

## DECISION

*Racing Integrity Act 2016, section 252AB*

<b>Review application number</b>	RAP-28	
<b>Name</b>	Alan Donohoe	
<b>Panel</b>	Ms Dianne Condon (Acting Chairperson) Mr Peter O'Neill (Deputy Chairperson) Mr Darren Guppy (Panel Member)	
<b>Code</b>	Harness	
<b>Rule</b>	Australian Harness Racing Rule 190(1) A horse shall be presented for a race free of prohibited substances.	
<b>Penalty Notice number</b>	PN-008362 PN-008363	
<b>Appearances &amp; Representation</b>	Applicant	Self Represented
	Respondent	Norm Torpey
<b>Hearing Date</b>	19 July 2023	
<b>Decision Date</b>	2 August 2023	
<b>Decision</b>	The racing decision the subject of this application is confirmed.	
<b>Penalty</b>	Pursuant to 252AH(1)(a) the Racing decision of six-month disqualification on each charge served concurrently is confirmed, commencing two weeks from the date of this decision.	
<b>Case References</b>	<i>Appo v Queensland Racing Integrity Commission</i> [2019] QCAT 313 <i>Baker v QRIC</i> RAP-18 <i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336 <i>Cole v Harness Racing Victoria</i> [2018] VCAT 1930 <i>Day v Sanders</i> [2015] NSWSC 173 <i>Doughty v Racing Queensland Limited</i> [2012] QCAT 678 <i>Edmondson v Queensland All Codes Racing Industry Board</i> [2016] QCAT 70 <i>Graham v Queensland Racing Integrity Commission</i> [2018] QCAT 198 <i>Graham v Queensland Racing Integrity Commission</i> [2021] QCATA 125	

*Hess v Queensland Racing Integrity Commission* [2018] QCAT 16  
*Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236  
*Lawlor v Racing Queensland Limited* [2012] QCAT 255  
*Morrisey v Queensland Racing Integrity Commission* [2018] QCAT 161  
*Queensland Racing Integrity Commission v Gilroy* [2016] QCATA 146  
*Queensland Racing Integrity Commission v Scott* [2019] QCATA 121  
*Wallace v Queensland Racing* [2007] QDC 168  
*Weeks v Queensland Racing Integrity Commission* [2017] QCAT 345  
*Xuereb v Racing Victoria Limited (Review and Regulation)* [2019] VCAT 473

## **Reasons for Decision**

### **Background**

- [1] The applicant in this matter, Mr Alan Donohoe, is a licensed harness racing trainer and driver who competes with two horses, The Hummer and True Origin. Both horses are trained at the premises of Mr Murray Thomas.
- [2] On 3 July 2023, Stewards conducted an inquiry into pregabalin being detected in The Hummer's urine samples after competing at race meets at Albion Park on 15 April 2023 and 22 April 2023.
- [3] Following that hearing, the applicant was charged with offences with respect to each race meeting pursuant to the Australian Harness Racing Rules ('AHRR' or 'Rules') 190(1) "*A horse shall be presented for a race free of prohibited substances.*" Penalty Notices 008362 and 008363 relate respectively.
- [4] The particulars of charges to which the applicant entered pleas of not guilty were as follows: -
- [5] **Charge 1:**  
*Fail to present The Hummer to race free of prohibited substances in that pregabalin was detected in the urine sample taken from The Hummer competing at Albion Park on 15 April 2023.*
- [6] **Charge 2:**  
*Fail to present The Hummer to race free of prohibited substances in that pregabalin was detected in the urine sample taken from The Hummer competing at Albion Park on 22 April 2023.*
- [7] The applicant was found guilty of both charges and penalties of six months disqualification on each charge were imposed in accordance with AHRR 256(1)(c) to be served concurrently, with the disqualification to commence from on 3 July 2023 and to end on 1 January 2024.
- [8] On 6 July 2023 the Applicant lodged an Application for Review with the Queensland Racing Appeals Panel seeking a review of the Stewards' decisions concerning both the findings of guilt and the penalties imposed.
- [9] Pursuant to section 252AB of the *Racing Integrity Act 2016* the applicant now seeks a review of both the findings of guilt and the penalties imposed.
- [10] The relevant grounds of the application for review in respect of the charges relates to:

**Guilt:** that the positive samples detected in The Hummer were the result of environmental contamination.

**Penalty:** that the penalties imposed are excessive.

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

## **Culpability**

### **The charge under the AHRR**

[12] It is instructive at this point to set out AHRR 190 (commonly known as the presentation rule) in full:

#### ***Presentation free of prohibited substances***

**190.** (1) *A horse shall be presented for a race free of prohibited substances.*

(2) *If a horse is presented for a race otherwise than in accordance with sub-rule (1) the trainer of the horse is guilty of an offence.*

(3) *If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub-rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*

(4) *An offence under sub-rule (2) or sub-rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*

(5) *A horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.*

(6) *Where a trainer intends to leave another person in charge of a horse in the trainer's absence, then prior to doing so, the trainer must notify the Chairman of Stewards, and the notification must be in the manner, within the time, and containing the information determined by the Controlling Body or the Chairman of Stewards.*

(7) *A person can only be left in charge of a horse by a trainer with the approval of the Chairman of Stewards.*

(8) *A trainer who fails to comply with sub-rule (6) or sub-rule (7) is guilty of an offence.*

[13] The elements of the breach under Rule 190 accordingly can be expressed as fourfold:

- A horse
- presented for a race
- by a trainer
- not free of a prohibited substance, namely pregabalin.

