IN THE RACING APPEALS TRIBUNAL

LESLIE DAVID KELLY
Appellant

v

RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing:	**18 March 2024**
Date of determination:	**3 May 2024**
Appearances:	**Mr J Murdoch KC for the Appellant**
	Mr O Jones for the Respondent
Determination:	**1. The appeal is dismissed.**
	2. The orders made by the Appeal Panel of Racing NSW on 20 December 2023 are confirmed.
	3. Noting the refusal of the stay, the disqualification will be taken to have commenced on 20 December 2023 and will expire on 20 March 2025
	4. The Appeal deposit is forfeited.

INTRODUCTION – THE CHARGES AGAINST THE APPELLANT

1. Following an Inquiry conducted in June 2023, Leslie David Kelly (the Appellant) was charged with two breaches of r 240(2) of the Australian Rules of Racing (the Rules) which is in the following terms:

> ***AR 240 – Prohibited substance in a sample taken from a horse***
> *(1) ...*
> *(2) Subject to subrule (3), if a horse is brought to a racecourse for the purposes of participating in a race and a prohibited substance on Prohibited List A and/or 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.*

2. The first of the charges against the Appellant was in the following terms: [1]

> ***Charge 1 – AR 240(2)***
> *The details of the charge being that he did commit a breach of AR 240(2) by reason of the following matters:*
> *1. He is a licenced trainer with Racing Queensland and was the trainer of Gogol when that gelding was brought to Grafton racecourse on Wednesday 13 July, 2022 for the purpose of participating in Race 7 the Ramornie Handicap.*
> *2. Prior to running in the Ramornie Handicap, blook sample B184420 was taken from Gogol.*
> *3. Peptide VNFYAWK (T6 fragment) was detected in sample B 184420 when analysed by two Official Racing Laboratories, namely the Australian Racing Forensic Laboratory and the Hong Kong Jockey Club Racing Laboratory.*
> *4. Peptide VNFYAWK is a highly specific fragment of an erythropoiesis-stimulating agent which is a prohibited substance as it is a:*
> *a. Erthropoiesis-stimulating agent which is specified as a prohibited substance on Prohibited List A;*
> *b. substance capable at any time of causing either directly or indirectly an action and/or effect within the cardiovascular system, the respiratory system, the Musculo-skeletal system and /or the blood system which is specified as a prohibited substance on Prohibited List B; and/or*
> *c. haematopoietic agent which is specified as a prohibited substance on Prohibited List B.*

3. The second of the charges was in the following terms:[2]

[1] AB 14 – 15; 733 – 734.
[2] AB 15; 735 – 736.

Charge 2 – AR 240(2)

The details of the charge being that he did commit a breach of AR 240(2) by reason of the following matters:

1. *He is a licenced trainer with Racing Queensland and was the trainer of Freddie Foxtrot when that gelding was brought to Grafton racecourse on Wednesday 13 July, 2022 for the purpose of participating in Race 7 the Ramornie Handicap.*
2. *Prior to running in the Ramornie Handicap, blook sample B185267 was taken from Gogol.*
3. *Peptide VNFYAWK (T6 fragment) was detected in sample B 185267 when analysed by two Official Racing Laboratories, namely the Australian Racing Forensic Laboratory and the Hong Kong Jockey Club Racing Laboratory.*
4. *Peptide VNFYAWK is a highly specific fragment of an erythropoiesis-stimulating agent which is a prohibited substance as it is a:*
5. *Erthropoiesis-stimulating agent which is specified as a prohibited substance on Prohibited List A;*
6. *substance capable at any time of causing either directly or indirectly an action and/or effect within the cardiovascular system, the respiratory system, the Musculo-skeletal system and /or the blood system which is specified as a prohibited substance on Prohibited List B; and/or*
7. *haematopoietic agent which is specified as a prohibited substance on Prohibited List B.*

4. The Appellant pleaded guilty to both charges.[3]

5. Schedule 1 to the Rules specifies prohibited substances, including substances which are prohibited at all times. Division 1 of Schedule 1 includes Prohibited Lists A and B. Prohibited List A includes the following:

> *The substances set out below in Division 1 are specified as prohibited substances:*
>
> 1. *Erythropoiesis-stimulating agents, including but not limited to erythropoietin (EPO), epoetin alfa, epoetin beta, darbepoetin alfa, and methoxy polyethylene glycol-epoetin beta (mircera).*

6. Prohibited List B includes the following:

> *The substances set out below in Division 1 are specified as prohibited substances.*
>
> 1. *Substances capable at any time of causing either directly or indirectly an action and/or effect within one or more of the following mammalian body systems:*
>
> .....
>
> *(b) the cardiovascular system;*
>
> *(c) the respiratory system;*

[3] AB 15.

....
(e) the musculoskeletal system;
...
(f) the blood system; and

2. Substances within, but not limited to, the following categories:

(pp) haematopoietic agents.

THE PENALTIES IMPOSED

7. The Stewards imposed the following penalties on the Appellant:[4]

    (i) charge 1 – a period of 20 months disqualification, reduced to 15 months after taking into account the Appellant's subjective circumstances;

    (ii) charge 2 – a period of 20 months disqualification, reduced to 15 months after taking into account the Appellant's subjective circumstances.

8. Having regard to principles of totality, the Stewards concluded that there should be partial cumulation of 3 months, leading to a total period of disqualification of 18 months.[5]

9. The factors which were taken into account in determining those penalties were:[6]

    (i) the plea of guilty to each charge;
    (ii) the nature of the offences;
    (iii) the Appellant's professional and personal circumstances;
    (iv) the Appellant's disciplinary record over an extended period as a licenced trainer; and
    (v) principles of specific and general deterrence, and "what message is sent to the industry in respect of such conduct".

10. The disqualification was ordered to commence on 22 June 2023, and to expire on 22 December 2024.

[4] AB 16.
[5] AB 16.
[6] AB 15.

THE APPEAL TO THE APPEAL PANEL OF RACING NEW SOUTH WALES

11. The Appellant brought an appeal to the Appeal Panel of Racing New South Wales which was heard on 28 September 2023.

12. In a decision published on 20 December 2023, the Appeal Panel made orders:

    (i) allowing the appeal against the severity of the penalty imposed;

    (ii) confirming the penalty imposed in respect of Charge 1;

    (iii) confirming the penalty imposed in respect of Charge 2;

    (iv) ordering that the penalties imposed in respect of Charges 1 and 2 be served wholly concurrently, such that the total period of disqualification was one of 15 months;

    (v) ordering that the period of disqualification commence on 22 December 2023 and expire on 22 March 2025; and

    (vi) ordering that the Appeal deposit be refunded.[7]

THE PRESENT APPEAL

13. On 20 December 2023, the Appellant filed a Notice of Appeal to this Tribunal against the determination of the Appeal Panel. An application for a stay was filed on 21 December 2023, and refused for reasons published on 22 December 2023.

14. The hearing of the appeal took place before me on 18 March 2024, following which judgment was reserved pending receipt of the transcript, which was provided to me on 5 April 2024.

