant was issued with a warning as a result of Hasty Bid being out of position at the candy pole.
- [40] The Applicant's submission then contends that Hasty Bid secured a prime position in running being placed third behind the leader for most of the race. Hasty Bid was able to get clear before the turn into the straight and travelled up to challenge on the outside of the leader.
- [41] The Applicant notes that AHRR149(1) required the applicant to use all reasonable and permissible measures to give Hasty Bid its best opportunity to win or place. Whilst the Panel accepts the accuracy

⁸ *Ibid*, paragraph 5.

⁹ *Ibid*, paragraph 6.

¹⁰ *Ibid*, paragraph 7.

of this submission, the Panel notes that in utilising his best endeavours the Applicant was still required to comply with all relevant rules from the AHRR.

Relevant Principles

[42] The Applicant submits that the majority decision of the High Court in *Australia Building Construction Commissioner –v- Pattinson*¹¹ confined civil penalties to the encouragement of compliance i.e., specific and general deterrence. Civil penalties are free of notions of retribution and denunciation. The Panel accepts this as an accurate summary of the relevant sentencing principles for civil penalties.

Interpretation of the Guidelines

[43] The Guidelines confirm that they were effective from 31 March 2023.

[44] Clause 3 of the Guidelines confirms that the purpose of the Guidelines is to provide:

- transparency to all stakeholders on decision-making relating to breaches of the Australian Harness Racing Rules (AHRR); and
- licensed participants in the harness code of racing of the penalties they may incur for breaching the AHRR: and
- a deterrent for stakeholders to consider prior to undertaking any actions which may breach the AHRR.

[45] Clause 4 of the Guidelines confirms that Schedule 1 prescribes the penalty starting points for certain offences committed against the AHRR.

[46] Clause 5 of the Guidelines relevantly provides:

5 How decisions are made under the Guidelines

Subject to the Penalty and Human Rights considerations' below (see B1.1 and B1.2) the Commission will apply the penalty starting point contained in Schedule 1 of these Penalty Guidelines to the licensee who is found to have breached an AHRR rule covered by these guidelines. The penalty issued to the licenced participant may include a monetary fine, suspension, or disqualification.

It must be understood that the penalty starting point identified in this document are a guide only. The Commission's Stewards will review and assess each case on its own merits, taking into account the penalty considerations below and any human rights considerations.

[47] Under the heading of 'B1.1 Penalty Considerations' the Guidelines relevantly provide:

Imposing a penalty in any given instance involves a balance between the severity of the offence, the need for deterrence (for both the individual concerned and industry participants generally) and any mitigating factors. All situations are assessed on their individual merits. In addition to undertaking an assessment of any human rights impacts, the Commission's Stewards' considerations may include, but are not limited to, the following:

- **Circumstances of offence including any mitigating or contributing factors:** any facts or details about the offence. Contributing factors are other matters relating to an incident which may have a bearing on penalty. Mitigating factors are factors or details about the offender or offence that tend to reduce the severity of penalty.

¹¹ [2022] 96 ALJR 426 per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ. at paragraphs [9], [10], [14], [15], [38], [39] and [42].

- **Degree of culpability:** the degree of personal or moral blameworthiness of the person accused of the breach. The more culpable the conduct, the more severe the penalty should be, from both a general and specific deterrence point of view.
- **Early guilty plea:** an early guilty plea is a mitigating factor that may result in a lesser penalty being imposed.
- **Frequency of participation:** the frequency in which a licensed individual participates in racing.
- **Offence record:** a record of breaches of the same or similar rules by a licensed individual including the circumstances and penalty imposed for each offence. A good offence record with few offences is a mitigating factor and a poor offence record with regular breaches is an aggravating factor.
- **Race status:** race status is relevant to penalty so an offence that occurs at a high-status race such as a feature race that represents the top-level of competition in the sport will be an aggravating factor in determining penalty. Group races, metropolitan races and events with higher prize money are regarded high-status races.

[48] Schedule 1 of the Guidelines in clause 1.3 deals with 'Whip Offences' and relevantly provides:

1.3 Whip Offences

1.3.1 AHRR 156 – *Driver's use of the whip*

Penalties: All breaches of AHRR 156 will incur the following incremental penalties. Penalties will be reset after a 56-day period from the date of the initial breach.