- [14] Establishment of the first three elements of the offence are not in dispute between the parties by admission of the applicant before the Stewards<sup>1</sup> and this panel: The Hummer was presented to Albion Park for racing on 15 April 2023 and 22 April 2023 by the applicant as trainer.
- [15] Whilst not contested by the applicant, the panel must also be satisfied that pregabalin is a prohibited substance within the meaning of the AHRR and there is evidence sufficient to conclude that pregabalin was present in the horse on each relevant date.

## **Pregabalin**

### **Evidence before the stewards**

- [16] In relation to each charge, The Hummer's urine samples were initially tested by QRIC's Racing Science Centre (RSC) and then confirmatory testing undertaken by Racing Analytical Services Ltd (RASL), with each laboratory producing certificates of exhibit identifying that pregabalin was detected in each case. Associated chain of custody documents concerning the respective urine samples are relied on by the respondent.
- [17] The certificate of exhibit evidence is summarised as follows:

#### **Charge 1 (15 April 2023) – sample 536144**

<b>Exhibit no.</b>	<b>Laboratory</b>	<b>Test</b>	<b>Certificate no.</b>	<b>Signatory</b>	<b>Date</b>
5	RSC	Initial	RSC23-111	Dr Shawn Stanley	16.05.23
11	RASL	Confirmatory	RS23/08603	David Batty `	02.06.23

#### **Charge 2 (22 April 2023) – sample 533776**

<b>Exhibit no.</b>	<b>Laboratory</b>	<b>Test</b>	<b>Certificate no.</b>	<b>Signatory</b>	<b>Date</b>
17	RSC	Initial	RSC23-108	Dr Shawn Stanley	16.05.23
23	RASL	Confirmatory	RS23/08605	David Batty `	09.06.23

- [18] None of the certificates of exhibit nominated levels of pregabalin detected. Only the confirmatory RASL certificates recorded a method of analysis (being 'RASL Method MS62'); and both RASL certificates record nil finding in relation to pregabalin being detected in the control fluid.
- [19] Both RSC and RASL certificates identify NATA accreditation, bearing accreditation numbers 5296 and 4105 respectively.
- [20] Dr Shawn Stanley holds a Ph.D in pharmaceutical chemistry and is the General Manager, Analytical Services, Racing Science Centre. He signed both of the RSC certificates of exhibit (Ex 5 & 17) and his evidence before the stewards described a process of SNT36 which was used to twice test the urine samples and that high concentrations of pregabalin were detected in each sample which had not been seen before and which he remarked as being unusual.<sup>2</sup>

<sup>1</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 line 11

<sup>2</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 229-243 and 247-255

[21] Dr Stanley referred the stewards to an academic paper published by Cornell University concerning the intravenous and nasogastric administration of pregabalin in horses as detected in plasma.<sup>3</sup> Dr Stanley told the inquiry he was not aware of any equine products containing pregabalin that was in use in Australia that was approved by the TGA or ABPMA.<sup>4</sup>

[22] Dr Stanley stated that in terms of (Rule) 188, pregabalin is a substance that is capable of acting directly or indirectly, or having an effect on the nervous system<sup>5</sup> and to have an effect on neuropathic pain.<sup>6</sup>

[23] Dr Stacey Flynn is a veterinary surgeon employed by the respondent and she stated to the stewards that pregabalin is a prohibited substance under the Rules and that it's used off-label in animals.<sup>7</sup> She further stated:<sup>8</sup>

*"It's used primarily for pain relief in nerve pain, but sometimes it causes mild sedation in some animals. In some animals it might even cause a transient colic or some sort of odd behavioural changes. It's not used widely therapeutically."*

### **Further evidence**

[24] On the hearing of the appeal the panel heard evidence from Dr Stanley who filed an affidavit sworn on 17 July 2023. His relevant evidence to the panel on the detection of pregabalin in The Hummer was in summary:

- a) Pregabalin is a prohibited substance in accordance with AHRR 188A(1)(a) being a substance capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within the mammalian nervous system.<sup>9</sup>
- b) That pregabalin is human medication primarily to treat neuropathic pain for which there are no registered veterinary products available for use in Australia.<sup>10</sup>
- c) Pregabalin was confirmed in The Hummer's urine samples ('the samples') taken on 15 April 2023 and 22 April 2023.<sup>11</sup>
- d) That the samples contained high concentrations of pregabalin such that both samples required dilution.

