

APPEALS PANEL OF RACING NEW SOUTH WALES

APPEAL OF KAYLA McEWEN

Appeal Panel: **Mr R. Beasley SC, Presiding Member; Mr P. Santucci; Mrs J. Foley**

Appearances: **Racing New South Wales Stewards: Mr O. Jones of Counsel**
Appellant: Ms M Tilbrook, Solicitor, Tilbrook & Associates

Date of Hearing: 11 September 2023 (last submissions 27 November 2023)

Date of Reasons: 15 January 2024

Rules involved: AR 228(b)

REASONS FOR DECISION BY PANEL ON BREACH

The Panel

Introduction

1. On 7 June 2023, licensed Foreperson Rider Ms Kayla McEwen (the Appellant) was found by Stewards to have breached AR 228(b) of the Australian Rules of Racing in that she was found to have engaged in “improper conduct”.
2. The particulars of the charge brought against the Appellant were as follows:

“... she did engage in improper conduct at approximately 8:00 am on Saturday, 25 March 2023, in the vicinity of the tie up stall area at Moruya racecourse when she did, whilst mounted on the registered racehorse “Fifteen Black”:

- (i) Turn her mount in the direction of licensed stable hand Mr Andrew Petith, who was on foot, and ride her mount in an aggressive manner attempting to make contact with Mr Petith in an attempt to frighten/intimidate Mr Petith.
- (ii) Attempt to strike Mr Petith with her whip in a frustrated and aggressive manner.”

3. The Appellant pleaded not guilty to breach of the rule but was found guilty by the Stewards. They imposed a penalty of a suspension in full of the Appellant's foreperson's licence for a period of two months.
4. The Appellant lodged an appeal to the Panel on 7 June 2023 challenging both the finding of breach of the rule, and the severity of the penalty imposed upon her.
5. The Appeal Hearing took place on 11 September 2023. The Appellant was represented by Ms M. Tilbrook, her solicitor, while Racing New South Wales was represented by Mr O. Jones of counsel. Oral evidence was given by a number of witnesses, and the transcript and exhibits from the Stewards' Inquiry were tendered. The last of the parties' written submissions was received on 27 November 2023.
6. The evidence in this appeal is of two conflicting versions of an incident that occurred on the morning of 25 March 2023 at the Moruya Racecourse. The Appellant denies the essential elements of the particulars of the Charge. She and Mr Petith agree there was some degree of animosity between them prior to the incident. They agree that after Mr Petith wished licensed trainer Mr C Hensler a happy birthday that morning as Mr Hensler was legging the Appellant onto Fifteen Black, some terse words were exchanged. Thereafter their versions of events differ. The Appellant says Mr Petith grabbed the reins of the horse, and then threw hot coffee over her and the horse. Any action she took on the horse was to get free of Mr Petith's grip. She swung her whip at him, but only in "self-defence". Mr Petith denies grabbing the horse's reins. He says the Appellant drove the horse at him, and forced him back about 30 metres. She swung the whip at him, but missed. Coffee was spilt, but accidentally, and caused by the Appellant's actions.
7. Set out below are the Panel's findings in relation to this incident and the appeal against breach.

Evidence

Mr Andrew Petith

8. Mr Petith signed a written statement on 15 May 2023 (Exhibit 1). The Panel has also had regard to Ex 13, 14, 15 and 17). In that statement he indicated that at about 8:00

am on 25 March 2023, whilst near the tie up stalls, opposite the race day swab box at Moruya Racecourse, he wished licensed trainer Mr Chris Hensler a happy birthday. This occurred while Mr Hensler was legging the Appellant aboard the horse Fifteen Black. He said the Appellant told him to “fuck off” in a loud voice. He described a previous incident which may have given rise to some animosity between himself and the Appellant. He said that after a brief discussion with the Appellant that:

“Instead of turning the horse to the right and the direction to do her track work duties, she propelled her horse forward using a forward action with reins, arms and hands with a kicking motion using both legs. Kayla said: ‘Get out of my way you piece of shit’”: Exhibit 1 at [12].

