

## DECISION

### *Racing Integrity Act 2016, sections 252AH, 252BM*

<b>Review application number</b>	RAP-19	
<b>Name</b>	Benjamin Mark Currie	
<b>Panel</b>	Mr Peter O'Neill (Chairperson) Mr Martin Einfeld KC (Panel Member) Mr Patrick Cullinane KC (Panel Member)	
<b>Code</b>	Thoroughbreds	
<b>Rule</b>	Australian Rules of Racing 240(2)  Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.	
<b>Penalty Notice number</b>	PN-008075	
<b>Appearances &amp; Representation</b>	Applicant	Michael Copley KC Darren Mahony
	Respondent	Tim Ryan KC Dominique Murphy
<b>Hearing Date</b>	12 June 2023	
<b>Decision Date</b>	20 June 2023	
<b>Decision</b>	Varied	
<b>Panel Penalty</b>	Pursuant to section 252AH(1)(b), the racing decision is varied to provide a penalty of a nine (9) month disqualification which commenced 22 May 2023 and ends on 22 February 2024.	
<b>Case References</b>	<i>Application by Desleigh Forster</i> RAP-6 3 May 2023. <i>Briginshaw v Briginshaw &amp; Anor</i> [1938] HCA 34. <i>Commercial Union Assurance Company of Australia v Ferrcom Pty Ltd</i> (1991) 22 NSWLR 389. <i>Currie v Queensland Racing Integrity Commission</i> [2020] QCAT 240. <i>Kuhl v Zurich Financial Services Australia Ltd</i> [2011] HCA 11; 243 CLR 361. <i>Laming v Racing Victoria Limited</i> [2011] VCAT 112.	

*Maund v Queensland Racing* [2009] QRAT 18 (27 July 2009).  
*Michelle Russell v Racing NSW*, Unreported, Racing New South Wales Appeal Panel, 15 July 2021.  
*Nathan Turnbull v Harness NSW*, Unreported, Racing Appeals Tribunal, 1 November 2017.  
*Neat Holdings Pty Ltd v Karajan Holdings* (1992) 67 ALJR 170.  
*Queensland Nickel Pty Ltd (in liq) v QNI Metals Ltd & Ors* [2021] QCA 138.  
*Queensland Racing Integrity Commission v Gilroy* [2016] QCATA 146.  
*Robert Graeme Smith v Queensland Racing* [2008] QRAT 006.

## **Reasons for Decision**

- [1] The Applicant in this matter, Mr Benjamin Currie, (at the relevant time) was a licensed stablehand employed by his father, Mr Mark Currie, who is a licensed trainer of racehorses operating from stables located in Toowoomba.
- [2] On 17 December 2022, Mr Mark Currie arranged for the gelding End Assembly to be taken to the Eagle Farm racecourse for the purpose of participating in a race, namely Race 8, being the Channel 7 Gold Edition Plate over 1200 metres.
- [3] Mr Mark Currie did not attend the Eagle Farm racecourse on 17 December 2022 and instead was on a visit of a personal nature to Taroom.
- [4] Mr Mark Currie sent three licensed stablehands, the Applicant, Mr Harry Hepner and Mr Jack Price to accompany the horses sent to the Eagle Farm racecourse from the Currie Racing stable on 17 December 2022.
- [5] At 3:30pm that race day, a pre-race blood sample was taken from the horse, which did not identify the presence of any prohibited substance in the sample.
- [6] End Assembly then participated in Race 8, which ran at 4:32pm and it won the race.
- [7] A post-race urine sample was then taken from the horse at 5:00pm, which subsequently revealed the presence of cocaine and its metabolites, benzoylecgonine and methylecgonine.
- [8] On 16 March 2023, Stewards conducted an inquiry into the positive urine sample obtained post-race on 17 December 2022.
- [9] The Applicant was initially contacted by the Deputy Chief Steward, Mr Geoffrey Goold and a request was made for the Applicant to attend the inquiry.
- [10] The Panel notes that there is a conflict between Mr Goold and the Applicant regarding when this conversation occurred and what was discussed in the conversation. Both the Applicant and Mr Goold have sworn affidavits<sup>1</sup>, and they also provided oral evidence to the Panel.
- [11] Ultimately very little turns on the conflict in the evidence between the Applicant and Mr Goold on this issue.
- [12] The Panel accepts the evidence of Mr Goold over that of the Applicant regarding the timing of the conversation. Mr Goold both in his affidavit and in his oral evidence confirms that he called the

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<sup>1</sup> Affidavit of Benjamin Mark Currie sworn 1 June 2023 and filed on 2 June 2023; Affidavit of Geoffrey Goold sworn on 7 June 2023 and filed on 7 June 2023.

Applicant on Monday, 13 March 2023 from his work mobile telephone.<sup>2</sup> Mr Goold further deposes (and confirms in his oral evidence) that he verified the date by examining records relating to his work mobile telephone. The Panel is satisfied that Mr Goold's version supported by contemporaneous telephone records is more reliable than the recollection of the Applicant as to the timing of the conversation.

[13] A Stewards' Inquiry was convened on 16 March 2023 and both Mark Currie and the Applicant attended the inquiry.

[14] Following certain evidence being provided to the Stewards' Inquiry (which will be addressed in greater detail later in these reasons) the Stewards were satisfied that the Applicant was 'in charge' of End Assembly on 17 December 2022 for the purposes of rule 240(2) of the Australian Rules of Racing (AR240(2)).

[15] Following a short adjournment, the Applicant was charged with breaching the requirements of AR240(2). The particulars of the charge were as follows:

*Mr Ben Currie as the licenced stablehand with the Queensland Racing Integrity Commission you were the person in charge of the thoroughbred gelding END ASSEMBLY trained by your father Mr Mark Currie when on 17 December 2022 the gelding was brought to the Eagle Farm racecourse for the purpose of competing in a race, that being Race 8 The Channel 7 Gold Edition Plate over 1200 metres, on which a post-race urine sample was collected following its winning performance which upon analysis revealed that sample to contain cocaine and its metabolites benzoylecgonine and methylecgonine, substances prohibited under the Australian Rules of Racing pursuant to Division 1 Prohibited List B and thus breaching the requirements of AR 240(2).*

[16] The Applicant entered a plea of not guilty and was then afforded the opportunity of making submissions in defence of the charge. At the conclusion of the Stewards' Inquiry the Applicant was found to have contravened AR240(2).

[17] The Stewards' Inquiry was then adjourned for further evidence to be heard in respect of the question of penalty. This further evidence was heard by the Inquiry across 12 April 2023 and 13 April 2023.

[18] By written decision delivered on 22 May 2023, the Stewards imposed on the Applicant a penalty of an eighteen (18) month disqualification with a starting date of 22 May 2023 and an end date of 18 November 2024.

[19] By application filed on 23 May 2023, the Applicant now seeks a review of that decision pursuant to section 252AB of the *Racing Integrity Act 2016* (Qld) ("the Racing Integrity Act"). In the application the Applicant challenges both the finding that he contravened the rule AR240(2), and the penalty imposed of an eighteen-month disqualification.

[20] The grounds for review contained in Annexure A to the Application are as follows:

*I am applying for the Review because the charge cannot be proven and, even if the Queensland Racing Appeals Panel was to take a contrary view that the charge could be proven, the Panel would not impose a penalty as severe as that imposed by the Stewards.*

...

*I seek a ruling that I did not breach the Rule of Racing and, in the event the Panel decides I did, a ruling that the penalty imposed by the Stewards was excessive.*

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<sup>2</sup> Paragraph 4 of the affidavit of Mr Goold filed 2 June 2023.

[21] Before this Panel, there was admitted into evidence the whole of the materials provided to the Stewards' Inquiry and the transcripts of the Inquiry.

## LIABILITY

[22] AR240(2) of the Australian Rules of Racing is contained within Part 11 of the rules, which is entitled "Prohibited Substances & Prohibited Methods Offences". The rule provides as follows:

*"Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules."*

[23] AR238 of the of the Australian Rules of Racing provides:

*"Without limiting any other rules or powers under these Australian Rules, if a person breaches any rule in this Part 11 the person may be penalised by a PRA or the Stewards."*

[24] The relevant offence is proved by establishing three elements:

- i. a horse was brought to a racecourse for the purpose of engaging in a race; and
- ii. a prohibited substance is detected in any sample taken from the horse prior to or following the horse running in a race; and
- iii. the person charged is the trainer or any other person who was in charge at the relevant time of the horse.

[25] In the outline of submissions provided on behalf of the Applicant<sup>3</sup> it is contended that the burden of proving the charge lies on the Respondent. The standard of proof is on the balance of probabilities and a finding of guilty should only be arrived at on evidence that is clear or cogent.<sup>4</sup> It is then submitted that the evidence, being that which the Stewards had available to them as well as the additional evidence before the Panel, is not sufficiently cogent or clear to permit the Panel to conclude on the balance of probabilities that the Applicant is guilty of the charge.

[26] In the Applicant's submissions it is contended that the Applicant's liability for a breach of AR240(2) only arises if he was in charge 'at any relevant time'. The submissions further note that the rule recognises the possibility that various people might be in charge of a horse at different times when it is at a racecourse, but leaving the trainer aside, the rule is only concerned to attach liability to the person who was in charge at 'any relevant time'.

[27] The issues that fall for determination in deciding liability are:

- I. The proper construction of AR240(2) and what meaning should be given to the phrase 'at any relevant time' in AR240(2)?
- II. Whether the Applicant was 'in charge' of End Assembly at a relevant time within the meaning of AR240(2)?

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<sup>3</sup> Applicant's Outline of Submissions filed 2 June 2023.

<sup>4</sup> *Application by Desleigh Foster* RAP-6, 3 May 2023 at [48]; *Neat Holdings Pty Ltd v Karajan Holdings* (1992) 67 ALJR 170 at 171,

## THE PROPER CONSTRUCTION OF AR240(2) AND THE MEANING OF 'ANY RELEVANT TIME'

- [28] The Applicant in his outline of submissions notes that the phrase 'at any relevant time' is not defined in the rules and the Applicant has been unable to find any authority which has considered the meaning of it.
- [29] The Applicant submits that making any other person in charge, other than the trainer, liable only at 'any relevant time' indicates, insofar as a person other than the trainer is concerned, that their liability does not attach to the whole of the period that the horse is at the racecourse but only to the period when they are in charge of it and only to the period of 'any relevant time'.
- [30] The Applicant further submits that by confining liability of a person in charge to 'any relevant time' the rule distinguishes the position of the person in charge from the trainer. The trainer is liable if a sample taken at any time at the racecourse contains a prohibited substance whereas a person in charge is only liable if the sample which shows the prohibited substance is taken at 'any relevant time'. The rule does not provide for a co-extensive liability for the trainer and any person in charge. If it did, there would be no qualification for the latter to, at 'any relevant time'.
- [31] In oral submissions it was submitted that in relation to a person in charge of the horse, the reach of the rule is not as extensive as it is with the trainer of the horse given the limiting words 'at any relevant time.' It was also submitted (in response to the Respondent's written submissions) that, if it was the intention to impose upon a person in charge of the horse a liability whilst the horse was at the racecourse, this could be achieved by AR240(2) stating 'whilst at the racecourse' rather than 'at any relevant time'.
- [32] In the Applicant's outline of submissions, it is contended that in light of the horse returning a negative test to a 3:30pm blood sample the really crucial time period is the time after that sample was taken until 5:00pm when the urine sample was taken.<sup>5</sup>
- [33] In the Respondent's outline of submissions<sup>6</sup> it is firstly noted that pursuant to section 101 of the *Racing Act 2002*<sup>7</sup>, 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.
- [34] Schedule 1 of the SI Act confirms that s14A of the AIA applies when interpreting a statutory instrument.
- [35] 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.
- [36] 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.<sup>8</sup>
- [37] The Respondent contends that the purpose of AR240(2) ('the Presentation Rule') is to ensure that horses participating at race meetings on which betting is conducted, are presented to race free of

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<sup>5</sup> Paragraph 7 of the Applicant's submissions filed 2 June 2023.