[25] The applicant confirmed before the panel that he did not challenge the validity of the test or the result that pregabalin was detected in The Hummer's urine samples taken on 15 April 2023 and 22 April 2023.

[26] Having regard particularly to the evidence of Dr Stanley together with the certificates of analysis and the admissions of the applicant, the panel is satisfied that there is clear and cogent evidence that supports the factual findings that:

- (a) that pregabalin is a prohibited substance within the meaning of the AHRR;

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<sup>3</sup> Exhibit 25

<sup>4</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 288-290 and 412-416

<sup>5</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 559-560 and 566-567

<sup>6</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 line 560

<sup>7</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 636-637 and 645

<sup>8</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 639-642

<sup>9</sup> Exhibit 39 – Affidavit of Dr Shawn Stanley dated 17 July 2023 paragraphs 5-6

<sup>10</sup> Exhibit 39 – Affidavit of Dr Shawn Stanley dated 17 July 2023 paragraph 7

<sup>11</sup> Exhibit 39 – Affidavit of Dr Shawn Stanley dated 17 July 2023 paragraph 8

- (b) The Hummer was presented to Albion Park for races on 15 April 2023 and 22 April 2023 respectively by the applicant as trainer; and
- (c) pregabalin was present in The Hummer's urine samples collected on 15 April 2023 and 22 April 2023.

## **Environmental contamination**

### **Evidence before the stewards**

[27] In his application for review the applicant stated:

*"I acknowledge the rule of administration but believe i am not responsible for breaking the rule nor had any intent of breaking the rule as i believe the positive swab in question was a result of enviromental contamination"*

[28] Before the stewards the applicant denied administration of pregabalin to his horses, stating *"I've never used Pregabalin, and I don't know of anyone who has ever used it."*<sup>12</sup> He stated he could not offer an explanation and considered that it may have been a case of environmental contamination after talking to Mr Peter Hill.<sup>13</sup>

[29] The applicant proceeded to describe various elderly persons who did reside at or visited Mr Murray's property where his two horses are kept, including The Hummer and that there is a septic system at the back of the house which filters down into the adjacent yards.<sup>14</sup> The applicant went on to state to the stewards:<sup>15</sup>

*"But because they all use that septic system and that septic system runs out the back of the house, I would suggest that this drug has contaminated the grass and soil in that area, and the horse must have eaten it. I can't put any other theory forward."*

[30] On the issue of potential of environmental contamination of the grass by septic tank water egress on the subject property Dr Stanley opined:<sup>16</sup>

*"In my opinion, the concentration needed to produce that in the grass that has been eaten would have to be very high. We've already established that it has gone through a septic system. It's getting diluted. There's lots of water coming in from other sources, like washing machines and things like that - and does get taken up.*

*You'd expect to see trace levels in a horse that was eating that grass, but this one wasn't trace; this was high enough to require us to dilute the sample down significantly to get it on the scale of the instrument. So it doesn't seem to be consistent with that idea that it was from the septic tank."*

[31] The applicant stated that he would have the horse in the paddock for an hour or hour and a half each day.<sup>17</sup> He described to the stewards that that area of the paddock was wet for about 30 metres at the time of the negative urine samples but is a lot less wet presently, to an area of about 5 metres.<sup>18</sup> The

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<sup>12</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 302-304

<sup>13</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 530 and 533-537

<sup>14</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 319-320

<sup>15</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 346-349

<sup>16</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 451-460

<sup>17</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 493-494

<sup>18</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 497-506

applicant stated that he instructed his brother to stop allowing True Origin to that area of the paddock after the negative urine samples were returned.<sup>19</sup>

- [32] A file note of Wayne Barr, Stipendiary Steward employed by the respondent refers to an inspection undertaken on 17 May 2023 at the property where The Hummer was kept. Attached to the file note are various photographs of the products kept in the feed shed including supplements,<sup>20</sup> however the file note and photos do not disclose any evidence of pregabalin being located at the property.