9. Mr Petith said he was holding a paper cup that contained a couple of mouthfuls of “cold coffee” which was:

“... projected onto the horse and rider, crushing the paper cup into my hand as the horse was driven into my chest, pushing me backwards in a weaving motion from left to right to left through the use of the riders reins for approximately 30 metres”.

He then said that the Appellant:

“... raised her whip slightly holding it in a manner that suggested she was going to hit me with it ... I feared Kayla was going to hit me with her black whip.” Exhibit 1 at [13].

10. Mr Petith gave evidence at the Stewards’ Inquiry held on 7 June 2023. That evidence was generally consistent with his written statement. He denied grabbing the reins of the horse when this was put to him: Stewards’ Transcript (ST) 7.280-284. He suggested again that he was driven backwards by the horse being ridden at him by the Appellant for about “30 metres”: ST-8.318. He stated that the coffee that was spilled on the horse and the Appellant during this incident was cold because it had made well before 8:00 am. At the Appeal hearing he again denied that he grabbed the horse’s reins or deliberately threw coffee over the Appellant or the horse: Appeal Transcript (AT) AT-22.1060-1064. He conceded that coffee went over the Appellant and Fifteen Black but denied that this occurred because the Appellant was trying to disengage the horse’s reins from Mr Petith’s grasp: AT-26.1274-.1280. He again suggested that in the course of the incident he was driven back by the horse “30 or 40 metres”: AT-27.1285-1290.

The Appellant

11. In an interview conducted on 21 April 2023 by Racing New South Wales Investigator Mr Aaron Chalker, the Appellant agreed that on the relevant morning when Mr Petith wished Mr Hensler a happy birthday she did say words to the effect “under my voice, ‘for fuck’s sake’”: Exhibit 2, page 2 line 95. Her description of the incident was that Mr Petith grabbed the horse’s reins and said words such as “what did you fucking say?” She then told him to “fuck off”, and he then threw hot coffee over her and the horse: Exhibit 2, line 100-115. She agreed she spun her horse towards Mr Petith and swung her whip at him: Exhibit 2, line 114, 115.
12. She said the coffee landed on her waist and thigh as well as the horse’s neck and caused a red mark on her leg: Exhibit 2, line 130-140. Whilst conceding she swung her whip at Mr Petith, she confirmed that she missed him: Exhibit 2, line 241-244.
13. In her evidence at the Stewards’ Inquiry the Appellant gave some elaboration of what she says was said by her and Mr Petith, both before and after he grabbed the horse by the “nearside rein”: ST-71.3255-3260. She asked him to leave her alone, which is when the Appellant says he threw coffee at her and the horse. She wanted to take a “swing at him with my whip” because he had burnt her and the horse with the coffee: ST-72.3274-3277. She said she was trying to “pull the rein out of his hands”, that Mr Petith had hold of the left rein, that she was trying to get herself free and that she “did have every intention of taking a swing”: ST-73.3313-3316. She tried to get him in the head with the whip, but she missed: ST-74.3379-3396. She told the Chairman of Stewards that she would “like to believe” that the coffee part of the incident was an accident, but doesn’t: ST-76.3461. While she did not mention this in her interview that is Exhibit 2, at the Stewards’ Inquiry the Appellant suggested that some of the coffee “splashed on [her] face”: ST-76.3485.
14. After being charged by the Stewards and pleading not guilty, the Appellant suggested that “it may have looked like I was going towards him but the horse was actually running away from him, which I stated before, and I was just trying to get the horse forward”: ST-92.4207-4210.

15. At the Appeal Hearing, the Appellant was challenged as to whether Mr Petith had at any stage grabbed hold of the horse's reins. The focus of this challenge was that it was put to her by Mr Jones that it would be extremely difficult for Mr Petith to use his left hand to pull the horse to the nearside if he was holding the left side rein: AT-87.4319-89.4410. She agreed in cross-examination that she had taken a swing at Mr Petith with her whip to get him to let go of the horse: AT-92.4563-4568. She agreed that this was not appropriate: AT-93.4599-4602.