THE FACTS

15. To a large extent, the facts of the Appellant's breaches of r 240(2) are not in dispute, and are reflected in the particulars set out above.[8] Rule 240(2) creates breaches of absolute liability. That said, it remains open to a person charged to seek to reduce their culpability by establishing how the prohibited substance came to be present in the system of the animal. This is a primary focus of the present appeal. In short, it is the Appellant's case that the prohibited substance

[7] AB 1 – 11.
[8] At [2] – [3].

entered the system of each horse as the consequence of contamination, either by human blood following events which occurred the day prior to the samples being taken and which are outlined below, or alternatively as a result of procedures adopted in the analytical Laboratory. In order to address this issue, it is necessary to refer to some of the evidence which was before the Inquiry.

THE EVIDENCE BEFORE THE INQUIRY

Joseph Aouad

16. Joseph Aouad is a part owner of *Freddie Foxtrot*.[9] Mr Aouad suffers from a chronic kidney condition and other adverse health issues,[10] one of which manifests itself in spasmodic and uncontrollable bleeding.[11]

17. In a Statutory Declaration provided for the purposes of the Inquiry, Mr Aouad explained[12] that on 12 July 2022 he attended the Appellant's stables with his friend, Bill Mansour, for the purposes of visiting *Freddie Foxtrot*. Mr Aouad said:[13]

> *[16] I went in the car with Bill and we purchased some carrots on our way to the stables. We took them to feed the horses, and Bill sometimes gave the horses a few cubes of sugar. Les Kelly was aware that we fed the horses the carrots and sugar cubes, but we only did that occasionally. We did not see Les Kelly at the time we arrived as we were delayed getting to the stables after my Dialysis.*
>
> *[17] The first thing I did was to stop at a small table near Les Kelly's office and cut up the carrots to give to the horses. At this time I cut my finger and got some blood on the carrots. Bill had been looking at some other horses when he returned, saw the blood and helped me wipe it up. The cut did not appear to be severe, and I didn't worry about it further at that time.*
>
> *[18] As we walked down towards Freddie Foxtrot's stall we passed Gogol and we patted him in his stable and knowing he was going to race against my horse the next day at Grafton, we thought we would pat him and look him over.*
>
> *[19] We gave clean carrots to the other horses as they were hanging their heads out of their stalls as we walked past just a few, including Gogol. We stopped and looked at Gogol and gave him a pat and looked him over. As I cannot stand without support, I gave Gogol a big hug around the neck. We*

[9] AB 491 at [12].
[10] AB 488 at [5] – AB 490 at [11].
[11] AB 490 at [12].
[12] AB 491 at [15].
[13] AB 491 at [16] – AB 493 at [23].

then went into Freddie Foxtrot's stall that was secured and spent extra time with him checking him over, his legs and gave him more carrots. But I didn't know I had blood on my arm. I didn't notice there was extra blood coming from my arm at that stage, from the Fistula under the bandage.

[20] As I cannot stand without support. I gave Freddie Foxtrot a hug and rubbed his neck and main. That was when Bill saw my arm and the extra blood on my arm and on the horse's neck and that extra blood had got into the bag of carrots. I had been hugging the horse's neck and only then had noticed there was a lot of blood on Freddie Foxtrot's neck and mane. I realised blood had also been spread on to the other horses I had been hugging, including Gogol.

[21] We both only realised how much blood was around after we emptied the carrots from the plastic bag and Bill wiped the carrots before putting them into the feed bin and went to throw the bag away.

[22] It became clear that there was more blood than from the cut on my finger that appeared quite minor. Bill went to the car and got some rags and bandages and wiped up the blood on the carrots and my arm and hands and the blood on the necks of the horses. Due to my failing eyesight and loss of sensation of touch I was unaware I was bleeding so profusely or that I had transferred the blood onto the horse's skin. Bill replaced the bandage on my arm, but due to the excess blood, it didn't stick very well. I continued to bleed from the arm. Bill then rapped [sic] cloth around my arm.

[23] Bill had the bleeding under control and had cleaned up the best we could. We fed the remainder of the carrots to my horse, putting them into Freddie Foxtrot's Feed Bin.

18. Mr Aouad generally confirmed this account of events when subsequently interviewed.[14]

19. Mr Aouad gave evidence before the Inquiry. Having confirmed that the account provided in his declaration, and in his interview, were correct,[15] he then told the Inquiry[16] (in reference to his declaration) that there was *"a lot of stuff in there that [he] was not happy with",* before stating:[17]

I'm saying the statement I gave is different to the one they've written.

[14] Commencing at AB 590.
[15] AB 24.312; AB 25.331.
[16] AB 44.1237.
[17] AB 44.1241.

20. When giving evidence, Mr Aouad explained that he was subject to a periodic injection of the drug *Aranesp.*[18] The Appellant's case is that traces of the properties of that drug were found in each sample, and that this strengthens the inference that Mr Aouad caused contamination of the substance.

21. Mr Aouad acknowledged that he had said in his declaration[19] that he had taken that drug (i.e. Aranesp) the day before he visited the Appellant's premises. However, he told the inquiry that was not sure that this was correct, saying:[20]

> *Mate, I could have but I'm not, I couldn't be, I can't be 100% because it's such a long time ago. To remember the days I've taken my needle, sometimes I take them on Tuesdays, sometimes I'll take them Wednesday. It just depends.*

22. Mr Aouad was subsequently asked:[21]

> *CHAIRMAN:* *You indicated that you're now of the opinion, despite telling us in a sworn statement, that you used Aranesp on the Friday or Saturday prior to visiting these horses, and you indicated to us that you now believe that you did not have access to Aranesp leading up to the 12th –*
> *AOUAD:* *That's right. I honestly don't know. I can't remember.*
>
> *CHAIRMAN:* *Well, that's not correct because –*
> *AOAUD:* *Because my wife said to me you took it on the Tuesday and probably we came back because I didn't take enough on Tuesday. Maybe I took it on Friday as well, you know, the 40, because sometimes it's 40 you see.*

23. It was suggested to Mr Aouad that he had not gone to the Respondent's stables on 12 July 2022 at all.[22] Mr Aouad denied that proposition in the following exchange:[23]

> *AOUAD:* *I definitely did because I said to Bill, 'I want to go to the stable to see Freddie Foxtrot and that's what happened.*
>
> *CHAIRMAN:* *And you bled all over the horses?*
> *AOUAD:* *Sorry?*

[18] AB 38.962.
[19] At [11].
[20] AB 40.1024.
[21] AB 50.1523. – AB 51.1534.
[22] AB 45.1260.
[23] AB 45.1263 – AB 46.1303.