Offence occurrence	Penalties incurred on or after 56 days from previous offence	Penalties incurred within 56 days of previous offence
1 st Offence	\$200 fine	\$200 fine
2 nd Offence	\$200 fine	\$400 fine
3 rd Offence	\$200 fine	14 days suspension
4 th Offence	\$200 fine	28 days suspension
5 th Offence	\$200 fine	56 days suspension
6 th Offence	14-day suspension	Not applicable

*A 6th and any further breach within a 12-month period from the first offence will incur an automatic 14-day suspension.

[49] The Applicant in paragraph 6 of his written submissions contends that without any supportive reasoning, the penalty imposed by the Stewards exceeded the applicable penalty under the Guidelines. The Panel does not accept this submission.

[50] If the Stewards were correct in concluding that the further whip breach committed by the Applicant on 23 June 2023 was a 6th offence within the 12-month period, then it appears that the Stewards have imposed the penalty set out in Clause 1.3 of Schedule 1.

Circumstances of the Offence

- [51] The Applicant relies on the race footage, particularly the side on, from the grandstand side, of the running of the first 70m of the final 170m. The applicant used a medium length sulky for his drive on Hasty Bid. The hind legs of Hasty Bid have wide action when the horse is at or near full pace. To accommodate that trait, it is necessary to use a longer, medium length sulky.
- [52] The Applicant contends that as a consequence of the use of the medium length sulky, with the whip remaining the same length, the Applicant needed to fully extend his arm, while at the same time:
- The right hand held the whip near its butt end;
 - The right hand held a rein;
 - The right hand was applying the whip in a wrist flicking fashion.
- [53] The Applicant contends that the provisions of AHRR156(2) are very technical. It is further submitted that the video footage shows that for the first 70 metres of the last 170 metres of the race, there was a limited horizontal movement of the Applicant's right arm (while his right hand was holding a rein and whip, and the arm was fully extended). The Applicant contends that the very limited horizontal movement of the right arm was concurrent with the approved wrist flicking of the whip and not intentional. The Applicant contends that there was no shoulder action involved in the use of the whip.
- [54] The Respondent in paragraph 17 of its written submissions¹² contends that the film of the race reveals that the Applicant contravened AHRR156(2) in three respects:
- a. Using the whip sideways;
 - b. Using the whip continuously;
 - c. Using the whip in more than just a flicking motion.
- [55] The Panel have carefully viewed all three films made available by the Respondent. The Panel does not accept the Applicant's characterisation of the Applicant's use of the whip as being accurate. The Panel finds that the Applicant was:
- a. Using the whip sideways;
 - b. Using the whip continuously;
 - c. Using the whip in more than just a flicking motion. The Panel in fact finds that in the manner that he utilised the whip in Race 11 on 23 June 2023 the Applicant did in fact engage his shoulder in the whipping motion.

Degree of Culpability

- [56] The Applicant contends that the infringement was at the lowest end of the severity scale. It is submitted that the very limited horizontal movement of the right arm does not seem, on the available footage to increase the force of the whip. The Applicant submits that there was no vertical movement of the whip or the Applicant's right arm. It is therefore submitted that there is no basis for any concern that Hasty Bid was mistreated.

¹² Respondent's written submissions filed 30 June 2023.

[57] The Respondent contends that it is erroneous to describe the contravention as 'at the low end of the scale'. The Respondent further submits that the video footage reveals a clear contravention of AHRR156(2), and this is why the Applicant pleaded guilty.

[58] The Panel does not accept the characterisation of the Applicant's breach as being at the lower end of the scale for breaches of AHRR156(2). Given the Panel's findings in paragraph [55] above, the Panel considers the Applicant's contravention to fall in the low to mid-range.

Early Guilty Plea

[59] The Applicant submits that in the case of an early guilty plea, there is a common practice in racing matters of discounting the "normal" penalty by around 25%. The Applicant notes that there was no explanation why there was no discount in this case.

