Queensland Racing Appeals Panel

DECISION

Racing Integrity Act 2016, section 252AB

Review application number	RAP-41
Name	Joshua Morrow
Panel	Mr Peter O'Neill (Acting Chairperson) Mr Darren Guppy (Panel Member) Ms Lyndsey Hicks (Panel Member)
Code	Thoroughbred
Rule	**Charges 1-4** Australian Rule of Racing AR 231(1)(b)(iv) A person must not, if the person is in charge of a horse fail at any time to provide proper and sufficient nutrition for the horse. **Charge 5** Australian Rule of Racing AR 232(b) A person must not fail or refuse to comply with an order, direction or requirement of the Stewards or an official; **Charge 6** Australian Rule of Racing AR 232(i) A person must not give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading. **Enacted Suspended Penalty** Australian Rule of Racing AR 231(1)(b)(iv) – A person must not, if the person is in charge of a horse fail at any time to provide proper and sufficient nutrition for the horse.
Penalty Notice number	PN-008565 Charge 1-4 PN-008571 Charge 5 PN-008572 Charge 6 PN-008567 enacted Suspended Penalty
Appearances & Representation	Applicant J Mudoch KC Respondent M Copley KC

Hearing Date	15 August 2023
Decision Date	1 September 2023
Decision	Pursuant to section 252AH(1)(a), the racing decision made on 31 July 2023 is confirmed.
Panel Penalty	**Charges 1-4 - AR 231(1)(b)(iv)** – the decision of the Panel is to impose a twenty-one-month disqualification. **Charge 5 - AR 232(b) -** the decision of the Panel is to impose a six-month disqualification. **Charge 6 - AR 232(i)** - the decision of the Panel is to impose a three-month disqualification. **Suspended Penalty** – the decision of the Panel is to confirm the enacting of a sixty-three-day suspension.
Case References	*Appeal of Joanne Hardy*, Unreported, Appeal Panel of Racing New South Wales, 10 October 2022 *Appeal of Matt Schembri*, Unreported, Appeal Panel of Racing New South Wales, 14 May 2019 *Australian Building and Construction Commission –v- Pattinson* 2022 HCA 13 [66] TO [72]; [2022] 96 ALJR 426 *Baker v Queensland Racing Integrity Commission* (Unreported, RAP-18, 30 May 2023) *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 *Chapman v Racing NSW* (Unreported, Stewards' Inquiry dated 29 November 2019) *Clements v Queensland Racing Ltd* [2010] QCAT 637 *Commonwealth –v- Director of Fair Work Building Industry Inspectorate* ("Agreed Penalties Case") (2015) 258 CLR 482 *Currie, Mark, v. Queensland Racing Integrity Commission* RAP-22, unreported, 5 June 2023 *Desleigh Forster v Queensland Racing Integrity Commission* (Unreported, RAP-6, 3 May 2023)

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28

Queensland All Codes Racing Industry Board v. Thomas [2016] QCATA 82

Robert Heathcote v Stewards of QTRB [2002] QRAA8 (17 June 2002).

Romeo v Racing Victoria Limited [2021] VCAT 473.

See v Racing NSW, Unreported, Appeal Panel of New South Wales, 17 April 2023.

Stewards of Queensland Racing Limited v. Stephenson [2009] QRAT 16

Thompson v Racing Victoria Limited [2020] VSC 574

Reasons for Decision

INTRODUCTION

[1] The Applicant, Mr Joshua Morrow, is the holder of a restricted trainers license with the Respondent.

[2] The Applicant's counsel, Mr Murdoch KC, notes in his submissions before the Panel dated 9 August 2023 that the business undertaken by the Applicant is unusual in that it encompasses four activities on his Darling Downs property which are:

(i) Breaking-in thoroughbred horses;

(ii) Pre-training of thoroughbred horses for licensed trainers;

(iii) Spelling thoroughbred horses; and

(iv) Training a small number of horses and racing them under his Restricted License.

[3] In oral evidence the Applicant also confirmed that he had recently commenced a breeding program.

[4] It was submitted by the Applicant that it is only the fourth category which requires the holding of a trainers' licence with the Respondent. This assertion will be the subject of findings by the Panel further in these reasons. It was further submitted that the Applicant's principal source of income was derived from the first three activities outlined above in [2].

[5] On 31 July 2023, the Respondent issued six charges against the Applicant in three separate Penalty Information Notices ('PIN'), along with a further PIN which enacted a prior suspended penalty of a sixty-three days suspension which had been suspended for two years. The primary charges are misconduct charges relating to the welfare of horses in the Applicant's care. Particularly, the charges primarily related to an alleged failure to provide proper and sufficient nutrition to four horses in the period December 2022 to 3 April 2023.

[6] The Applicant pleaded not guilty to all charges.

[7] The Stewards delivered their Decision and Penalty Findings on 31 July 2023 where he was found Guilty of all charges and penalties imposed. For ease of reference, the various charges and Penalties imposed by the Stewards are outlined as follows:

[8]

PIN	Charges	Rule	Disqualification
008565	Charges 1-4	AR 231(1)(b)(iv) - A person must not, if the person is in charge of a horse fail at any time to provide proper and sufficient nutrition for the horse	21-months disqualification for charges 1-4 31/07/23 to 30/04/2025
008571	Charge 5	AR 232 (b) - failing to comply with direction of stewards	6-month disqualification- 30/04/2025 to 30/10/2025
008572	Charge 6	AR 232(i) - A person must not give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading	3-month disqualification- 31/04/2023 to

			31/10/2023 (inclusive)
008567	Enacted Suspension Charge	AR 231(1)(b)(iv) - A person must not, if the person is in charge of a horse fail at any time to provide proper and sufficient nutrition for the horse	63-day suspension to be served concurrently with Disqualification

[9] The total period of disqualification ordered by the Stewards was 27 months.

[10] By way of Application for Review with the Queensland Racing Appeals Panel dated 1 August 2023, the Applicant has sought a review of all the decisions of Stewards' concerning the findings of guilt and penalty pursuant to section 252AB of the *Racing Integrity Act* 2016 ("*The Act*"). The relevant grounds of review set out in the Application for Review of the various charges and penalties were outlined in the application as follows:

(i) Penalty 1 (Charges 1-4) - "*Each of the four charges is incompetent. Evidence inadequate to support the charge to the requisite standard. Penalty manifestly excessive. No rule breach and penalty excessive*";

(ii) Penalty 2 (Enacted Suspension Charge) - "*Suspended penalty from previous charge not enlivened. Order that previous suspended sentence not be enlivened"*;

(iii) Penalty 3 (Charge 5) - "*Rule not breached. The three horses allegedly taken after the issue of the direction had been booked and the booking's accepted by myself prior to the direction. Penalty excessive. Sought Order that the breach be set aside and penalty be set aside*";

(iv) Penalty 4 (Charge 6) - "*On the evidence there was no infringement of the rule. Penalty excessive*. *Order that infringement be set aside. Order that penalty be set aside"*.

[11] The Panel had before it the entirety of the materials before the Stewards' Inquiry held on 31 May 2023 which included a substantial number of audio interviews and transcripts, bodycam footage of the Stewards during various property and stables inspections, along with videos and photographs of the various horses in question taken at various times.

Stay Application

[12] The Panel confirms that the evidence before it during the preliminary hearing of this matter following an application made by the Applicant for a Stay of the racing decision has also been received. On 4 August 2023, the Panel ordered "*That the operation of the racing decision to which the application relates be stayed until such time as the panel decides the review application*". Several conditions were also ordered by the Panel as follows:

Conditions imposed

1. Applicant is not to take any horses to the Kulpi property.

2. Applicant is not to take further possession of any further horses until a decision of the Panel is made.

3. Applicant is precluded to attend any registered training track or racetrack for the purposes of racing.

4. Applicant to provide a list and photo of all horses currently in his possession and their registered owners to the Respondent.

Discussion

[13] The essence of the primary charges related to the very poor condition of four horses at the Kulpi property. The property on which the four horses were actually placed appears to be a neighbouring property to the property being owned by the Applicant's mother. The period of time in question was from mid-December 2022 until the four horses were seized by the Respondent on 3 April 2023. The seizure took place following a stable inspection undertaken by the Stewards at 32 Moore Road, Westbrook on the day prior, 2 April 2023.

[14] In a document entitled 'Further Material for Application for Review' dated 9 August 2023, the Applicant suggests that the two colts owned by Ms Shayne Melkis arrived at his Wellcamp property on 13 December 2022,[1] but were not taken to the Kulpi property until 16 January 2023.

[15] In her email of 21 April 2023[2], Ms Melkis notes that on 27 or 28 December 2023 the Applicant advised her that '*he had only just started on them*'. Ms Melkis was '*rather dismayed*' about this. The Panel also notes an invoice[3] from the Applicant to Ms Melkis dated 12 January 2023 for two 'breakers' in the sum of $4,400.00. Presumably this invoice would be issued after the breaking in had been completed, although it is not adequately explained when this may have occurred, if at all.

[16] When the breaking in took place is further confounded when consideration is taken of the assertion by Ms Melkis that she tried to contact the Applicant during the weekend of the Rockhampton Sales[4] as she was concerned how long the breaking in was taking.