<sup>6</sup> Outline of submissions on behalf of the Queensland Racing Integrity Commission filed 7 June 2023.

<sup>7</sup> *Racing Act 2002* - Queensland Legislation - Queensland Government.

<sup>8</sup> *Racing Integrity Act 2016* (Qld) s 3.

prohibited substances.<sup>9</sup> The Panel accepts this contention as correctly reflecting the objects of the *Racing Integrity Act*.

- [38] The Respondent further contends that an analysis of the Australian Rules of Racing amply demonstrates the significant obligations under the Rules of 'a person in charge of a horse' regarding the integrity of racing, the safety of racing and the welfare of thoroughbreds.<sup>10</sup>
- [39] The Respondent also makes reference to Local Rule 44<sup>11</sup> which relevantly provide as follows:
- LR.44. Trainer not present at Race Meeting***
- If a Trainer is unable to attend a Race Meeting at which a horse trained by him is to be a runner, not less than one hour before the advertised starting time of the race the Stewards shall receive a letter signed by the Trainer authorising another Trainer or a stablehand approved of by the Stewards and mentioned in the letter to manage and control the horse at the Race Meeting. The provisions of this Rule shall not apply when the management and control of the horse rests with the Trainer's foreperson.*
- [40] The Respondent notes (in reliance on LR44) that the Local Rules do not require an absent trainer to provide written authorisation to the stewards when the person in charge of a horse attends the races. The Respondent contends that rather, the rule reflects the differentiation of responsibilities between different persons and that a written authority is only required under Local Rule 44 when others are to be responsible for the management and control of a horse at a race meeting.<sup>12</sup>
- [41] The Respondent builds on that submission by noting that a trainer may not be able to personally attend every race meeting that their horse attends for various reasons. The Respondent contends that where a trainer is not attending a race meeting with their horse, the trainer requests another person to be in charge of the horse at the race meeting, to perform the same tasks that would ordinarily be undertaken by the trainer.<sup>13</sup>
- [42] The Respondent contends that where a trainer is not physically present at a race meeting, it is the responsibility of the person in charge of the horse at the race meeting to fulfil the race day responsibilities of the trainer.<sup>14</sup>
- [43] The Respondent then submits that the person in charge of a horse at the race meeting may allocate or delegate different tasks to other stablehands, or perhaps even another trainer who is present at the race meeting. The allocation of such tasks does not relieve the person that the trainer placed in charge of the horse from discharging their obligations and responsibilities as the person in charge of the horse at the race meeting.
- [44] The Respondent further contends that the premise upon which the Presentation Rule proceeds is that there will always be a person at the race meeting who is ultimately responsible for the security and management of the horse while it is at the race meeting. In the event that the trainer does not attend the race meeting, a person who is not the trainer will bear responsibility for the security of the horse at the race meeting, for the purposes of the Presentation Rule.<sup>15</sup>

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<sup>9</sup> Paragraph 4 of the Respondent's Outline of Submissions.

<sup>10</sup> *Ibid*, paragraph 5 and Attachment 1 to the submissions.

<sup>11</sup> Racing Queensland Local Rules (Thoroughbred Racing) 8 November 2022.

<sup>12</sup> Paragraph 6 of the Respondent's Outline of Submissions.

<sup>13</sup> *Ibid*, paragraph 8.

<sup>14</sup> *Ibid*, paragraph 9.

<sup>15</sup> *Ibid*, paragraph 11.

- [45] The Respondent then submits at [12] of its outline of submissions, that to interpret the Presentation Rule in a way that enables the person in charge of the horse at the race meeting to 'hand over' responsibility for the horse to another person would defeat the purpose of ensuring that there is always one person in attendance at the meeting who is responsible for ensuring that the horse is presented to race free of prohibited substances.
- [46] The Panel considers that AR240(2) has deliberately been drafted in such a manner that it is intended to have a broad scope of operation. This would appear to be consistent with the objectives set out in section 3 of the *Racing Integrity Act*. Further, giving a broad construction to AR240(2) would appear to be the construction that will best achieve the purposes of the *Racing Integrity Act* and the Australian Racing Rules.
- [47] The interpretation of AR240(2) pressed by the Respondent that where the trainer is absent from the racecourse that one person in effect stands in the shoes of the trainer as being in charge of the horse appears to be consistent with the context of Local Rule 44 and its requirement for the trainer to authorise another to be responsible for managing and controlling the horse at the racecourse.
- [48] An interpretation of AR240(2) that leads to a result that the person or persons who has physical control or hold of the horse at any particular time are the persons 'in charge' of the horse is not an interpretation that best achieves the purposes of the *Racing Integrity Act*.
- [49] This approach introduces unnecessary uncertainty and leaves open the scenario that, where in fact no one is in close proximity to, or has control of the horse at that specific time, effectively there is no one in charge of the horse. That is an unlikely construction.
- [50] The Panel therefore accepts the submission of the Respondent as to the manner in which AR240(2) should be construed. The Panel accepts that, in circumstances where the trainer does not attend the racecourse for some reason, there is a person that takes on the race day responsibilities of the trainer. It will be necessary on a case-by-case basis to analyse the factual circumstances to determine who that person is.
- [51] The Respondent also contends at paragraph [13] of its outline of submissions that the focus of the attention must be upon the time at which the person was in charge of the horse while the horse was at the race meeting.
- [52] The Panel again notes that it appears that AR240(2) has been deliberately drafted in a broad manner to ensure the widest scope of the operation of the rule.
- [53] There is a difficulty in the approach of both the Applicant and the Respondent as to how the phrase 'at any relevant time' should be construed.
- [54] The Applicant seeks to narrow the meaning of the phrase in the context of the factual circumstances relevant to this case to a period of time between 3:30pm and 5:00pm when the urine sample is taken from End Assembly.
- [55] The Applicant contends that had the phrase been intended to mean the entire time that the horse is at the racecourse, the rule could simply state that.
- [56] The Respondent contends that the relevant time must be the entirety of the time that the horse was at the racecourse on the day that it races.

- [57] The difficulty with both of these approaches is that they seek to provide a specific definition of the scope of the operation of the rule by the manner in which the phrase 'at any relevant time' is interpreted.
- [58] As one example, if some prohibited substance is given to the horse whilst it is at the stables prior to leaving for the racecourse, or indeed, on the way to the racecourse, the approach of the Respondent of focusing attention upon the time at which the person was in charge of the horse at the race meeting will not achieve the purpose of the Presentation Rule.
- [59] The Panel is satisfied that what is meant by the phrase 'at any relevant time' will fall to be determined on a case-by-case basis and dependent on the factual circumstances of each case.
- [60] The Panel is satisfied that, in the present case the relevant time is in fact the period of time that End Assembly was at Eagle Farm racecourse on 17 December 2022 and more probably between 3:30pm (when the negative blood sample was taken) and 5:00pm (when the positive urine sample was taken).
- [61] It is then necessary to consider the relevant evidence from the Stewards' Inquiry to determine whether the Applicant was in charge of End Assembly during that relevant time.

#### **EVIDENCE BEFORE THE STEWARDS – LIABILITY**

- [62] In the present case, End Assembly did return a clean blood sample at approximately 3:30 pm on 17 December 2022.
- [63] It is also uncontroversial that in the urine sample taken at approximately 5:00pm both cocaine and the metabolites of cocaine, benzoylecgonine and methylecgonine were present.
- [64] The Applicant contends that at various times during the course of the afternoon on 17 December 2022 any one of the three stablehands attending Eagle Farm racecourse may have been in charge of End Assembly.
- [65] It is therefore necessary to consider the relevant evidence that was before the Stewards' Inquiry.
- [66] The Applicant does not contend that there is any flaw or defect in the sampling process or the outcome of the testing of the sample. Exhibits 1 to 3 and 5 to 7 and 9 tendered to the Stewards' Inquiry are the relevant chain of custody documents for the samples.
- [67] The Racing Science Centre Certificate of Analysis – RSC22-103<sup>16</sup> dated 20 February 2023 confirms the presence of cocaine and its metabolites, benzoylecgonine and methylecgonine, in the urine sample taken at 5:00pm.
- [68] The Racing Analytical Services Ltd Certificate of Analysis<sup>17</sup> dated 28 February 2023 confirms the presence of cocaine and benzoylecgonine and methylecgonine in End Assembly's urine sample.
- [69] Dr Shawn Stanley, General Manager, Analytical Services, and manager of the Racing Science Centre provided evidence to the Stewards' Inquiry<sup>18</sup>. The Panel notes that Dr Stanley holds qualifications including a Bachelor of Pharmacy cum laude, Master of Science (Pharmaceutical Chemistry) and Doctor of Philosophy (Pharmaceutical Chemistry).<sup>19</sup>

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<sup>16</sup> Exhibit 4.

<sup>17</sup> Exhibit 8.

<sup>18</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #2, lines 163-364; recording #3, lines 1-397.

<sup>19</sup> Exhibit 19 – Statement of Shawn Stanley dated 11 April 2023.



- [70] In his statement and his oral evidence Dr Stanley confirmed that the Racing Science Centre only conducts a qualitative analysis and not a quantitative analysis to determine the quantity of cocaine or its metabolites present and the reasons for this including because AR240(2) merely requires proof of a positive sample for a contravention.<sup>20</sup> This in contrast to other prohibited substances, for example, those generated naturally in a horse's system where the Schedule to the Rules identifies a specified level of the product which is prohibited once that level is exceeded.
- [71] Dr Stanley confirmed in paragraph 11 of Exhibit 19<sup>21</sup> that the presence of cocaine metabolites, benzoylecgonine and methylecgonine in a sample, confirmed that cocaine has passed through the animal's blood stream before being excreted into its urine.
- [72] Dr Stanley further confirmed that the transfer of a substance like cocaine through the skin into the bloodstream does not occur very easily, it is not an efficient way of ingesting the drug and it is a very slow way of ingesting the substance.<sup>22</sup>
- [73] Dr Stanley also confirmed that the presence of the metabolite EME (methylecgonine) was a good indicator that it was not just casual contact bringing about the contamination.<sup>23</sup>
- [74] The Panel is, as a consequence of this evidence, satisfied that the urine sample taken from End Assembly at approximately 5:00pm on Saturday 17 December 2022 did test positive for cocaine and its metabolites benzoylecgonine and methylecgonine.
- [75] There is no evidence before the Panel which would enable the Panel to form any reliable conclusion as to the extent of cocaine present in End Assembly's urine sample at the time that the sample was taken.