CHAIRMAN: *And you've bled all over these horses?*
AOUAD: *I bled into the carrot bag.*

CHAIRMAN: *Right.*
AOUAD: *And I gave them the carrots and I didn't know I was bleeding.*

CHAIRMAN: *Right.*
AOUAD: *I've got no feelings in my fingers and my hands. I don't have those types of feelings to know if the blood is hot or cold or no blood or there's blood.*

CHAIRMAN: *So where else did the blood get, apart from on the bag?*
AOUAD: *The horses.*

CHAIRMAN: *What about on the ground? Were you bleeding profusely you said, I think?*
AOUAD: *Oh mate, honestly, I didn't even bother looking at the ground or anything. I just wanted to get it stopped because if I let it run, the blood, then my haemoglobin's going to drop and I didn't want it to drop as much. I had to stop the leak.*

CHAIRMAN: *So if you've bled all over the carrots and it was running down into the bag, one would assume that the blood would be pretty visible on the ground as well?*
AOUAD: *I didn't even look, I'm sorry, I didn't even look. I wasn't interested in the ground or whatever. I had my own problems. You can understand that. My haemoglobin's gonna drop if I'm gonna – you know how many times I've lost a lot of blood on the machine? I have to, what do you call it, what's the word I'm looking for, I had to throw away the blood. If the machine doesn't want to take it back the, flowing back in my arm, I threw the bloods out and that's what gets, the haemoglobin drops. So I had no -- I didn't even look at the ground.*

William Mansour

24. William (Bill) Mansour is a friend of Mr Aouad. In a Statutory Declaration made for the purposes of the Inquiry, Mr Mansour said the following in relation to his attendance at the Appellant's stables on 12 July 2022:[24]

> *[10]* *... On the 12th July 2022 about mid-afternoon we went to the stables to see Freddie Foxtrot because it was racing the next day at Grafton. We purchased some carrots on the way and took them to feed the horses. I sometimes gave the horses a few cubes of sugar.*
>
> *[11]* *We arrived at the stables but before we went to where Freddie Foxtrot was kept, Joe started cutting up the carrots for the horses on a table near Les's office. I wondered [sic] off and was looking at some other horses and when*

[24] Commencing at AB 496.

I returned I noticed Joe had cut himself and was bleeding and there was blood on the carrots. We did not see Les Kelly when we arrived as we were delayed after Joe's dialysis and didn't get to the stables until mid-afternoon.

[12] Les Kelly was aware that we occasionally fed the horses carrots and sugar cubes.

[13] Joe and I are familiar with another horse named Gogol that Les Kelly trains, but Joe and I have no financial interest in him. When we went to the stables, we stopped and patted Gogol in the stable as we walked to see Joe's horse, Freddie Foxtrot. We had an interest in seeing how Gogol looked as we knew he was racing in the same race at Grafton the next day.

[14] As we walked towards Freddie Foxtrot, we gave just a few carrots to other horses as they were hanging their heads out of their stalls, including Gogol. We stopped and looked at Gogol, gave him a pat and looked him over. Joe couldn't stand and reach out to rub Gogol's neck, so he gave Gogol a hug by putting his arms around the horse's neck.

[15] I didn't notice any excess of blood at that stage. We went to Freddie Foxtrot's stall that was secured and spent extra time with him checking him over, his legs and gave him more carrots. Joe couldn't stand and reach out to rub Freddie Foxtrot's neck so he stood up and gave Freddie Foxtrot a hug by putting his arms around the horse's neck. I then noticed there was an excess of blood on Joe's arm and the carrots, and we hadn't immediately realised the extent of the blood and that there was blood over the skin on the [sic] Freddie Foxtrot's neck.

[16] Joe had been rubbing the horse's neck and then I noticed there was a lot of blood on Freddie Foxtrot's neck and mane, I noticed blood had been spread onto the other horses Joe was hugging including Gogol. It became clear that there was more blood than from the quite minor cut on Joe's finger.

[17] It was only then I realised how much blood had spread from Joe's arm onto the horse's skin and onto the carrots in the bag. I checked Joe to see where the blood was coming from and noticed it flowing from under a bandage on his right arm where he connects the dialysis machine. I went to my car and collected some rags and bandages and when I returned I wiped the excess blood off Joe's arm. I replaced the bandage on his arm but due to the excess blood it didn't stick very well. He continued to bleed from the arm. I then rapped [sic] the cloth around his arm.

[18] I then wiped the blood off Freddie Foxtrot's neck and wiped the carrots as best I could. I then put the extra carrots into Freddie Foxtrot's Feed Bin. I then went and wiped some blood off Gogol's neck.

[19] I wiped the blood on the carrots and Joe's hands and the blood on the necks of the horses. Due to his failing eyesight and loss of sensation in his

hands and fingers, it appeared to me Joe was unaware he was bleeding so profusely or that he had transferred to the blood on to the horse's skin.

[20] Once we had the bleeding under control and had cleaned up the best we could we placed the remainder of the carrots in Freddie Foxtrot's Feed Bin.

25. Mr Mansour was interviewed on 6 March 2023,[25] at which time he gave an account of his visit to the Appellant's stables with Mr Aouad[26] which was generally consistent with his declaration. Mr Mansour also gave evidence before the Inquiry which was again generally consistent with what he had previously stated.[27] In terms of the blood that he had noticed on *Freddie Foxtrot,* Mr Mansour said it was the size of *"at least a hand print"* and was *"all down the side of [the horse's] neck",* with *some in his mane … some on his forehead".*[28]

26. Mr Mansour also said that Mr Aouad was *"not a very well man"* that he *"gets confused all the time".*[29]

Melissa Kelly

27. Melissa Kelly is the Appellant's daughter-in-law and was employed by the Appellant as a stable hand at the relevant time. Ms Kelly gave evidence of having a recollection of Mr Aouad and Mr Mansour attending the Appellant's stables on 12 July 2022. She said that they had *"free access"* to the horses,[30] but that she had been *"up the other end"* of the stables when they were present.[31] She said that that Mr Aouad and Mr Mansour were in the habit of bringing carrots to feed the horses when they visited.[32]

28. Ms Kelly was asked:[33]

CHAIRMAN: One of the scenarios is that Mr Aouad was bleeding freely and it was running down to his fingertips. In a stable, if you notice blood on the ground, what would be the first thing you'd be looking for?

[25] Commencing at AB 623.
[26] AB 625.135 – AB 626.179.
[27] AB 64.2195 – AB 64.2222; AB 66.2303 – AB 67.2330.
[28] AB 67.2367 – AB 67.2377.
[29] AB 67.2355 – AB 67.2363.
[30] AB76.2801 – AB 76.2804.
[31] AB 76.2803.
[32] AB 76.2808.
[33] AB 76.2814 – AB 77.2848.

KELLY:	*Either a horse has got a cut or we've had pigeons come in with it. There's a lot of different things. People, the lot.*
CHAIRMAN:	*But it's something you would be alert to if you noticed bleeding, if you noticed blood on the ground?*
KELLY:	*Yeah, that doesn't mean I seen it though when I'm up the other end.*
CHAIRMAN:	*Right, but I take it you would have been at some stage at the other end of the stables? You wouldn't be exclusively at one end of the stable, would you?*
KELLY:	*I was still finishing off doing what I was doing.*
CHAIRMAN:	*Right. If you noticed bloodstains what would you do?*
KELLY:	*Like I said, it depends who was there, like, what was there, horse. Could have been a pigeon.*
CHAIRMAN:	*Well, in a stable if you noticed blood on the floor –*
KELLY:	*I would have hosed –*
CHAIRMAN:	*-- one would think you'd be worried about if a horse is either injured or its bled, if its bled from its nostril?*
KELLY:	*That's what I said. I said it depends on the scenario. But if they were a way up that end, I wouldn't know which horse it was.*
CHAIRMAN:	*Right. So you didn't notice any blood?*
KELLY:	*At that point, no.*

29. Ms Kelly said that she was in charge of both *Freddie Foxtrot* and *Gogol* at the Grafton race meeting on 13 July 2022,[34] although she was predominantly with *Freddie Foxtrot*.[35] She said she saw no blood on that horse at any stage.[36] She recounted the circumstances in which the blood sample was taken from *Freddie Foxtrot*[37] and was not able to recall anything unusual about that process.[38]

30. When further questioned about the circumstances in which Mr Aouad and Mr Mansour had visited the stables, Ms Kelly said that neither person had approached her to advise her that one or other of them had bled over a horse.[39]

[34] AB 77.2850 – AB 77.2862.
[35] AB 78.2904.
[36] AB 78.2912.
[37] Commencing at AB 79.2941.
[38] AB 80.2983.
[39] AB 83.3148 – AB 83.3151.