[60] The Applicant provides by way of an example of this alleged practice the decision of the New South Wales thoroughbred stewards of 15 June 2023, in the matter of *Kelly*.¹³

[61] The Applicant submits that whether the discount be 25% or a greater or lesser percentage is a matter of discretion. The Applicant then strongly submits that the existence of the guidelines does not preclude the use of a discount. Indeed, Part B1.1 of the guidelines expressly recognises the category of "early guilty plea".

[62] Mr Farquharson in his affidavit states that he has been a Steward for forty years. He further states that there is no set practice in Queensland of allowing a 25% reduction in penalty for a plea of guilty.¹⁴

[63] Mr Farquharson goes on to note that whether a reduction in penalty is available, is assessed on a case-by-case basis with reference to:

- a. The type of breach;
- b. Whether the plea has assisted the Stewards' Inquiry process, by saving time and resources;
- c. Whether the plea represents a genuine expression of remorse, which reveals that the licensee has insight into their behaviour and has learnt from the experience that they will not commit a further breach of the rule in the future.¹⁵

[64] The Panel places limited weight on the decision of *Kelly* given that it is a New South Wales decision and involved a charge against a thoroughbred racing trainer. Further, the nature of the charge was very different in that it involved a presentation offence in breach of the Australian Rule of Racing 240(2).

[65] The major difficulty with the argument of the Applicant relating to the early guilty plea is that the Guidelines in B1.1 specifically note that an early guilty plea is a mitigating factor **that may** result in a lesser penalty being imposed (emphasis added). This means that the Stewards retain a discretion as to whether an early guilty plea will give rise to a discount or not. This appears to be consistent with the approach described by Mr Farquharson in his affidavit.

[66] In the present case the difficulty is that the Stewards have not provided reasons for determining to simply apply the automatic fourteen-day suspension provided by the Guidelines. In the matter of *Mark*

¹³ *New South Wales Stewards' Inquiry re Les Kelly*, 15 June 2023.

¹⁴ Paragraph 10 of the Affidavit of David Farquharson sworn 30 June 2023.

¹⁵ *Ibid*, paragraph 11.

*Currie v QRIC*¹⁶, the Queensland Racing Appeals Panel noted the failure of the Stewards in that matter to set out in the reasons for decision the basis upon which the sentencing discretion was exercised.

[67] This Panel reiterates the importance for the Stewards to provide some reasoning setting out why the particular penalty was imposed.

[68] For the reasons which will be set out below, the Panel is satisfied that the decision of the Stewards to not apply a discount for the Applicant's early guilty plea was appropriate in this case.

Frequency

[69] The next issue raised by the Applicant is that there is an inbuilt unfairness in the guidelines for AHRR156 in that it is time based. The Applicant submits that it is a matter of public records that the Applicant is one of Queensland's most prolific harness racing drivers. It is submitted that in the 56 days immediately leading up to and including Friday 23 June 2023, the Applicant had 159 drives. It is contended in the review submissions that he normally drives at a minimum of four harness racing meetings each week.¹⁷

[70] The Applicant goes on to draw a comparison between himself and a part-time and/or "hobby" trainer-drivers and submits that his number of drives would be much greater. The Applicant submits that his past record of AHRR156 infringements should be assessed in that context – not merely in the context of a period of days.

[71] Mr Farquharson in his affidavit provides further information to address the submission made by the Applicant.

[72] Mr Farquharson deposes that he has caused the Harvey database to be searched to locate the record of the top 10 harness drivers in Queensland for their respective compliance with AHRR156 in the current racing season (that is, from January 2023).¹⁸ He set out the following table:

Name	Races	Whip breaches
Nathan Dawson	999	2
Pete McMullen	570	3
Angus Garrard	667	3
Brendan Barnes	681	4
Shane Graham	464	6
Grant Dixon	468	3
Matthew Neilson	503	2
Adam Sanderson	347	0

¹⁶ RAP-22, 5 June 2023 at paragraphs [150] and [151].

¹⁷ Paragraph 21 of the Applicant's written submissions dated 29 June 2023.

¹⁸ Paragraph 9 of the affidavit of Mr Farquharson sworn on 30 June 2023.

Leonard Cain	668	5
Narissa McMullen	388	4

[73] From the data provided by Mr Farquharson the conclusion can be drawn that in comparison to his peers, the Applicant has objectively the worse record for contraventions of AHRR156 in the current season.