### **Further evidence**

- [33] The applicant gave evidence before the panel confirming he was a licenced trainer and driver for harness racing. He gave evidence about the layout of Mr Thomas' property where his horses were trained, including that the septic system was directly behind the house and adjacent flat which were positioned in front of the top two of the three grazing yards. The applicant stated the yards were 30 metres away from the house and tanks across a grassed area. He further stated the stables and wash bay were a good distance from that at about 100 metres away.
- [34] The applicant's evidence was that there could be overflow from the septic system when it was wet such that around the system and for some distance, the ground would be quite wet and the grass surrounding quite lush. He confirmed that this was outside the yards, however when it was extremely wet the overflow would continue into the yards which were approximately 30 metres away. Under cross examination the applicant stated that a resident of the house at the time, Mr Mins, used a lot of water via a submersible pump to hose water out of the septic system over the yards. He confirmed that he did not know what medication Mr Mins was on.
- [35] The applicant also gave evidence regarding his care and preparation of his horses to race. He stated that in the lead up to the race on 15 April 2023 he would have trained The Hummer every day, after which he would have washed him and put him in one of the yards to graze for an hour or an hour and a half. He also stated that he would have trained The Hummer and that he would have been grazed in the yard then. Under cross examination the applicant confirmed the horses grazed mainly in the top two yards.
- [36] With regard to his to his preparation on race days, the applicant stated that he had a similar approach, being that The Hummer was usually restricted to his yard and if he had time in the paddock, it was only for a short period of time.
- [37] The applicant confirmed he had always only given his horses green feed and grain. He said the feed was the same every morning and evening and on race days he would provide an additional grain feed with green feed in it. The applicant's evidence was that he wasn't concerned about The Hummer eating grass and that the horse also would have picked the lush grass in the immediate area of the septic system just before the yards. He also said he would have been more careful with The Hummer in good form.
- [38] In confirming that he had the same training routine in the lead up to race days and the same routine on a race day, the applicant conceded that he could not recall the specifics of what he did with The Hummer leading up to and on the relevant race days of 15 April 2023 and 22 April 2023.
- [39] On the hearing of the appeal the panel also heard evidence from Mr Murray Thomas a licenced trainer who prepared a Statutory Declaration dated 6 July 2023. Mr Thomas confirmed that he owned the

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<sup>19</sup> Transcript of Stewards Inquiry 03/07/2023 recording #1 lines 515-521

<sup>20</sup> Exhibit 12

property at Buccan (for some 22 years) where the applicant's horses were trained and that he had 10 of his own horses<sup>21</sup> in training there in addition to the horses of other trainers.

[40] In describing his property to the panel Mr Thomas confirmed that there were two separate septic tanks which were 20 metres apart and that they were directly behind the house in which he lives, and an adjacent residential unit respectively then occupied by two tenants. He stated that there was a grassed area behind the tanks and with respect to the three grassed yards, one was straight to the back of the unit and another 20 metres further beyond that.

[41] Mr Thomas further described the egress of water from the respective septic tanks, relevantly:

(a) They run into same drainage section with two separate holding tanks which have pumps on them which get pumped out by hoses such that water goes onto the grassed area around the tanks.

(b) The septic tank from the house pumps out in the area between the house and the wash bay and the other separate yard; and that the discharge can run down and wet the whole three yards if enough water was pumping out. He confirmed in April 2023 the area between the septic tank to the fence of the first yard was waterlogged.

(c) The septic tank from the unit pumps out onto the grassed area between the tank and yard with more runoff to the top yard due to one of the unit residents pumping water across the back of the house.

[42] He confirmed in contrast now the area is dry with not much grass about.

[43] Mr Thomas also gave evidence regarding his training habits for the horses on his property, particularly their access to the three yards. He stated that he maintained a consistent training routine for his horses which, other than his racehorse Ella Street, included them being in the three grassed day yards each day for about 15 or 20 minutes before they were put away. Mr Thomas confirmed that these were shared paddocks and that his horses<sup>22</sup> and the horses of other trainers all had access to the same three yards the applicant's horses did. He qualified that this was except for the horses of trainer Jonah Hutchinson, who only did trackwork and they did not go to the grassed yards.

[44] Mr Thomas stated that between January 2023 and June 2023 he had three winning horses for six wins and that all his winners were either urine or blood tested for prohibited substances, including pre-race tests. His evidence was that that during that period no positive results were returned on any of his horses.

[45] Mr Thomas' evidence to the panel confirmed that he was taking a number of drugs since a 2019 assault including lyrica and paxelia.<sup>23</sup> He stated he took lyrica twice daily between April 2023 to finishing up on lyrica at the end of May 2023. He further stated that there were two occupants of the unit on the property but he was not aware what medication they were on.

[46] Regarding the urinating habits of male residents and visitors<sup>24</sup> to the property around that time, Mr Thomas stated that everyone does it in areas the horses could get to including around the yards and stables. He said he would urinate on the grass area behind the shed.

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<sup>21</sup> Including two racehorses

<sup>22</sup> Except for Ella Street

<sup>23</sup> Statutory Declaration of Murray Thomas dated 6 July 2023

<sup>24</sup> Including the applicant, Nathan Smith and Dennis Towel



[47] The panel also heard from Mr Nathan Smith, a fencer, who worked at the property for six to eight years several times a week doing various jobs for Mr Thomas including welding, fencing, yard work and working on Mr Thomas' truck. Mr Thomas stated before the panel that he also attended the property with his partner as he has a couple of horses which Mr Thomas trains. He confirmed that he also did some strapping work with the horses<sup>25</sup> on the property which included quite often taking them for a pick on grass outside of the green yards before putting them back.

