

DECISION

Racing Integrity Act 2016, sections 252AB

Review application number	RAP-22	
Name	Mark Alexander Currie	
Panel	Mr Peter O'Neill (Acting Chairperson) Mr Martin Einfeld KC (Panel Member) Ms Juanita Maiden (Panel Member)	
Code	Thoroughbreds	
Rule	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.	
Penalty Notice number	PN-008076	
Appearances & Representation	Applicant	Michael White Tom McKee
	Respondent	Dominique Murphy
Hearing Date	1 June 2023	
Decision Date	5 June 2023	
Decision	Varied	
Panel Penalty	Pursuant to section 252AH(1)(b), the racing decision is varied to provide that a penalty of a fine of \$10,000.00 is substituted for the original penalty of a fine of \$15,000.00. The earlier suspended monetary fine of \$1,000.00 imposed on 2 August 2022 is also to be enforced.	

REASONS FOR DECISION

INTRODUCTION

- [1] The Applicant in this matter, Mr Mark Currie, is a licensed trainer of racehorses who operates from stables located in Toowoomba.
- [2] On 17 December 2022, Mr 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] 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.¹
- [4] The horse then participated in Race 8, which ran at 4:32pm and End Assembly won the race.²
- [5] A post-race urine sample was then taken from the horse at 5:00pm,³ which was subsequently revealed to contain cocaine and its metabolites, benzoylecgonine and methylecgonine.⁴
- [6] On 16 March 2023, Stewards conducted an inquiry into the positive urine sample obtained post-race on 17 December 2022.
- [7] At the conclusion of the Stewards' Inquiry Mr Currie was found to have contravened rule 240(2) of the Australian Rules of Racing.⁵
- [8] The particulars of the charge were as follows⁶:

Mr Mark Currie, as a licensed trainer with the Queensland Racing Integrity Commission you were the registered trainer of END ASSEMBLY when on 17 December 2022 the gelding was brought to the Eagle Farm racecourse for the purpose of participating in a race, that being Race 8 the Channel 7 Gold Edition Plate over 1200 metres, upon which a post-race urine sample was collected following its winning performance which upon analysis revealed the sample to contain cocaine and its metabolites benzoylecgonine and methyl ecgonine. The substances are prohibited under the Australian Rules of Racing pursuant to Division 1 Prohibited List B and thus breaching the requirements of AR 240(2).
- [9] 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.
- [10] By written decision delivered on 22 May 2023,⁷ the Stewards imposed on Mr Currie a monetary fine in the sum of \$15,000.00, and an earlier suspended monetary fine of \$1,000.00 imposed on 2 August 2022 was activated.
- [11] By Application filed on 25 May 2023, Mr Currie 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 Mr Currie

¹ Exhibit 9 at the Stewards Inquiry; Transcript of Stewards Inquiry – 16 March 2023, recording #1 lines 164-167.

² RQ Website – <https://www.racingqueensland.com.au/racing/fullcalendar/thoroughbred/meeting/e%20fm/20221217>.

³ Exhibit 1 at the Stewards' Inquiry.

⁴ Exhibits 8 and 16 at the Stewards' Inquiry.

⁵ Transcript of Stewards Inquiry – 16 March 2023, recording #1 lines 1822-1823.

⁶ Penalty Information Notice PN-008076 – Document No. 105 in the Hearing Documents submitted by the Respondent.

⁷ Document No. 104 in the Hearing Documents submitted by the Respondent.

challenges both the finding of guilty in respect of the charge under AR240(2) and the penalty imposed of a fine of \$15,000.00.

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

1. The Stewards' finding that the Applicant is guilty of the charge was unreasonable and unsupported by the evidence in circumstances where:
 - (a) The Applicant presented End Assembly to race on 17 December 2022 free of any prohibited substance – which is evidence by having returned a clear blood test prior to its race;
 - (b) The Applicant was not in control of End Assembly at the relevant time on 17 December 2022 – this responsibility was assumed by one of his employees, Mr Hepner;
 - (c) The Stewards' finding that the Applicant had not provided any training or given any instruction to his employees that they should not allow any persons to touch horses in their care was contrary to the evidence – the evidence was that Mr Hepner had clear instructions that had been consistently “*drummed into him*” by the Applicant that he was not to allow any persons to touch the horse other than members of the Applicant's staff;
 - (d) There was, at the relevant time, an intervening event, namely Mr Soden's uninvited contact with the horse, without the Applicant's knowledge or consent, in respect of which Mr Soden confirmed in his evidence:
 - i. Mr Soden had purchased and presumably consumed, at least one bag of cocaine prior to touching the horse;
 - ii. On at least one occasion, he was with the horse for at least a few minutes, during which time he patted the horse on its head, neck and face;
 - iii. He bet that he would have had cocaine on his fingers at the time;
 - iv. His entry into the winner's area following the race was brought about by him having “*broke through a barrier attendant*” in order to be present with the horse and its owners, despite his knowledge that he had no entitlement to be there;
 - (e) The horse subsequently returned a urine test that showed a presence of cocaine, which the evidence revealed could be in the most miniscule amount, including as low as 5-15 nanograms per millilitre, in circumstances where no quantitative testing of the urine sample had been undertaken;
 - (f) During the entirety of the above series of events, the Applicant was more than 400km away, with his daughter in Taroom, such that he had no knowledge or control whatsoever in respect of Mr Soden's conduct.
2. The Stewards' penalising discretion miscarried, and resulted in the imposition of a penalty that is excessive, in circumstances where:
 - (a) the Steward's adoption of the degrees of blameworthiness categorised in *Scott v Queensland Racing Commission (No 2)* [2018] QCAT 301 (which introduced the discrete category of “carelessness”) mistook the law, because such an approach was overturned in the subsequent appeal decision of *Queensland Racing Integrity Commission v Scott* [2019] QCATA 121;
 - (b) the Stewards' finding that the Applicant had been careless was in any event unsupported by the evidence, having regard to the matters set out in paragraph 1 herein;

- (c) instead, the evidence showed that there was no blameworthiness on the part of the Applicant which would justify the imposition of a penalty, him having presented End Assembly to race free of any prohibited substance;
- (d) the Applicant was able to show a specific explanation for how End Assembly came to return a positive test for cocaine following its initial clear test, namely Mr Soden's interactions with the horse, which does did not involve any blameworthiness on the Applicant's part.