The general tenor of Ms Kelly's evidence was that she had little interaction with Mr Aouad and Mr Mansour whenever they visited.[40]

Vanessa Paisley

31. Vanessa Paisley also worked as a stable hand for the Appellant and was the attendant for *Gogol* on 13 July 2022.[41] In evidence to the Inquiry, Ms Paisley said that she could not recall seeing anything on *Gogol's* coat on that day[42] and had noticed nothing different about the horse.[43] Ms Paisley was present at the time of the blood sample being taken. She said that she saw nothing unusual about that process, and had not been asked any question by the veterinarian who took the sample about the presence of blood on the horse.[44]

Dr Chelsea Kramer

32. Dr Kramer is a Veterinary Surgeon who was present at the race meeting at Grafton on 13 July 2022 to, as she put it, *"do all of the pre-race bloods and help with swabs as necessary and anything on the track if Dr Giles was held up"*.[45] When giving evidence before the Inquiry, Dr Kramer said that *"nothing stood out"* in terms of her memory of taking blood samples from *Freddie Foxtrot* and *Gogol*[46].

33. Having given evidence of her general routine,[47] Dr Kramer said that she did not recall seeing any blood stain on any horse that she had tested at that time.[48] She said that if she had noticed a stain that replicated blood on a horse's neck, she would have undertaken investigations of both the horse, and the person responsible for handling it.[49] Dr Kramer explained that her practice was to use an alcohol swab and to check it for debris or dirt after swabbing a horse. She

[40] AB 83.3142; AB 87.3343.
[41] AB 114.4677 – AB 114.4692.
[42] AB 115.4756 – AB 115.4763.
[43] AB 116.4798.
[44] AB 116.4802 – AB 117.4815.
[45] AB 643.47.
[46] AB 92.3596.
[47] AB 92.3601 – 92.3608.
[48] AB 93.3658.
[49] AB 93.3663 – AB 93.3667.

explained that this practice was to *"make sure that it's clean so that when I'm actually inserting the needle I'm not going to go through a dirty bit of skin"*.[50]

34. In terms of what she would do if she found blood on a horse to be swabbed, Dr Kramer then said:[51]

> *If it was a nick that I could definitely say there was blood coming from this area that wouldn't be affecting its racing or its physical look of it in the parade, I wouldn't, I would unlikely be bringing that up, but if there's blood that I cannot attribute to any reason for on the horse then I would swab that horse, or I would collect the blood after cleaning its jugular, and then bring that information to the attention of the Stewards. ... I never had to report miscellaneous blood on a horse prior to swabbing before.*

35. Dr Kramer was cross-examined by senior counsel for the Appellant (who also appeared for the Appellant in the present appeal) in the following terms:[52]

MR MURDOCH:	*Putting aside the fact that you may not be an expert, if human blood had been smeared on the neck of a horse about 20 hours earlier, you would expect that it would be quite dry, wouldn't you?*
DR KRAMER:	*Yes. I mean, that would make sense.*
MR MURDOCH:	*And you would expect that if human blood from 20 hours before was on the horse's skin, that it would be very securely adhering to the horse's skin, wouldn't you?*
DR KRAMER:	*Again, yes, as long as the horse wasn't sweating or rubbing or have been hosed down.*
MR MURDOCH:	*And so far as blood that may have been smeared on a horse's hair, human blood some 20 hours before, you would expect that human blood would be well and truly adhering to the hairs, wouldn't you?*
DR KRAMER:	*Yes. Again, depending on those variables that we just discussed.*
MR MURDOCH:	*The work that you did on Ramornie day, it appears that you were the only veterinarian doing the pre-race swabs that day?*
DR KRAMER:	*That's correct.*

[50] AB 94.3687 – AB 95.3728.
[51] AB 95.3753 – AB 96.3768.
[52] AB 101.4035 – AB 101.4065.

MR MURDOCH:	*And it appears that each of the horses in the Cup was pre-raced?*
DR KRAMER:	*Bloods were collected from each of the horses running in the cup?*
MR MURDOCH:	*Yes?*
DR KRAMER:	*For pre-race bloods, yes.*

Professor Martin Sillence and Emeritus Professor Colin Chapman

36. Professor Sillence and Professor Chapman gave evidence concurrently before the Inquiry. Professor Chapman had previously provided a report to the Appellant's solicitor[53] in which he expressed the following opinions:[54]

> 1. *The identification of specific peptide fragments of rhEPO in blood collected from Gogol and Freddie Foxtrot does not prove that rhEPO was administered to either horse: these fragments could have been detected because either rhEPO was administered to each horse or there was rhEPO contamination of the blood samples.*
>
> 2. *Contamination of the blood samples is possible because fresh blood from Joseph Aouad could have found its way onto each horse before blood was collected at Grafton the following day.*
>
> 3. *The only way to know for sure if rhEPO was or was not administered to the horses is to examine the consequences of the alleged administration: were any/all of the following blood 'parameters' unusual of the day of the race or in the days and weeks that followed: packed cell volume (PCV or haematocrit), haemoglobin (Hb) and red cell volume (RCV).*
>
> 4. *Without evidence of increased PCV, Hb and RCV it is not possible to be comfortably satisfied that rhEPO had been administered to Gogol and Freddie Foxtrot (emphasis in original).*

37. In oral evidence, Professor Chapman said that it was *"possible"* that contamination could arise if the relevant area of the horse was swabbed, and that area was then touched by a veterinarian's hands that had been in contact with an unswabbed part of the horse's neck.[55]

[53] AB 484 – AB 487; it is noted that the report is incorrectly dated 4 January 2022, and not 4 January 2023.
[54] AB 486.
[55] AB 141.5979 – AB 141.5983.