[17] During this conversation in early April 2023 Ms Melkis was advised by the Applicant that the horses were '*still just trotting and cantering without any other education*'. Ms Melkis advises she was very upset about this '*considering they had been with him for three months*'. Ms Melkis outlined that the Applicant advised her that '*they were still just being broken in, trotting and cantering, after three months when it is normally 4 weeks for breaking in'*. She advised that she was '*extremely angry, frustrated and disappointed*' in the Applicant. Ms Melkis heard nothing further from the Applicant until she was advised that the horses had been 'taken away to be fed'.[5] The seizure took place on 3 April 2023.

[18] Taken from the steward's inquiry, it seems the fillies were at the Kulpi property from the end of January or early February 2023. The Applicant in his 'Further material for application for review' asserts they were taken to Kulpi on 20 January 2023 and were there until being removed by him on 24 March 2023. This was shortly after being alerted to their poor condition by his mother by text message on 19 March 2023.[6]

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[1] ` This date is corroborated by the owner Mr Melkis in an email to Stewards dated 1 May 2023 – see exhibit 20 (document 37).

[2] Document 37 – Exhibit 20.

[3] Document 38 – Exhibit 21.

[4] Around 2 April 2023 given the facts of charge 6 centre on the phone call made to the Applicant on that date at these sales.

[5] Document 37 – Exhibit 20.

[6] See Document 59 - Exhibit 42.

[19] Consequently, it is unclear the exact dates the four horses were at the Kulpi property. It is accepted that the four horses had been there for at least nine weeks (20 January 2023 until 24 March 2023).

[20] Dr John Barnwell, veterinarian, attended the stable inspection with stewards on 2 April 2023.[7] In his report dated 3 April 2023 Dr Barnwell assessed all the four horses as having a body score of between 1 to 2 (Poor to Very thin). Dr Barnwell noted that the "*main reason in my opinion for their body condition was not getting sufficient food for maintenance and growth*". Dr Barnwell did not think that any of the horses were suffering from any clinical condition which would make them sick and lose weight at the time. He thought they were all bright and eager to eat.

[21] On 3 April 2023, a Senior Veterinarian employed by the Respondent, Dr Gemma Silvestri, also examined the horses and undertook the recognised 'Body Score' rating pursuant to the Henneke rating System. The relevant body score of the four horses ranged from 1.5-2 / 9 which is better described as Body Score 2 "very thin" and Body Score 1 as "poor".[8]

[22] Relevantly, Dr Silvestri noted no other observable significant abnormalities which could be the cause of the very poor condition of the horses. She noted that all four horses were bright, alert and not displaying any other obvious clinical signs of disease. A simple lack of sufficient and proper nutrition was identified as the reason for their emaciated condition.[9]

[23] A primary part of the Respondent's concern was that it became apparent during the investigation and inquiry that the Applicant had not checked on the horses at that property during the entirety of their time at the Kulpi property,[10] being a period of at least nine weeks.

[24] Additionally, on 3 April 2023, Dr Silvestri examined a total of 21 horses (including the four seized horses outlined above) at three different locations. Some thirteen of these horses had issues with their condition being assessed within the range "moderately thin" to "emaciated".[11]

[25] Turning to the four horses in question, the Respondent in its submissions[12] notes that two of the four horses had registered names. Another was registered while the birth of another had been registered with the Australian Stud Book. It is accepted that a pre-condition to registering a horse is the foal being accepted for inclusion in the Australian Stud Book (Rule 27(a)). Three of them had been microchipped while the horse that had been registered with the stud book had been appropriately branded for identification.[13] The Panel have no doubts that the four horses were thoroughbreds who were bred for the end purpose of racing.

Jurisdiction

[26] The Applicant submitted that the Stewards did not have power to deliver any charges to the Applicant as the Australian Rules of Racing did not purport to regulate activities of horse care, aside from racing. In essence it was submitted that the first three activities of the Applicants business[14] as reproduced in paragraph [2] herein, did not require any licence required by the Respondent. An older decision of the

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7 See Document 22 – Exhibit 5, Report Dr John Barnwell, Equine Veterinary Services, dated 3 April 2023, page 1.

8 Exhibit 7 – Report of Dr Gemma Silvestri, Lead Veterinarian dated 3 April 2023.

9 *Ibid, pages 2-3.*

10 See Stewards Inquiry dated 8 June 2023, page 10.

11 Document 23 - Exhibit 7- Report of Dr Silvestri dated 3 April 2023, page 3.

12 Dated 11 August 2023 at [7-8].

13 Document 61 - QRIC Stewards Decision and Penalty Findings dated 31 July 2023 at page 1.

14 Applicant's Submission at [4].

Racing Appeals Tribunal of Queensland in *Stewards of Queensland Racing Limited v. Stephenson*[15] was relied upon.

[27] In the *Stephenson* decision, it was alleged that Mr Stephenson, a licensed trainer, acted improperly in relation to the sale of a thoroughbred race horse `Cotton Candy' by failing to disclose a fee he received for his part in the sale of the horse. On appeal to the Racing Appeals Tribunal, the Tribunal confirmed the decision of the First Level that the sale of the horse by Mr Stephenson as agent for the owners was not a matter or incident relating to racing within the meaning of the term used in the applicable rule (at the time) AR10.

[28] The Panel disagrees with this submission for a number of reasons.

[29] Firstly, the Applicant submits,[16] that the critical rule is AR 3 which provides:

> ***AR 3 Application of these Australian Rules***
>
> *Any person who takes part in any matter or race meeting coming within these Australian Rules agrees with Racing Australia and each PRA to be bound by and comply with them.*
>
> (*our emphasis*).

[30] The clear reference to 'Any person' is sufficient to relate to anyone, not necessarily a licensed person.

[31] It was conceded by the Applicant's counsel that the Applicant comes within the definitions of a 'participant in racing' as defined in AR 2[17]. The Panel agrees with that concession. For reference, AR 2 defines a 'participant in racing' as:

> (a) a trainer;
>
> (b) a person employed or contracted by a trainer in connection with the training or care of a horse;
>
> (c) an owner;
>
> (d) a nominator;
>
> (e) a rider;
>
> (f) a rider's agent; and
>
> (g) any person who provides a service/s connected with the keeping, training or racing of a horse.
>
> (our Emphasis)

[32] The Panel finds that the Applicant comes within the 'participant in racing' definition in the three different respects as emphasised above in subparagraphs (a), (b) & (g). That the Applicant falls within subparagraph (a) is clear.

[33] The Panel also finds that the Applicant had been '*contracted by a trainer in connection with the training or care of a horse*' within the terms of subparagraph (b).

[34] Finally, given the Applicant provides several different 'services' relating to racehorses as outlined in his submissions,[18] it is considered that each of those 'services' relates to the 'keeping' of a 'horse' as

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15 [2009] QRAT 16 (8 August 2009).

16 Applicant's submissions at [23-24].

17 Applicant's submissions at [25].

18 Namely, the 'breaking–in', 'pre-training', 'spelling' and 'training' of horses –see Applicant's submissions at [4].

contemplated in subparagraph (c). It is further noted by the Panel that the definition refers to 'a horse', not a 'racehorse' necessarily in subparagraphs (b) & (g).

[35] AR 2 defines 'PRA' as a 'Principal Racing Authority', and thereby relevantly here, 'Racing Queensland Board'. The Panel is satisfied and finds that the application of the Australian Rules of Racing outlined above is sufficiently and purposefully broad to include the Applicant here and the facts of this matter.

[36] Secondly, the relevant governing legislation in this State is the *Racing Integrity Act* (Qld) 2016.[19] The long title is noted as "*An Act to safeguard the welfare of animals, to ensure the integrity of persons involved in the racing industry and to manage matters relating to betting and sporting contingencies*". The Panel notes the three specific limbs noted in the Long Title, namely the first pertaining to the 'welfare of animals'; the second to ensure the 'integrity of persons' involved in the racing industry; and thirdly to manage matters relating to betting and sporting contingencies. The panel places emphasis on the reference to '*safeguard the welfare of animals…*' and *'to ensure the integrity of persons involved in the racing industry'* within the long title to gain an accurate understanding as to the purpose and scope of *The Act*.

[37] Further, Section 3 outlines that the Main purpose of the Act and their achievement as follows:

> **3 Main purposes of Act and their achievement**
>
> (1) The main purposes of this Act are—
>
> (a) to maintain public confidence in the racing of animals in Queensland for which betting is lawful; and
>
> (b) to ensure the integrity of all persons involved with racing or betting under this Act or the Racing Act; and
>
> (c) to safeguard the welfare of all animals that are or have been involved in racing under this Act or the Racing Act.

[38] The Panel places emphasis on subparagraphs (b) & (c) as having relevance to the facts of this matter, namely, to ensure the integrity of 'all persons' involved in the racing of animals and the safeguarding of the 'welfare of all animals'. The Panel finds that there is little risk that each of the four horses were bred for the purpose of racing as thoroughbreds and had been sent to the Applicant with that eventual aim in mind.