LIABILITY

[13] 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."

[14] 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."

[15] The Applicant contends that proper application of the rule necessarily involves a consideration of a number of factors, including:

- (a) whether the horse was brought to a racecourse for the purpose of participating in a race free of a prohibited substance;
- (b) who was in charge of the horse at the "relevant time"; and
- (c) what may be regarded as the "relevant time" for the purposes of the rule.⁸

[16] In the Applicant's written submissions it is contended as a matter of construction of AR240(2) that the use of the language "*the trainer and any **other person who was in charge of the horse at any relevant time***" makes clear the rule's intent that a trainer should be liable for a contravention of the rule to the extent to which they were in charge of the horse at the relevant time; in the period leading up to the presentation of End Assembly to race, during which Mr Currie was clearly in charge of the horse as its trainer, the horse was free of any prohibited substance.⁹

[17] It is then contended that the Panel could not be satisfied that Mr Currie was "in charge" of End Assembly during any "relevant time" such that liability for the horse's positive test should be sheeted home to him. To hold Mr Currie responsible for the uninvited acts of a third party when he was not in charge of the horse does not serve to further the intention and purpose of this rule.¹⁰

[18] The Applicant contends in reliance on the decision of *Queensland All Codes Racing Industry Board v Thomas*¹¹ that AR240(2) should be construed *contra proferentum* (strictly against the maker).

[19] The Applicant then submits that Mr Currie made no choice for End Assembly to come into contact with cocaine after he presented it to race free of a prohibited substance: that choice was taken away from

⁸ Paragraph 16 of the Applicant's submissions.

⁹ Paragraph 32 of the Applicant's submissions.

¹⁰ Paragraph 33 of the Applicant's submissions.

¹¹ [2016] QCATA 83.

him by the intervening conduct of an unrelated third-party. The Applicant concludes that on a proper construction of the rule, Mr Currie should be found not guilty of the charge against him.

- [20] Regarding the issue of the proper approach to the construction of the Australian Racing Rules, the Respondent firstly submits in relation to the decision of *Queensland All Codes Racing Industry Board v Thomas*¹² that there is no support for adopting a *contra proferentum* construction of the Rules in any other State or Territory in Australia. The Respondent contends that this approach is plainly wrong and should not be adopted by the Panel.¹³
- [21] Some support for the approach to construction adopted by Carmody J in *Thomas* is indicated by Cavanough J in *Thompson v Racing Victoria Limited*¹⁴ at paragraph [32]. Ultimately, it is not necessary for the Panel to determine that issue to decide the review application.
- [22] The objects of the **Racing Integrity Act** and Rules include maintaining public confidence in racing, ensuring the integrity of all persons involved with racing, and safeguarding the welfare of animals.¹⁵
- [23] Section 101 of the *Racing Act 2002*¹⁶ states that 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)*. The Respondent submits that the important consequences of the Rules of Racing being statutory instruments is that section 14(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.
- [24] Schedule 1 of the *SI Act* confirms that section 14A of the *AIA* applies when interpreting a statutory instrument.
- [25] As a consequence, in interpreting AR240(2) the Panel is to prefer the interpretation that will best achieve the purpose of the Act.
- [26] The Panel is satisfied that the Applicant's contention that it is necessary in order to establish a contravention of AR240(2) (in the case of a trainer) that the trainer must at the relevant time be in charge of the horse is not correct and should not be accepted.
- [27] If the approach suggested by the Applicant is correct, this would mean that a trainer could deliberately give a horse a prohibited substance which is then brought to a racecourse to race, but then absolve himself from any liability by simply not attending the race. Such an interpretation is not one which would best achieve the purposes of the *Racing Integrity Act*.
- [28] Further, it is generally accepted that all words within a provision have some work to do:

As a general principle courts are not at liberty to consider any word or sentence as superfluous or insignificant. All words must prima facie be given some meaning and effect. This principle is more compelling if the word or phrase in question has been added by amendment. However, these matters are subject to the overriding consideration that it may be impossible to give a full and accurate meaning to every word. In such cases the duty of the court is to give the words the construction that produces the greatest harmony and the least inconsistency.¹⁷

¹² [2016] QCATA 83.

¹³ Paragraph 1 of the Respondent's submissions.

¹⁴ [2020] VSC 574 at [32].

¹⁵ *Racing Integrity Act 2016* (Qld) s 3.

¹⁶ *Racing Act 2002* - Queensland Legislation - Queensland Government.

¹⁷ D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 49.

- [29] If the approach to the interpretation of AR240(2) contended by the Applicant were to be accepted, it renders the words 'the trainer and' and 'other' as superfluous. The rule could simply read 'any person who was in charge of the horse at the relevant time'. Given the above, the Applicant's contention as to how AR240(2) should be construed is rejected by the Panel.
- [30] The Panel is satisfied that AR240(2) is a strict liability provision which applies to the trainer of the horse, and in addition, any other person in charge of the horse at the relevant time.
- [31] What needs to be proven to establish a contravention of AR240(2) in the case of the trainer of the horse is:
- (a) The horse is brought to a racecourse;
 - (b) For the purpose of participating in a race; and
 - (c) A prohibited substance is detected in a sample taken from the horse prior to or following its running in any race.
- [32] In *Day v Sanders*,¹⁸ when considering the analogous harness racing rule (AHRR190) to AR240(2), Basten JA said:
85. A proper reading of r 190(2) is that it imposes on a trainer an absolute responsibility for the horse presented for a race being free of prohibited substances with the result that, if the trainer presents a horse that does not satisfy that condition, he or she is guilty of an offence.
- ...
88. None of this is to say that the state of mind and the reasonableness of the applicants' conduct is irrelevant, but merely that it is irrelevant to the question of liability. Rather, its relevance is limited to the question of penalty.
- [33] Accordingly, when a prohibited substance is detected in any sample taken from a horse prior to or following its running in a race, the finding (and breach of AR 240(2)) is mandatory. However, the decision whether to punish the trainer is discretionary.¹⁹