### **Who was in charge of End Assembly?**

- [76] In the absence of any evidence as to the period of time that cocaine was in the horse's system, the problem before the Stewards was, and before the Panel is, to determine who was in charge of End Assembly at the relevant time, which as indicated above was probably between 3:30pm and 5:00pm.
- [77] The Panel will come shortly to the evidence given by the Applicant and his father, Mr Mark Currie, but before doing so, the Panel outlines a number of the Applicant's salient submissions on the issue of who was in charge of End Assembly.
- [78] In the Applicant's outline of submissions at [6] it is submitted that the evidence about who was in charge of the horse when the post-race sample was obtained from End Assembly is that the strapper, Mr Harry Hepner, was in charge.<sup>24</sup> The Applicant then submits that it was Mr Hepner<sup>25</sup>, or Mr Hepner and Mr Price<sup>26</sup> who led the horse into the mounting yard just prior to the race.
- [79] On the other hand, the Applicant contends that the evidence about who was in charge of the horse prior to it going into the mounting yard is neither clear nor cogent. Once again in paragraph [6] of the Applicant's outline of submissions, the Applicant himself notes that on a stewards' visit to the Currie

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<sup>20</sup> *Ibid*, paragraphs 5 to 9; Transcript of Stewards' Inquiry – 12 April 2023, recording #2, lines 185-212.

<sup>21</sup> *Ibid*, paragraph 11.

<sup>22</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #2, lines 185-212.

<sup>23</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #3, lines 89-97.

<sup>24</sup> Transcript of Stewards' Inquiry – 12 April 2023, page 65 of 73, line 1844; page 68 of 73, line 1916; page 24 of 73, lines 684-687 and Transcript of Stewards' Inquiry - 16 March 2023, page 13 of 71, lines 344-348.

<sup>25</sup> Transcript of Stewards' Inquiry - 16 March 2023, page 12 of 71, lines 316-318; Transcript of Stewards' Inquiry – 12 April 2023, page 13 of 73, lines 377-378.

<sup>26</sup> Transcript of Stewards' Inquiry – 12 April 2023, page 17 of 64, lines 439-440.

stable in Toowoomba on 24 February 2023 Mr Hepner had said that the Applicant put the bridle on End Assembly and that the Applicant assisted to saddle the horse.<sup>27</sup>

- [80] The submission further notes that the Applicant's evidence about where he was when the horse was fitted with its gear prior to the race was as follows. He said he assisted. When asked about whether he put the bridle on he said 'I would have, yeah. I can't recall for sure but I'd assume so.' When asked about the tongue tie he said 'yep'. When asked about the blinkers he said, 'I'd say it would have been me too'.<sup>28</sup>
- [81] In the hearing before the Panel, it was confirmed that End Assembly in fact did not wear blinkers.
- [82] The Applicant's submission then notes that on Wednesday, 12 April 2023 Mr Hepner said that he and Jack Price saddled the horse, that he was sure of this, that the Applicant was only there at the end and that his answers about this to the stewards in February were different because he forgot then what had happened.<sup>29</sup>
- [83] Mr Price's evidence was that Mr Hepner put the bridle on and saddled the horse and that he (Price) put the tongue tie on. He said that the Applicant was talking to the owners.<sup>30</sup>
- [84] The Applicant's outline of submissions notes that Mr Hepner's evidence was that for most of the afternoon he was responsible for the horse<sup>31</sup>, by which he meant in charge of it.<sup>32</sup>
- [85] The Applicant's outline of submissions notes that Mr Hepner's evidence at one point was that he did not allow anyone to have contact with the horse prior to the race,<sup>33</sup> but at another point he said that he did.<sup>34</sup>
- [86] The Applicant's submissions note that the Applicant was present when the 3:30pm blood sample was taken.<sup>35</sup> The Applicant made no admissions to being with the horse at all times thereafter up to the running of the race.<sup>36</sup>
- [87] The Applicant made what appears to be fairly clear admissions during the first day of the Stewards' Inquiry on 16 March 2023 that he was in charge of End Assembly.
- [88] The first occasion that this occurs is on the first day of the Stewards' Inquiry on 16 March 2023 in the course of questioning by the Deputy Chief Steward Mr Goold:

*Mr Goold: Okay. With you not attending the race meeting, who was in charge of the horse for the purposes of...*

*Mr Mark Currie: Ben.*

*Mr Ben Currie: I was.*

*Mr Goold: Mr Currie - Mr Ben Currie, your son?*

*Mr Mark Currie: Yep.*

<sup>27</sup> See the transcript of Exhibit 33 Hepner Interview of 24 February 2023 at page 17 of 19, lines 437-455.

<sup>28</sup> Transcript of Stewards' Inquiry - 16 March 2023, page 11 of 71, lines 304-315.

<sup>29</sup> Transcript of Stewards' Inquiry - 12 April 2023, page 35 of 73, line 994 - page 37 of 73, line 1033.

<sup>30</sup> Transcript of Stewards' Inquiry - 12 April 2023, page 16 of 64, lines 431-436.

<sup>31</sup> Transcript of Stewards' Inquiry - 12 April 2023, page 14 of 73, lines 387-389.

<sup>32</sup> Transcript of Stewards' Inquiry - 12 April 2023, page 40 of 73, lines 1134-1137.

<sup>33</sup> Transcript of Stewards' Inquiry - 12 April 2023, page 15 of 73, lines 411-417 and 427-437.

<sup>34</sup> Transcript of Stewards' Inquiry - 12 April 2023, page 18 of 73, line 498 - page 19 of 73, line 548).

<sup>35</sup> Transcript of Stewards' Inquiry - 16 March 2023, page 10 of 71, lines 278-286.

<sup>36</sup> Transcript of Stewards' Inquiry - 16 March 2023, page 11 of 71, lines 290-296.

*Mr Goold: So Mr Currie, you confirm you were in the charge of the horse...*

*Mr Ben Currie: Yeah.*

*Mr Goold: ... on that day? Mr Currie - Mark Currie for the record - for the audio record - do you know who took the horse to the races?*

*Mr Mark Currie: Yeah. Ben, Jack and Harry.<sup>37</sup>*

[89] The Respondent in its outline of submissions at [22] contends that the evidence excerpted above given by the trainer of the horse, Mr Mark Currie, unequivocally established that he placed the Applicant in charge of the horse at the race meeting.

[90] Subsequent to that evidence being provided by Mr Mark Currie to the Stewards' Inquiry, no attempt has been made by Mr Mark Currie (either before the Stewards or before this Panel) to retract or modify his evidence that Ben Currie was in charge of End Assembly on the day in question.

[91] The Respondent goes on to contend at [23] of its outline of submissions that it is hardly surprising that the trainer of the horse placed the Applicant in charge of the horse, given that the other stable staff who attended the races were inexperienced stablehands.

[92] The Applicant had previously held a trainer's licence for nearly 10 years and was one of Queensland's leading trainers<sup>38</sup> in that time. As of February 2023, Mr Hepner had held his licence for 'about a year'<sup>39</sup>. As of December 2022, Mr Price had held a stablehand's licence for 6 to 8 months.<sup>40</sup>

[93] A little later, Mr Mark Currie confirmed that he had earlier discussed with the Applicant the tactics to be adopted for End Assembly during the race (presumably for the Applicant to discuss with the jockey).<sup>41</sup>

[94] The Applicant then once again confirmed on 16 March 2023 that he was in charge of the horse for the day in the following terms:

*Mr Goold: Okay. So you were in charge of the horse for the day.*

*Mr Ben Currie: Yeah.*

*Mr Goold: So being in charge of the horse, that requires you to obviously collect the saddle?*

*Mr Ben Currie: Yeah, collect the saddle, walk it, wash it I suppose and whatever needs to be done.<sup>42</sup>*

[95] The third occasion when the Applicant agreed on 16 March 2023 that he was in charge of End Assembly occurred later in the day on the first day of the Stewards' Inquiry as follows:

*Mr Goold: ... I continue to say to you, you were in charge of the horse. You've admitted that you were in charge of ...*

*Mr Ben Currie: Correct.*

*Mr Goold: The horse, your father's admitted you were in charge of*

<sup>37</sup> Transcript of Stewards' Inquiry – 16 March 2023, pages 7-8 of 71, lines 201-212.

<sup>38</sup> See item 88 - *Currie v Queensland Racing Integrity Commission* (2020) QCAT 240, at page 6, paragraph 5 the Tribunal accepted the Applicant's submission, made at the hearing on 18 June 2020, that the Applicant was one of Queensland's leading trainers and has held a trainer's licence for approximately 10 years.

<sup>39</sup> Transcript of the Stewards' Inquiry – part 1 12 April 2023, page 9 of 73, line 248.

<sup>40</sup> Transcript of the Stewards' Inquiry - part 4 12 April 2023, page 3 of 64, line 56.

<sup>41</sup> *Ibid*, page 9 of 71, lines 246-252.

<sup>42</sup> *Ibid*, at pages 9-10 of 71, lines 255-263.

Mr Ben Currie:        Yep

Mr Goold:             ... the horse ...<sup>43</sup>

[96] The Applicant has provided an affidavit in this proceeding<sup>44</sup> and he has also provided oral evidence in both of which he attempted to resile to some extent from what appeared to be the clear admissions that he made at the Stewards' Inquiry on 16 March 2023.

[97] In the affidavit and in his oral evidence the Applicant attempts to paint a picture that he impetuously jumped into questioning of his father by the Stewards and provided answers without thinking, and thus grossly oversimplifying what occurred on 17 December 2022.<sup>45</sup>

[98] In paragraph 5 of his affidavit the Applicant asserts:

*'It did not dawn on me until later in the hearing that the Stewards were considering me for the charge. I did myself a disservice by being dogmatic when saying I was in charge rather than stopping, thinking, and explaining properly the situation. I tried to clarify what I meant later but it was difficult as I felt the situation I found myself to be in unfair. I was worried about my future.'*

[99] In the Applicant's outline of submissions it is contended at [6] that the Applicant's admissions might be the product of impetuosity rather than the product of an accurate reflection of his true position derives some support from the manner in which he repeatedly intervened at various times during the first day of the Stewards' Inquiry.<sup>46</sup> The submission continues as follows:

*The Applicant deposes that he thought he was present only as a witness at the hearing on 16 March 2023. He deposes that had he then had a clearer appreciation of the potentiality for him to be charged with a breach of the rule he would have properly explained his situation. The Applicant was informed the inquiry concerned his father as 'the trainer under the rules' (transcript at page 3 of 71, lines 61-62). He complained about his perception of a denial of procedural fairness and, relevantly to the Applicant's assertion about his understanding of the nature of the inquiry, a steward responded, 'there's not an accusation of you having to defend yourselves' (lines 443-444). It is clear that the Applicant was of the understanding that the inquiry concerned his father, not him, (lines 860-861, 878-879, 916-918, 134-137 and 1385).*

[100] In relation to the contention regarding the observation of the Steward about the Applicant not having to defend himself, the Panel notes that two of the admissions made by the Applicant about being in charge of End Assembly had occurred prior to the response made by the Steward noted above about the Applicant not having to defend himself. As a consequence, those admissions could not be said to have been induced by anything said to the Applicant by the Stewards.