38. Professor Sillence provided a report dated 26 April 2023.[56] His conclusions included the following:[57]

> - *The contamination of a blood sample … is unprecedented and is extremely unlikely due to the method in which multiple blood samples are collected. The site of the needle insertion is first cleansed with alcohol (which destroys proteins) before a fine needle is inserted, with a vacuum only applied once the needle is inside the horse's vein.*
>
> - *The so-called samples of sample contamination referred to by Prof Chapman and reported in the literature, all apply to the detection of small molecule drugs in urine. As the sample collection method for urine bears no resemblance to the method used to collect blood, these examples are grossly misleading and irrelevant to this case.*

39. Professor Sillence expressed the opinion that the presence of the prohibited substance in either horse through contamination was "*improbable*".[58] He explained[59] that even assuming the maximum possible concentration of Mr Aouad's blood, the quantity that would have been needed to contaminate the sample so as to account for the laboratory result was *"improbably high"*. Professor Chapman appeared to agree with that proposition, saying[60] that he thought it "*highly unlikely that you'd get enough down a tube for the contamination amount that we're talking about to be feasible"*. However, he described[61] the possibility of contamination in the Laboratory (or as he put it, *"from the hand onto the tube and the stopper"*) as a *"different story."*

40. Professor Sillence also expressed the view that if the contamination had come about as a consequence of Mr Aouad bleeding, the detection of traces of other medications he was taking at the time would have been expected.[62] Professor Chapman did not disagree with that proposition, describing it as *"quite possible".*[63]

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[56] AB 687 – AB 694.
[57] AB 694.
[58] AB 123.5075; AB 123.5096.
[59] Commencing at AB 123.5082.
[60] AB 136.5750.
[61] AB 136.5752 – AB 136.5753.
[62] AB 137.5791 – AB 137.5809.
[63] AB 137.5812; AB 138.5835 – AB 138.5836.

41. Professor Chapman also raised, in oral evidence, the question of possible contamination in the laboratory, saying:[64]

> *Well, no, it could be done in the lab. It could be done in the laboratory because if the tube is in --, The tube has on any part of the tube, the stopper or the glass on the outside, has any of this contamination that's occurred, then when it gets to the lab, the lab person has to handle the tube to take the stopper out. Once you've done that, you've got contamination creeping into the whole process. So it is feasible for that to be the case and, you know, I think that's the sort of thing that if you look at the unusual, unexpected things that could happen. That's certainly one of them.*

John Keledjian

42. Mr Keledjian is the General Manager of the Australian Forensic Laboratory. When asked to comment about the evidence of Professor Chapman in respect of the potential for contamination within the laboratory he said:[65]

> *So the six tubes, four tubes are placed on the A pouch. They are used by the laboratory here to undertake routine drug screening for all prohibited substances and including the EPO test. Two tubes are then used for confirmation. From the initial two tubes. And two tubes of the six are in the B pouch, which is sent to the referee laboratory for confirmatory analysis. So this laboratory doesn't test all six tubes.*

43. When asked whether, in his view, there was any potential for contamination arising from the Laboratory's procedures, Mr Keledjian said:[66]

> *Mr. Chairman, we try and follow best practice here, that he is using gloves at every point where samples are touched, whether it's from sample receipt through into the preliminary processing in the laboratory and then preparing such samples for testing whether there's steps involved with pippeting, or in the case of EPO where it is pretty much a fully automated procedure where the technician or scientist predominantly just puts the samples in racks in positions, sets up schedules and removes the lid and from then on an automated process takes place for the analysis where at each step the tip is automatically disposed of by the instrument, with a new tip inserted into the dispensing apparatus, whether it be to sample from the blood or add re-agents to the 96 plate or stop solutions per se. So to answer your question, we take all steps that we possibly can to minimise and particularly in the case of blood where clearly there's less*

[64] AB 130.5438 – AB 130.5444.
[65] AB 131.5489 – AB 131.5494.
[66] AB 145.6194 – AB 145.6206.

handling with blood. Unlike urine, where there's pouring and PH-ing and these sorts of things.

44. When given the opportunity to do so, Professor Chapman did not comment on this evidence.[67] Professor Sillence observed[68] that the use of a robot in the Laboratory would *"certainly minimise sample contamination"*.

The Appellant

45. The Appellant was interviewed by Stewards on 31 August 2022.[69] He was unable at that time to explain the presence of the prohibited substance in either horse, and described being *"stunned"*[70] at what had transpired. Before the Inquiry, the Appellant was questioned about a suggested lack of security in the stables which had allowed Mr Aouad and Mr Mansour to simply walk in and start to feed the horses.[71] The Appellant explained that he had put increased security in place since these events occurred.

PRELIMINARY ISSUES

46. As a consequence of the evidence outlined above, and before coming to consider any question of penalty, it is necessary for me to determine two preliminary issues.

47. The first, is whether the Appellant bears an onus to establish either of the explanations for the presence of the prohibited substance in the horses, and if so to what standard.

48. The second, is whether I can be satisfied of either of those explanations, so as to reduce the Appellant's culpability.

Submissions of the Appellant

49. As to the first matter, and in written submissions, senior counsel accepted (as I understood it) that the Appellant bore the onus to establish matters of

[67] AB 146.6213.
[68] AB 146.6215.
[69] AB 263 – AB 317.
[70] AB 277.679.
[71] AB 151.6490 – AB 151.6506.

mitigation.[72] However, he took issue with the proposition that the Appellant bore any onus of establishing the circumstances of the presence of the prohibited substance so as to reduce his culpability.[73] In other words, in the context of this case, senior counsel took issue with the proposition that the Appellant bore any onus to satisfy me that the most likely explanation for the presence of such substance was one or other of the forms of the contamination upon which he relied. It was submitted, in particular, that there was nothing in either the Rules or the governing legislation which gave rise to what he submitted was, in effect, a reverse onus of proof.

50. As to the second issue, senior counsel submitted that on the basis of the opinion of Professor Chapman, it was open to conclude that the exposure of each horse to blood as a consequence of Mr Aouad's presence at the stables was a *"possible means of contamination of the pre-race blood samples taken at Grafton from the jugular vein of the neck of each horse"*.[74] Senior counsel submitted that in these circumstances, the most likely explanation for the presence of the substance was accidental contamination of the samples from the presence of congealed blood on the hair of the neck of each horse, that being, in each case, the area from which the blood samples were taken.[75]

51. Senior counsel expanded on these propositions during oral submissions at the hearing, He submitted,[76] in particular, that I should find that the most likely explanation was that there was contamination arising from the *"visit and blood episode"* involving Mr Aouad. In the event that I was not able to reach such a finding, senior counsel submitted that I should conclude there was simply no evidence which explained how the substance found its way into the system of either horse.

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[72] T4.186 – T 4.190.
[73] T 4.155 – T 4.165.
[74] AB 813 at [32].
[75] AB 813 – AB 814 at [33].
[76] T 8.382 – T 8.390.

52. In support of these submissions, senior counsel took me, in detail,[77] to the evidence of Mr Aouad and Mr Mansour which I have previously summarised. He submitted[78] that such evidence generally supported the proposition that the most likely explanation for the presence of the prohibited substance in the sample was contamination. Senior counsel submitted that the evidence of Professor Chapman provided support for that conclusion.[79]

Submissions of the Respondent

53. In written submissions, counsel for the Respondent submitted that the Appellant had not explained the presence of the prohibited substance by reference to either asserted potential cause and that accordingly, it was not open to determine the question of penalty on the basis that he was blameless.[80] Counsel submitted[81] that the onus in that regard lay on the Appellant, and that the standard of that burden was proof on the balance of probabilities.