EVIDENCE BEFORE THE STEWARDS – LIABILITY

- [34] In the present case, End Assembly did return a clean blood sample at approximately 3:30pm on 17 December 2022.
- [35] It is also uncontroversial that in the urine sample taken at approximately 5:00pm that both cocaine and the metabolites of cocaine, benzoylecgonine and methylecgonine were present.
- [36] On the Applicant's written submissions and oral argument, if it can be established that contamination of End Assembly occurred post the running of the race, then the trainer will not have presented the horse to race with a prohibited substance in its system.
- [37] The Applicant contends that the intervention of Mr Soden and his alleged role in contaminating End Assembly means that the Panel should not be satisfied that Mr Currie 'presented' End Assembly to race with a prohibited substance in its system in any practical sense.
- [38] It is therefore necessary to consider the relevant evidence that was before the Stewards' Inquiry.

¹⁸ [2015] NSWCA 324; (2015) 90 NSWLR 764, [85] and [88].

¹⁹ *Appeal by Gai Waterhouse*, Racing NSW Appeal Panel, 2 September 2005 at page 5.

- [39] 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.
- [40] The Racing Science Centre Certificate of Analysis – RSC22-103²⁰ dated 20 February 2023 confirms the presence of cocaine and its metabolites, benzoylecgonine and methylecgonine, in the urine sample taken at 5:00pm.
- [41] The Racing Analytical Services Ltd Certificate of Analysis²¹ dated 28 February 2023 confirms the presence of cocaine and benzoylecgonine and methyl ecgonine in End Assembly's urine sample.
- [42] Dr Shawn Stanley, General Manager, Analytical Services, and manager of the Racing Science Centre provided evidence to the Stewards' Inquiry²². 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).²³
- [43] 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.²⁴
- [44] Dr Stanley confirms in paragraph 11 of Exhibit 19 that the presence of cocaine metabolites, benzoylecgonine and methyl ecgonine in a sample confirm that cocaine has passed through the animal's blood stream before being excreted into its urine.
- [45] 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.²⁵
- [46] 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.²⁶
- [47] In light of the evidence of Dr Stanley, 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.
- [48] Mr Nigel Soden attended the Eagle Farm race day on 17 December 2022 as a member of the public.
- [49] Mr Soden provided a Statutory Declaration²⁷ 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;²⁸

²⁰ Exhibit 4.

²¹ Exhibit 8.

²² Transcript of Stewards Inquiry – 12 April 2023, recording #2, lines 163-364; recording #3, lines 1-397.

²³ Exhibit 19 – Statement of Shawn Stanley dated 11 April 2023.

²⁴ *Ibid*, paragraphs 5 to 9; Transcript of Stewards Inquiry – 12 April 2023, recording #2, lines 185-212.

²⁵ Transcript of Stewards Inquiry – 12 April 2023, recording #2, lines 185-212.

²⁶ Transcript of Stewards Inquiry – 12 April 2023, recording #3, lines 89-97.

²⁷ Part of Exhibit 15 before the Stewards Inquiry.

²⁸ Exhibit 15, paragraph 6; Transcript of Stewards Inquiry – 12 April 2023, recording #4, lines 717-737.

- 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;²⁹
- He consumed the bag within an hour of purchasing it;³⁰
- At some stage after consuming the bag of cocaine he asked whether he could go down to the stables to see End Assembly;³¹.
- 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;³²
- 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;³³
- 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.³⁴

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

[51] In relation to the purchase of the first bag of cocaine, Mr Soden gave evidence that 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.³⁵

[52] 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.³⁶

[53] Mr Soden went on to confirm that in addition to the cocaine that he would have consumed somewhere between ten (10) to twenty (20) drinks involving a mixture of beer, vodka, and double vodkas.³⁷

[54] 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.'³⁸

[55] 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 4:30pm in the afternoon.³⁹

[56] 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

²⁹ Exhibit 15, paragraphs 10 and 11.

³⁰ *Ibid*, paragraph 12.

³¹ *Ibid*, paragraph 13.

³² *Ibid*, paragraphs 15 and 16.

³³ *Ibid*, paragraphs 18 and 19.

³⁴ *Ibid*, paragraphs 20 to 23.

³⁵ Transcript of Stewards Inquiry – 12 April 2023, recording #4, lines 820-912.

³⁶ *Ibid*, lines 1718-1767.

³⁷ *Ibid*, lines 959-974.

³⁸ *Ibid*, lines 978-984.

³⁹ *Ibid*, lines 939-953; 1001-1016.

could not recall whether this occurred before he had a photograph taken with Justin Stanley the jockey riding End Assembly or after that.⁴⁰

- [57] The Panel has before it as Exhibit 35, three Sky Channel videos which portray the race and events following the race.
- [58] 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.
- [59] Whilst in evidence, Mr Soden was shown the video evidence⁴¹ and further questioned about his version.
- [60] 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.⁴²
- [61] 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.⁴³
- [62] Mr Soden conceded the possibility that it may have been a false memory.⁴⁴
- [63] 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.⁴⁵
- [64] 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.
- [65] Ms Bobeszko gave evidence regarding the process by which she obtained the urine sample.⁴⁶
- [66] Ms Bobeszko confirmed that once the photograph was taken of End Assembly with the owners, she followed Harry Hepner, the strapper to the tie-up stalls.⁴⁷
- [67] Ms Bobeszko confirmed in her evidence that from that point on, End Assembly was in her sight and nothing out of the ordinary occurred.⁴⁸ 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.⁴⁹
- [68] 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.⁵⁰
- [69] Following the evidence of Mr Soden, Ms Bobeszko was recalled to provide further evidence.