[101] The Respondent contends that in evaluating the truthfulness of the contentions advanced by the Applicant in his affidavit, the sequence of events that occurred on 16 March 2023 is instructive. The submission notes that at 12:46pm the Stewards adjourned for a lunch break and upon resumption at 1:54pm, the Stewards laid a charge against the trainer, Mark Currie, to which he entered a plea of not guilty.<sup>47</sup>

<sup>43</sup> *Ibid*, at page 48 of 71, lines 1396-1401.

<sup>44</sup> Affidavit of Benjamin Mark Currie, sworn 1 June 2023 and filed 2 June 2023 – Item 113.

<sup>45</sup> *Ibid*, paragraph 3.

<sup>46</sup> The submission references the Transcript of the Stewards' Inquiry of 16 March 2023, page 14 of 71, line 387; page 15 of 71, line 402; and page 15 of 71, line 422.

<sup>47</sup> Paragraphs 36 and 37 of the Respondent's Outline of Submission.

[102] The Respondent's submission then notes that only after the Applicant was charged did he then attempt to "back pedal" and assert that he only had the horse in his care up until the blood test was taken at 3:30pm.<sup>48</sup> The Respondent notes that the Applicant's assertion was contradicted by his earlier evidence regarding his involvement in saddling the horse and when this was pointed out to him by Mr Zimmerman (one of the Stewards) he could not provide a satisfactory explanation for the inconsistency.<sup>49</sup>

[103] The Respondent ultimately submits at paragraph [49] that the Panel would accept the Applicant's evidence given on 16 March 2023 prior to being charged as being truthful and the back pedalling reflected an attempt to avoid responsibility for a charge under the Presentation Rule.

[104] The Applicant's affidavit is somewhat of a curious document in that he does not depose that the admissions he made to the Stewards' Inquiry were in fact not correct or untrue, and nor does he then go on to explain what his evidence would have been had he been properly prepared and/or had some form of representation. It is not clear even after his oral evidence how his evidence would have differed from that he provided to the Stewards' Inquiry.

[105] In the New South Wales Court of Appeal decision of *Commercial Union Assurance Company of Australia v Ferrcom Pty Ltd*<sup>50</sup> Handley JA noted:

*'As I have already said the insured made no attempt to prove that it could and would have obtained cover for this mobile crane without the endorsement by pursuing the course that Mr Hughes said would alone have achieved that result.*

*In my opinion the Court should not draw inferences favourable to the insured on these matters when no attempt was made to prove them by direct evidence and in particular when no relevant questions were asked of Mr Ferrarese. Rather it seems appropriate to apply the principles of Jones v Dunkel (1959) 101 CLR 298.*

*There appears to be no Australian authority which extends the principles of Jones v Dunkel to a case where a party fails to ask questions of a witness in chief. However, I can see no reason why those principles should not apply when a party by failing to examine a witness in chief on some topic, indicates "as the most natural inference that the party fears to do so". This fear is then "some evidence" that such examination in chief "would have exposed facts unfavourable to the party": see Jones v Dunkel (at 320-321) per Windeyer J. Moreover in Ex parte Harper; Re Rosenfield [1964-5] NSW 58 at 62, Asprey J, citing Marks v Thompson 1 NYS 2d 215 (1937) at 218, held that inferences could not be drawn in favour of a party that called a witness who could have given direct evidence when that party refrained from asking the crucial questions.'*

[106] The observations of Handley JA excerpted above have been subsequently approved and applied by the Queensland Court of Appeal<sup>51</sup> and the High Court.<sup>52</sup>

[107] The failure by the Applicant to address in his affidavit, the alternative version of his evidence or how his evidence would have differed from that provided to the Stewards' Inquiry together with the failure for

<sup>48</sup> *Ibid*, paragraphs 38 to 40.

<sup>49</sup> *Ibid*, paragraphs 41 to 42.

<sup>50</sup> (1991) 22 NSWLR 389, per Handley JA at pages 418E-419G.

<sup>51</sup> *Queensland Nickel Pty Ltd (in liq) v QNI Metals Ltd & Ors* [2021] QCA 138 at [132] per Fraser and Morrison JJA and Burns J.

<sup>52</sup> *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 at [63] per French CJ and Gummow J.

further evidence-in-chief to be led from him regarding those issues entitles the Panel to draw an inference that his evidence on these issues would not have assisted the Applicant.

[108] It would appear more likely to the Panel that the Applicant would give honest evidence to the Stewards' Inquiry at a time when he believed he was only a witness and that he was not exposed to any sanction himself.

[109] Further, during cross-examination in his evidence before the Panel, the Applicant accepted that he had an obligation to give truthful evidence to the Stewards' Inquiry.

[110] There appears to be some tension between the submission made on behalf of the Applicant that fundamentally he is a truthful person who comes across as a truthful person in a formal environment with his latter attempts to resile from his admissions to the Stewards' Inquiry as not being completely accurate and having arisen from his impetuous interjection.

[111] In addition to the evidence highlighted above, the Respondent also relies upon other actions of the Applicant as indicia supporting a finding that the Applicant was in charge of End Assembly on 17 December 2022.

[112] These additional matters can be summarised as follows:

- Mr Patrick Bundai, drove the truck transporting End Assembly to Eagle Farm on 17 December 2022. He gave evidence to the Stewards' Inquiry on 12 April 2023 that the Applicant met him at the truck upon his arrival at Eagle Farm, to take the horse off the truck.<sup>53</sup>
- The pre-race swab card was signed at 3:30pm by the Applicant.<sup>54</sup>
- The Applicant acknowledged that he and the trainer had discussed the tactics to be deployed on End Assembly in the race.<sup>55</sup>
- The Applicant collected the saddle from the jockey before the race.<sup>56</sup>
- Mr Michael Monroe, one of the owners gave evidence at the Stewards' Inquiry that whilst the Applicant was with the owners, he gave *`a bit of a briefing to the jockey before the race'*.<sup>57</sup>
- It was the Applicant who spoke to Sky Channel immediately after the running of the race about End Assembly's preparation and its successful run.<sup>58</sup>

[113] In addition to those matters, the Applicant conceded in his evidence at the Stewards' Inquiry that he was the most senior representative of Currie Racing at the racecourse on 17 December 2023.<sup>59</sup>

[114] In his oral evidence, the Applicant responded to a question from the Panel confirming that he was the most senior stablehand at the races on 17 December 2023 and that he supervised the saddling of the horse. The Panel notes that there is other evidence summarised in the Respondent's outline of Submissions at [31] of the Applicant in fact playing a more active role in the saddling of the horse.

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<sup>53</sup> Transcript of the Stewards' Inquiry – part 1 12 April 2023, page 53 of 73, lines 1484 to 1491.

<sup>54</sup> Exhibit 9 – pre-race sample card signed by the Appellant.

<sup>55</sup> Transcript of the Stewards' Inquiry – 16 March 2023, page 9 of 71, lines 246-250.

<sup>56</sup> *Ibid*, page 9, lines 257-260.

<sup>57</sup> Transcript of the Stewards' Inquiry – Part 1 - 13 April 2023, page 11 of 21, lines 281-282.

<sup>58</sup> See Item 74 – Exhibit 35 – Sky Channel footage of the race, in particular the first video, which contains an interview between the Applicant and Bernadette Cooper.

<sup>59</sup> Transcript of the Stewards' Inquiry – 16 March 2023, page 57 of 71, line 1657.

[115] When the Panel considers the totality of the evidence, there appears to be no reason to not accept the answers given by the Applicant and his father to the Stewards' Inquiry on 16 March 2023 that it was in fact the Applicant who was in charge of End Assembly for the day on 17 December 2022.

[116] That conclusion is supported by the other actions of the Applicant highlighted in paragraph [112] above.

[117] The Panel is satisfied that there is clear and cogent evidence that supports a factual finding that the Applicant was in fact 'in charge' of End Assembly on 17 December 2022 during the relevant time, the whole of the time that the horse was at the Eagle Farm racecourse.

### **Does the Applicant bear any culpability for the breach of AR240(2)?**

[118] The Applicant in paragraph [10] of his outline of submissions places some reliance on the evidence of Mr Soden before the Stewards' Inquiry as providing a potential explanation for End Assembly being contaminated with cocaine. It is then contended that, if the Panel concludes that the transference of the cocaine to the horse occurred as suggested by Mr Soden to the Stewards, then that reduces the culpability of the Applicant. It is therefore necessary for the Panel to consider the evidence of Mr Soden.

[119] Mr Nigel Soden attended the Eagle Farm race day on 17 December 2022 as a member of the public.

[120] Mr Soden provided to the Stewards a Statutory Declaration dated 21 March 2022 (this appears to be an error and it should be 2023) in which he declares that:

- *On 17 December 2022 he attended at Eagle Farm racecourse;*
- *Prior to attending the races he had placed a winning bet on Race 1 on Chatty Lady and won approximately \$1,000.00;<sup>60</sup>*
- *At sometime in the early afternoon, he went to the male bathroom, and he was approached by a young male that he did not know and asked whether he wanted to 'buy a bag' and that he knew he was referring to cocaine and he agreed to buy a bag;<sup>61</sup>*
- *He consumed the bag within an hour of purchasing it;<sup>62</sup>*
- *At some stage after consuming the bag of cocaine he asked whether he could go down to the stables to see End Assembly;<sup>63</sup>*
- *He attended the stables with some of the other people who were sitting at the table, and a young man who he assumed was the strapper. Whilst at the stables he patted End Assembly on the face and neck;<sup>64</sup>*
- *Later in the afternoon he ran into the same young male in the bathroom, and agreed to purchase another bag of cocaine which he consumed throughout the course of the afternoon;<sup>65</sup>*

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<sup>60</sup> Exhibit 15, paragraph 6; Transcript of Stewards' Inquiry – 12 April 2023, recording #4, lines 717-737.

<sup>61</sup> Exhibit 15, paragraphs 10 and 11.

<sup>62</sup> *Ibid*, paragraph 12.

<sup>63</sup> *Ibid*, paragraph 13.

<sup>64</sup> *Ibid*, paragraphs 15 and 16.

<sup>65</sup> *Ibid*, paragraphs 18 and 19.

- *Following the running of race 8, he and a number of people from the table attended the mounting yard and whilst there he again patted the horse again around the face and head following which they returned to the bar and continued drinking.*<sup>66</sup>

[121] Mr Soden also provided oral evidence to the Stewards' Inquiry.

[122] In relation to the purchase of the first bag of cocaine, Mr Soden gave evidence that this occurred approximately from 2:00pm to 3:00pm and that the male person was approaching people in the male toilet asking if anyone wanted a bag. He confirmed that one or two other people had been approached prior to him. Mr Soden confirmed that in the presence of other strangers he agreed to buy a bag and pulled money out of his pocket. He then consumed at least part of the bag in a toilet cubicle.<sup>67</sup>

[123] Mr Soden was not able to provide clear evidence as to the method or methods he used to ingest either of the bags of cocaine and suggested that he could not recall exactly which way, but knowing himself, he would have used all methods to consume two bags of cocaine.<sup>68</sup>

[124] Mr Soden went on to confirm, that in addition to the cocaine, he would have consumed somewhere between ten (10) to twenty (20) drinks involving a mixture of beer, vodka, and double vodkas.<sup>69</sup>

[125] Mr Soden confirmed that by 4:30pm that day following the consumption of the alcohol and cocaine that he was 'pretty loose, that's for sure.'<sup>70</sup>

[126] Mr Soden went on to confirm running into the same young male in the bathroom and agreeing to buy a second bag of cocaine from him. He alleged that this occurred around 4:30 in the afternoon.<sup>71</sup>

[127] In relation to Mr Soden's allegation of touching End Assembly in the mounting yard after the race Mr Soden alleges that he patted End Assembly a number of times around the face and the head, but he could not recall whether this occurred before he had a photograph taken with Justin Stanley the jockey riding End Assembly or after that.<sup>72</sup>

[128] The Panel also has before it as Exhibit 35, three Sky Channel videos which portray the race and events following the race.