Licensed Trainer, Mr C. Hensler

16. In his interview with Mr Chalker conducted on 14 April 2023, Mr Hensler said that Mr Petith had "thrown a cup of coffee over" the Appellant and horse: Exhibit 3, line 98-100. He said he "witnessed" the throwing of the coffee: Exhibit 3, line 143-149.
17. At the Stewards' Inquiry Mr Hensler said he heard the Appellant and Mr Petith arguing, but somehow managed to not see any relevant part of what occurred. He told the Appellant to get the horse out on the track, while still managing only to hear part of an argument but not see any part of the incident alleged in the Charge. Mr Hensler also stated in his evidence at the Stewards' Inquiry that, contrary to what he said in Exhibit 3, he did not see Mr Petith throw coffee over the Appellant: ST-42.1900-1910. He confirmed in his evidence that rather than seeing this incident, it was "reported to him": ST-44.1994-2003; see also ST-45.2060-2062. Following this, Mr Hensler then seemed to become confused as to whether he had seen anything in relation to the coffee or not. He said: "I'm not sure about that, whether I saw it or not, no ... well that incident was related to me probably": ST-45.2087-2108.
18. At the Appeal Hearing, Mr Hensler's evidence was that he had not seen any coffee thrown. He again confirmed he heard the argument. He said that he "yelled at Kayla to get out on the track. She seemed to be mucking about": AT-71.3510-3513. He said in cross-examination that he did see Mr Petith under the horse's neck, although he was 20 metres away: AT-73.3590-3594. When asked what he meant by saying that the Appellant was "mucking about", Mr Hensler said: "She seemed to be dithering with the horse about where Petith was and I said: "Get out on the track": AT-73.3616-3618.

Evidence of Ms Maddison Wright, Licensed Track Work Rider

19. In an interview with Mr Chalker, conducted on 14 April 2023, Ms Wright said that she saw the Appellant “chasing [Mr Petith] with her horse” and heard the Appellant say to Mr Petith “Don’t throw coffee at me you cunt” in very aggressive terms: Exhibit 5, lines 85-91. She also gave the following evidence:

“Initially, she rode the horse towards him to run him over but then when the horse wouldn’t run him over because they’re trained not to run people over, yeah, she circled around him and that’s when – after she had a go, and then left, yeah.”: Exhibit 5, lines 163-165.

20. Ms Wright gave evidence consistent with her statement at the Stewards’ Inquiry, and at the Appeal Hearing. At the Appeal Hearing Ms Wright said that she

“... saw Kayla’s horse charging toward Andrew Petith ... It was walking very, I don’t know what you would call it, but I would call it as someone sooling their horse to try and run someone over. That’s what I would call it.”: AT-54.2669-2679.

21. She felt that Mr Petith was distressed after the accident rather than being angry or in a state that could be described as rage. She said “he had tears in his eyes and shaking”: AT-59.2916.

Other Witnesses

22. Licensed trainer Mr Kevin Cassidy was interviewed by Mr Chalker on 14 April 2023 and gave evidence. Mr Cassidy, however, did not see the incident and whilst we have considered his evidence, it is not directly relevant to the resolution of whether the particulars of the charge are made out.

23. Licensed trainer Mr M. Gee also gave evidence. Mr Gee’s did not witness the incident. The main relevance of Mr Gee’s account was the evidence of the usual stable practices in the morning being consistent with Mr Petith’s coffee no longer being hot by the time it came in contact with the Appellant. But Mr Gee accepted in evidence before the Panel that he could not be sure on the day whether Mr Petith had one or two cups: AT 49.2397

24. Licensed trainer Lynne Morrison also gave evidence, and although she was not present said that the Appellant describe the incident to her, including having the hot coffee

thrown over her. She said the Appellant had “quite a burn and complained of stinging”. There is no evidence of this burn requiring treatment from a medical professional. Ms Morrison encouraged the Appellant to have Mr Petith charged with assault or to make a complaint: ST-86.3900-3933. Shortly after Ms Morrison gave evidence, Ms McEwen confirmed at the Stewards’ Inquiry that “the coffee wasn’t a stinking hot freshly made coffee, so it didn’t severely burn me”: ST-88.4205-4206.