⁴⁰ *Ibid*, lines 1036-1071.

⁴¹ *Ibid*, lines 1077-1273.

⁴² *Ibid*, lines 1163-1166.

⁴³ *Ibid*, lines 1166-1170.

⁴⁴ *Ibid*, line 1210.

⁴⁵ *Ibid*, lines 1179-1184; lines 1261-1273.

⁴⁶ Transcript of Stewards Inquiry – 12 April 2023, recording #1, lines 1654-1705.

⁴⁷ *Ibid*, lines 1857-1859.

⁴⁸ *Ibid*, lines 1868-1875.

⁴⁹ *Ibid*, lines 1917-1943.

⁵⁰ *Ibid*, lines, 1947-1955.

- [70] 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.⁵¹
- [71] 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.⁵²
- [72] 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.⁵³
- [73] 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.⁵⁴
- [74] The Panel accepts the evidence of Ms Bobeszko as being accurate and reliable.
- [75] Mr Harry Hepner, the strapper employed by Mr Currie gave evidence to the Steward's 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.⁵⁵
- [76] Mr Hepner was not sure about the number of people that may have been there.⁵⁶ He estimated that this occurred approximately ten minutes prior to the horse being taken to the swabbing stall.⁵⁷ 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.⁵⁸
- [77] If Mr Hepner was alleging that Mr Soden attended the tie up stalls post-Race 8, this was contradicted by Mr Soden's evidence.
- [78] 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 does not find the evidence of Mr Hepner on this issue persuasive.
1. In addition, in light of:
 - (a) The fact that there was clear evidence from the analysis of the samples that the cocaine in End Assembly's body had time to partially metabolise; and
 - (b) The evidence of Dr Stanley referred to in paragraph 44 of these reasons, that this would require the cocaine to have passed through End Assembly's blood stream to then be excreted into the urine, the Panel finds that it is unlikely that there was sufficient time for

⁵¹ Transcript of Stewards Inquiry – 12 April 2023, recording #5, page 3, lines 52-75.

⁵² *Ibid*, page 5, lines 118-132.

⁵³ *Ibid*, pages 5-6, lines 133-137.

⁵⁴ *Ibid*, lines 141-143.

⁵⁵ Transcript of Stewards Inquiry – 12 April 2023, recording #1 [230411_0564], page 16, lines 444-523.

⁵⁶ *Ibid*, lines 516-520.

⁵⁷ *Ibid*, lines 579-585.

⁵⁸ *Ibid*, lines 557-585

this to occur had the exposure to cocaine occurred ten minutes or less prior to the urine sample being taken as indicated in the evidence of Mr Hepner.

- [79] Having viewed the videos that form Exhibit 35 and having read and observed the evidence of Mr Soden and Ms Bobeszko, the Panel do not accept the evidence of Mr Soden that he touched End Assembly on the head and face post-Race 8 in the mounting yard.
- [80] The Panel 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.
- [81] In light of the extent of Mr Soden's alcohol and drug consumption of the afternoon of 17 December 2022 and his concession that his memory of patting the horse could be a false memory, the Panel finds his evidence to be unreliable.
- [82] 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.
- [83] One of the videos showed Mr Peter Grills, one of the syndicate owners' of End Assembly patting End Assembly on the nose whilst the horse was in the enclosure for the purpose of having his saddle removed.
- [84] Mr Grills was called to give evidence in which he confirmed 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).⁵⁹
- [85] 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.
- [86] Mr Bird gave evidence to the Stewards Inquiry that he was in the mounting yard/winner's circle following the running of the race and he was in the group photograph that was taken. Mr Bird could not recall but accepted that he may have touched the horse on the loin or some part of its body. Mr Bird also confirmed that he had not used cocaine that day and he was not a person that uses cocaine.⁶⁰
- [87] The Stewards Inquiry finally also heard evidence from Mr Michael Monroe, also a member of the owners' syndicate. Mr Monroe confirmed that he was in the owner's photograph, but he could not recall patting the horse after the photograph was taken. Mr Monroe also confirmed that he had not used cocaine that day and that he was not in the habit of using cocaine at the time.⁶¹
- [88] Given the totality of the evidence summarised above, 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

- [89] Mr Hepner in his evidence confirmed that in the time leading up to Race 8 from the time when End Assembly arrived at Eagle Farm that no one person was in charge of the horse and that this duty was shared around but in the time that he was looking after the horse it remained in the tie up stalls.⁶²
- [90] Mr Hepner confirmed that whilst he would have walked End Assembly around the area in front of the tie up stalls, he did not walk the horse over to the fence to allow race goers to give it a pat. He further

⁵⁹ Transcript of Stewards Inquiry – 12 April 2023, recording #5, pages 9-10, lines 242-249.

⁶⁰ Transcript of Stewards Inquiry – 13 April 2023, [230412_0569] recording #6, pages 3-4, lines 72-96.

⁶¹ *Ibid*, page 12, lines 322-336.