[39] The Panel finds that the facts giving rise to these charges are encapsulated within the main purposes of the *Act,* as further provided for in the Long Title of the *Act*, namely, to ensure the welfare of horses and the integrity of individuals entrusted to care for horses involved in the racing industry.

[40] The Panel also notes the decision of the Queensland Civil and Administrative Tribunal (`QCAT') in *Clements v Queensland Racing Ltd*[20]. Mr Clements was a professional gambler who had been warned off for life following his refusal to provide relevant information to a Stewards' Inquiry.

[41] In the review it was contended on behalf of Mr Clements that the respondent had no jurisdiction because Mr Clements was not a person who was covered by the respondent's powers, or rules. At paragraph [29]

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[19] As amended by the *Racing Integrity Amendment Act 2022*.

[20] [2010] QCAT 637.

of the decision QCAT noted that Queensland Racing was a body established by a statutory framework which included:

- *Racing Act 2002*;
- Policies of Queensland Racing;
- Australian Rules of Racing;
- Local Rules of Racing.

[42] In the present review this would include *Racing Integrity Act 2016.* At paragraph [32] of the decision QCAT noted section 3 of the *Racing Act 2002* (which remains in the same form), and the main purposes contained in section 4 which were very similar to the main purposes as contained in section 3(1) of the 2016 Act. QCAT noted:

> [33] With respect to the question of Queensland jurisdiction, we find that upon any reading of the opening paragraphs of the Act it is clear that;
>
> - The power given has statutory force and the body empowered is Racing Queensland Ltd; and
> - The legislation is expressed widely, to bind all persons and, more particularly in s 4 "all persons involved in the industry of racing including persons lawfully betting."
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> ....
>
> [42] As such as a person who is a professional punter and earns his living by the placing of bets and wages is clearly within the purview of the rules. Indeed, while it unnecessary to decide in this matter it is probable that any person who places a bet at all, whether or not a professional punter, is within the purview of these rules.

[43] The Panel is satisfied that similar reasoning can be adopted in the present review and the other activities of the Applicant would fall within the purview of the *Australian Rules of Racing* and the *Act*.

[44] Thirdly, it cannot be accepted that the intent of *The Australian Rules of Racing* or *The Act* was to have no application whatsoever to the breaking-in, spelling or pre-training of thoroughbred racehorses by a person who may not be licensed. To suggest otherwise would lead to innumerable foreseeable circumstances where properly registered and named racehorses, be they yearlings being broken in or seasoned performed racehorses who are having a spell of any length, would not be bound by or have the protections afforded by the Rules of Racing or *The Act* in any respect, in the event that a person in charge of the horse at the time was not licensed with the Respondent.

[45] Such a construction could lead to situations where non-licensed individuals or entities are specifically commenced or engaged to defeat the purpose of the Act and the application of *The Australian Rules of* Racing. The Panel is satisfied that such a construction of the *Act* and the Rules is not correct.

[46] Fourthly, the decision relied on by the Applicant of *Stephenson*, can be distinguished here given the specifics of that matter and the legislation that was in place at the time. The Panel notes that *Stephenson* was delivered in 2009, some 14 years ago when the *Racing Act (Qld)* 2002 was in force.

[47] As noted above, the facts involved the selling of a horse by a trainer who was not forthright to the owners in relation to the sale price of $5,000.00. The trainer gave $4,000.00 to the owners, without declaring the

additional $1,000.00 which he had kept to himself. One of the owners became aware of the true sale price and a complaint was lodged about the 'secret commission' kept by the trainer.

[48] The case involved the interpretation of Australian Racing Rules 175(a)[21], and AR 10[22]. Relevantly, in 2009, AR 175(a) provided that "*...the Stewards may punish: (a) any person who in their opinion has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing*".

[49] Similarly, in 2009 AR. 10 provided "*The Stewards may at any time inquire into, adjudicate upon and deal with any matter in connection with any race meeting or any matter or incident related to racing*". The question for the Tribunal was whether it had jurisdiction to consider the facts of the matter, namely the selling of a horse, by virtue of the power outlined in these sections. The Tribunal determined that the sale of a racehorse in such circumstances was not '*a matter or incident relating to racing*'. Given the wording of the AR in place at the time, that result was hardly surprising.

[50] However, the current Australian Rules of Racing are different. Here, the primary four charges relate to a breach of AR 231(1)(b)(iv) namely, a person in charge of 'a horse' must not at any time fail to 'to provide proper and sufficient nutrition for the horse'. Critically, unlike the *Stephenson* matter, there is no requirement that such a breach be 'in connection with racing' or similar. AR 231 is merely entitled 'Care and welfare of horses'. Accordingly, the *Stephenson* matter is not analogous and can be distinguished here on the facts.

[51] Fifthly, the Panel adopts the approach to statutory construction outlined by the Panel in a recent decision of *Currie, Mark, v. Queensland Racing Integrity Commission:*[23]

> *[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.*[24]
>
> *[23] Section 101 of the Racing Act 2002*[25] *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 (Sl Act). The Respondent submits that the important consequences of the Rules of Racing being statutory instruments is that section 14(1) of the Sl 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.*

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[21] Now AR 229(1)

[22] Now AR 20.

[23] *RAP 22,* unreported, 5 June 2023 at [22] to [27].

[24] *Racing Integrity Act* 2016 (Qld) s 3.

[25] *Racing Act* 2002 - Queensland Legislation - Queensland Government.

[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.

[52] The construction of the Rules submitted by the Applicant is rejected. The panel finds that the Rules of Racing apply in the Applicant's circumstances and more generally with respect to thoroughbreds who are being broken-in, undertaking pre-training or being spelled. Adopting this approach will ensure the purposes of *The Act* and the Rules of Racing are met, especially maintaining the integrity of those who are charged with their care and the welfare of horses are involved.

[53] Finally, there are many other sections of the Rules of Racing which are relevant to a consideration of powers of stewards to issue such breach notices. The powers are extensive and wide and relevantly include:

(i) AR 5 Breaches of these Australian Rules and their consequences

(1) A person breaches these Australian Rules if:

(a) a rule expressly provides as such;

(b) the person is required to do something under a rule but does not do it; or

(c) the person is prohibited from doing something under a rule but does it.

(2) If a person breaches any of these Australian Rules the person may be penalised, regardless of whether or not the rule expressly provides that the person may be penalised.

(ii) AR 6 Exercise of rights, powers or authorities to be final and conclusive

Any act done or decision made by a PRA or by the Stewards in the exercise or intended exercise of any right, power, function or authority conferred by or under the Rules is, except where otherwise provided in the Rules, final and conclusive.

(iii) AR 16 – Disciplinary Action -

Without limiting any other PRA powers, a PRA has the following powers in relation to disciplining and/or penalising a person.

(iv) AR 19 – Source of Stewards Powers

Stewards' powers and functions are conferred on them by the Rules read with the Queensland Racing Integrity Commission (QRIC) "Standard – Powers under the Rules of Racing" dated 1 July 2017, made pursuant to section 58(1)(b) of the *Racing Integrity Act* 2016 (Qld);

The Respondent has issued a Standard pursuant to section 58(1)(b) of the *Act*. The standard is entitled "*Powers under the Rules of Racing*" (A standard to clarify the powers and functions under the Rules of Racing in accordance with the provisions of the *Racing Act 2002* and *Racing Integrity Act* 2016).

(v) AR 20 - General powers

The Stewards have the following powers: (a) to regulate and control, investigate, inquire into, hear and determine matters relating to the conduct of all officials, licensed persons or registered persons, persons connected with a horse, persons attending a racecourse, and any other person connected with racing…

(vi) AR 226 – Penalty for breach

Without limiting any other rules or powers under these Australian Rules, if a person breaches any rule in this Part 9 the person may be penalised by a PRA or the Stewards.[26]

(vii) AR 227 – Breaches of the Rules -

Without limiting any other powers, a PRA or the Stewards may penalise any person who: (a) commits any breach of the Rules, or engages in conduct or negligence which has led or could have led to a breach of the Rules …

(viii) AR 228 – Conduct detrimental to the interests of racing.

A person must not engage in: (a) conduct prejudicial to the image, interests, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere; (b) misconduct, improper conduct or unseemly behaviour…

[54] Here, the Panel is satisfied that the powers of stewards under the Rules of Racing are not restricted only to matters pertaining to the training of racehorses by licensed persons.

[55] The critical rule relied on by the Applicant, AR 3, commences with the phrase "*Any person*' … *who takes part in any matter… agrees with Racing Australia and each PRA to be bound by and comply with them'.* This is sufficient of itself to defeat the construction proposed by the Applicant. AR 3 does not refer to a 'licensed person' or even 'participant in racing'.

[56] The Panel finds that the Rules of Racing can be found to apply to 'any person' in charge of a horse, should there be a breach of a respective rule.

Liability

The Primary charges 1-4

[57] These charges relate to a breach of a misconduct rule relating to the care and welfare of horses, namely AR 231, by ensuring that they have proper and sufficient nutrition. The rule applies to any person in charge of a horse who at 'any time' fails to do so.