[48] Mr Smith stated before the panel that he takes Lyrica twice a day since re-injuring his shoulder by dislocation in early January 2023. Under further examination, Mr Smith confirmed the drugs he was on since the re-injury were Palexia, tramadol, Endone, Targin and Slenyto and that he had understood Lyrica to be the same drug as Palexia. He confirmed he continued to work after his re-injury at Mr Thomas' quite often, doing mostly welding. His further evidence was that he mostly urinated beside the sheds or stable if working in the yards, rather than using the toilet in the house.

[49] Dr Stanley gave evidence to the panel regarding the assertion put forward by the applicant that The Hummer ingested grass which was contaminated with pregabalin through waste-water. This evidence was in summary:

- a) That gabapentin, Neurontin and Lyrica are in the same drug family as pregabalin for treating neuropathic pain in people.
- b) That Palexia, also known as tramadol and tapentadol, is an analgesic and a different class of drug to pregabalin.
- c) That The Hummer's urine samples taken on 15 April 2023 and 22 April 2023 were tested for many prohibited substances commonly consumed by people in daily life (including caffeine and ibuprofen)<sup>26</sup> and that no other prohibited substances were detected in The Hummer samples.<sup>27</sup>
- d) If Palexia, tramadol and Endone were being excreted into wastewater contaminating grass The Hummer ate, then that he would have expected it to present in The Hummer's samples at least at trace levels and no such were detected.
- e) When asked to comment on an academic paper which reported on the detection of gabapentin in horses in the USA in 2016<sup>28</sup> Dr Stanley confirmed that:
  - i. Pregabalin is not metabolised by humans, and it is excreted largely unchanged; and
  - ii. In relation to its stability in the environment, that it was unlikely that pregabalin would be stable in grass being among other factors that it's subject to thermolytic breakdown.
- f) When asked if the horse had access to grass contaminated with pregabalin the day before it was tested, Dr Stanley opined that the short half-life of pregabalin meant that it would be rapidly eliminated from a horse's system such that the levels would drop significantly from day one, to day two then day three.

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<sup>25</sup> Including Mr Thomas' horses and the applicant's horses

<sup>26</sup> Exhibit 39 – Affidavit of Dr Shawn Stanley dated 17 July 2023 paragraph 10

<sup>27</sup> Exhibit 39 – Affidavit of Dr Shawn Stanley dated 17 July 2023 paragraphs 10-11. Dr Stanley stated to the panel that were there such, the certificates of analysis would reflect other compounds detected.

*"Gabapentin, a human therapeutic medication and an environmental substance transferring at trace levels to horses: a case report"* Irish Veterinary Journal 2022 75:19

- g) That high concentrations of pregabalin detected in The Hummer's samples indicated that:
- i. He did not think the presence of low concentrations of pregabalin on grass would produce the high levels detected in The Hummer's urine sample. He further opined that if such was the case, it would be extremely unlikely for the same result to be produced 7 days later when the second sample was taken.
  - ii. it was unlikely the presence of pregabalin in The Hummer was the result of casual contact with someone previously exposed to pregabalin.

[50] It would be highly unlikely that the presences of pregabalin in The Hummer's urine samples was the result of the horse eating grass potentially exposed to the overflow from a domestic septic system.<sup>29</sup> Dr Stanley opined if such was the case then other substances should be picked up.

### **Discussion**

[51] The applicant seeks to explain The Hummer's positive urine samples for pregabalin by advancing that they were the result of the horse eating grass contaminated with pregabalin discharged in the wastewater from the septic system on the property. However, there is a paucity of evidence before the Panel to support this explanation to the requisite standard when one considers the evidence as a whole including the evidence of the applicant and his witnesses and that of Dr Stanley's.

[52] Firstly, there is no scientific evidence of contamination to support this explanation in terms of testing of the grass or soil on the property at the relevant time for the presence of pregabalin.<sup>30</sup>

[53] The panel has had regard to evidence of the applicant that his horses would have been grazed in the three yards each day in the lead up to the race days for an hour or an hour and a half; and on the race days in the three yards for a shorter period of time.

[54] Additionally, Mr Thomas' key evidence was that nine of his horses and the horses of other trainers on the property all had access to the same three yards in which the applicant's horses grazed. He also gave evidence that none of his horses have returned positive test samples including the six winners he has had since January 2023.

[55] On this matter the respondent submits that this current season Mr Thomas has had 90 starters, 14 of which have been winners and that none of the post-race urine samples from those horses have tested positive.<sup>31</sup>

[56] Mr Smith's evidence was that at the relevant time he was then on medications palexia, tramadol, endone, targin and slenyto. In the panel's assessment of Mr Smith's evidence, he erroneously equated lyrica with palexia. In his submissions to the panel the applicant conceded that Mr Smith's evidence was damning in terms of being supportive of proof of his contamination explanation, particularly being that Mr Smith was not on lyrica as the applicant had understood.