⁶² Transcript of Stewards Inquiry – 12 April 2023, [230411_0564] recording #1, page 14, lines 390-398.

confirmed that during the course of the afternoon whilst he was in charge of the horse no one made physical contact with the horse at all.⁶³

- [91] 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 stable hand's licence which he had obtained in February 2022, and he was employed by Mr Mark Currie.⁶⁴
- [92] 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 Mr Benjamin Currie (Mark Currie's son and at the time also a stable hand employed by Mark Currie) in taking care of End Assembly whilst Mr Benjamin Currie had some lunch.⁶⁵
- [93] 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 Ben Currie was on lunch.⁶⁶
- [94] Mr Price indicated that he relieved Benjamin Currie for approximately half-an-hour.⁶⁷
- [95] Mr Price when questioned 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.⁶⁸
- [96] Mr Price went on to confirm that the group who were patting the horse included owners and people that were not owners who 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.⁶⁹
- [97] When ultimately pressed to try and establish a timeframe for when he attended the tie up stalls to relieve Mr Currie, Mr Price ultimately conceded that it would have been two races prior to Race 8 and therefore between 2:00pm and 2:30pm.⁷⁰
- [98] This is significant because it would confirm that these events occur prior to the blood sample being taken from End Assembly at 3:30pm.
- [99] Mr Bird 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 Ben Currie was there as was the strapper (Harry Hepner).⁷¹
- [100] 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.⁷²

⁶³ *Ibid*, page 15, lines 415-437.

⁶⁴ Transcript of Stewards Inquiry – 12 April 2023, [230412_0567] recording #4, pages 2-3, lines 44-57.

⁶⁵ *Ibid*, pages 4-5, lines 102-108.

⁶⁶ *Ibid*, and at page 6, lines 137-153.

⁶⁷ *Ibid*, page 6, lines 137-143.

⁶⁸ *Ibid*, page 10, lines 266-276.

⁶⁹ *Ibid*, page 11, lines 277-300.

⁷⁰ *Ibid*, page 17, lines 447-461.

⁷¹ Transcript of Stewards Inquiry – 13 April 2023, [230412_0569] recording #6, pages 5-7, lines 135-164.

⁷² *Ibid*, page 7, lines 168-180.

- [101] Mr Bird confirmed that he did not touch End Assembly during this period.⁷³
- [102] Mr Bird confirmed that from his recollection no one touched the horse, but he could not be sure.⁷⁴
- [103] 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.⁷⁵
- [104] 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 down 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.⁷⁶
- [105] This then leaves the evidence of Mr Soden about his alleged contact with End Assembly prior to the race being conducted.
- [106] Mr Soden in his Statutory Declaration⁷⁷ dated 21 March 2022 states in paragraph 13 that at some stage after consuming the bag of cocaine, he asked whether he could go down to the stables to see End Assembly.
- [107] The version in the Statutory Declaration is unsatisfactory in that Mr Soden does not confirm who he spoke to, what the contents of that conversation were. He also does not make any attempt to try and clarify when during the afternoon this occurs.
- [108] In paragraph 15 of the Statutory Declaration, Mr Soden declares that he attended the tie up stalls with some of the other people who were sitting at the table, and a young man who he assumed was the strapper.
- [109] Once again, this paragraph is deficient in detail regarding the number of people who went down to the tie-up stalls and their identity.
- [110] 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.⁷⁸ Further, Mr Soden alleged that Mr Hepner had been at the Members' bar during the day.⁷⁹
- [111] 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.
- [112] The further difficulty is that he alleges that upon arrival at the tie-up stall it was Mr Hepner looking after End Assembly at the tie-up stall.⁸⁰ 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

⁷³ *Ibid*, lines 181-184.

⁷⁴ *Ibid*, page 8, lines 200-202.

⁷⁵ *Ibid*, page 10, lines 274-280.

⁷⁶ *Ibid*, page 11, lines 291-304.

⁷⁷ Exhibit 15.

⁷⁸ Transcript of Stewards Inquiry – 12 April 2023, [230412_0567] recording #4, pages 50-51, lines 1376-1427.

⁷⁹ *Ibid*, page 51, lines 1428-1429.

⁸⁰ *Ibid*, page 50, lines 1398-1401.

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.⁸¹

[113] 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.

[114] 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.⁸² Mr Soden had earlier in his evidence alleged that he had purchased the second bag of cocaine some time between 4:00pm and 4:30pm.⁸³

[115] If this timing is incorrect, 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.

[116] 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.⁸⁴ 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.

[117] As a consequence of the inconsistencies between Mr Soden's evidence and that of the other witnesses and the inconsistencies within his own evidence, and the extent of his level of intoxication and drug use on the afternoon of 17 December 2022, the Panel once again have formed the view that Mr Soden's evidence regarding him touching End Assembly is unreliable and should be given limited weight.

[118] The Panel is then left in the position where the evidence before the Panel establishes that at some time between 3:30pm and 4:32pm on 17 December 2022, End Assembly was exposed to cocaine in some way that the drug has entered End Assembly's blood stream and been partially metabolised.

[119] The manner in which this has occurred and who is responsible for causing End Assembly to become exposed to cocaine and as a consequence contaminated remains unknown on the evidence before the Panel.

[120] The Panel again notes the evidence of Dr Stanley summarised at paragraph 46 above that the presence of the metabolite EME (methylecgonine) in the urine sample of End Assembly was a good indicator that it was not just casual contact bringing about the contamination.

[121] The Panel again notes the observations of the appeal panel in the *Waterhouse* appeal that when a prohibited substance is detected in any sample taken from a horse prior to, or following, its running in a race, the finding (and breach of AR240(2)) is mandatory. However, the decision whether to punish the trainer is discretionary.⁸⁵

⁸¹ *Ibid*, pages 52-53, lines 1437-1477.

⁸² *Ibid*, pages 53-54, lines 1485-1492.

⁸³ *Ibid*, page 34, lines 939 to 951.

⁸⁴ See paragraphs 13 to 15 and paragraph 18 of Exhibit 15.

⁸⁵ *Appeal by Gai Waterhouse*, Racing NSW Appeal Panel, 2 September 2005 at page 5.

[122] The Panel also notes the concession made in paragraph 2 of the submissions provided to the Panel by the Applicant that on 17 December 2022 Mr Currie presented the gelding End Assembly to the Eagle Farm racecourse for the purpose of participating in Race 8, the Channel 7 Gold Edition Plate.