54. Counsel submitted that the evidence of Professor Chapman did not rise above the proposition that contamination by Mr Aouad's blood was a *"possible"* cause[82] of the presence of the prohibited substance, and ultimately described as *"fanciful"* the proposition that the positive result in each case had been brought about as a consequence of contamination by Mr Aouad.[83] He also invited me to reject any suggestion of contamination as a consequence of the Laboratory process(es).

55. In oral submissions, counsel argued that the conclusions he had urged as to the issue of onus of proof were simply a consequence of the fact that the offences to which the Appellant had pleaded guilty were offences of absolute liability.[84] He submitted that in those circumstances, any explanation for a positive result must necessarily come from the person charged. In support of that proposition,

[77] T 15.1 – T 16.779.
[78] T 19.900 – T 19.908.
[79] T 18.865 – T 18.870.
[80] AB 830 at [19].
[81] AB 828 at [10].
[82] AB 830 at [18].
[83] AB 830 at [20].
[84] AB 21.1005 – AB 21.1010.

counsel also pointed to the fact that a satisfactory explanation for a positive result was a mitigatory factor.[85]

56. In all of these circumstances, counsel for the Respondent submitted that I should reject the proposition that the positive result came from contamination, and find that the positive result was unexplained.

CONSIDERATION

57. I accept the submission advanced by senior counsel for the Appellant that neither the Rules, nor the *Racing Appeals Tribunal Act 1983* (NSW), address the question of the onus of proof. That, of course, is not determinative of the issue. For the reasons that follow, I am satisfied that in a case of this kind where a person charged seeks to advance an explanation for the circumstances giving rise to the presence of a prohibited substance, the onus is on that person to establish the factors which form the basis of that explanation on the balance of probabilities.

58. To begin with, offences of the kind to which the Appellant has pleaded guilty are offences of absolute liability. Accordingly, it is not necessary for the Respondent, in order to establish the offence, to explain how, when, where or why the substance entered the animal's system. I accept the submission of counsel for the Respondent that in those circumstances, as a matter of common sense, the person who is most likely to be in a position to offer any explanation is the person against whom the breach is alleged. The explanation could hardly come from the relevant Regulator. Viewed in such a way, that does not constitute, as was submitted on behalf of the Appellant, as some form of "reverse onus". It is, in a true sense, an onus to establish a factor in mitigation.

59. In this regard I am cognisant of the fact that the Tribunal is not a Court. I am also cognisant of the fact that the penalties imposed for breaches of the rules, and any proceedings associated with them, are not penal in nature. I am particularly mindful of the statements made by the majority in *Australian Building and*

[85] AB 23.1

Construction Commissioner v Pattison and anor.[86] *(Pattinson)* which make it clear that in matters of this kind, considerations which form part of the determination of penalties in the criminal jurisdiction (for example, the necessity for any penalty to be proportionate to the objective seriousness of the conduct) have no role to play. At the same time, I do not understand those observations to preclude this Tribunal from applying, where appropriate, statements of principle regarding matters of *procedure* which might also apply in the criminal jurisdiction.

60. An approach which places, on a person in the Appellant's position, an onus to prove matters in mitigation on the balance of probabilities is consistent with principle.[87] It is also an approach which is entirely consistent with the manner in which this issue has historically been approached by this Tribunal and others of its kind.[88] For these reasons, I take the view that if a person in the position of the Appellant seeks to establish the circumstances of the presence of a prohibited substance in the animal's system, he or she bears the onus of doing so on the balance of probabilities.

61. Accepting that to be the case, the second matter to be addressed is whether the Appellant has discharged the onus of establishing that the positive samples returned by *Freddie Foxtrot* and *Gogol* were, in each case, the consequence of contamination. The Appellant's primary case is that such contamination arose from circumstances surrounding the presence of Mr Aouad at the stables on 12 July 2022. An alternative proposition, namely that there was contamination through some process in the Laboratory, also arises on the evidence and although not forcefully pressed on the Appellant's behalf, it must also be considered.

62. For the reasons that follow, I am unable to find that the Appellant has discharged the onus on either basis.

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[86] (2022) 274 CLR 550; [2022] HCA 13 at [10].
[87] See *Olbrich v The Queen* (1999) 199 CLR 270; [1999] HCA 54 approving *R v Storey* [1998] 1 VR 359.
[88] See for example *Kavanagh v Racing Victoria Limited* [2018] VCAT 291 at [16]; *Turnbull v Harness Racing New South Wales* (30 September 2022) at [236] – [239].

63. I turn firstly to the reliance on the circumstances surrounding the attendance of Mr Aouad at the Appellant's stables. The proposition that there was contamination as a consequence of the circumstances surrounding Mr Aouad's visit to the stables does not withstand close scrutiny for a number of reasons.

64. First, the fundamental basis of that proposition is the evidence of Mr Aouad. Whilst it is certainly open to find that Mr Aouad visited the Appellant's stables the day before the samples were taken, he seemed to be in some doubt about a number of other matters, not the least of which was the important question of whether he had in fact taken *Aranesp* prior to doing so. Whilst it may well be that Mr Aouad was doing his best to be truthful, the general unreliability of his evidence presents the Appellant with an immediate difficulty.

65. Secondly, Dr Kramer's evidence was that:

    (i) she did not recall seeing any blood stain on any horse that she had tested around that time;
    (ii) had she done so, she would have investigated it;
    (iii) her practice was to use an alcohol swab and to check it for debris or dirt after swabbing the horse, in order to ensure that the area where the needle was to be inserted was clean; and
    (iv) if she found blood on a horse to be swabbed she would notify the Stewards.

66. That evidence tends completely against any suggestion of contamination through the events involving Mr Aouad.

67. Thirdly, Dr Kramer's evidence aside, the evidence is that no person who had contact with either horse at or about the material time (i.e., on the day the samples were taken) noticed any blood.

68. Fourthly, properly analysed, the evidence of Professor Chapman as to suggested contamination from Mr Aouad rose no higher than a possibility.

69. Finally, the evidence of Professor Sillence was that contamination in that way was improbable. Professor Sillence also pointed out that if contamination in that way had occurred, it might have been expected that properties of other drugs taken by Mr Aouad would also have been present in the sample, but that they were not. Their absence tends completely against the Appellant's position.

70. In terms of contamination through Laboratory processes, Professor Chapman's evidence, at its highest, was that such a scenario was *"feasible",* and that it *"could happen"*. Again, that evidence does not rise above a possibility. Moreover, it is entirely inconsistent with the evidence of Mr Keledjian and Professor Sillence which is overwhelmingly to the contrary. In those circumstances, I am not satisfied that the onus has been discharged on this basis.

71. It is well established[89] that in terms of a consideration of penalty in matters of this kind, there are three categories of offending, namely:

(i) where a positive culpability on the part of the person responsible is established, for example, by administration of the drug, or at the direction or otherwise instrumental, and possibility involving deliberate wrongdoing, or through ignorance or carelessness. This is the worst category of offending, in respect of which high penalties are appropriate;

(ii) where the decision-maker cannot determine where the prohibited substance came from, or the decision maker does not accept the explanation given by the trainer, which will attract a penalty similar to the first category;

(iii) where the person is not responsible for the administration of the drug or for administration by others and whilst technically guilty of the offence because it is absolute, has no true moral culpability. In such a case it is necessary for the trainer to demonstrate, because the onus is on the trainer, that culpability does not exist. That is, the blameless test. If this

[89] See for example *Turnbull* at [236]-[239].