25. Ms Morrison’s evidence before the Appeal Panel was that in respect of the coffee making contact with the Appellant Ms McEwan had “*tried to pass it off as an inconsequential matter*” and that she had fair or sensitive skin and that Ms Morrison had excepted the Appellant’s explanation at the time: AT 76.3754-3759

Reports of Mr Graham Baxter

26. A report was prepared by Mr Graham Baxter dated 26 July 2023 on behalf of the Appellant, as well as a Supplementary Report dated 14 August 2023. Mr Baxter was a detective in the New South Wales Police Force between January 2007 and February 2022. Mr Baxter’s expresses a number of opinions in his reports, including that the particulars in the charge brought under the Rules of Racing are in his view particulars of a criminal offence entitling Ms McEwen to claim a privilege against self-incrimination. Allegations are made concerning alleged inadequacies of the investigation conducted by the Racing New South Wales Stewards. In his report Mr Baxter reached the conclusion that the investigation “departed from reasonable and objective standards for civil investigations, let alone an investigation into conduct which constituted a serious indictable offence”: Baxter report 26 July 2023 at [18]. It was asserted that the Racing New South Wales Investigators and Stewards denied the Appellant procedural fairness.
27. Many of the matters raised by Mr Baxter in his report have been addressed in previous Rulings by the Panel and will not be repeated here. The Panel is an administrative decision-making body, not a court determining judicial review proceedings or hearing criminal cases. It is no objection to the power conferred upon an administrative decision-maker or administrative body that it may be necessary as a step in the decision-making process to consider and determine facts which establish that person has committed a crime: *ACMA v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352.

28. More importantly, as stated in those previous rulings, the Appeal is a hearing de novo, where fresh evidence may be allowed, and the Appellant had an opportunity to present any evidence she wished and test any evidence advanced by the Stewards. Following earlier procedural rulings certain of the investigating Stewards remained available to be questioned if the Appellant was able to explain why and how such a line of questioning would assist her case in light of the de novo hearing before the Panel. The Appellant ultimately chose not to pursue any such application nor did she indicate at the hearing that any part of her appeal was prejudiced as a result. It was simply not correct to say, as the Appellant submitted in writing that: “*Despite multiple requests of Racing NSW no stewards or investigators were made available for questioning*” (AWS at [9]).
29. Admirably, the Appellant’s representative Ms Tilbrook narrowed her presentation of the case on the issues addressed in the Baxter report. Ultimately, Mr Baxter’s reports were not tendered and do not constitute evidence in the Appeal. It was agreed that they would be treated as a form of submission.
30. Although little ultimately turns on it in respect of the Panel’s reasons regarding breach, we reject the submission (made by way of the Baxter report) that any of the medical documents in respect of Mr Petith’s consultations were forgeries. The weight to be given to those documents is a matter of greater relevance on sentencing.

Submissions

Racing New South Wales Stewards

31. There seems to be no dispute that the term “improper conduct” in AR 228(b) requires a determination as to whether the conduct complained of “was in all of the circumstances not in accordance with acceptable standards” having “regard to the reasonable person’s assessment of the facts and circumstances”: *Morris v Harness Racing New South Wales* RAT 30 March 2022.
32. As to what can be described as “the incident” that occurred between the Appellant and Mr Petith, the Stewards submit that Mr Petith’s evidence should in general be preferred to that of the Appellant. His denial of grabbing the reins should be accepted, and they point to the absence of evidence of this having occurred from any other witness other

than the Appellant, and the difficulty of Mr Petith being able to grab the nearside reins with his left hand in circumstances where he was on the nearside of the horse: Stewards' written submissions (SWS) at [16(c)].