[58] The rule relevantly provides:

AR 231 Care and welfare of horses

(1) A person must not:

[26] The Panel notes that all charges 1-6 are contained within Part 9, namely sections AR 231 & 232.

(a) commit or commission an act of cruelty to a horse, or be in possession of any article or thing which, in the opinion of the Stewards, is capable of inflicting cruelty to a horse;

(b) if the person is in charge of a horse – fail at any time:

(i) ...

(ii) ...

(iii) ...

(iv) To provide proper and sufficient nutrition for the horse.

[59] The Applicant submits that the charges do not specify a time, or time period, in which there was a failure to provide proper and sufficient nutrition to the horses.

[60] While the Applicant conceded the charges do stipulate the period of time that the Applicant was 'in charge of the horse' in each respective case, there was not a specific time during that period in which the 'failing' or the breach occurred.

[61] The Panel find that each of the Penalty Information Notices are sufficiently detailed and outline with particularity the relevant matters required to meet the charges issued. There can be no doubt that the charges relate to the Stewards view that the 'failing' of the applicant was during the period December 2022 to 3 April 2023 as outlined in the PIN numbered 008565 (Charges 1-4).

[62] The Applicant in his submissions goes on to develop two supplementary arguments as to why charges 1 to 4 are not made out.

[63] Firstly, the Applicant contends that:

(a) In the period following the four horses being retrieved from the Kulpi property he took the following steps to address the poor condition of the horses:

a. had their teeth done;

b. `wormed' them;

c. was hand feeding them with hay (after initial attempts to put them on grain were counterproductive).

[64] The Applicant submits that his handling of the horses after they were brought in could not reasonably be described as a situation of failing to provide nutrition.

[65] In relation to the earlier period when the four horses were on the Kulpi property the Applicant contends that they were in a large paddock that had grass for grazing. The paddock container another horse which had done well, and cattle, which had also done well.

[66] The Applicant provided to the Stewards' Inquiry a statement from his mother; Ms Jane Morrow dated 7 June 2023.[27] In that statement Ms Morrow confirms that due to a number of circumstances she had not checked on the horses in the back paddock for approximately four weeks. She notes that the horses were running on 200 acres with cattle.

[67] Ms Morrow confirms that five of the horses had not done well, while two had done extremely well and all of the cattle were fat and healthy. Ms Morrow contacted the Applicant on 19 March 2023 by text and

[27] Document 59 – Exhibit 42 – Statement of Jane Morrow dated 7 June 2023.

sent him a picture of the condition of one horse[28]. Ms Morrow notes that over the next few days the Applicant collected the four horses from her property. The fifth horse she described as not doing well, she notes was an old, retired horse who was moved on to the house block with his wind suck collar on and getting fed regularly.

[68] Secondly, the Applicant contends that the evidence has not established that the poor condition of the horses was caused by a lack of nutrition. The Applicant notes that in particular there was no evidence as to whether QRIC caused any tests to be done to rule out their poor condition resulting from a cause other than a lack of access to sufficient nutrition.

[69] The Applicant contends that it cannot be inferred from the horses being in poor condition, that the Applicant failed to provide the horses with proper and sufficient nutrition.

[70] In relation to the last issue, the stewards obtained evidence from veterinarians Dr John Barnwell and Dr Gemma Silvestri. Dr Barnwell attend the initial stable inspection with stewards on 2 April 2023,[29] while Dr Silvestri attended the following day, 3 April 2023, namely the day the horses were seized.

[71] The Panel notes the report of Dr Barnwell following the stable inspection assessed all the four horses as having a body score of between 1 to 2 (Poor to Very thin) and that the main reason for their body condition was insufficient food. Further, Dr Silvestri in her report of 3 April 2023[30] assessed body score ratings for the four horses of between 1.5-2 / 9.

[72] During the steward's inquiry the Applicant conceded that the four horses being spelled at his mother's property were his responsibility. The Applicant confirmed that he did not speak to his mother on the phone at any time during the nine-week period.

[73] The Applicant agreed that he had not gone to check that the horses had water during that period. It was asserted by the Applicant, and photographs that were provided to the Panel for the hearing of the application for review confirm that there were some dams and possibly a creek on the property. The photographs that were put before the panel show that there is good easy access for the horses to access water, at least at one dam. Unusually, the Applicant also agreed that the horses were actually left on a property belonging to a neighbour of his mother's property, rather than hers.

[74] The evidence before the panel was that the two colts were sent to the Applicant on 13 December 2022[31], while the two fillies were there from mid-January 2023. Therefore, the four horses were in his charge for a period of between 9-14 weeks.

[75] Curiously, the owner of the colts, Ms Shayne Melkis says that the colts were sent to the Applicant to be broken in. Ms Melkis was under the impression that the breaking in of the colts would commence 'straight away' and was 'rather dismayed' when it was ascertained on 27 or 28 December that he had only just started on them. She advised that breaking-in normally only takes 4 weeks and after 2-3 months the Applicant had only just started cantering and trotting them.

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28 Which is attached as part of Exhibit 42.

29 Document 22 – Exhibit 5 – Veterinary report of Dr John Barnwell dated 3 April 2023.

30 Document 24 – Exhibit 7 – Veterinary report of Dr Gemma Silvestri dated 3 April 2023.

31 Document 37 – Exhibit 20 - Email from the owner, Ms Shayne Melkis, dated 21 April 2023.

[76] The next time Ms Melkis heard from the Applicant was after they had been seized. It is unclear if the breaking in service for which he invoiced the owner for,[32] was completed. It seems for a great period of that time they were taken to the 200-acre paddock at Kulpi and left them to their own devices.

[77] During the Steward inquiry on 8 June 2023, the following relevant exchange took place between the Senior Stipendiary Steward Mr Clayton Warren, Stipendiary Steward Ms Emily Tickner and the Applicant:

CW: You're left with no instructions regarding them.

JM: No.

CW: Were you paying her for them to agist there?

JM: No.

CW: So what skin has she got in the game?

JM: What do you mean?

CW: She's just letting you put your horses on her place?

JM: Yeah.

CW: That she's not responsible for them. No, you are.

JM: Yeah, and that's what I've told you at the start that they were my responsibility. At no point have I said it isn't.

CW: Did you think you should? Did you speak to her on the phone about them at any-time during this nine weeks?

JM: No.

CW: So you just put them out there and said mum Jane, your mother.

JM: Yep

CW: said mum. There's four horses there. Let then go out the back. And she said. OK. And that was it for 9 weeks.

ET: And not even like you haven't even given her a day of being, like, sort of, you know, we'll bring them back into work in 10 weeks. Or 8 weeks, nothing like that. They were just out there for the foreseeable future?

JM: Yeah.

[78] The Applicant concedes that the horses were his responsibility and that he did not provide any instructions to his mother with respect to their care at any stage. The four horses were left to their own devices for at least a nine-week period. The Applicant did not check on their progress at any stage. The Applicant advised the panel during his evidence that it was only a drive of some 30-40 minutes from his property to the Kulpi property where the subject horses were being kept. Accordingly, there is seemingly no reason why they could not be properly monitored by him had he so wished.

[32] See Exhibit 20, Email S Melkis to S Heidke. Also see Exhibits 21, 22 & 23 being various invoices. Exhibit 21 is Invoice number 236, dated 12 January 2023 for $4,400.00 for the breaking in of 2 x colts.

[79] The Applicant submitted that "*the state of the evidence is not such as to permit a safe conclusion that the horses were in poor condition on account of lack of nutrition*." Further, it was asserted that there was "*no evidence that there was insufficient forage or accessible water for the four horses when they were at Kulpi*".

[80] In relation to the first of those contentions and the contention regarding a lack of testing to rule out some other medical condition causing the horses' poor condition, the veterinary evidence of Drs Barnwell & Silvestri is clear, namely, that in their opinion the reason for their poor condition was due to insufficient food and further that they were not suffering from any other illness or condition which would account for their poor condition.

[81] The Panel is therefore satisfied on the balance of probabilities that the poor condition of the horses resulted from a lack of nutrition and was not due to some other medical condition.

[82] The Panel has brought to the attention of both parties the decision of the Victorian Supreme Court in *Thompson v Racing Victoria Limited*[33] and invited submissions on that decision.

[83] In the *Thompson* case Ms Jody Thompson was a licensed racehorse trainer. Ms Thompson was charged with two offences. The first offence related to her failing to provide proper and sufficient nutrition for a retired racehorse called *Skating for Gold* owned by her. The second charge alleged a failure by her, prior to about 27 January 2017 to provide for veterinary treatment for the horse in respect of its body condition.

[84] Ms Thompson was found guilty of both charges and disqualified for three months on the first charge and one month on the second charge.

[85] The evidence established that the horse was agisting in a paddock that was owned by a third party and that the paddock had adequate suitable feed, in the form of grass and lucerne for *Skating for Gold* and for the other horses that were agisting there. The evidence also established that the other horses agisting there did well in the paddock.

[86] *Skating for Gold* lightened off considerably in condition because it had a severe habit of `wind sucking' which the horse did instead of eating. Ms Thompson managed this by causing the horse to wear a wind sucking collar.