[123] In light of the evidence summarised above and the concession noted in paragraph 2 of the Applicant's submissions, the Panel makes the following factual findings in relation to the elements required to be established as set out in paragraph 31 herein:

- (a) End Assembly was brought to the Eagle Farm racecourse on 17 December 2022;
- (b) for the purpose of participating in Race 8, the Channel 7 Gold Edition Plate; and
- (c) 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.

[124] As a consequence, it has been established to the Panel's satisfaction on the balance of probabilities on the *Briginshaw*⁸⁶ standard that Mr Mark Currie has contravened AR240(2) of the Australian Rules of Racing.

[125] The Panel confirms the decision of the Stewards Inquiry that Mr Mark Currie was guilty of the charge under AR240(2).

PENALTY

[126] The Applicant in his written submissions cites and relies upon the decision of Carmody J in *Queensland All Codes Racing Industry Board v Thomas*⁸⁷ as setting out the test to be used in determining penalty in a 'presentation' case. In that decision his Honour observed:

[77] Consequently, a respondent is not liable to a penalty if an overall assessment of the evidence rebuts the [no]⁸⁸ fault inferred from a positive test and reasonably supports a finding that he or she acted under an honest and reasonable mistake that the horse being presented to race was drug-free or alternatively, had done all they could to stop the horse from testing positive for a banned substance.

...

[104] The salient penalisation factors are not spelled out in the AR's but clearly include the character and the degree of culpability of the applicant which, in this case, the RBD found was such as to warrant the transgression being overlooked and any penalty waived.

[105] Considerations irrelevant to liability, such as good character, lack of knowledge, accident, or carelessness and even unexcluded possibilities may mitigate, if not sufficient to excuse or support a forensic finding consistent with innocence.

[106] The RDB was within its rights in re-exercising the discretion to choose not to impose any penalty at all, because the respondent was "a man of senior years with an unblemished record throughout his (long) history", he was "forthright in this approach", at the mercy of a rule "somewhat predatory in its conclusiveness", held in "great respect" by the stewards, not morally culpable, not even partially suspended from training, and already financially disadvantaged by the horse's disqualification. There is no *House v The King* error evident in this approach and, therefore, no power to disturb it.

⁸⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362.

⁸⁷ [2016] QCATA 82.

⁸⁸ The inclusion of the word 'no' in this paragraph appears to be an error.

[127] In *Wallace v Queensland Racing*⁸⁹ McGill DCJ 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.

[128] In the Applicant's written submissions it is contended at paragraph 48 that, having regard to the statements made by Carmody J in *Queensland All Codes Racing Industry Board v Thomas*, the question that needs to be asked in the present case is: what did Mr Currie do wrong by his conduct such as to ascribe to him a moral blameworthiness that requires punishment?

[129] The Applicant goes on to contend that the present case falls within the first, and least culpable of the categories considered by his Honour Judge McGill in *Wallace* because:⁹⁰

- (a) firstly, there is no blameworthiness on the part of Mr Currie which would justify the imposition of a penalty, him having presented End Assembly to race free of any prohibited substance and put in place reasonable measures with his staff to mitigate against the risk of any race-day contamination of the horse;
- (b) secondly, Mr Currie is able to show a specific explanation for how End Assembly came to return a positive test for cocaine following its initial clear test, namely Mr Soden's interactions with the horse, which does did not involve any blameworthiness on Mr Currie's part;
- (c) thirdly, even if the Panel is to adopt the same approach as the Stewards and disregard Mr Soden's evidence in its entirety such that it is unable to reach a clear conclusion as to the explanation for the positive urine test, this case would not fall into the second of the categories proposed by McGill DCJ, because the Panel is able to make an assessment as to whether or not there is any personal blameworthiness on the part of Mr Currie so as to mitigate against the imposition of any penalty against him.

[130] In relation to the second of those contentions 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 Mr Currie from blameworthiness.

[131] 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.

⁸⁹ [2007] QDC 168, [69].

⁹⁰ Paragraph 49 of the Applicant's written submissions.

[132] In relation to the first and third contentions, the Panel finds that it is open on the evidence before the Panel to make a finding as to the blameworthiness of Mr Currie (despite his absence from the racecourse at the time that the positive sample was returned).

[133] At some time between 3:30pm and 4:30pm the horse has been exposed to cocaine.

[134] The Panel accepts that Mr Hepner gave evidence as follows regarding the instructions he received from Mark Currie:

Tim Ryan KC: Okay then. During that period of time, had Mark Currie given you instructions, for example, and trained you at all about how to manage or care for horses under your supervision when you took them to the races?

Harold Hepner: Yeah. [Unclear] like that.”⁹¹

...

Tim Ryan KC: Anyway, had – before this day on – in December, had there any – ever been any training given to you by Mark Currie – who you’re employed by – about how to reduce the risk of drug contamination in horses being taken to the races?

Harold Hepner: Yeah. He said, [unclear] don’t let anyone touch her [or anything].

Tim Ryan KC: What else? Anything else?

Harold Hepner: Just keep the horse with yourself and don’t let anything do [unclear] nothing else can happen to her.

Tim Ryan KC: Right. The idea was – am I correct in saying this – Mr. Currie, Mark Currie, had told you this from, what, the time when you first started working for him?

Harold Hepner: Yeah.

Tim Ryan KC: Was it something that was drummed into you, or is it a one-off conversation that you had?

Harold Hepner: Drummed in.

Tim Ryan KC: So then [coughs] excuse me. Then was it something that was said by Mark Currie to you, for example, before 17 December [unclear] just before that?

Harold Hepner: Yeah.

Tim Ryan KC: How long before 17 December do you think it was that he said that to you?

Harold Hepner: I don’t know, he usually reiterates it every week ...

Tim Ryan KC: Every week?

Harold Hepner: ... before we go to the races.

Tim Ryan KC: About how important it is to reduce the risk of drug contamination in horses?