[129] The Panel has viewed each of the videos and in none of the videos is Mr Soden seen near to, or touching, End Assembly as he alleges in his Statutory Declaration and in his oral evidence.

[130] Whilst in evidence, Mr Soden was shown the video evidence and further questioned about his version.

[131] Mr Soden confirmed that the video showed him as not being near the horse (at lines 1126-1156). Mr Soden further confirmed that the video footage did not support him making physical contact with the horse at all whilst it was in the enclosure.<sup>73</sup>

[132] Despite being shown this video evidence, Mr Soden maintained his version that he had touched the horse but then alleged it must have been after the photograph was taken of the horse and owners.<sup>74</sup>

<sup>66</sup> *Ibid*, paragraphs 20 to 23.

<sup>67</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #4, lines 820-912.

<sup>68</sup> *Ibid*, lines 1718-1767.

<sup>69</sup> *Ibid*, lines 959-974.

<sup>70</sup> *Ibid*, lines 978-984.

<sup>71</sup> *Ibid*, lines 939-953; 1001-1016.

<sup>72</sup> *Ibid*, lines 1036-1071.

<sup>73</sup> *Ibid*, lines 1163-1166.

<sup>74</sup> *Ibid*, lines 1166-1170.



- [133] Mr Soden conceded to the Stewards the possibility that his recollection may have been a “false memory”.<sup>75</sup> This was an important concession.
- [134] Mr Soden confirmed that he did not go to the tie-up stables after End Assembly was led off to have the urine sample conducted and that he returned upstairs with the owners to continue drinking.<sup>76</sup>
- [135] In addition to that evidence, the Panel has before it evidence from Ms Larissa Bobeszko an employee of the Respondent who was the sample collection officer responsible for taking the urine sample from End Assembly.
- [136] Ms Bobeszko gave evidence regarding the process by which she obtained the urine sample.<sup>77</sup>
- [137] Ms Bobeszko confirmed that once the photograph was taken of End Assembly with the owners in the mounting enclosure after the race, she followed Harry Hepner, the strapper to the tie-up stalls.<sup>78</sup>
- [138] Ms Bobeszko confirmed in her evidence that from that point on, End Assembly was in her sight and nothing out of the ordinary occurred.<sup>79</sup> Ms Bobeszko further confirmed in response to a question from the Stewards that Mr Hepner took End Assembly into the tie-up stall and that to her recollection the horse was not presented or shown to anyone in that area and she kept observation of the horse whilst it was being walked to cool off.<sup>80</sup>
- [139] Ms Bobeszko further confirmed that End Assembly prior to the swab being taken was not taken over to the fence in front of the tie-up stalls to allow members of the public to pat the horse.<sup>81</sup>
- [140] Following the evidence of Mr Soden, Ms Bobeszko was recalled to provide further evidence.
- [141] Ms Bobeszko was shown the video of the horse being placed into the enclosure in the mounting yard and the saddle removed and then backed out and being walked around by Mr Hepner. Ms Bobeszko confirmed that she had the horse under observation from that point onwards.<sup>82</sup>
- [142] Ms Bobeszko further confirmed that following the photograph with the owners being taken, she and Mr Hepner and End Assembly walked straight down the mounting yard and into the tie-up stalls. She further confirmed that from where the video ends, she did not observe any person to pat the horse on the face or neck.<sup>83</sup>
- [143] Ms Bobeszko was further specifically asked whether Mr Soden (who had been earlier pointed out to her in the video footage) had come anywhere near the horse during that point in time (photograph being taken) or whilst it was being walked away. She responded that she did not remember him coming near the horse.<sup>84</sup>
- [144] Ms Bobeszko also confirmed that after winning the race she could not recall anyone touching the horse immediately upon its return once it entered the gate.<sup>85</sup>

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<sup>75</sup> *Ibid*, line 1210.

<sup>76</sup> *Ibid*, lines 1179-1184; lines 1261-1273.

<sup>77</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #1, lines 1654-1705.

<sup>78</sup> *Ibid*, lines 1857-1859.

<sup>79</sup> *Ibid*, lines 1868-1875.

<sup>80</sup> *Ibid*, lines 1917-1943.

<sup>81</sup> *Ibid*, lines, 1947-1955.

<sup>82</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #5, page 3, lines 52-75.

<sup>83</sup> *Ibid*, page 5, lines 118-132.

<sup>84</sup> *Ibid*, pages 5-6, lines 133-137.

<sup>85</sup> *Ibid*, lines 141-143.

- [145] This Panel has no reason to doubt the evidence of Ms Bobeszko as accurate and reliable in relation to her observations prior to the urine sample being taken by her.
- [146] Mr Harry Hepner, the strapper employed by Mr Currie gave evidence to the Inquiry that following the race and End Assembly returning to the tie-up stalls that he permitted a number of members of the public to pat the horse.<sup>86</sup>
- [147] Mr Hepner was not sure about the number of people that may have been there.<sup>87</sup> He estimated that this occurred approximately ten minutes prior to the horse being taken to the swabbing stall.<sup>88</sup> Mr Hepner later in his evidence had some recollection of Mr Soden being at the tie-ups, despite Mr Hepner never having met him before. His evidence was unclear whether this was pre or post Race 8, and he gives no evidence that Mr Soden was touching End Assembly.<sup>89</sup>
- [148] If Mr Hepner was alleging that Mr Soden attended the tie-up stalls post Race 8, this was contradicted by Mr Soden's evidence.
- [149] On this summary of the evidence, a differently constituted Racing Appeals Panel in the matter of Mark Currie (RAP-22) found that in light of the clear and uncontroverted evidence of Ms Bobeszko that the horse made no contact with anyone after leaving the mounting enclosure, the Panel did not find the evidence of Mr Hepner on this issue persuasive. This Panel has reached the same conclusion on its review of the relevant evidence.
- [150] This Panel has also concluded similarly to the Racing Appeals Panel in the Mark Currie matter that, having viewed the videos that form Exhibit 35 and having read and observed the evidence of Mr Soden and Ms Bobeszko, this Panel does not accept the evidence of Mr Soden that he touched End Assembly on the head and face post Race 8 in the mounting yard.
- [151] This Panel also finds that the combination of the video evidence in Exhibit 35 and the evidence of Ms Bobeszko on the balance of probabilities establishes that this could not have occurred. In light of this finding, the concession by Mr Soden that his recollection may be a false memory and in light of the extent of his drug and alcohol consumption on the afternoon of 17 December 2022, this Panel does not accept the evidence of Mr Soden as reliable.
- [152] The video evidence in Exhibit 35 did confirm that a number of individuals made deliberate or incidental contact with End Assembly in the mounting enclosure.
- [153] The Panel notes that each of those persons, being part of the owners' syndicate of End Assembly were called to give evidence before the Stewards' Inquiry. Mr Peter Grills was shown in the video to pat End Assembly on the nose in the mounting enclosure. Mr Grills confirmed in his evidence that he patted the horse on the head. He further confirmed that he was 73 years of age and that he had never had cocaine (in his life).<sup>90</sup>

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<sup>86</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #1 [230411\_0564], page 16, lines 444-523.

<sup>87</sup> *Ibid*, lines 516-520.

<sup>88</sup> *Ibid*, lines 579-585.

<sup>89</sup> *Ibid*, page 32, line 896 to page 35, line 985.

<sup>90</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #5, pages 9-10, lines 242-249.

[154] The video also appeared to show contact being made by Mr Scott Bird and Mr Michael Monroe, both also members of End Assembly's owners' syndicate. Both of those gentlemen gave evidence to the Stewards' Inquiry and denied using cocaine on the day or being users of cocaine.<sup>91</sup>

[155] Having carefully analysed the totality of the evidence before this Panel, the Panel places particular weight on the video evidence contained in Exhibit 35 and the evidence of Ms Bobeszko and finds that the Panel is not satisfied that the exposure of End Assembly to cocaine occurred in the period following the completion of the race up until 5:00pm when the urine sample was obtained.

### **Contact with End Assembly Pre-Race**

[156] That renders it likely that End Assembly's ingestion of the prohibited substance occurred prior to the race which took place at 4:32pm. It is therefore necessary to consider the evidence of what occurred prior to the running of the race.

[157] Mr Jack Price is the managing owner of End Assembly's owners' syndicate. He gave evidence before the Stewards' Inquiry that at the time of the events on 17 December 2022, he also held a stablehand's licence which he had obtained in February 2022, and that he was employed by Mr Mark Currie.<sup>92</sup>

[158] Mr Price gave evidence that at some stage during the afternoon of 17 December 2022 and after End Assembly had arrived at Eagle Farm, he went down to the tie-up stalls and relieved the Applicant in taking care of End Assembly whilst Mr Benjamin Currie had some lunch.<sup>93</sup> Mr Price then gave evidence that during this period he took End Assembly over to the fence where the hedge was, and he allowed 'a lot of the boys give him a pat' during the period that the Applicant was on lunch.<sup>94</sup>

[159] Mr Price indicated that he relieved the Applicant for approximately half-an-hour.<sup>95</sup>

[160] Mr Price stated that he could not recall whether Harry Hepner was present when this allegedly occurred and nor could he say what time of the afternoon that this incident occurred.<sup>96</sup>

[161] Mr Price went on to confirm to the Stewards that the group who were patting the horse included owners and people whom he did not know. Mr Price could not confirm whether Mr Soden had patted the horse in his presence. He estimated that there could have been ten or fifteen people there at the same time.<sup>97</sup>

[162] The Stewards' Inquiry also heard evidence from Mr Scott Bird and Mr Michael Monroe who were both members of the owners' syndicate for End Assembly and who both attended the Eagle Farm racecourse on 17 December 2022.

[163] Both of those witnesses denied using cocaine at any time on 17 December 2022 and were not users of cocaine.<sup>98</sup>

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<sup>91</sup> Mr Bird's evidence can be found at Transcript of Stewards' Inquiry – 13 April 2023, [230412\_0569] recording #6, pages 3-4, lines 72-96. Mr Monroe's evidence can be found at Transcript of Stewards' Inquiry – 13 April 2023, [230412\_0569] recording #6, pages 3-4, lines 322-336.

<sup>92</sup> Transcript of Stewards' Inquiry – 12 April 2023, [230412\_0567] recording #4, pages 2-3, lines 44-57.

<sup>93</sup> *Ibid*, pages 4-5, lines 102-108.

<sup>94</sup> *Ibid*, and at page 6, lines 137-153.

<sup>95</sup> *Ibid*, page 6, lines 137-143.

<sup>96</sup> *Ibid*, page 10, lines 266-276.

<sup>97</sup> *Ibid*, page 11, lines 277-300.