[87] The evidence before the Court further confirmed that an unknown interloper on at least three occasions had removed the wind sucking collar and as a consequence, *Skating for Gold* had not been eating. The evidence further established that either Ms Thompson or a family member were regularly checking on the horse and re-fitting the wind sucking collar when it was found that it had been removed.

[88] As noted above, Ms Thompson had been found guilty of both charges and those findings were confirmed on review by the Victorian Civil and Administrative Tribunal (`VCAT').

At paragraphs [25] to [27] of the decision, Cavanough J made critical comment as to the manner in which VCAT had approached the interpretation of AR 175(o)(iv) which was in like terms to AR 231(1)(b)(iv) as follows:

> 25 VCAT found Ms Thompson liable on the first charge on the basis that she had not sufficiently supervised *Skating for Gold* when it was in the agisting paddock in the period up to 27 January 2017. According to VCAT, it was 'no excuse' that a third party had intervened to remove the wind sucking collar repeatedly. To the contrary, according to VCAT, this circumstance increased the level

[33] [2020] VSC 574.

of responsibility attaching to Ms Thompson. According to RVL and VCAT, she ought to have visited *Skating for Gold* more often and supervised it more closely.

26 Whether or not VCAT's criticisms of Ms Thompson's conduct are fair, they do not show that Ms Thompson's conduct amounted to a breach of AR 175(o)(iv). The interpretation of that provision adopted by RVL and (implicitly) by VCAT would stretch its words beyond breaking point. Unlike sub-paragraph (i) of AR 175(o), sub-paragraph (iv) makes no reference to 'reasonable care' or 'control' or 'supervision'. Unlike sub-paragraph (ii), sub-paragraph (iv) makes no reference to the taking of 'such reasonable steps as are necessary' to achieve a particular purpose. Sub-paragraph (iv) does not speak of the relevant person 'ensuring' anything. Rather, the implied obligation is simply 'to provide proper and sufficient nutrition for a horse'.

27 As to the word 'nutrition' itself, having regard to its immediate grammatical context in sub-paragraph (iv) and to its larger context in AR 175(o) as just mentioned, it is plain, in my opinion, that the word 'nutrition' is used in the second sense given in the Oxford English Dictionary (1989), namely, 'that which nourishes; food, nutriment'. It is true that the primary meaning of the word 'nutrition', as indicated in the same dictionary, is the meaning it has as a 'noun of action', namely, 'The action or process of supplying, or of receiving, nourishment'. But that primary meaning is simply inapplicable here. One does not speak of 'providing' the action or process of supplying, or of receiving, nourishment. Rather, one speaks of *providing* food or nutriment. That sense is further confirmed by the use of the adjectives 'proper' and 'sufficient' in conjunction with the verb 'provide'. Additionally, the prescribed obligation is to provide proper and sufficient nutrition 'for' a horse. The prescribed obligation is by no means the same as an obligation to *provide for the proper and sufficient nutrition of* a horse. But, in effect, that is how VCAT read AR 175(o)(iv), at the urging of RVL. Indeed, as mentioned above, VCAT did not, in its reasons, even refer to the contrary interpretation of AR 175(o)(iv) that had been advanced on behalf of Ms Thompson. Compounding the error, VCAT spent large parts of its reasons on assessing whether Ms Thompson had complied with a certain code of practice relating to the welfare of animals to which the Rules of Racing made no reference. (*Citations omitted*)

[89] At paragraph[29], his Honour noted that as far as the principles of statutory construction were concerned, in his view Racing Victoria's (and VCAT's) interpretation of AR 175(o)(iv) involved reading the provision as if it contained different and additional words. His Honour noted:

> `*...RVL's approach would 'divine unexpressed legislative intention' and would seek to 'remedy perceived legislative inattention'. It would amount to speculation, not construction. It would involve illegitimate 'repair'. It would be 'wholly ungrammatical or unnatural'*.

[90] His Honour determined that the first charge should be dismissed (it is noted that the second charge was also dismissed).

[91] In response to the invitation by the Panel to provide submissions, the Applicant provided brief supplementary submissions on 30 August 2023 which essentially submitted that the decision in *Thompson v Racing Victoria Ltd* supports the Applicant's argument as to how AR 231(1)(b)(iv) should be interpreted. It is contended that this is supported by paragraphs 22, 23, 31 and 33 of the decision. The submission further notes that the facts in *Thompson's* case are similar, in relation to the key circumstances of the paddock, progress of other horses and the feed availability, as the paddock at Kulpi.

[92] The Respondent provided supplementary submissions on 31 August 2023.

[93] The Respondent submits firstly that the reasons for judgment in *Thompson v Racing Victoria Ltd* [2020] at [22] and [26]- do not reveal that consideration was given to the temporal aspect of the forerunner to the

current rule 231(I)(b)(iv). The Respondent notes that each iteration of the rule imposed (in the case of rule 175(o)(iv)) or imposes (in the case of rule 231(I)(b)(iv)), a continuing obligation, not an obligation that only need be complied with on one day or at the commencement of an agistment arrangement.

[94] The Respondent contends that this is illustrated by the language used in rule 231(I)(b). A person must not: if the person is in charge of a horse fail at any time' to provide proper and sufficient nutrition. The language used imposes a duty for so long as a person is in charge of a horse not to fail to at any time provide proper and sufficient nutrition.

The Respondent contends that a person does not discharge the obligation to provide proper and sufficient nutrition by selecting an apparently well grassed paddock and an apparently permanent water course, or large dam, and then trust the season.

[95] The Respondent at paragraph 2 of the supplementary submissions notes that the Panel might follow the reasoning in *Thompson* that the obligation is not to ensure a horse maintains good nutritional health at all times (*Thompson* at [31]), it might also follow the reasoning that the obligation is to provide or make available proper and sufficient nutrition (*Thompson* at [22]) but mindful of the temporal aspect of the obligation, conclude that there was a continuing duty or obligation to provide proper and sufficient nutrition.

[96] The Respondent then submits at paragraph 3 of the supplementary submissions that having arrived at this suggested construction of the rule, the Panel would then consider the evidence – that not one but all four horses were either emaciated or very emaciated but none displayed any obvious signs of disease and from this conclude that they had not made available to them at all times proper nutrition.

[97] Regarding the relevant principles of statutory interpretation, it has been noted that the principles of statutory interpretation should be guided by common sense.[34] It has been said that "*The starting point should always be to look at the words, their context, and the purpose of the legislation, then applying that to produce a result that is both fair and workable in the particular fact situation you have before you.*'[35]

[98] The learned authors, D C Pearce and R S Geddes[36] at [4.1] note:

> "Legislation is, at its heart, an instrument of communication. For this reason, many of the so-called rules or principles of interpretation are no more than common-sense and grammatical aids that are applicable to any document by which one person endeavours to convey a message to another. Any inquiry into the meaning of an Act should therefore start with the question: 'What message is the legislature trying to convey in this communication?"

[99] Such an approach is also consistent with Queensland Statute. The *Acts Interpretation Act* (Qld) 1954 sets out the principle to be applied in the interpretation of statutes and subordinate legislation in Section 14A as follows:

14A Interpretation best achieving Act's purpose

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[34] The Hon Justice John Middleton (FCA), "Statutory Interpretation: Mostly Common Sense?, Melbourne University Law Review Annual Lecture, Melbourne Law School, 14 April 2016 at 632.

[35] *Ibid*.

[36] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 146 [4.1]

(1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[100] This approach is also consistent with the approach to statutory interpretation stated by the High Court in *Project Blue Sky v Australian Broadcasting Authority*[37]

[101] Recognising that a purposive approach to the interpretation of AR 231(1)(b)(iv) the Panel does not consider that the rule should be interpreted in such a way that it imports an obligation to ensure a horse maintains good nutritional health. To adopt such an approach would be to fall into the error identified by Cavanough J in *Thompson* that such an approach requires the reading into the section of additional words.

[102] As noted in *Thompson v Racing Victoria Ltd*[38] at [26], AR 231(1)(b)(iv) does not import any threshold test outlining to what level a 'person' must go to in order not 'fail' that respective subparagraph. This is unlike subparagraphs (i), (ii), & (iii) as follows:

(i) – 'to take reasonable care, control or supervision… so as to prevent… cruelty'

(ii) – 'to take such reasonable steps as are necessary to … alleviate pain;

(iii) - to provide veterinary treatment …. where such treatment is necessary'.

[103] That there is no such test in subparagraph (iv) is because to do so would be entirely superfluous. There is no need for the drafters of the rules to import a test of 'reasonableness' of ensuring a horse is fed. It goes without saying that the single most critical matter for survival of a horse is that it has food and water, or in other words, 'proper and sufficient nutrition'. The Rules do not need to go any further and specify that a person must take reasonable steps to feed a horse properly.

[104] The Panel therefore considers that the most appropriate interpretation of AR 231(1)(b)(iv) which recognises the fundamental purpose of not only the rules of racing but also the main purpose contained in section 3(c) of the *Racing Integrity Act 2016* of safeguarding the welfare of all animals is that the rule imposes an obligation to provide or make available proper and sufficient nutrition to a horse in the person's charge.