Harold Hepner: Yeah. [Unclear].”⁹²

[135] There are two difficulties for the Applicant that arise from this evidence. The first is that, if the evidence of Mr Hepner is accepted, during the relevant period prior to the running of the race, he did not allow any of the owners or indeed anyone else to have contact with End Assembly.

[136] The second difficulty is that this was not the only evidence before the Stewards Inquiry and therefore the only evidence before the Panel.

⁹¹ Transcript of Stewards Inquiry – 12 April 2023, recording #1 lines 250-254.

⁹² Transcript of Stewards Inquiry – 12 April 2023, recording #1 lines 730-757.

[137] The Respondent in its written submissions helpfully summarises the other evidence relating to the issue of Mr Mark Currie's systems in place at racecourses and the level of instructions provided to other staff members as detailed in the following paragraphs.

[138] Josh Oliver is not an employee of Currie Racing, but a self-employed jockey who took Chatty Lady to the races on 17 December 2022, where he attended to all duties in relation to Chatty Lady.⁹³ On 13 April 2023 he said that Mark Currie:

- a. had not given him instructions about how to manage the horse and ensure it was properly supervised while at the racecourse;⁹⁴ and
- b. did not give him any instructions about matters to do with reducing the risk of a horse being contaminated by any drugs or other substances while at the racecourse;⁹⁵

[139] Mr Oliver had been an apprentice to Mr Mark Currie 5 years ago. Mr Oliver said that Mr Mark Currie would have taught him as an apprentice about "all that sort of stuff".⁹⁶

[140] The Respondent's submission records Jack Price's explanation as follows:⁹⁷

Tim Ryan KC: What do you mean by what you do - have you been trained by Mr Currie, for example, who was your employer - had Mr Currie trained you as to how to behave at the racetrack, for example, in the proper supervision of horses and the management of a racehorse at the racecourse?

Jack Price: Yeah, obviously, that has happened, but at the same time, when it's your horse and you have raised it as a foal and everyone else in the family knows the horse and we've [run] it all together, it just goes out the window, doesn't it?

Tim Ryan KC: Well, would you answer my question, please?

Jack Price: Yeah, what was the question again?

Tim Ryan KC: Don't you remember the question? The question was, did Mark Currie give you any instructions at all prior to this day - let me finish the question first. Prior to this day, had Mr Mark Currie given you any instructions as to how to manage horses when they're taken to the racecourse?

Jack Price: Not to my [unclear] knowledge?

Tim Ryan KC: He's never done that at all?

Jack Price: You just know what to do with the horse, really?

Tim Ryan KC: How would you know what to do with the horse? You'd only been a stable hand, you told us, from about February of last year. Sorry?

Jack Price: I don't know.

Tim Ryan KC: So is the answer to this that Mr Currie had never given you any instructions as to how to manage the horse when it was on the racecourse? Are we clear about that, or do you disagree with it?

Jack Price: No, no, no, yeah. You get told how - what to do when you go to the courses.

Tim Ryan KC: Who told you that, then?

Jack Price: What's that?

⁹³ Transcript of Stewards Inquiry - 12 April 2023, recording #2 [230412_0565], pages 2-3, lines 28-58.

⁹⁴ *Ibid*, lines 78-83.

⁹⁵ *Ibid*, lines 88-93.

⁹⁶ *Ibid*, lines 99-102.

⁹⁷ Transcript of Stewards Inquiry - 12 April 2023, recording #4 [230412_0567], pages 6-7, lines 154-191.

Tim Ryan KC: Who told you that, then?
Jack Price: Mark, he did tell me about what you've got to do when you get there.
Tim Ryan KC: Did Mark ever say to you, for example, when you're at the races, you never let anyone - any members of the public or anyone else touch the horse, either before or after the race?
Jack Price: No, I haven't been told that.
Tim Ryan KC: Okay, and that wasn't something that you even gave any thought to at all or consideration to?
Jack Price: No, well, I think they were touching the horses all the time, so...

[141] The Respondent specifically noted in its written submissions that neither the Applicant nor Benjamin Currie (who accompanied End Assembly to the racecourse as a strapper and was with End Assembly for part of the day) elected to give evidence at the Inquiry after being informed that the issue of instructions was a relevant issue. In oral submissions the Respondent contended that an adverse inference should be drawn against Mr Mark Currie from his failure to give evidence.

[142] The Respondent subsequently provided four authorities which it contends supports its position that an adverse inference can and should be made by the Panel in the circumstances.⁹⁸

[143] The Applicant provided supplementary written submissions dated 2 June 2023 which addressed those authorities. The Applicant's argument is encapsulated in the following paragraphs of the supplementary submissions:

14. What the above cases demonstrate is that the Applicant was not in this case required to give evidence in order to either corroborate or dispute the evidence given by his staff and contractors as to the extent of instructions provided to them. This would not constitute evidence of an additional fact that is peculiarly within the knowledge of the Applicant and the Applicant alone, such that it could not be the subject of evidence from any other person or source.
15. This is not a case in which the Panel could, for example, draw the inference that no direction was given by the Applicant to his staff regarding the management of horses on race day because no evidence was before the Panel in respect of this issue. The Panel in fact has before it extensive evidence on this issue from each of the relevant staff and contractors of the Applicant. Accordingly, it is able to reach its own conclusions as to what the evidence reveals on this issue without having to draw any inference at all.
16. That is what renders this case different from Costello - only Mr. Costello could speak to the investigations he had undertaken in accordance with his undertaking, and there was no other evidence before the Tribunal on the issue.
17. That is what renders this case different from Power - only Mr. Power could speak to the circumstances in which the F Drive had not been found in a search of his house, and there was no other evidence before the Tribunal on the issue.
18. For the above reasons, no adverse inference may be drawn from the Applicant's election not to give evidence.