[74] In light of this, the Panel finds that the frequency of the Applicant's drives does not provide a basis for the penalty in the present matter to be reduced.

Offence Record

[75] The next matter raised by the Applicant is his disciplinary history.

[76] The Applicant notes that he has had five infringements of AHRR156(2)(a) in the past 12 months as follows:¹⁹

23 June 2023	2 weeks suspension (current matter)	+ 34 days
20 May 2023	\$200 fine	+ 81 days
1 March 2023	\$200 fine	+ 113 days
9 September 2022	\$400 fine	+ 55 days
16 July 2022	14-day suspension	

[77] The Applicant concedes that his past record has 13 infringements of AHRR156(2)(a) going back three years to 10 June 2020. The Applicant then submits that based on the frequency of his drives, that represents 13 past infringements over approximately 3000 drives.

[78] The Respondent in its written submissions contends that the Applicant has a poor record of compliance with AHRR156, demonstrated by the three previous sets of 14-day suspensions he received in 2021 and 2022 for committing the same offence six times.

[79] The Panel has before it the Applicant's disciplinary history dating back to 11 August 1998.²⁰

[80] The Applicant's disciplinary history in total reveals that he has received suspensions for whip offences (of various natures) on ten occasions between 26 November 2010 and 23 June 2023.

[81] In total, the Applicant has had either reprimands, cautions, fines or suspension for various whip offences on 101 occasions over the course of his driving career.

[82] Given this, the Panel considers his disciplinary history for whip related offences to be a particularly poor one.

¹⁹ Paragraph 25 of the Applicant's written submissions.

²⁰ Disciplinary History – Shane Graham as at 23 June 2023, Document 11.

- [83] The Applicant in his submission notes that there was an infringement of AHRR156(3) on 27 December 2022. The Applicant submits that this offence, and the other breaches of AHRR156(3) are different in character (i.e., driving using the whip in an unapproved manner) to AHRR156(2)(a). The Applicant notes that the 27 December 2022 breach incurred a \$200 fine.²¹
- [84] In oral submissions the Applicant contended that the breach of AHRR156(3) on 27 December 2022 should not have been included as one of the six offences giving rise to an automatic 14-day suspension because it was an offence of a different character.
- [85] The Applicant contends that upon a proper construction of the Guidelines, for the 14-day automatic suspension to be enlivened, all of the previous six offences must be of the same character (or rule).
- [86] The Respondent in its written submissions contends that the Applicant's submission regarding how the Guidelines should be construed is wrong. The Respondent firstly notes that the title of the whip penalty section is:²²

1.3.1 AHRR 156 – *Driver's use of the whip*

Penalties: All breaches of AHRR 156 will incur the following incremental penalties.

- [87] The Respondent further submits that the clear intent of the penalty guidelines is that the scale of penalties listed will apply to **all** contraventions of AHRR156, including AHRR156(2) and AHRR156(3) (emphasis added).²³
- [88] The Respondent further submits that upon the sixth breach of AHRR156 and any further breaches of AHRR156 committed within a 12-month period, an automatic penalty of 14 days is imposed. The concept of an 'automatic penalty' is that 14 days is imposed for the sixth offence, and subsequent offences even where the circumstances warrant a higher penalty.
- [89] Pursuant to section 101 of the *Racing Act 2002*²⁴, the policies and Rules of Racing made by a control body are statutory instruments within the meaning of the *Statutory Instruments Act 1992 (SI Act)*. Further, s14(1) of the *SI Act* states that nominated provisions of the *Acts Interpretation Act 1954 (AIA)* contained in Schedule 1 of the *SI Act* apply when interpreting a statutory instrument.
- [90] Schedule 1 of the *SI Act* confirms that s14A of the *AIA* applies when interpreting a statutory instrument.
- [91] Section 14 of the *AIA* relevantly provides when interpreting a provision of a statutory instrument, the interpretation that will best achieve the purpose of a statutory instrument is to be preferred to any other interpretation.
- [92] The Panel notes that the objects of the ***Racing Integrity Act*** include maintaining public confidence in racing, ensuring the integrity of all persons involved with racing, and safeguarding the welfare of animals.²⁵
- [93] The Panel considers that clause 1.3 is quite clear in its wording that any breach of AHRR156 can be relied upon when determining whether an automatic 14-day suspension should be imposed.