<sup>98</sup> Mr Bird's evidence can be found at Transcript of Stewards' Inquiry – 13 April 2023, [230412\_0569] recording #6, pages 3-4, lines 72-96. Mr Monroe's evidence can be found at Transcript of Stewards' Inquiry – 13 April 2023, [230412\_0569] recording #6, pages 3-4, lines 322-336.

- [164] Mr Bird also gave evidence confirming that he and some of the other owners went down earlier in the afternoon to see End Assembly in the tie-up stalls. He confirmed that he and the other owners remained on the other side of the fence and that the horse remained two metres away from them. He further confirmed that Mr Price was with them, and he thought he was outside the fence with the other owners. Mr Bird also confirmed that Benjamin Currie was there as was the strapper (Harry Hepner).<sup>99</sup>
- [165] Mr Bird appeared to confirm that both Mr Hepner and Mr Benjamin Currie walked End Assembly around the area in front of the tie-up stalls whilst he was present.<sup>100</sup>
- [166] Mr Bird confirmed that he did not touch End Assembly during this period.<sup>101</sup>
- [167] Mr Bird confirmed that from his recollection no one touched the horse, but he could not be sure.<sup>102</sup>
- [168] Mr Monroe in his evidence also confirmed that once the owners received word that End Assembly had arrived at the track, he along with Scott Bird, Nick Price and he believed Trent Cameron went to the tie-up stalls to have a look at the horse and they remained on the public side of the fence.<sup>103</sup>
- [169] Mr Monroe gave evidence that when they arrived at the tie-up stalls the horse was being walked around by Benjamin Currie and Jack Price was there as well. Mr Monroe confirmed that he believed that Mr Currie brought End Assembly over to the group. He stated that he could not remember touching the horse, but he may have.<sup>104</sup>
- [170] Mr Soden gave evidence of attending at the tie-up stalls prior to the race being run at 4:32pm in the company with a number of the owners and patting End Assembly.<sup>105</sup>
- [171] In his evidence before the Stewards' Inquiry Mr Soden alleged that Mr Hepner came up to the members area where he and some of the owners were drinking to take them down to see End Assembly in the tie-up stalls.<sup>106</sup> Further, Mr Soden alleged that Mr Hepner had been at the members bar during the day.<sup>107</sup>
- [172] The difficulty with this evidence is that Mr Hepner gave no evidence of ever attending the members area on 17 December 2022 or bringing any of the owners down to see End Assembly in the tie-up stalls.
- [173] The further difficulty is that Mr Soden alleges that upon arrival at the tie-up stall, it was Mr Hepner looking after End Assembly at the tie-up stall.<sup>108</sup> Mr Soden then alleges that it was Mr Hepner leading the horse around when he arrived at the tie-up stall. He states that Mr Hepner stopped and allowed him to pat End Assembly. He confirmed that it was definitely not Mr Price leading the horse around and he was there only for a matter of minutes before he walked back.<sup>109</sup>

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<sup>99</sup> Transcript of Stewards' Inquiry – 13 April 2023, [230412\_0569] recording #6, pages 5-7, lines 135-164.

<sup>100</sup> *Ibid*, page 7, lines 168-180.

<sup>101</sup> *Ibid*, lines 181-184.

<sup>102</sup> *Ibid*, page 8, lines 200-202.

<sup>103</sup> *Ibid*, page 10, lines 274-280.

<sup>104</sup> *Ibid*, page 11, lines 291-304.

<sup>105</sup> Exhibit 15 - paragraphs 15 and 16 of the Statutory Declaration of Nigel Soden dated 21 March 2023 and Transcript of Stewards' Inquiry – 12 April 2023, [230412\_0567] recording #4, pages 52-53, lines 1437-1477.

<sup>106</sup> Transcript of Stewards' Inquiry – 12 April 2023, [230412\_0567] recording #4, pages 50-51, lines 1376-1427.

<sup>107</sup> *Ibid*, page 51, lines 1428-1429.

<sup>108</sup> *Ibid*, page 50, lines 1398-1401.

<sup>109</sup> *Ibid*, pages 52-53, lines 1437-1477.

- [174] Once again, the evidence of Mr Soden about this alleged contact with End Assembly is contradicted by the evidence of Mr Hepner, summarised above, that prior to the race whilst he was at the tie-up stalls, he did not allow anyone to touch End Assembly.
- [175] Mr Soden then went on to confirm that this visit to the tie-up stalls occurred after he had purchased the second bag of cocaine, but he could not recall whether he had consumed any of the contents of the second bag.<sup>110</sup> Mr Soden had earlier in his evidence alleged that he had purchased the second bag of cocaine sometime between 4:00pm and 4:30pm.<sup>111</sup>
- [176] If this timing is correct, it is inconsistent with the evidence of all of the other witnesses as to the time when the owners went to the tie-up stalls. Further, it appears likely that if Mr Soden's timing is correct, this would be the period when final preparations were being made with End Assembly for the horse to race at 4:32pm.
- [177] There is one final inconsistency between Mr Soden's Statutory Declaration and his oral evidence. In his Statutory Declaration, Mr Soden maintains that the visit to the tie-up stalls occurred prior to purchasing the second bag of cocaine.<sup>112</sup> In his oral evidence Mr Soden maintains that the visit to the tie-up stalls occurred after purchasing the second bag of cocaine. This apparent inconsistency was not explained by Mr Soden in his evidence before the Stewards.
- [178] The Panel has already noted its concerns regarding the reliability of the evidence of Mr Soden. The Panel does not find the evidence of Mr Soden given to the Stewards regarding his contact with End Assembly prior to the race being run convincing. It is noted that Mr Soden was not called to give any further evidence at the hearing before the Panel.
- [179] The Respondent in its submissions at [60] contends that the Applicant's assertion on 16 March 2023<sup>113</sup>, that no one who was not associated with the stable came into contact with the horse and his further assertion at (page 13/71, line 365):<sup>114</sup>
- Question: Okay, in regard to contact with the horse pre- and post-race, prior to the race did you observe anyone beside yourself or Mr Hepner having any contact with the horse?
- Answer: No.
- demonstrates at best, that the Applicant had no idea about the security of the horse at the races on 17 December 2022.
- [180] The Respondent also notes that there is no evidence before the Panel to suggest that the Applicant had himself given any instructions to stablehands about the security of the horse while it was at the meeting on 17 December 2022.
- [181] The Applicant has not provided any other evidence as to the systems or processes (if any) which he put in place on 17 December 2022 to minimise the risk of End Assembly being contaminated with a prohibited substance.
- [182] In particular, the Applicant apparently has taken no steps to ensure that persons not associated with the Currie Racing stable could not have had access to End Assembly.

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<sup>110</sup> *Ibid*, pages 53-54, lines 1485-1492.

<sup>111</sup> *Ibid*, page 34, lines 939 to 951.

<sup>112</sup> See paragraphs 13 to 15 and paragraph 18 of Exhibit 15.

<sup>113</sup> Transcript of Stewards' Inquiry – 16 March 2023, page 23/71, line 657.

<sup>114</sup> Transcript of Stewards' Inquiry – 16 March 2023, page 13/71, line 365.

[183] The Panel makes the following factual findings in relation to the elements required to be established as set out in paragraph 31 herein:

- i. End Assembly was brought to the Eagle Farm racecourse on 17 December 2022;
- ii. for the purpose of participating in Race 8, the Channel 7 Gold Edition Plate;
- iii. the Applicant was in charge of the horse during the time that End Assembly was at the Eagle Farm racecourse on 17 December 2022; and
- iv. a prohibited substance being cocaine and its metabolites, benzoylecgonine and methylecgonine, were detected in a sample taken from End Assembly the horse prior following its running in Race 8.

[184] As a consequence, it has been established to the Panel's satisfaction on the balance of probabilities on the Briginshaw standard that the Applicant has contravened AR240(2) of the Australian Rules of Racing.

[185] The Panel confirms the decision of the Stewards' Inquiry that the Applicant was in breach of AR240(2).

## **PENALTY**

[186] The Applicant in his written submissions cites and relies upon the decision of *McGill DCJ in Wallace v Queensland Racing*.<sup>115</sup> In that decision his Honour at [69] said:

*In my opinion, however, there is a difference between a case where there is evidence to show a specific mitigating circumstance, and simply an absence of evidence of an explanation, either mitigating or aggravating depending on the extent to which it shows an absence or presence of blameworthiness on the part of the trainer.[8] Cases where the trainer was able to show a specific explanation which did not involve any blameworthiness on his part are really examples of the situation where the trainer has for the purpose of penalty been able to show a mitigating circumstance. It may well be appropriate for such cases to be treated more leniently than what might be described as the ordinary case, where there is no explanation for the elevated reading, and therefore no indication as to whether or not there is any personal blameworthiness on the part of the trainer. Obviously the third category of case would be one where there was some explanation which did show moral blameworthiness on the part of the trainer, which I would expect would justify a more severe penalty.*

[187] The Applicant notes that it is the last category of case where blameworthiness could be attached to the person.

[188] The Applicant goes on to contend in his written submissions that a reasonable inference or a rational inference open on the evidence is that the horse ingested cocaine in circumstances devoid of any blame attaching to the Applicant. The transference of cocaine to the horse could have been secondary transference rather than primary transference. By the latter is meant a user of cocaine transferring that drug from himself to the horse. By the former is meant a user of cocaine having had contact with a non-user of the drug and then that non-user unknowingly transferring the drug to the horse.<sup>116</sup>

[189] The Applicant goes on to note that at the Stewards' Inquiry Mr Soden gave evidence that he had consumed cocaine on two occasions at the racecourse prior to the running of the race. He had been keeping company with the horse's ownership group. He was a stranger to most of the people in that

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<sup>115</sup> [2007] QDC 168, [69].

<sup>116</sup> Paragraph 10 of the Applicant's written submissions.

group and to the Applicant and thus the Applicant submits that it is reasonable to infer that he shook hands with members of that group that afternoon when he met them. The submission notes that at least one member of that group patted the horse.<sup>117</sup> Dr Stanley conceded that cocaine could be absorbed through a horse's skin, though he was of the opinion that this could not occur very easily.<sup>118</sup>

[190] The Applicant goes on to submit that if the Panel concludes that transference of the cocaine to the horse occurred in these circumstances, then, as there is no evidence that the Applicant had any knowledge that anyone associated with the horse's connections had used cocaine, only a fine would be warranted as a penalty.<sup>119</sup>

[191] The final submission of the Applicant is that, if the Panel concludes that the horse ingested cocaine due to some conduct of the Applicant, the Panel could at most only conclude that it was due to an omission on his part rather than an act of commission on his part. The Applicant contends that the nature of any omission cannot be identified beyond concluding that it occurred some time after 3:30pm and prior to 5:00pm.<sup>120</sup>

[192] The Applicant submits that there is no basis to conclude that a failure to take proper precautions occurred in the knowledge that cocaine had been used by either Currie's staff or anyone else.

[193] In light of this, it is contended by the Applicant that a penalty of disqualification for any period of time would be grossly disproportionate due to any omission in these circumstances. It is submitted that a fine would be effective to maintain public confidence, ensure the integrity of those involved in the industry and safeguard animal welfare.<sup>121</sup>

[194] In oral submissions, Mr Copley KC submitted that there must be some parity or proportion between the penalty ultimately imposed on the Applicant's father, Mr Mark Currie, being a fine of \$10,000.00 and the penalty to be imposed upon the Applicant.