> explanation is accepted and there is no culpability, then it may not be appropriate to impose deterrence and it may be possible to impose no penalty at all.

72. In light of the reasons I have given regarding the explanations advanced by the Appellant, it must follow that the offending in the present case falls into category (ii) above. That provides the fundamental basis on which penalty is to be assessed.

SUBMISSIONS OF THE PARTIES ON PENALTY

Submissions of the Appellant

73. Senior counsel for the Appellant advanced the following submissions on penalty.

74. First, senior counsel emphasised that the primary purpose of the imposition of penalties in matters of this nature was protective rather than punitive. That said, he appeared to accept that deterrence in some form may have some role to play.[90]

75. Secondly, he drew attention to the Appellant's subjective circumstances, including his state of health and that of his wife.[91] In this respect, senior counsel placed particular reliance on the Appellant's medical history and related matters outlined in the affidavit of Dr Morris.[92]

76. Thirdly, senior counsel relied on the Appellant's high level of co-operation in the course of the investigation,[93] and the efforts he undertook on his own behalf to investigate and determine how the prohibited substance entered the horses' system.[94]

77. Fourthly, senior counsel submitted that, when viewed against a background of large number of starters trained by the Appellant over a period of approximately 50 years, his record was "*a relatively good one*".[95]

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[90] AB 809 at [12].
[91] AB 810 at [13]-[15].
[92] AB 819 – AB 826.
[93] AB 811 at [21].
[94] AB 814 at [26](a).
[95] AB 810 at [16]-[18]; T 12.551 – T 12.567.

78. Fifthly, senior counsel submitted that on the whole of the evidence, the Appellant had a low level of culpability.[96]

79. Sixthly, it was submitted that I should take into account the fact that the Appellant had been subject to what was described as a *"pre-emptive ban"* which was put in place in September 2022, the effect of which was that the Appellant had been deprived from earning prizemoney in New South Wales since that time. Senior counsel submitted that any suggestion that the effect of this ban was ameliorated by the fact that the Appellant was still permitted to participate in the racing industry in Queensland should be rejected.[97]

80. Seventhly, senior counsel submitted that there was nothing to suggest that there was a *"prevalence of administration of EPO to thoroughbred racehorses."*[98]

81. Taking into account determinations in other cases to which I was referred, it was submitted that a fine was appropriate in all of the circumstances, particularly where a suspension would, it was submitted, *"effectively be the end of the Appellant's training career"*.[99]

Submissions of the Respondent

82. The submissions of counsel for the Respondent on penalty may be summarised as follows.

83. First, counsel accepted that the primary purpose of the imposition of penalties for breaches of this kind was protective rather than punitive. However, he emphasised that principles of both general and specific deterrence had a role to play.[100] Specifically, as to the former, it was submitted that general deterrence required that a *"strong message be sent to the industry that … positive results are unacceptable"*.[101]

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[96] AB 811 at [19]; T 11.535 – T 11.545.
[97] AB 815 at [25]-[28]; T 12.569 – T 13.602.
[98] AB 815 at [43].
[99] AB 816 at [47] – AB 818 at [56].
[100] AB 827 at [5].
[101] AB 828 at [11].

84. Secondly, counsel submitted that in matters of this kind, there were other specific considerations at play in terms of assessing penalty, including the creation and maintenance of a level playing field in terms of competition.[102]

85. Thirdly, counsel pointed out that EPO was a "List A" drug under AR 240, the presence of which was an objectively serious matter.[103]

86. Fourthly, counsel took issue with the proposition that the Appellant's record was properly described as *"good"*. He submitted that in light of the multiplicity of instances of prior offending, the Appellant's record was not something to be taken into account in his favour as a factor in mitigation.[104]

87. Fifthly, counsel submitted that the "pre-emptive ban", whilst a relevant matter to be taken into account, was deserving of limited weight. Counsel submitted, in particular, that properly viewed, the ban was a consequence of the offending and that, in any event, an analysis of the total prizemoney earned by the Appellant showed an increase over the relevant period, such that it was not open to conclude that the ban had resulted in any prejudice to him.[105]

88. Sixthly, and dealing with the Appellant's general subjective case, counsel accepted that the discount for pleas of guilty in matters of this kind had, historically, have been assessed at 25%,[106] and did not suggest that there should be any departure from that practice. Counsel also accepted that in circumstances where the two offences had arisen from the one set of circumstances, total concurrency of any penalties were appropriate.[107]

89. Finally, counsel also made reference to previous determinations made in matters of this kind. He took issue with the proposition that any of those determinations,

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[102] AB 828 at [7] – [9].
[103] AB 829 at [14].
[104] AB 832 at [26]; T 31.1500 – T 31.1520.
[105] AB 832 – 833 at [27]-[30]; T 30.1447 – T 31.1498.
[106] T 33.1620 – T 34.1655.
[107] T 35.1700.

whether taken individually or collectively, supported the disposition of the appeal by way of the imposition of a fine. He submitted that the appeal should be dismissed.[108]

CONSIDERATION OF PENALTY

90. The majority in *Pattinson* enumerated[109] a list of relevant matters to be taken into account in determining what might be described as a *"non-criminal"* penalty. The nature of the proceedings in *Pattinson* were quite different to those in the present case but to the extent that the matters to which the majority referred are relevant, I have taken them into account.

91. For the reasons I have previously given, the Appellant's offending falls into the second of the categories discussed above.[110] Bearing in mind what was said in *Turnbull,* that is a factor which, without more, renders the offending objectively serious.

92. What might be described as public interest considerations have a role to play in determining penalty.[111] So too, in my view, does the related necessity to protect the integrity of the racing industry. Those matters necessarily engage principles of general deterrence. Any penalty imposed must be such as to send a message to industry participants that offending of this kind is likely to meet with a substantial penalty.

93. The Appellant pleaded guilty to both offences at an early opportunity and is entitled to have those pleas taken into account in his favour. The established practice, from which there is no justification to depart, is that such pleas will attract a discount of 25%.

94. In terms of the Appellant's subjective case generally, I have taken into account his state of health, as well as that of his wife. He is now 67 years of age and whilst I

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[108] AB 833 – 835 at [31]-[42].
[109] At [18].
[110] At [71].
[111] See *Day v Saunders; Day v Harness Racing New South Wales* (2015) 90 NSWLR 764; [2015] NSWCA 324 at [79]; [84] per Basten JA.

am not able to necessarily accept that a disqualification will, of itself, mean the end of his career, I accept that at such an age, he may find it difficult to re-establish himself at the end of any significant period of disqualification.

95. The Appellant's record is before me.[112] It appears to be incomplete in some respects, in that there seem to be matters within it in respect of which fines were imposed, but for which no particulars are provided. At the risk of overanalysing it, the evidence seems to establish that in the period between September 1998 and the present, the Appellant has been fined on 21 separate occasions for a range of offences. Given the evidence that he has been involved in the industry for approximately 50 years, it is not clear whether what is before me is his complete history.