²¹ Paragraph 29 of the Applicant's written submissions dated 29 June 2023.

²² Paragraph 10 of the Respondent's written submissions dated 30 June 2023.

²³ *Ibid*, paragraph 11.

²⁴ *Racing Act 2002* - Queensland Legislation - Queensland Government.

²⁵ *Racing Integrity Act 2016 (Qld)* s 3.

- [94] The Panel further considers that this construction of clause 1.3 best achieves the purpose of the *Racing Integrity Act* in its purposes of maintaining the public confidence in racing and safeguarding the welfare of animals.
- [95] The Panel is therefore satisfied that the Applicant had committed six breaches of AHRR156 in the twelve months prior to 23 June 2023 and as a consequence it was open to the Stewards to impose a 14-day suspension as a penalty.

Status of the Race

- [96] The Applicant submits that the maiden race, programmed as the eleventh and final event on an 11-race weeknight meeting, was not a significant event. It is further submitted that Hasty Bid was not advantaged by the infringement and did not overtake the leader. It is further submitted that Hasty Bid had the third-place getter well covered at the finish line.
- [97] The Guidelines note that a high-status race will be an aggravating factor in determining the penalty.
- [98] The Guidelines do not confirm that because a race is a lower status race that this justifies a reduction in the penalty imposed.
- [99] The Panel does not consider this to be a relevant factor in the present case for the determination of the appropriate penalty to be imposed.

The Applicant's Other Arguments

Retrospective operation

- [100] The Applicant notes that the Guidelines were effective from 1 February 2023. The Applicant submits that it is strongly arguable that the Guidelines did not have retrospective effect.²⁶
- [101] The Applicant further submits that without retrospective effect, the use of the "6th breach" automatic 14-day suspension provision was not a proper application of the guidelines.²⁷
- [102] The Applicant contends that there is nothing on the face of the guidelines to manifest an intention that they apply retrospectively. The Applicant notes that by analogy, the *Acts Interpretation Act 1954* (Qld) provides that "*an Act commences on the date of assent except so far as the Act otherwise expressly provides*".²⁸
- [103] The Respondent in response to that submission contends that the Guidelines simply record in writing the penalty system that had been imposed upon licensees for contraventions of AHRR156 since the rule's introduction on 1 September 2020. The Respondent submits that this is demonstrated in the Applicant's own disciplinary history²⁹, where, prior to the current incident, he received three previous 14-day suspensions on 16 July 2022, 9 October 2021, and 8 October 2021.³⁰
- [104] In effect, the Respondent submits that the Guidelines are in fact simply a codification of the penalty system that was already in place.
- [105] The Panel notes that this submission does appear to be supported by the contents of the Applicant's disciplinary history since 1 September 2020 when the rule was introduced.

²⁶ Applicant's written submissions dated 29 June 2023, paragraph 31.

²⁷ *Ibid.*

²⁸ Section 15A of the *Acts Interpretation Act 1954* (Qld).

²⁹ Disciplinary History – Shane Graham as at 23 June 2023, Document 11.

³⁰ Respondent's written submissions dated 28 June 2023, paragraph 8.

[106] The Panel notes by analogy that section 20C of the *Acts Interpretation Act 1954* (Qld) relevantly provides that if an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences.

[107] Given that the Guidelines have not effected a change to the system of penalties in relation to whip offences, the Panel does not accept the Applicant's argument that the Guidelines should not have retrospective operation.

Clause 1.3 Whip Offences is ambiguous.

[108] The Applicant notes that the provisions of Guideline 1.3 are described in the preface to the table as "incremental penalties". The Applicant submits that it is counter intuitive to follow a \$200.00 fine on 20 May 2023 and a \$200.00 fine on 1 March 2023 with a 14-day suspension. The Applicant contends that this is not incremental.³¹

[109] The Applicant further contends that the provisions of clause 1.3 Whip Offences are vague and ambiguous in key parts. One such part is the sentence which immediately precedes the table: "Penalties will reset after a 56-day period from the date of the initial breach". That sentence clashes with the heading on the middle column: "Penalties incurred on or after 56 days from the previous offence" (Applicant's underlining).³²

[110] The Applicant in making this submission appears to be conflating the two separate columns in the table contained in clause 1.3 to create an artificial ambiguity.