[105] The Panel also accepts the Respondent's submission that it is necessary to take account of the temporal aspect of the obligation, and the Panel concludes that the obligation imposed by AR 231(1)(b)(iv) imposes a continuing duty or obligation to provide proper and sufficient nutrition for a horse in the person's charge.

[106] Although there are some factual similarities between the *Thompson* case and the present matter, the Panel is also satisfied that there are some significant factual differences as well as follows:

a. The *Thompson* matter related to one horse whereas this matter relates to four horses;

b. In *Thompson* there was a clear explanation for the horse lightening in condition, that being the wind sucking habit and the actions of the unknown interloper in removing the wind sucking collar. In the present case the relevant veterinary evidence indicates that the condition of the four horses is not due to illness or some other condition, but is in fact due to a failure to provide proper and sufficient nutrition to the horses;

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[37] (1998) 194 CLR 355; [1998] HCA 28, at [69] (McHugh, Gummow, Kirby and Hayne JJ).

[38] [2020] VSC 574.

c. In *Thompson* there was evidence of either Ms Thompson or another member of her family regularly checking on *Skating Gold* and re-fitting the wind sucking collar where necessary. In doing so it can be assumed that those attending the property would be able to confirm that proper and sufficient nutrition was available to the horse. In the present case, at the minimum there was a period of four weeks (or more) where the four horses were not checked on by anyone. The evidence also established that the Applicant did not check on the four horses at any time whilst the horses were on the other property;

   In *Thompson,* the period involved where the condition of *Skating Gold* lightened was approximately four weeks prior to Ms Thompson taking action to remove *Skating Gold* back to her stables and commence a feeding program. In the present case the period in which the four horses were agisted on the neighbour's property is considerably longer.

[107] Given those significant factual differences, the Panel considers that the *Thompson* decision can be distinguished on its facts.

[108] Although it may be the case that when the four horses were initially placed on the neighbour's property there may have been proper and sufficient nutrition available, the evidence is silent as to whether that continued to be the case.

[109] At the hearing of the review application, some video and photographic evidence was provided of the paddocks at a time in August 2023, however, the Panel is not satisfied that this assists in establishing what the state of the paddocks were in the period from January to April 2023 and whether in fact the condition of the paddocks changed.

[110] There is some evidence in the form of photographs taken of the Kulpi property[39] that cause the Panel some concern as to whether there was in fact proper and sufficient nutrition available to the horses during the relevant period up to the removal of the four horses from the Kulpi property by the Applicant.

[111] The Panel accepts the submission from the Respondent that a person does not discharge the obligation to provide proper and sufficient nutrition by selecting an apparently well grassed paddock (at the commencement of the period) and an apparently permanent water course, or large dam, and then trust the season.

[112] Further, the condition of the horses outlined in numerous photographs speak for themselves.[40]

[113] The panel also refers with concern to the findings of Dr Silvestri after she examined twenty-one horses (including the four subject horses) on 3 April 2023 at three different properties from which the Applicant was operating. Not only were the four subject horses noted to be in very poor condition, but she also assessed at least thirteen of them in the 'moderately thin to emaciated' range.

[114] Although the Applicant has not been charged in relation to the other horses, this is evidence of there being a more significant issue of the Applicant failing to provide proper and sufficient nutrition to horses in his charge which extended beyond the four horses at the Kulpi property.

[115] The Panel find that all the four horses that were agisted at the Kulpi property were grossly underweight due to insufficient food or nutrition being provided to them. They had been left totally unsupervised while the Applicant was in charge of them and the Panel is satisfied that whatever the situation may have

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[39] Document 50 – Exhibit 33.

[40] See various photographs - Horse 1 – chestnut filly (Exhibits 3, 8, 15, 28); Horse 2-Black Mare (Exhibits 4, 9 & 16; Horse 3-Black colt (Exhibits 1, 11, 17, & 36; Horse 4-Chestnut Colt (Exhibits 2, 10, 18, 34 & 35).

been when the horses were initially placed on the Kulpi property in terms of the available feed and nutrition, that as time went on the Applicant has failed to provide proper and sufficient nutrition to the four horses within the terms of AR 231(1)(b)(iv).

[116] The Panel is satisfied on the balance of probabilities and on the *Briginshaw v Briginshaw*[41] standard that the Applicant has contravened AR 231(1)(b)(iv) in respect of Charges 1 to 4. The Panel confirms the guilty finding of the stewards with respect to charges 1-4.

Charge 5 - AR 232(b), namely 'fail or refuse to comply with an order, direction or requirements of the stewards or an official'.

[117] On 5 April 2023, the Applicant was issued with a set of written directions by Thoroughbred Chief Steward Mr Josh Adams to, inter alia, '*not to take on any new horses in any capacity. This includes pre training and breaking.*'[42]

[118] By email dated 11 May 2023,[43] the Applicant sought to have the direction varied as it "i*s ceasing my business and not allowing myself to make an income in this industry*'. By email dated 19 May 2023, Senior Stipendiary Steward Mr Clayton Warren confirmed they had considered the Applicant's submission for a variation to the direction, but it was declined. The directions were re-iterated, including not taking on "*any new horses in any capacity*.' [44]

[119] Subsequently on 31 May 2023, the Applicant confirmed he had taken on three new horses as detailed in PIN 008571. During the Stewards' Inquiry on 31 May 2023 the following exchange occurred:

> `CW: Moving through that then to Mr. Adams' direction. Specifically point 4 "you are not to take on any new horses in any capacity. This includes pre training and breaking.." Look at the diary entry which I discussed with you previously. There was the power colt that was picked up on the 8th of May and I'll just refer to my diary here where I wrote down their chip numbers and such. Now there was the Power Colt microchip 985100012195661 out of Tapperstry. And then on the 9th there was the American Pharaoh filly Microchip 985100012210265. And on that same day, Sir Prancealot, Colt Microchip 985100012204799 out of I am invincible. That's correct. Those were picked up on the 8th and 9th the diary's accurate?
>
> JM: Yep.
>
> CW: Is there any reason you deviated from the directions given by Mr Adams on the 5th of April.
>
> 00:22:19
>
> **JM: If I fully followed that. Sir I'd have one horse in work, and I'd be broke. That's all I have to say.** (emphasis added)
>
> CW: You can appreciate why, Mr Adams put those directions on. Obviously, that was subsequent to Four horses being seized by the Commission, acting on veterinary advice due to welfare concerns.
>
> JM: Yep.

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41 [1938] HCA 34; 60 CLR 336.

42 Document 29 – Exhibit 12 – Direction issued by J Adams to J Morrow dated 5 April 2023.

43 Document 47 - Exhibit 30.

44 Document 46 – Exhibit 29.

CW: So this, these directions one through to six were, as a result of that. So you can appreciate the seriousness of those directions and complying with those directions.

JM: I believe I have the right to make a living.

CW: You can understand why that direction would have been put on, though.

JM: Ohh, with the race horses? Yes, not with breakers.

00:23:20 Speaker 1

Hmm, well, the four horses that were seized were. 3 were registered these three that we've documented here arriving on the 8th and 9th are registered, so they're not Stock horses out of a paddock. They're they're registered thoroughbreds bred for the purpose of racing Their identification and breeding have been ratified by the overarching control body of Racing Australia And to the stud book, they were being broken in for the purpose of racing. The only reason they exist is for racing. So if that's not the racing, the racing.

JM: Horses live. They've got more to life than just racing. That's a bit of a.

[120] Before the Panel, the Applicant gave evidence that he thought the direction would not have covered horses that he had previously agreed to take on even though they were to arrive after the direction had been issued. This is not consistent with what the Applicant said at the Stewards Inquiry as to the reason that he took on the horses.

[121] The Panel is of the view that the direction was clear which was also apparent to the Applicant given his email of 11 May 2023. The construction suggested by the Applicant about prior arrangements being outside the scope of the directions is rejected. The directions were clear, and they were breached by the Applicant. Consequently, the Panel affirms the guilty finding of the Stewards.

Charge 6 – AR 232(I) - A person must not give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading.

[122] The basis of this charge was that during a telephone conversation on 2 April 2023, the Applicant lied to Senior Steward Clayton Warren about whether he had any horses at the 'Moore Road' property?

[123] The audio of the phone conversation was in evidence before the panel. The Panel is clearly of the view that the charge and finding was appropriate because it was not until the Applicant became aware that the Steward was in fact at the property at the time of the telephone call that he admitted to having four horses (the four horses the subject of charges 1 to 4) at the Moore Road property. Accordingly, the Panel affirm the guilty decision of the stewards.

Enacted Suspended Penalty - PIN-008567

[124] The PIN asserted that due to the confirmation of a breach of AR 231 a previously suspended penalty of a sixty-three (63) day suspension (suspended for a period of two (2) years at Internal Review), must also be enacted. It was ordered that the penalty be served concurrently with the disqualification to commence effective from the day of this decision, 31 July 2023.

[125] The Applicant did not make any submissions relating to this charge and finding aside from that asserted in the review application, namely, that the "previously suspended sentence not be enlivened."

[126] Given the lack of particulars and argument from the Applicant regarding this charge and finding the Panel affirms the decision of the stewards.