[195] In relation to the Applicant's contention regarding the evidence of Dr Stanley, that cocaine can be absorbed through the skin of the horse, the Panel notes the evidence of Dr Stanley referred to earlier in these reasons where Dr Stanley confirmed that the presence of the metabolite EME (methylecgonine) was a good indicator that it was not just casual contact bringing about the contamination.<sup>122</sup> This casts doubt over the Applicant's contention that casual contact post race was the likely explanation for the positive sample result.

[196] In relation to the Applicant's submission regarding the evidence of Mr Soden, the Panel has found Mr Soden's evidence of his alleged contact with End Assembly to be unreliable. In light of that finding, there is no specific explanation before the Panel which explains how End Assembly came to return a positive urine sample for cocaine which absolves the Applicant from blameworthiness.

[197] In light of this the Panel is satisfied that the present case falls within the second category of case identified by his Honour McGill DCJ in the Wallace decision, that is, there is no explanation for the positive cocaine test result.

[198] The Respondent in its outline of submissions submits that the primary purpose of imposing penalties under the Rules of Racing is protective; it is not about punishment, but in order to protect the image

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<sup>117</sup> *Ibid.*

<sup>118</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #2 [230412-0565], page 9 of 13, lines 230-235).

<sup>119</sup> Paragraph 11 of the Applicant's written submissions.

<sup>120</sup> *Ibid.*, paragraph 12.

<sup>121</sup> *Ibid.*

<sup>122</sup> Transcript of Stewards' Inquiry – 12 April 2023, recording #3, lines 89-97.

and integrity of racing, deterrence (personal and general) will often be a highly relevant consideration.<sup>123</sup>

[199] The Respondent then submits that in the matter of *Michelle Russell v Racing NSW*<sup>124</sup> (15 July 2021) the Appeal Panel of Racing New South Wales said at [33]:

*However, as has now been stated in a number of relevant judgments by Courts, and in reasons for decision of this Panel (see The Appeals of Hyeronimus and Paine, Reasons for Decision on Penalty, RAP, 8 April 2021 at [9]-[10]; The Appeal of Noel Callow, RAP, 3 April 2017 at [37]-[41]), NSW Bar Association v Evatt (1968) 117 CLR 177 at 183-4 ; Day v Sanders; Day v Harness Racing New South Wales (2015) 90 NSWLR 764 per Leeming JA at [70] and Simpson JA at [131]; The Appeal of Hunter Kilner (RAP, 27/12/17)) the primary purpose of the imposition of penalties under the Rules of Racing is protective. It is not about punishment. It is about protecting the image and the integrity of the sport of racing. Deterrence is also relevant in the manner explained in the above judgments and reasons. Deterrence is relevant in circumstances where there has been no intent to breach AR240(2) – for example, where a licensed person has breached the rule not by any intent to do the wrong thing, but because they have failed to maintain proper stable practices, or heed the warnings of the Stewards in relation to certain products where there is a risk of a breach of the Rules through lax practices and cross-contamination. Penalties are imposed to deter that kind of conduct – and protect the sport and the racing public from it - as well of course for more deliberate cheating (which is not involved in this case).*

[200] The Respondent's outline of submissions<sup>125</sup> then cites the appeal decision regarding *Nathan Turnbull v Harness NSW*, a decision of the Racing Appeals Tribunal of New South Wales on 1 November 2017<sup>126</sup>, that Tribunal in the context of a harness racing presentation offence involving cocaine, made the following applicable observations at [32]:

- *The Tribunal is satisfied integrity is an issue here.*
- *Cocaine is a prohibited substance.*
- *It has no place in the community as its possession and use is a criminal offence.*
- *It has no legitimate use in or about racehorses in any fashion at all or, indeed, about any animal at all.*
- *A presentation case in respect of cocaine, therefore, does raise issues that a message must be given to the community at large, and to the individual trainer, that such matters warrant sanction.*

[201] The Respondent's submissions further note that in *Turnbull*, the Tribunal made reference to the case of *McNair*, a thoroughbred case in which it was observed at [34]:

*“that on race day, an appropriate level of security for a horse about to race is much greater than it would be at any other times. Relevant to this case, that the appellant knew that it was race day and so much greater was the obligation upon him to ensure that everything proper was done, such that the horse was not presented with a prohibited substance in it.”*

[202] The Respondent's submission then notes at [55], that in paragraph [54] of *Turnbull*, the Tribunal observed that there is need in an illegal substance matter such as cocaine, for a message to be given to

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<sup>123</sup> Paragraph 51 of the Respondent's Outline of Submissions filed 7 June 2023.

<sup>124</sup> Unreported, Racing New South Wales Appeal Panel, 15 July 2021.

<sup>125</sup> Respondent's Outline of Submissions, paragraphs 53 to 55.

<sup>126</sup> *Nathan Turnbull v Harness NSW*, Unreported, Racing Appeals Tribunal, 1 November 2017.



other trainers, to the industry at large, the betting public and the community that, when a prohibited substance such as this illegal drug is detected, there must be a loss of the imprimatur of the regulator, and therefore of the Tribunal on this finding that the privilege of a licence can continue.

[203] The Respondent contends that the Applicant's own disciplinary history for presentation offences involving illicit drugs, including cocaine, ought to have placed him on notice as to the need to exercise real care to prevent the ingestion of an illicit drug when in charge of a horse at a race meeting.<sup>127</sup>

[204] The Respondent then makes the following further submissions relevant to the culpability of the Applicant for the positive urine test result:

- i. *Although it is not possible to determine how End Assembly ingested cocaine, the Applicant was in charge of the horse at the race meeting, and he failed to take all reasonable precautions to ensure the security and integrity of the horse whilst it was at the racecourse;*<sup>128</sup>
- ii. *At the minimum, those precautions should have included excluding other persons having contact with the horse, by not placing the horse in a position where it could be patted in the period leading up to the race.*<sup>129</sup>

[205] The Panel has summarised the evidence of the relevant witnesses regarding what occurred regarding the handling of End Assembly pre the race being run at 4:32pm.

[206] The Respondent contends at [63] of its submissions, that the Applicant's disciplinary history, of itself, significantly limits the leniency that can be extended to him in the determination of penalty. The Panel notes the Applicant's disciplinary history, and this will be considered in more detail later in these reasons.

[207] The Respondent concedes at [64] of its submissions that, though it cannot be alleged that the Applicant was responsible for the horse ingesting cocaine, he is not without blame. The Respondent submits that it is fair to describe the Applicant as having a casual approach to the security of the horse at the racecourse, particularly in circumstances where the other two stable staff were inexperienced stablehands. It cannot be said that there is no blameworthiness at all on his part.

[208] The Respondent concludes that having regard to the principles discussed in *Turnbull v Harness NSW* and *Currie v Queensland Racing Integrity Commission* [2020] QCAT 240, the appropriate penalty was a disqualification of the Applicant's licence and for a significant period of time.

[209] In paragraph [67] of its outline of submissions, the Respondent makes a submission that the Applicant's consistent reference to cocaine as being a 'recreational drug' during the course of the Stewards' Inquiry on 16 March 2023 reflects a lack of insight by him of the seriousness of the breach.

[210] In oral submissions Mr Copley KC contended that the Applicant's description of cocaine in this manner was consistent with how the drug is referred to in the media and by the general community and as a consequence did not reflect a lack of insight by the Applicant. The Panel accepts the submission of Mr Copley KC and does not draw the inference contended by the Respondent regarding the Applicant's use of the descriptor 'recreational drug' for cocaine.

[211] Contrary to the submission from the Applicant that there must be some parity or proportionality between the penalty to be imposed on him and the \$10,000.00 fine imposed on his father, Mr Mark

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<sup>127</sup> Respondent's Outline of Submissions, paragraph 56.

<sup>128</sup> *Ibid*, paragraph 37.

<sup>129</sup> *Ibid*, paragraph 38.

Currie (the registered trainer of End Assembly), the Respondent submits at [69] that the fine imposed by the Racing Appeals Panel does not place a ceiling on the level or type of penalty to be imposed upon the Applicant given the Applicant's significant relevant disciplinary history. The Respondent then refers to the decision of the Racing Appeals Tribunal in the case of Robert Smith.<sup>130</sup>

[212] In that case Mr Robert Smith was a stable foreman employed by his father Les Smith who was the licensed trainer of Attackengo. Mr Les Smith was on holidays overseas when the horse was presented at the Toowoomba Turf Club on 12 April 2008 to compete in Race 5, the Class 5 Handicap.

[213] The horse won the race; however, a pre-race blood sample revealed an excess of total plasma carbon dioxide. Both Mr Les Smith and Mr Robert Smith were charged under AR178 (the predecessor rule to AR240(2)). The evidence before the Tribunal was that the horse had been fed additional bicarb on veterinary advice on the Friday, the day before the race.

[214] Mr Stanfield, the Member hearing the appeal noted at page 6 of the decision:

*Mr Torpey submitted that the Appellant should be dealt with as a repeat offender and referred the Tribunal to previous decisions concerning Trainers Caught (RT021-06) and Wallace (RT012-07). Mr Torpey stated that the Appellant is a "repeat offender" as there was a previous positive swab involving an elevated TC02 reading which resulted in the Appellant being suspended for six months which expired on 27 May 2007. Mr Torpey stated that with the loss of racing because of the EI crisis the Appellant effectively has only been in the industry for seven months.*

*While the Appellant is a young man and is dependent on racing the industry has to be conducted on a drug free basis. Certainly, a disqualification will cause him severe hardship but where there has been a repeat offence over a relatively short period of time the disqualification period has to be such to enforce the industry stance of drug free racing.*

[215] The Tribunal confirmed the original penalty imposed by the Stewards of a nine-month disqualification.

[216] In the present case the Penalty Determination decision of the Stewards in relation to the Applicant delivered on 22 May 2023 made specific note of the following:

- i. The Applicant had failed in his duties to not expose horses under his charge and supervision to situations that could potentially expose a horse to contamination and the possible adverse consequences that arise from a positive swab.
- ii. The Applicant had also previously as a registered trainer, had three (3) instances of horses under his care return positive samples to illicit substances, two (2) of which were cocaine.

[217] The Stewards determined that a disqualification for a period of eighteen months was warranted in the circumstances.

[218] In the present case the Panel takes into account the following mitigating factors in favour of the Applicant:

- i. The Applicant has been working within the racing industry for a significant period of time both as a licensed trainer, a stablehand and foreman at his father's stables. Mr Currie has been training for a significant period of time approximating 24 years;<sup>131</sup>
- ii. The Applicant along with his father, Mr Mark Currie, operate a significant training business which employs a number of staff;

<sup>130</sup> *Robert Graeme Smith v Queensland Racing* [2008] QRAT 006.

<sup>131</sup> Document 84 – Mark Currie Personnel Incident Report.

- iii. The Applicant is dependent upon work in the racing industry to support himself and his pregnant fiancé;
- iv. There is no evidence before the Panel to establish the amount of cocaine that was ingested by End Assembly and as a consequence the Panel cannot assume that it was a substantial ingestion; and
- v. There is no evidence before the Panel to establish that the cocaine that was ingested by End Assembly on 17 December 2022 in fact affected the performance of the horse.