96. Such a multiplicity of offending does not entirely lend itself to the use of the word *"good"* to describe the Appellant's history. In that regard, I accept the submission advanced on behalf of the Respondent that those who participate in the industry should be expected to complete their careers having complied with the rules. That said, I am not satisfied that the Appellant's history constitutes an aggravating factor. Moreover, given that on the basis of what is before me the Appellant has not previously been disqualified, personal deterrence, although of some relevance, does not seem to me to be a major consideration in terms of penalty.

97. I accept that the Appellant co-operated with the enquiry, and that he undertook his own investigations to determine what had occurred. As to the former matter, I have taken it into account, but there is some force in the submission of counsel for the Respondent that it is of limited weight. Participants in the industry are expected to co-operate in relation to any enquiry as to integrity-related issues. To give that factor any substantial weight would be tantamount to giving credit for something that a participant is expected (if not obliged) to do in any event. As to the latter, I have no doubt that the investigations which were undertaken came at a financial cost to the Appellant, which of course is in addition to the financial

[112] AB 745 – AB 746.

consequences which will no doubt ensue in the event of a disqualification. I have taken those matters into account.

98. Although the pre-emptive ban does, as counsel for the Respondent submitted, stem from the offending, it also constitutes, in one sense, an additional penalty to which I should have regard. Moreover, I am not able to accept the submission that an analysis of prizemoney figures leads to a conclusion that the Appellant has not suffered any penalty at all as a consequence of the ban. A bare analysis of that kind can be something of a blunt instrument, for the simple reason that it remains unknown what *further* prizemoney the Appellant may have earned had the ban not been in place.

99. As I have noted, I was referred in argument, by counsel for both parties, to a number of previous determinations in matters of this kind. In considering the submissions made in respect of those determinations it is necessary to make a number of observations.

100. To begin with, and fundamentally, there is obviously an overriding need strive for consistency in terms of penalty. For that reason, parties should be encouraged to bring to the attention of the Tribunal previous determinations which might be relevant. Consideration of such determinations is an important component of the process of determining penalty, and is obviously directed towards the objective of achieving consistency.

101. At the same time, it is necessary to recognise the obvious, namely that no two cases are ever factually *identical*, be it in terms of the objective circumstances of the offending, or the subjective circumstances of the offender. It follows that whilst considering previous determinations is important for the reasons I have stated, it is also something which must be approached with an appropriate degree of caution, bearing in mind first, that the Tribunal's discretion in terms of penalty is, for good reason, broad-based, and secondly, that consistency in this sense means

consistency in the application of principle, not numerical equivalence in terms of the penalties imposed.[113]

102. Senior counsel for the Appellant submitted that there was *"ample precedent for a trainer guilty of presenting a horse to a race where a Prohibited List A substance is detected to have a penalty in the form of a fine only imposed"*.[114] In support of that submission, he placed significant (although not exclusive) reliance on the decision in *Waller*[115] where the Appellant had been charged with, and had pleaded guilty to, a breach of r 178G arising from the detection of methamphetamine in a horse of which he was the trainer. Stewards imposed a fine of $30,000.00, which the Panel reduced to a fine of $10,000.00. Whilst the Panel was not able to make a positive finding as to how the substance found its way into the horse's system, it concluded that it was more likely than not that a member of the Appellant's staff was inadvertently responsible.[116]

103. Those circumstances are, factually, far removed from those in the present case. Whether the fine imposed in *Waller* was an appropriate penalty is something about which reasonable minds might differ, but in any event this Tribunal is, for obvious reasons, not bound by previous determinations of the Appeal Panel. I need only observe that that case is distinguishable on its facts, including the nature of the substance and were what found to have been the likely circumstances of its source.

104. Senior counsel also referred me to a number of other determinations[117] all of which I have considered. I accept his submission that it should not be assumed that a matter of this nature will, without more, *inevitably* result in a period of disqualification. To take that approach would be impermissibly restrictive for a number of reasons, not the least of which is that it would run contrary to the fundamental and uncontroversial proposition that each case must be determined

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[113] *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [48]-[49].
[114] Written submissions at [39].
[115] A decision of the Racing New South Wales Appeals Panel of 10 February 2017.
[116] At [4](b).
[117] Written submissions at [50] and following; T 14 and following.

on its own facts. At the same time, the objective seriousness of offending of this general nature must be recognised.

105. I am not able to accept the submission that there is *"ample precedent"* for the imposition of a fine in cases of this nature. Such a submission significantly overstates the position. Whilst there have certainly been instances in which fines have been imposed, there have, equally, been instances in which significant periods of disqualification have been imposed.[118] All of those circumstances simply highlight the fundamental necessity to approach the question of penalty having regard to all of the matters to which I previously referred.

106. I should also note that following judgment in this matter being reserved, the Appellant's Solicitor forwarded a copy of a decision of the Queensland Racing Appeals Tribunal in *Schmidt,*[119] in which the Tribunal imposed a suspended period of disqualification upon a participant in the greyhound racing industry who had offended in a manner not dissimilar to the Appellant. It is evident from reading that judgment that the factors which caused the Tribunal to reach the conclusion that it did included what was described as the Appellant's *"very good"* record,[120] along with the finding that the Appellant's explanation for the presence of the substance was neither unlikely nor inherently improbable.[121] Those factors are distinguishable from the present case.

107. Moreover, and in circumstances where the Tribunal in *Schmidt* was asked to consider a series of prior determinations, it was observed that all cases are different, that there are a range of penalties available, and that it should not be thought that one penalty is necessarily inevitable.[122] I would respectfully endorse those comments. They are entirely consistent with my own observations above.

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[118] See the Respondent's written submissions at [33] and following.
[119] 13 March 2024.
[120] At [25].
[121] At [17].
[122] At [34].

108. Finally, it might also be noted that the Tribunal in *Schmidt* came to the view that a disqualification *was* appropriate, but determined that it be suspended for a period of 12 months. It can be reasonably concluded from the Tribunal's reasons that in reaching the determination to suspend the disqualification, reliance was placed upon the factors I have identified above, none of which form part of facts of the present case.

109. In my view, in the circumstances of this case, a period of disqualification must be imposed. The breaches are objectively serious, and they engage principles of general deterrence. Closely aligned to those principles is the need to maintain the integrity of, and public confidence in, the racing industry as a whole. I have taken into account the Appellant's subjective circumstances, particularly as they relate to his health. Whilst those considerations, and the other matters to which I have referred, are obviously relevant, it remains the case that subjective circumstances cannot be permitted to result in a penalty which is inappropriate and which, in this particular context, fails to have proper regard to principles of general deterrence.

110. This matter comes before me as a hearing *de novo* in which I engage in the fresh exercise of the discretion to determine the appropriate penalty. Taking all matters into account, I am satisfied that the determination of the Appeal Panel reflects an appropriate penalty.

111. For the reasons I have given, I make the following orders:

1. The appeal is dismissed.
2. The orders made by the Appeal Panel of Racing NSW on 20 December 2023 are confirmed.
3. Noting the refusal of the stay, the disqualification will be taken to have commenced on 20 December 2023 and will expire on 20 March 2025.
4. The Appeal deposit is forfeited.

THE HONOURABLE G J BELLEW SC
2 May 2022