⁹⁸ *Costello v Racing Appeals Tribunal* [2019] NSWSC 1808, see paragraphs [51] to [61]; *Maund v Racing Victoria Limited* [2016] VSCA132; *Ghosh v Health Care Complaints Commission* [2022] NSWCA 229 at [65]; and *Council of the New South Wales Bar Association v Power* (2008) 71 NSWLR 451; [2008] NSWCA 135 per Hodgson J at [22].

[144] Whilst the Panel accepts the substance of the submissions of the Applicant, in the circumstances the Panel declines to draw an adverse inference against Mr Mark Currie from his failure to give evidence addressing the issue of what instructions he had provided to staff who were attending racecourses in his absence.

[145] Nevertheless, in circumstances where a trainer is unable to attend a racecourse where he or she has horses running, it is incumbent upon the trainer to have in place a system of work and a system of control and instructions to ensure that the risk of a horse being drugged or otherwise contaminated is minimised.

[146] In *Doughty v Racing Queensland Limited*⁹⁹, the Queensland Civil and Administrative Tribunal (QCAT) noted in a case dealing with the earlier iteration of AR240(2) that:

[8] It is the view of this Tribunal that the source of the prohibited substance is not determinative of whether or not Mrs Doughty is guilty of the offence. AR178 allows for a penalty to be applied if the prohibited substance is detected in the sample taken from the horse. The penalty "may" be applied whether that substance was present in the sample as a result of a deliberate act or inadvertence, whether with the knowledge of the trainer or without. The question of „blameworthiness" arises only in determining whether and to what extent a penalty is appropriate.

...

[12] It is the function of the trainer to ensure that the horse does not present with a prohibited substance and the function of AR178 is to penalise a trainer when, through act or omission, this has occurred. If Mrs Doughty runs a stable where contamination is allowed to occur, she cannot be said to be without blame ...

[147] Despite the evidence of Mr Hepner, the Panel is ultimately satisfied to the *Briginshaw* standard that there was an operative failure by Mr Currie to have in place full and adequate control measures at times when he was personally not attending the racecourse, which included ensuring that all staff members attending the racecourse had received appropriate training and instructions on what steps were to be taken to minimise the risk of horses being contaminated.

[148] The Panel is further satisfied that the failure of the trainer to implement a system whereby the horse was not contaminated is ultimately the responsibility of the trainer.

[149] The Panel is therefore satisfied that there should be a penalty imposed.

[150] In the Penalty Determination for Mr Mark Currie the Stewards did not in their reasons for decision set out the basis upon which it was determined that a fine of \$15,000.00 was appropriate.

[151] As a consequence, it is not possible for this Panel to determine whether the Stewards' exercise of sentencing discretion has miscarried because of the inadequacy of the reasons for decision.

[152] In the present case the Panel takes into account the following mitigating factors:

- (a) The initial blood sample of End Assembly was clear and therefore the contamination of End Assembly did not occur at Mr Currie's stables but in fact at the racecourse;
- (b) Mr Currie has been training for a significant period of time approximating 24 years;¹⁰⁰

⁹⁹ [2012] QCAT 678 Kate Buxton, Member, Joanne Browne, Member.

¹⁰⁰ Document 84 – Mark Currie Personnel Incident Report.

- (c) Until more recent times Mr Currie did not have a serious disciplinary history;¹⁰¹
- (d) Mr Mark Currie and his son Benjamin Currie operate a significant training business which employs a number of staff.

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

- (a) Mr Currie did not plead guilty to the charge and therefore loses the benefit of a discount on the proposed penalty;
- (b) The horse 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;
- (c) The seriousness of a breach of AR240(2);
- (d) The effect of a positive test upon the image of horse racing;
- (e) The duty of the Queensland 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;
- (f) The requirement for specific and general deterrence;
- (g) That Mr Currie has two previous "administration" offences under AR178E(1) (the predecessor rule to AR 240) which the Panel notes are historical and date back over five years ago; and
- (h) That Mr Currie has two more recent positive swabs from 3 August 2022 in contravention of AR241(a) which resulted in fines.

[154] In relation to the issue of specific and general deterrence, in *Queensland Racing Integrity Commission v Gilroy*¹⁰², 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*[18] 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)

[155] In *Webb v Racing Queensland* (2011) QCAT 44, a stablehand's use of cocaine was entirely unknown to the trainer and a breach, but no penalty was recorded.

¹⁰¹ *Ibid.*

¹⁰² [2016] QCATA 146 at [24] and [25] per Thomas J, President.

[156] In April 2017, Stephen Lee was fined by Stewards \$6,000 for a presentation with methamphetamine. It was his first offence in 30 years.

[157] In October 2015, Greg Wehlow presented a horse which tested positive for methamphetamine and amphetamine. It was his second breach. He was disqualified for six months following a Stewards' Inquiry. His previous AR178 offence was in September 2010 which received a \$4,000 fine.

[158] In *Currie v Queensland Racing Integrity Commission*¹⁰³, the Applicant's son Benjamin Currie faced a charge under AR178 when a horse he presented to race at Toowoomba had a post-race urine test reveal a positive for methamphetamine. Mr Benjamin Currie had employed a relative with a history of drug use and he had handled the horse on the day of the race. Member Hanger AM QC imposed a fine of \$5,000.00 on Mr Currie.

[159] The Panel considers in the circumstances that the fine imposed by the Stewards of \$15,000.00 was excessive. Having regard to the matters set out in paragraph 153 and the importance of the need to deterrence which we have referred to above, the Panel rejects the Applicant's submission that no penalty should be imposed. Instead of the fine imposed, the Panel considers that a proportionate penalty would be a fine of \$10,000.00. The Panel is satisfied that this addresses the need for both specific and general deterrence.

[160] In addition to that fine, the Panel also orders that the earlier suspended monetary fine of \$1,000.00 imposed on 2 August 2022 is to be enforced.

ORDERS

[161] The decision of the Panel is to vary the racing order made by the Stewards by substituting a fine of \$10,000.00.

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¹⁰³ [2019] QCAT 107.