[57] On a reasonable view of the evidence this leaves only Mr Thomas as a person either residing at or visiting the property who was taking lyrica daily in April 2023 and whose evidence was that he was residing in the house and also toileting on the grass area behind the shed.

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<sup>29</sup> Exhibit 39 – Affidavit of Dr Shawn Stanley dated 17 July 2023 paragraph 9

<sup>30</sup> The panel had evidence before it that the applicant made recent attempts to secure such testing, albeit without success.

<sup>31</sup> Respondent's submissions dated 18 July 2023 at paragraph [23]

- [58] If the panel is to favour evidence about the layout of Mr Thomas' property and as to the egress of water from the septic tanks evidence, it would be that of Mr Thomas who has resided there for 22 years. Specifically, he confirmed that in April 2023 the area between the septic tank to the fence of the first yard was waterlogged; also that discharge *can* run down and wet the whole three yards if enough water was pumping out.
- [59] On this issue the applicant's evidence was similar nonetheless, confirming when it was wet the ground around the septic system would be quite wet and the grass surrounding quite lush; and that this was onto the grassed area around the tanks outside the yards; however, when it was extremely wet the overflow would continue into the yards.
- [60] Relevantly there is no clear evidence before this panel that the three yards were lush with grass or indeed waterlogged from waste-water runoff in April 2023.
- [61] Moreover, the evidence of Dr Stanley is completely inconsistent with the applicant's explanation of environmental contamination.
- [62] The panel accepts the evidence of Dr Stanley as summarised above at paragraph [49] and particularly his opinion that it would be highly unlikely that the presences of pregabalin in The Hummer's urine samples was the result of horse eating grass contaminated with pregabalin discharged in overflow waste-water from the septic system, which is largely premised on:
- (a) The absence of any other prohibited substances being detected in The Hummer's samples; and
  - (b) The high concentrations of pregabalin detected in both samples with his attendant opinions:
    - i. pregabalin would unlikely be stable in grass;
    - ii. the presence of low concentrations of pregabalin on grass would not likely produce the high levels detected in The Hummer's samples;
    - iii. that the short-half life of pregabalin meant that it would be rapidly eliminated from a horse's system such that the levels would drop significantly from day one, to day two then day three of consumption of contaminated grass; and
    - iv. the high unlikelihood of such a result of high concentrations being reproduced 7 days later between the two testing dates.
- [63] The Panel is accordingly of the view that that the environmental contamination explanation proffered by the applicant is not supported by the evidence.
- [64] Notwithstanding, consideration of the availability of any defences or exculpation of the contravention is necessary. The respondent in their submissions<sup>32</sup> refer the panel to Adamson J in *Day v Sanders* as authority for the position at law that Rule 190 creates an offence of absolute liability to which there is no defence.<sup>33</sup>
- [65] Those submissions also cite Member King-Scott in *Appo v Queensland Racing Integrity Commission* who distinguished between absolute liability and strict liability as relating to Rules of Racing.<sup>34</sup>

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<sup>32</sup> Respondent's submissions dated 18 July 2023 from paragraph [45]

<sup>33</sup> [2015] NSWSC 173 at [83]

<sup>34</sup> [2019] QCAT 313 at [21]

*"However, in my opinion, absolute (no fault) liability should be distinguished from strict (minimum fault) liability. The latter may permit some evidence of lack of fault and lack of due diligence would be sufficient to result in a determination of guilt."*

- [66] Whilst the more recent decision of QCAT in *Graham v Queensland Racing Integrity Commission* states Rule 190 is an offence of 'strict liability', the decision frames the finding more in absolute terms: *"if a horse is presented to race other than free of prohibited substances, the offence is committed without more."*<sup>35</sup>
- [67] The Panel accepts that Rule 190 is an offence of absolute liability in accordance with the relevant authorities. Accordingly, and having regard to the findings of fact at paragraph [26] and further in these reasons for decision, the Panel is satisfied on the balance of probabilities on the *Briginshaw*<sup>36</sup> standard that the applicant has contravened Rule 190(1) of the Australian Harness Racing Rules.