[219] The Panel takes into account the following aggravating factors:

- i. The Applicant did not plead guilty to the charge and therefore loses the benefit of a discount on the proposed penalty;
- ii. End Assembly raced at a major metropolitan meeting where the Panel can properly assume that significant sums of money would have been wagered on the race in question;
- iii. The seriousness of a breach of AR240(2);
- iv. The effect of a positive test upon the image of horse racing;
- v. The duty of Racing Integrity Commission to ensure that the integrity of the sport is maintained. It is fundamental to the integrity of racing that animals competing in races are running drug free;
- vi. The requirement for specific and general deterrence;
- vii. The Applicant has a significant disciplinary history since 2016 which includes seven (7) presentation offences of various natures in contravention of the former AR178 and also a number of "administration" offences under AR178E(1).

[220] The Panel notes that in *Laming v Racing Victoria Limited*<sup>132</sup>, Senior Member Nixon observed at [10]:

*The detection of any of the prohibited substances specified in Australian Rule 177B(2) in a sample taken from a horse being trained by a licensed trainer is indeed serious and here I regard, as did the Board, the offence seriousness as high. The integrity of the racing industry is an important consideration and public confidence in the industry is critical. Any loss of public confidence in the honesty and integrity of the industry has the potential to imperil the very lifeblood of the industry due to negative publicity throughout the media associated with the detection of any of the specified prohibited substances in this rule.*

[221] In *Maud v Queensland Racing*<sup>133</sup>, the Racing Appeals Tribunal considered an appeal by Mr Maud from a decision of the Stewards disqualifying him for twelve (12) months for a breach of AR178 following a sample revealing the presence of hydrocortisone. In that case Mr Maud (as the trainer) was not at the racecourse when the horse was presented to race and was unaware that an ointment had been used in the treatment of the horse that contained hydrocortisone.

[222] The Racing Appeals Tribunal after noting the mitigating circumstances in favour of Mr Maud made the following pertinent comments in determining to confirm the twelve-month disqualification as being an appropriate penalty:

*In considering the appropriate penalty in this matter, while the Tribunal does accept there are matters in mitigation presented by the Appellant, the overriding matter which the Tribunal believes it must*

<sup>132</sup> [2011] VCAT 112 (1 February 2011).

<sup>133</sup> [2009] QRAT 18 (27 July 2009).

*consider is the previous breaches of the Rule by the Appellant. This is the Appellant's fifth offence for a breach of AR178 since 2002 and notwithstanding that the Appellant may feel that he was not to blame, the fact that there is a fifth offence is deplorable. While the Tribunal is reluctant to refer to the Appellant as a multiple offender, it must be accepted that he has had multiple breaches of the Rule. It was advised at the hearing that there have been no similar cases where there has been four previous breaches in Queensland or throughout Australia.*

*While it is accepted that a twelve month disqualification will cause detriment to the Appellant, the penalty as deterrent for trainers who repeatedly breach AR179 needs to be reinforced.*

[223] The Panel notes that those observations apply with equal force to the case of the Applicant in light of his disciplinary history.

[224] In relation to the Applicant's disciplinary history, the Panel notes in particular the following entries from his record<sup>134</sup>:

- 02.02.19 – AR.178 – presentation of Eight Over to race on 02.02.19 when found to have cocaine, methylecgonine and benzoylecgonine. Decision to impose a twelve-month disqualification confirmed.<sup>135</sup>
- 05.12.18 – AR.178 – presentation of Lil Rodge, to race on 05.12.18 when dexamethasone present in a sample. \$3,000 fine imposed on 28 January 2021 – guilty plea.
- 16.09.18 – AR.178 – presentation of Dreamscope to race on 16.09.18 when found to have cocaine and benzoylecgonine in a swab. On internal review initial penalty of a disqualification for six months increased to nine months. On appeal to QCAT, the penalty amended to a \$5,000.00 fine.<sup>136</sup>
- 06.07.18 – AR.178 – presentation of Karaharaga to race on 06.07.18 when methylmorphinan-3-ol found in a swab. Internal review amended penalty to a \$5,000.00 fine.
- 28.01.18 – AR.178 – presentation of Shakira to race when found to have testosterone in a sample. Fine – amended to six-month disqualification on internal review. Penalty set aside by QCAT.<sup>137</sup>
- 19.03.17 – AR.178 – presentation of Smooch to race on 19.03.17 when hydroxy xyalzine found in a swab. Penalty imposed fine.
- 02.02.17 – AR.178 – presented Wicked Trilogy to race when Meloxicam found in a sample. On internal review – penalty amended to a \$5,000.00 fine.
- 16.07.16 – AR.178 – presentation of Party Till Dawn when sample taken on race day contained methamphetamine. Fine of \$9,000.00 reduced to a fine of \$5,000.00.<sup>138</sup>

[225] In light of that history, it is concerning that the Applicant when placed in charge of a horse was not sufficiently vigilant and alert to avoid the risk of the horse being contaminated, whoever was responsible for causing that contamination. In addition, this extensive disciplinary history explains why

<sup>134</sup> Ben Currie Disciplinary History dated 27 April 2023 – Document No. 80.

<sup>135</sup> *Currie v Queensland Racing Integrity Commission* [2020] QCAT 240.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Currie v Queensland Racing Integrity Commission* [2019] QCAT 107.

the Panel rejects the submission made on the Applicant's behalf that there should be a correspondence and parity with the penalty upon the Applicant's father, Mr Mark Currie.

[226] In relation to the issue of specific and general deterrence, in *Queensland Racing Integrity Commission v Gilroy*<sup>139</sup>, Thomas J, President stated:

[24] *A key consideration in determining penalty is to maintain the integrity of the industry as a whole and to demonstrate to participants in the industry and the public, that behaviour which breaches the rules will not be tolerated.[17] There is a need to deter participants in the industry from acting in a way that is in breach of the rules, which have been formulated to achieve the purposes which include: maintenance of public confidence, ensuring the integrity of all persons involved in the industry, and safeguarding the welfare of all animals involved in racing.*

[25] The Tribunal agrees with the observations made in the Victorian case of *David Crawford v Stewards of Greyhound Racing Victoria* where it was said:

*"The Board is guided by principles of specific deterrence, general deterrence and the upholding of the good name of the industry by creating a level playing field... on the topic of general deterrence a message needs to be sent to the trainers that the cobalt threshold must not be breached as it is not satisfactory that performance enhancing substances are used especially those which may impact on the welfare of greyhounds. Public confidence in the industry will also exist if prohibited free substance racing is ensured." (Footnotes omitted)*

[227] The failure by the Applicant to ensure that adequate systems were not put in place for the supervision of End Assembly on 17 December 2022 when taken together with his significant history of presentation offences together with the need for both specific deterrence in the case of the Applicant (given his significant history of presentation offences) and general deterrence for the industry at large and the need to maintain the image and integrity of the racing industry lead the Panel to conclude that a penalty of disqualification is appropriate in this case.

[228] Having considered the earlier decisions of Maund<sup>140</sup> and Robert Smith<sup>141</sup> and the somewhat unusual circumstances of this case where End Assembly initially tested clear in the blood test taken at 3:00pm, and that the Applicant was not the trainer of the horse, and the mitigating factors that the Panel has highlighted above, the Panel considers that the penalty imposed by the Stewards of an eighteen-month disqualification was excessive.

[229] The Panel considers that an appropriate penalty reflecting the culpability of the Applicant and taking into account the mitigating and aggravating factors identified above is a disqualification for nine months.

### **Section 252AH(3) of the *Racing Integrity Act***

[230] Section 252AH(3) of the *Racing Integrity Act* requires where the Panel's decision includes the taking of disqualification action against the Applicant, to decide whether the action is taken because of a serious risk caused to:

(a) the welfare or health of an animal; or

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<sup>139</sup> [2016] QCATA 146 at [24] and [25] per Thomas J, President.

<sup>140</sup> *Maund v Queensland Racing* [2009] QRAT 18 (27 July 2009).

<sup>141</sup> *Robert Graeme Smith v Queensland Racing* [2008] QRAT 006.

- (b) the safety or any person; or
- (c) the integrity of the Queensland racing industry.

[231] The Panel has noted earlier in these reasons that it in its view, it is fundamental to the integrity of the Queensland racing industry and the image and reputation of the industry in the eyes of participants and the general public the importance that animals competing in the industry are free from prohibited substances.

[232] The Panel confirm and support the observations of Thomas J, President in paragraphs [24] and [25] of *Queensland Racing Integrity Commission v Gilroy*<sup>142</sup>.

[233] In the present case the disqualification of the Applicant is imposed because of a serious risk to the integrity of the Queensland racing industry if horses are permitted to compete whilst contaminated by prohibited substances.

### **Human Rights Act 2019**

[234] Section 58(1) of the Human Rights Act 2019 (the HR Act) makes it unlawful for a public entity:

- (a) *to act or make a decision in a way that is not compatible with human rights; or*
- (b) *in making a decision, to fail to give proper consideration to a human right relevant to the decision.*

[235] This includes considering whether a limit on a human right is reasonable and justifiable, having regard to the factors in section 13(2) of the HR Act.

[236] The Applicant has rights under the HR Act. The Panel confirms that it has considered the HR Act and its impact on the Applicant, participants in the racing industry and the general public. The Panel considers that section 19, freedom of movement, section 24, property rights, that is a person must not be arbitrarily deprived of the person's property which arguably includes the right to earn income via a stablehand's licence, and section 25, right to privacy and reputation, which includes a right not to have a person's reputation unlawfully attacked, could be impacted by a decision to disqualify the Applicant's licence.

[237] Disqualification of a licence imposes potentially significant financial consequences for the Applicant, including preventing him from earning income from the thoroughbred racing industry.

[238] However, the Panel notes that three of the key objectives of the Racing Integrity Act are to:

- i. safeguard the welfare of all animals that are or have been involved in racing;
- ii. maintain public confidence in the racing of animals in Queensland for which betting is lawful; and
- iii. to ensure the integrity of all persons involved with racing or betting under the *Racing Integrity Act* or the *Racing Act*.

[239] The Panel is satisfied that the presence of cocaine and/or its metabolites when found in a sample taken from a horse (particularly in circumstances where the horse has won a race):

- i. detrimentally affects the welfare of the animal;

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<sup>142</sup> [2016] QCATA 146 at [24] and [25] per Thomas J, President.

- ii. brings public condemnation upon the racing industry and undermines public confidence in the racing industry;
- iii. has potential to damage the image of racing and cast doubt about the integrity of racing.

[240] The Panel is satisfied that neither a fine or a period of suspension would not constitute an adequate or sufficient penalty in light of the objects of the *Racing Integrity Act* and the matters noted in the preceding paragraph and that there are no less restrictive or reasonably available ways to achieve this purpose pursuant to the *Racing Integrity Act* and the Australian Rules of Racing.

[241] As such, in consideration of section 13 of the *Human Right Act 2019*, the Panel considers in balancing the purposes of disciplinary sanctions against the impacts upon the human rights of the Applicant, the impacts of the disqualification are reasonable and justifiable, having regard to the seriousness of the contravention of the rules and the particular circumstances of the Applicant.

## **ORDERS**

[242] The decision of the Panel is to vary the racing decision made by the Stewards by substituting a penalty of nine (9) months disqualification which commenced on 22 May 2023 and ends on 22 February 2024.

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