Penalty

Charges 1 to 4

[127] In relation to penalty for Charges 1 to 4, the Applicant in his written submissions 9 August 2023 submits that infringements of the Australian Rules of Racing ("the ARs") do not give rise to criminal offences. They may, however, attract penalties: AR5(2). Any penalty imposed is in the nature of a civil penalty.

[128] The Applicant refers to the nature of penalties in civil matters are imposed to achieve deterrence, rather than deliver punishment or retribution.[45] The Applicant refers to an application of this aim in a racing context in this state in the matter of *Queensland All Codes Racing Industry Board v. Thomas* [2016] QCATA 82 per Justice Carmody[46] where his Honour stated at [43]:

> *[43] Though closely allied with criminal punishment regulatory penalties are different in nature and function. Their main concern is not to repudiate innate immorality or denounce and discourage socially repugnant behaviour violating the collective interest of the community but to use the educative, protective, preventative and deterrent value of the penalty for control purposes.*

[129] The QRIC Thoroughbred Racing Penalty Guidelines 2023 state that the purpose of a penalty under the rules is to maintain standards of integrity and animal care by enforcement of the rules of racing and to provide general deterrence to the industry. This purpose is achieved by imposing penalties for breach of the rules which are '*sufficiently serious to discourage other participants from breaching the rule*' and specific deterrence to the individual to discourage them from engaging in similar conduct.[47]

[130] The guidelines note that '*imposing a penalty in involves a balance between the severity of the offence, the need for deterrence (for both the individual concerned and industry participants generally) and any mitigating factors. All situations are assessed on their individual merits*'.[48]

[131] The Guidelines outline numerous factors which may be considered, including an assessment of all the relevant factors is required including the circumstances of the offence itself and the degree of culpability involved. Other matters such as early pleas of guilty and the disciplinary record of the person charged are also relevant.[49]

[132] The Applicant in his submissions relevant to penalty at paragraph 40 accepts that the horses 'did poorly' in the paddock.

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[45] Citing the High Court decision in *Australian Building and Construction Commission v Pattinson* 2022 HCA 13[66] TO [72]; [2022] 96 ALJR 426 at 442, where a six-judge majority (Edelman J dissenting) confirmed the primacy of deterrence in fixing civil penalties and also affirmed the earlier decision of the High Court in *Commonwealth –v- Director of Fair Work Building Industry Inspectorate* ("Agreed Penalties Case") (2015) 258 CLR 482.

[46] See paragraph [38] of Applicant's submissions.

[47] *Desleigh Forster v QRIC* (Unreported, RAP-6, 3 May 2023) at [52]; and *Baker v QRIC* (Unreported, RAP-18, 30 May 2023) at [13].

[48] QRIC Thoroughbred Racing Penalty Guidelines 2023 at page 4.

[49] *Ibid.* at pages 13-14.

[133] The Applicant's submission notes the evidence in Jane Morrow's statement[50] confirming the horses were spelling in a paddock situated at the back of her property for nine weeks. She further confirms that due to various circumstances she had not checked on the horses in approximately four weeks and that unfortunately five had not done well but two had done extremely well.

[134] The Applicant also referred to the evidence provided by Clohee Morrow to the Stewards' Inquiry[51] regarding the treatment plan put in place once the horses were at the Westbrook property. She asserted that the Applicant was doing everything in his ability to get the horses to a healthier condition.

[135] As a mitigating factor it is submitted that once the Applicant was made aware of the condition of the horses, he picked up them up within a couple of days. It is submitted that it is not a case of neglect and the reason for the failure is uncertain. It is submitted that it is to his credit that the horses were retrieved in a timely fashion once notice was provided.[52]

[136] It was suggested that a fine was appropriate in the circumstances to achieve specific and general deterrence.

[137] At paragraph [48] of the Applicant's submissions dated 9 August 2023 it is suggested that apart from the four horses in question '*all of the horses in his care are in good order and condition*' and that what occurred to the four horses was an 'isolated incident'.

[138] The Panel disagrees with these assertions as is proved by the report from Dr Silvestri of 3 April 2023 where some 13 horses were noted to be underweight. Further, a review of the very long bodycam video undertaken by QRIC Stewards Mr Scott Heidke & Mr Jackson on 31 December 2022 of the Applicant's stables showed the general condition of the stables, yards and surrounds to be in poor condition and rife with faeces and urine.

[139] It is submitted by the Respondent that the primary breaches of AR 231(1)(b)(iv) occurred due to a combination of omissions such as failing to issue instructions to the occupier of the property and failure to ensure the occupier provided regular updates. Further failings are suggested such as not providing monies to purchase feed. Acknowledgment of the urgency with which the Applicant dealt with the four subject horses was provided by the Respondent. In making that concession however, the Respondent noted that it was the Applicant's failures which directly contributed to them reaching that state.

[140] The Respondent also referred to the prior cruelty related charge from 31 December 2022 relating to the possession of a whip in his stables.[53]

[141] The Respondent referred to a less serious case of *Chapman v Racing NSW*[54] which involved a breach of AR 231(1)(b)(iv) involving one horse with a body score of 0.5/5 or an '*extremely poor condition*'. There was also a failure to seek veterinary treatment. He received a disqualification of 12 months and 9 months respectively for the two charges.

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50 Document 59 – Exhibit 42 – Jane Morrow letter dated 8 June 2023.

51 Document 60 – Exhibit 43 – Clohee Morrow letter dated 8 June 2023.

52 See the Applicant's submissions dated 9 August 2023 at paragraphs [44] – [46].

53 This was discovered during the long stable inspection by QRIC stewards Scott Heidke & Mr Jackson on 31 December 2022 – see video footage at video time stamp 1:38 or media player time of 1.01:25.

54 Unreported, Stewards' Reasons for Decision – Peter Chapman, 29 November 2019.

[142] Reference was also made to a more serious case of O'Leary and *O'Leary v. Racing SA Ltd*[55] involved seven breaches of the rules relating to thirteen horses by a husband and wife (respectively trainer and registered stable hand). Further charges related to failing to provide veterinary treatment and a failure to take steps to alleviate pain and suffering. Three horses had to be euthanised and both had clean records. Mrs O'Leary was disqualified for 2 years while Mr O'Leary was disqualified for 18 months. The reasons for decision noted that Mr O'Leary played a secondary role as he did not have day to day oversight of the horses.

[143] The Respondent submits that sanctions are imposed for the reasons of general and personal deterrence. The Respondent further notes that the issue of personal deterrence is by no means only a theoretical consideration in light of the Applicant's previous charge referred to in paragraph [92] above.

[144] The Respondent contends that disqualification for a period of 1 year and 9 months (21 months) is an appropriate sanction having regard to the number of horses involved and their condition.

[145] There can be no doubt about the ability of the Applicant as a horseman and he has wide ranging skills with horses and has built up a significant business with wide-ranging clients. The Panel considers that the Applicant may have encountered issues in the proper management of his staff and his growing business. Account is also taken of the far-ranging effects a severe penalty may have on the Applicant. Nonetheless, the Panel is of the view that it is the welfare of the animals should be considered the paramount consideration here, not the welfare of the Applicant.

[146] Considerations of general deterrence are important and the message it sends to the community. Such considerations require a period of disqualification. The positive references tendered such as those from Mr Deane are also important and have been taken into account by the Panel.

[147] The racing industry depends on a fragile social licence with the community which requires all participants to act according to the rules and expected behaviours.

[148] One of the paramount considerations for maintaining that social licence is the issue of animal welfare and ensuring that animals are appropriately fed, maintained, and cared for by participants in the industry. It is a matter of vital importance to the whole racing industry. In *Romeo v Racing Victoria Limited*[56] the Victorian Civil and Administrative Tribunal in conducting a review into three charges alleging that Mr Romeo had failed to provide necessary veterinary treatment to three horses observed at [19] and [20]:

> 19. As the VRT observed, animal welfare is an issue of vital importance to the whole racing industry. I agree. Misconduct in relation to the care and welfare of horses by licensed participants risks the reputation and standing of the industry and the social licence under which it operates.
>
> 20. Protecting the reputation of the industry and general deterrence (deterring others from engaging in similar misconduct) are both important considerations here.

[149] The Panel endorses and adopts those comments.

[150] In the present case the Panel is satisfied that despite the matters in mitigation that have been raised on behalf of the Applicant, it is necessary for the purposes of specific and general deterrence in this matter to impose a significant disqualification.

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[55] Unreported, Racing SA Limited Stipendiary Stewards' Report 23 March 2023.

[56] [2021] VCAT 473.

[151] The Panel is further satisfied that a 21-month disqualification as originally imposed by the Stewards was an appropriate sanction in the circumstances of this case.

[152] The Panel therefore confirms the Stewards' decision to impose a 21-month disqualification in respect of Charges 1 to 4.

Charge 5

[153] In relation to Charge 5 of failing to follow directions of the Stewards, the Applicant in his written submissions notes that the charge arose out of a series of directions from the Chief Steward Thoroughbreds, Mr Adams, which included:

> `4. You are not to take on any new horses in any capacity. This includes pre training and breaking.'