## Penalty

- [68] The Penalty Guidelines issued by the Queensland Racing Integrity Commission state that the purpose of a penalty under the rules is to maintain standards of integrity and animal care through the enforcement of the rules of racing, to provide general deterrence to the industry by ensuring that any penalty imposed is sufficient to discourage other participants from breaching the particular rule, and, finally, to provide specific deterrence to the individual.<sup>37</sup>
- [69] The Guidelines set out a number of factors which may be taken into account. Imposing a penalty involves a balance between the severity of the offence, the need for deterrence, both for the individual and the industry generally and any mitigating factors. All situations need to be assessed according to their individual merits. Considerations listed include the circumstances of the offence itself, the degree of culpability involved in the offending, whether there has been an early plea of guilty for the disciplinary record of the person involved and also the race status.<sup>38</sup>
- [70] Whilst the Panel is not bound by the Guidelines, they enunciate well-established sentencing principles as to mitigation and aggravation relevant for the panel to consider and seek to provide for consistency in the imposition in penalties under the Rules. His Honour Thomas J in *Queensland Racing Integrity Commission v Gilroy*<sup>39</sup> provided some direction in the fixing of penalties noting that:

*"[a] key consideration is to maintain the integrity of the industry as a whole and to demonstrate to participants in the industry and the public, that behaviour which breaches the rules will not be tolerated."*<sup>40</sup> Further, the exercise of *"imposing a penalty involves a balance between the severity of the offence, the need for deterrence and any mitigating factors"*.<sup>41</sup>

- [71] Such principles also align with the objects of the *Racing Integrity Act 2016* (Qld) that are outlined in Section 3(1) as follows:

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<sup>35</sup> *Graham v Queensland Racing Integrity Commission* [2021] QCATA 125 at [131]; *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236 at [7].

<sup>36</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>37</sup> *Baker v QRIC* RAP-18 at [13]

<sup>38</sup> *Baker v QRIC* RAP-18 at [13] – [14]

<sup>39</sup> [2016] QCATA 146.

<sup>40</sup> *Ibid*, 6 [24]. See also *Hess v Queensland Racing Integrity Commission* [2018] QCAT 16.

<sup>41</sup> *Edmondson v Queensland All Codes Racing Industry Board* [2016] QCAT 70, 7 [27].

*The main purposes of this Act are—*

- (a) To maintain public confidence in the racing of animals in Queensland for which betting is lawful;*
- (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 involved in racing under this Act or the Racing Act.*

[72] Firstly and whilst not sufficient to militate against a finding of guilt, the trainer's intention is relevant to determining the appropriate penalty.<sup>42</sup>

[73] The respondent's written submissions cites and relies upon the decision of *McGill DCJ in Wallace v Queensland Racing*.<sup>43</sup> In that decision his Honour at [69] said of relative concepts of blameworthiness as to considering penalty:

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

[74] In its submissions the Respondent suggests that the present matter falls within the second category, being there is no explanation for the presence of pregabalin in The Hummer on both occasions.<sup>44</sup> Before this panel the Applicant conceded that this would be the only sensible conclusion on a finding that the environmental contamination argument could not be sustained by the evidence. That finding so made, the panel accordingly agrees this is a matter which falls within the second category.

[75] Here, the Panel takes into account the following mitigating factors:

- a) That Mr Donohoe is a very experienced harness trainer and driver; and
- b) The impact that a disqualification may have on the applicant financially and socially.

[76] Conversely, there are a number of relevant factors against the Applicant here, including:

- a) There being no early plea of guilty requiring a full hearing of all the evidence and issues;
- b) A significant past history of disciplinary action, including a number of prior positive findings for prohibited substances (despite those transpiring over a very long period of time they are still nonetheless a relevant consideration);
- c) The very high levels of pregabalin involved;
- d) The lack of any other substances being identified in either of the samples;

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<sup>42</sup> *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236 at [7].

<sup>43</sup> [2007] QDC 168, [69].

<sup>44</sup> Respondent's submissions dated 18 July 2023 at paragraph [62].

- e) The fact that no other horse from a number of trainers operating out of the same premises have returned a positive finding this season, including 14 winning performances from the stables of Mr Murray Thomas;
- f) That the substance, essentially being a neuropathic pain blocker, is likely to result in a horse performing better than it might have ordinarily, especially where some niggling injuries are apparent; and
- g) That the offences occurred at the State's premier harness track, namely Albion Park, which is well attended, advertised with betting occurring throughout the country.

[77] It is also noted that the Applicant only trains two horses.

[78] The Respondent has provided the panel with a comparative decision from Western Australia also involving the use of Pregabalin, by trainer Mr Ross Oliveri. In *Oliveri*, the Stewards relevantly noted that the substance was intended for human use and that there were no registered veterinary products containing pregabalin. This is similar evidence as given by Dr Flynn in this present case. Mr Oliveri was disqualified for a period of 6 months noting that other penalties involving human-use only medications had also resulted in disqualifications.

[79] The Applicant relied on two decisions of *Town* and *Sallis*. Turning to the matter of *Town*, the Stewards decided on 1 October 2013 that there were clear facts establishing environmental contamination in that case, including: -

- a) that the trainer was taking the same identified substance for a heart condition;
- b) that the trainer regularly urinated in the stable complex housing the said horse;
- c) that the bedding of the stables had not been changed for a lengthy period;
- d) that the substance involved, Sotalol, is excreted in urine unchanged and could therefore directly contaminate the bedding.