[111] The Panel considers that properly construed, the right-hand column in that table provides for a range of penalties for a series of breaches of AHRR156 that occur within one 56-day period. It is clear that the penalties in the right-hand column are in fact incremental rising from a \$200 fine for a first offence, up to a 56-day suspension for the fifth offence in any given 56-day period. That this is the proper construction of how the table operates appears to be quite clear.

[112] By contrast, the middle column provides the penalties to be applied where the offence falls outside of the 56-day period. This column does not, and is not intended to, provide incremental penalties.

[113] This can be illustrated by the Applicant's own disciplinary history. On 1 March 2023 the Applicant was found to have contravened AHRR156(2)(a). His previous contravention of AHRR156 occurred on 27 December 2022. The offence on 1 March 2023 occurred some 64 days after the offence on 27 December 2022 and therefore in accordance with the penalties provided by the middle column of the table, he received a \$200 fine.

[114] The next contravention by the Applicant of AHRR156 occurred on 20 May 2023 which once again was a contravention of AHR156(2)(a). This breach occurred approximately 80 days after the offence on 1 March 2023 and as a consequence he again received a \$200 fine.

[115] When the further breach of AHRR156 occurred on 23 June 2023, this gave rise to the option for the Stewards to impose the automatic 14-day suspension.

[116] The Panel is not satisfied that there is any ambiguity as to how the penalty provisions in the table under clause 1.3 of Schedule 1 of the Guidelines operate.

³¹ Applicant's written submissions dated 29 June 2023, paragraph 35.

³² *Ibid*, paragraph 36.

The Winter Carnival

[117] The final matter raised by the Applicant is the fact that his suspension will encompass the period of the Winter Carnival during which the Applicant had bookings for drives on higher quality horses.

[118] The Applicant submits that the loss of opportunity resulting from a suspension, is a factor which can properly be put into the mix of considerations when fixing a penalty.³³

[119] The Respondent in its written submission refers to the decision of the Racing Appeals Panel in *Beriman v QRIC*³⁴ (RAP-10) where the Queensland Racing Appeals Panel noted:

[11] Although there are many factors to be considered in determining penalty and a wide range of matters that need to be taken into account, the mere fact that a suspension may have the consequence that a jockey may miss the opportunity to ride in a particular race or at a particular race meeting should not of itself or as a matter of course constitute a ground for mitigating a penalty otherwise objectively appropriate and merited by the breaching conduct.

[12] This is particularly so where, as in this case, the level of offending conduct is deemed to be of a high order. For these reasons, the panel is of the view that the application should be dismissed, and the panel order is that the racing decision, the subject of the application, is confirmed.

[120] In response to that submission the Applicant contends that the proposition that *Beriman* stands for is that a missed opportunity to participate in a particular race or races 'should not of itself or as a matter of course constitute a ground for mitigating a penalty'.

[121] The Panel is not satisfied that it is appropriate in this case to consider the Applicant's various losses of opportunity during the Winter Carnival as a mitigating factor.

Disposition of the Application for Review

[122] Whilst making oral submissions on behalf of the Respondent Mr Torpey referred to the decision of the Racing Appeals Tribunal New South Wales in *Xuereb v Harness Racing NSW*³⁵.

[123] That matter dealt with an appeal from a decision to impose a penalty of a fine of \$400 and a seven-day suspension of Mr Nathan Xuereb's licence for a contravention of AHRR156(2)(a).

[124] In the decision, Mr Armati noted at [9] and [10] the mischief towards which the new rule was directed was:

10. *It is in the context of the introduction of a new rule to further lessen the use of a whip. In submissions, the respondent points out the focus which is upon the racing industries in respect of whip use generally and it is a matter of the equivalent of judicial notice that the Tribunal is aware of the limitations being introduced by the two codes in this state, and generally across Australia, in a reduction in the way a whip can be used and the imposition of limits upon riders and drivers in respect of when and how a whip can be used. The introduction of the rule 156(2) is to be interpreted with that in mind.*

³³ *Ibid*, paragraph 40.