[154] The Applicant submits that the six directions from Mr Adams – and in particular, direction 4 – were confusing and infected by ambiguity. It is contended that the expression `takes on' suggests that the direction was confined to breaking in, pre-training, or otherwise handling horses that were taken on the Applicant as their trainer.

[155] The Applicant further submits that expressly, and by necessary implication, horses temporarily in Mr Morrow's care while they were being broken in or pre-trained by him, are not horses he had "taken-on". The Applicant states that there is no evidence that he was going to train them for racing under his restricted trainers' licence.

[156] The Applicant submits that if there has been non-compliance with this part of the directions from Mr Adams, the confusing nature, and ambiguity, of the directions is a mitigating factor in favour of the Applicant.

[157] In the Respondent's submission, it is stated in relation to Charge 5 that the serious feature of the Applicant's breach was because he needed to earn an income.

[158] The Respondent notes that the Applicant had voluntarily joined an industry in circumstances where he agreed to participate and make what income he could, subject to the rules of racing.

[159] The Respondent submits that the participants' refusals to obey stewards' directions undermine the integrity of the industry and its public image. The Respondent contends that this must be deterred and the imposition of a penalty concurrent with the behaviour that brought about the direction would not be efficacious to deter generally.

[160] The Respondent refers to a decision of *See v Racing NSW*.[57] In that matter Mr See was a jockey who faced three charges arising from his mobile phone being found in the jockey's room. One of the charges that Mr See faced was a breach of AR232(c)(i) arising from Mr See's refusal to obey a direction of the Stewards relating to providing his phone to the Stewards.

[161] The Appeal Panel noted at [14] that licensed persons who refuse to cooperate with proper instructions and requests by the Stewards, or who hinder their investigations, can expect `*that absent what would be quite unusual or exceptional circumstances, it is almost inevitable that [a licensed person who refuses to co-operate with proper instructions] will be disqualified… for a considerable period…'.*

[57] Unreported, Appeal Panel of New South Wales, 17 April 2023.

[162] The Respondent suggests that the penalty made was an appropriate sanction.

[163] At the hearing, Mr Murdoch suggested that Mr Morrow should have been able to provide input into the framing of the directions.

[164] The evidence available to the Panel appears to confirm that the Applicant well understood the direction that was made by Mr Adams restricting him from taking on any further horses. The reason that the Applicant put forward at the Stewards' Inquiry for taking on the new horses was one of economic necessity.

[165] The Panel is not satisfied that the direction made by Mr Adams was ambiguous.

[166] As noted in paragraph [119] herein, the Applicant in response to a question seeking an explanation why he had not complied with direction 4 from Mr Adams, stated `*If I fully followed that. Sir I'd have one horse in work, and I'd be broke. That's all I have to say*.

[167] There was no indication from the Applicant that he misunderstood the direction or was confused about what it entailed. Nor is there any evidence of the applicant seeking clarification in relation to the direction.

[168] In light of the comments made by the Applicant at the Stewards' Inquiry, the Panel can only conclude that the Applicant deliberately failed to comply with the direction about not taking on any new horses.

[169] Deliberate disobedience with a Steward's direction is an action that warrants a significant sanction being imposed in the interest of both specific and personal deterrence. The Panel is satisfied that the penalty of a six-month disqualification was appropriate in the circumstances.

[170] The decision of the Stewards to impose a six-month disqualification of the Applicant's licence for charge 5 is confirmed.

[171] The Stewards also determined that the disqualification period for Charge 5 should be served cumulatively upon the disqualification period for Charges 1 to 4. In the Stewards' Decisions and Finding on Penalty[58] it is noted that the determination that this sanction was to be served cumulatively was made because the breach reflected in Charge 5, did not occur contemporaneously or in association with those outlined in Charges 1 to 4.

[172] The Stewards noted that this breach occurred as a result of a direction made subsequent to the commencement of the investigation and it constituted an independent breach of the Australian Rules of Racing and as a consequence, the penalty should also be incurred independently.

[173] The Panel also considers that this conclusion was appropriate in the circumstances, and it was appropriate for the disqualification imposed for Charge 5 to be served cumulatively,

Charge 6

[174] In relation to Charge 6, namely the provision of false or misleading information to the stewards, the Applicant submits that his physical state, namely his inebriation, should be taken into account as a mitigating factor.

[58] Document 61.

[175] Reference was made by the Applicant to two cases involving well known trainers of Chris Munce and Rob Heathcote.[59]

[176] In *Munce*,[60] a $5,000.00 was issued, while in *Heathcote* a fine of $10,000.00 was issued on Appeal. The Applicant suggests that the *Heathcote* matter was serious as he had 'deliberately lied to the stewards' relating to a case of 'dummy training'. The Appeal body noted that '*lying to the Steward's as Heathcote did undermines the whole basis of control of the industry*'.

[177] Within the documents that were originally before the Stewards' Inquiry is a decision from the Appeal Panel of Racing New South Wales in the *Appeal of Matt Schembri*[61], the reasons for decision of the Principal Member at [14] observes:

> `Little needs to be said about the third offence. As a matter of obviousness, giving false evidence to Stewards, particularly in the course of a Stewards' Inquiry, is obviously serious offending. The Stewards are charged with upholding the integrity of racing. If licensed persons are unwilling to cooperate with Stewards in that task, or worse still, lie to them, the Stewards are obviously hampered in their task, and the integrity of racing is damaged.'

[178] In the *Appeal of Joanne Hardy*[62], in providing the reasons for decision on a penalty appeal, the Appeal Panel observed at [10]:

> `As to the charge under 232(i), while such breaches are always serious for the reasons outlined in the *Appeal of Poidevin* (RAT, 8/5/2018) – that is, they are destructive of the trust necessary between licensed person and those empowered and obligated to enforce the Rules on behalf of the industry as a whole – it is relevant to penalty again that the misleading conduct related to a matter concerning a horse's welfare.'

In that matter the Appeal Panel confirmed a penalty of a 2-month disqualification for the breach of AR232(i).

[179] Once again, the Panel endorses and adopts those comments of the Appeal Panel of Racing New South Wales in the two preceding paragraphs as applying in relation to the conduct of the Applicant in relation to Charge 6.

[180] The Respondent submits in relation to the sanction imposed for the breach of rule 232(i), the Respondent notes that it is a 3-month disqualification but to be served concurrently with the 21-month disqualification. The Respondent submits that it is a moderate penalty.

[181] The Panel is satisfied that both general and specific deterrence required the imposition of a period of disqualification in relation to the conduct of the Applicant in lying to the Stewards in the course of their investigations.

[182] The Panel considers that the sanction of a three-month disqualification as imposed by the Stewards was appropriate and the Panel confirms that decision.

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59 *Robert Heathcote v Stewards of QTRB* [2002] QRAA8 (17 June 2002).

60 More charges for Munce and son – Queensland Racing Integrity Commission (qric.qld.gov.au)

61 Unreported, Appeal Panel of Racing New South Wales, 14 May 2019 at [14].

62 Unreported, Appeal Panel of Racing New South Wales, 10 October 2022 at [10].

Suspended Penalty

[183] The Panel considers that it was appropriate for the Stewards to enliven the suspended penalty in the circumstances and the Panel confirms this decision of the Stewards.

Statement under 252AH(3)

[184] The Panel notes its requirement to make a finding in matters where disqualification action is taken being reliant on one of the factors noted in Section 252AH, namely:

> **252AH Decision of panel**
>
> ....
>
> (3) If the panel's decision includes the taking of disqualification action against the applicant, the panel
>
> must decide whether the action is taken because of a serious risk caused to—
>
> (a) the welfare or health of an animal; or
>
> (b) the safety of any person; or
>
> (c) the integrity of the Queensland racing industry.

[185] The Panel refers to the purposes of the Act as outlined in Section 3 which includes maintaining public confidence in the racing of animals, to ensure the integrity of all persons involved with racing or betting and to safeguard the welfare of all animals involved. It is Imperative to meeting these purposes to ensure that racing activities and that the outcomes of races are not tainted by corruption.

To do otherwise clearly undermines the public's confidence in racing and significantly detracts from the integrity of the sport.

[186] Accordingly, the panel considers a serious risk is caused to integrity of the Queensland racing industry such as to warrant the imposition of the disqualification action in the circumstances of this case in accordance with section 252AH(3(c).

Human Rights Act 2019

[187] The Panel recognises the need for regard to be had of the *Human Rights Act 2019* in circumstances where it intends to impose a period of disqualification. Particularly, any disqualification needs to be 'reasonable and demonstrably justifiable'. The Panel has taken into account the matters noted in section 13 of the *Human Rights Act* and is satisfied that the facts and circumstances of this matter are such that a period of disqualification is reasonable and justified.

Orders

[188] The decision of the Panel is to confirm the Stewards' racing decision made on 31 July 2023 and the penalties imposed in respect of the six charges.

Appeal

Panel decisions are appealable to QCAT in relation to a disqualification action and only on a question of law. A completed appeal application must be lodged to QCAT within 28 days of this Racing Appeal Panel decision.

To access the approved application form to appeal this decision or for more information about QCAT please visit their website.

racingappealspanel.qld.gov.au