[80] In relation to the recent matter of *Sallis*, the Stewards were satisfied that the environmental contamination was the cause of the presence of the prohibited substance. The panel is of the view that each of the decisions relied on by the Applicant are distinguishable from the circumstances here.

[81] Other decisions noted by the panel include:

- a) *Lawlor v Racing Queensland Limited* [2012] QCAT 255 - one charge of elevated TCO2 - disqualification of 6 months confirmed;
- b) *Morrisey v Queensland Racing Integrity Commission* [2018] QCAT 161 - prohibited substance, cobalt, detected in a sample taken on race day. The trainer was found to be 'negligent in the limited extent of his enquiry into the contents of the product'. He cooperated '*fully and candidly*', entered a plea of guilty at the earliest available opportunity, and had an unblemished training record over a 50-year period. The offence was considered 'to be at the less serious end of the scale'. A penalty of suspension for 9 months suspended after 5 months for a period of 12 months was imposed.
- c) *Graham v Queensland Racing Integrity Commission* [2018] QCAT 198 - harness racing case involving elevated cobalt reading - 12-month suspension;
- d) *Weeks v Queensland Racing Integrity Commission* [2017] QCAT 345 - presentation of a horse with cobalt levels in excess of the allowable threshold. Though the trainer had other disciplinary history, it was at the lower end of seriousness and did not involve prohibited substances. A

period of disqualification for 6 months was ordered followed by suspension for a further period of 9 months, with that period of suspension fully suspended;

- e) *Doughty v Racing Queensland Limited* [2012] QCAT 678 - the Tribunal was satisfied that the prohibited substance was due to stable contamination of a medication given to another horse in the stables rather than direct ingestion. Court noted that it was not appropriate to disqualify Mrs Doughty from training in circumstances where this is her first presentation in where she has otherwise, for the past fifteen (15) years, managed her stables in a way which has resulted in a previously unblemished record;
- f) *Queensland Racing Integrity Commission v Scott* [2019] QCATA 121 - the individual was suspended for a period of twelve months for the presentation of a horse to race with Cobalt levels in excess of the threshold;
- g) *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236 - presentation of a horse with cobalt levels in excess of the allowable threshold; three separate charges, relating to different horses on different race days. High levels of cobalt were the result of one or more supplements or preparations being administered at levels collectively in excess of the manufacturer's recommendations. While it was not found that the presentation with the prohibited substances was deliberate, it was inferred that it was at least the result of a 'lack of due care'. Mr Hooper had a lengthy prior disciplinary history, including a previous prohibited substance conviction. A penalty was imposed of 12 months disqualification for each offence, three months of each offence to be served concurrently, giving an aggregate disqualification period of 30 months;
- h) *Xuereb v Racing Victoria Limited (Review and Regulation)* [2019] VCAT 473 - administering a prohibited substance, cobalt, that the trainer was unaware that the product in question contained cobalt. The product in question was found to be an unregistered product & obtained from an unauthorised dealer and was administered without any veterinarian advice. The details were not recorded in the treatment diary. A penalty of disqualification for 6 months was imposed;
- i) *Cole v Harness Racing Victoria* [2018] VCAT 1930 horse presented with cobalt levels in excess of the allowable threshold; The Tribunal accepted expert evidence that the reported treatment regime was unlikely to have resulted in the detected cobalt levels and that it was highly unlikely that it would have arisen from the cobalt concentration in the soil as asserted by the trainer. A similar hypothesis was raised by the Applicant here. While it was concluded that 'while no deliberate wrongdoing' was proven, the evidence does not discharge the onus the trainer had to prove reduced or absent culpability. A penalty of 12 months suspension of Mr Cole's trainer and driver licenses was imposed.

[82] Taking all the matters into consideration, pursuant to Section 252AH (1)(a), the Panel affirm the racing decision made by the Stewards of the two charges and the penalty by way of disqualification for six months for each charge respectively and order that they be served concurrently.

### **Statement under 252AH(3)**

[83] 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.*

[84] The Panel refers to the important 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. Imperative to meeting these purposes is racing animals being presented to race free from prohibited substances. To do otherwise clearly undermines the public's confidence in racing and significantly detracts from the integrity of the sport.

[85] 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***

[86] 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**

[87] **Charge One** - AHRR 190(1) the decision of the panel is to confirm the racing decision and the six-month disqualification imposed, commencing two weeks from the date of this decision.

[88] **Charge Two** – AHRR 190(1) the decision of the panel is to confirm the racing decision and the six-month penalty imposed, commencing two weeks from the date of this decision.

[89] The panel confirms the racing decision that the six-month periods of disqualifications be served concurrently.

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](http://www.qcat.qld.gov.au).