³⁴ (2023) RAP-10, 12 May 2023.

³⁵ Unreported, 8 August 2022.

[125] When going on to consider the appeal against penalty, the Tribunal provided the following observations which appear to apply equally to this review:

32. *This is not a case for a dissertation on the rules relating to penalty in civil disciplinary matters. Simply put, the Tribunal has to find a protective order. In doing so, it is apparent that a case of this nature with the facts surrounding it require that the message that is given to this individual driver and the industry generally as well as the supporting and unsupporting public is that continued breaches of this particular rule will warrant that the penalties cannot be as lenient as they might have been in the past.*
33. *The guidelines apply here. It is the submission for the respondent that they are not aware of any particular occasion on which the particular guideline for whip offences has not been applied. The Tribunal, to its knowledge in relation to whip matters, has in the past applied the particular guideline. Is there any reason why it should not on this occasion, because it is a guideline not a tramline, will be touched upon?*
34. *Simply put, the guideline provides, and the respondent invites, that this being within the terminology of a third offence, that there be a fine of \$400 and seven days' suspension. That was the order the stewards found to be appropriate. Is it appropriate here?*
35. *The Tribunal has in its determination indicated that it considers the breach itself was blatantly obvious. It is a whip rule breach. There is nothing about it that raises anything greater of a protective nature than an appropriate penalty with the history that the appellant has.*
36. *And that history is not a favourable one. The submission is that this is the 59th rule breach for whips. The Tribunal, on a quick calculation, in fact finds there are probably 56. Nothing turns upon that, in the difference between 56 and 59. The Tribunal's calculations were that he has been suspended on 10 occasions, reprimanded 16 times and fined 30 times since he first came under notice on his history for driving matters on 27 December 2012. That is less than 10 years. It works out at something equating to more than five whip rule breaches per year. That can hardly be a satisfactory offence report history.*

...

41. *Other than those, the Tribunal sees no reason whatsoever why the message to be given to him, with that necessary civil disciplinary penalty, should not be that which any other driver would have expected. That is, the Tribunal will apply the penalty guidelines for whip offences and will apply the order that the stewards considered appropriate and which the respondent submits should be applied today, and there is but faint argument against that, quite frankly, in respect of the submissions, there being really nothing more that could have been said on his behalf.*
42. *Accordingly, the appeal against severity is dismissed.*

[126] In the present case the Applicant also has a significant whip disciplinary history which has involved him being suspended on eleven occasions (counting the current suspension). As earlier noted, over the course of his driving career the Applicant has had over 100 charges for various whip offences.

[127] The Panel is satisfied that on this history alone, the requirements for specific and general deterrence require a period of suspension of the Applicant's licence.

- [128] Although the Appellant did enter a plea of guilty, the Panel is not satisfied that in the particular circumstances of this case that this warranted a discount on the suspension that was to be automatically put in place by clause 1.3 of Schedule 1 of the Guidelines.
- [129] The scenarios which might justify the Stewards in discounting the automatic 14-day suspension on a guilty plea may include where the Applicant was facing an automatic 14-day suspension for the first time or alternatively, where any previous 14-day suspension was some substantial time in the past.
- [130] These types of factors are not present in the Applicant's case.
- [131] The Applicant has been suspended on multiple occasions for whip offences.
- [132] In more recent times, the Applicant has been suspended for whip offences for 14-days on 16 July 2022 and 5 April 2022 and once again on 9 October 2021. This means that the current suspension will be the Applicant's third suspension in the space of approximately 14 months with all of those suspensions being related to whip offences.
- [133] The Panel is satisfied that in those circumstances it is not appropriate to provide any discount for the Applicant's guilty plea. The Panel is also satisfied that a fine or a reduced period of suspension would also not satisfy the need for general and specific deterrence in relation to whip offences.
- [134] The Panel is satisfied that the 14-day suspension ordered by the Stewards was appropriate in the circumstances. For these reasons, the Panel is of the view that the application should be dismissed, and the Panel order is that the racing decision, the subject of the application, is confirmed.
- [135] The Panel will leave the issue of the calculation of the remaining suspension to be served by the Applicant as a matter to be resolved between the Applicant and the Respondent.