33. The Stewards also submit that a finding should be made that Mr Petith did not deliberately throw coffee over the Appellant. Again, they point to the difficulty of Mr Petith deliberately throwing coffee on the Appellant in circumstances where he was, according to the Appellant, standing directly next to the horse grabbing its reins: SWS at [18(b)].
34. The Stewards note the admission by the Appellant that she swung her whip at Mr Petith. They note that she did not raise any element of self-defence when interviewed by Mr Chalker on 21 April 2023. The Stewards ultimately submit that regardless of any of the other circumstances, the admission by the Appellant of swinging her whip at Mr Petith's head is enough to sustain the charge.
35. As to the incident generally, the Stewards point to the evidence of Ms Wright, whose evidence was that the Appellant rode (or to use Ms Wright's description, "sooled") the horse towards Mr Petith to run him over. They submit that there is no reason for Ms Wright not to be accepted as a credible and reliable witness.

Appellant's Submissions

36. Amongst other submissions, it is submitted that the Panel should infer that Mr Petith did grab the reins of the horse. This is supported, it is said, by the fact that the Appellant and Mr Petith were arguing and that the horse took some time to get out onto the track. It is submitted that there are doubts about Ms Wright's evidence to the extent that she did not see any incident regarding coffee, but did hear the Appellant say words at the time that would be consistent with an immediate complaint of coffee having been thrown on the Appellant, and Mr Petith admits that coffee did spill (albeit accidentally) onto the Appellant and the horse. It is also noted that there is no evidence to support the contention of Mr Petith that he was driven backwards by the horse for approximately 30 metres: Appellant's written submissions (AWS) at [57].

37. As to the coffee incident, the Appellant notes that Mr Petith concedes that coffee did spill onto the Appellant and the horse, and there was evidence of some redness on the Appellant's waist. It is further suggested that the Panel should accept the evidence that Mr Hensler gave when interviewed that he saw Mr Petith throw the coffee over the Appellant and the horse, rather than his later retraction, when it was said that he was the subject of an "acrimonious cross-examination" by the Chairman of Stewards Mr Walshe: AWS at [64].
38. Importantly, in respect of the timing of the coffee incident it was submitted that if the Panel accepted Ms Wright's evidence of what she had seen (which did not include the coffee spill), the Panel could not accept Mr Petith's version of events that had the coffee being spilled while he was being charged (on his account) for 30 metres: AWS at [59]. That is a matter to which we return and a submission we partially accept.
39. It is ultimately submitted that the Panel should find that Mr Petith's version of events is a "fabrication": AWS at [59]. This, at least in part, is based on a submission that the evidence of Ms Wright should be rejected as "speculation" when it comes to what she said she saw in relation to the Appellant riding the horse or driving the horse aggressively towards Mr Petith: AWS at [38]. This seems to be based on a submission that Ms Wright was unfamiliar "with the personality traits of Fifteen Black, nor did she know his issues": AWS at [37].

Findings and Resolution

40. One aspect of this matter that can be resolved immediately, prior to making findings in relation to the particulars of the Charge, relates to the evidence of Mr Hensler. As mentioned above, when Mr Hensler was interviewed by Mr Chalker, on more than one occasion he gave evidence of having seen Mr Petith throw coffee over the Appellant and the horse. When asked about this at the Stewards' Inquiry, he indicated he had not seen this occur. He then seemed to become confused at least in his own mind as to whether he had seen the incident or not. His final position seems to be that he did not see Mr Petith throw coffee, either over the horse or the Appellant.

41. The Appellant submits that his earlier evidence should be accepted, and the Panel should somehow ignore Mr Hensler's evidence at the Stewards' Inquiry because it was, on the Appellant's assertion, the subject of an "acrimonious cross-examination".
42. The submission that Mr Hensler was subjected to an "acrimonious cross-examination" by the Chairman of Stewards is nonsense. He was responsibly asked pertinent question about a very serious accusation that a licensed person had deliberately thrown hot coffee over another licensed person, and a racehorse. He is an adult with long experience as a license person. The idea that he was in some way pressured, intimidated or coerced into giving entirely contradictory evidence of a serious incident because he was tested about it by the Stewards is fanciful, and unsupported by the transcript.
43. It is clear to us that on the occasion that he was interviewed by Mr Chalker, Mr Hensler was untruthful when he told Mr Chalker that he had seen Mr Petith throw coffee over the horse and the Appellant. It is commendable that Mr Hensler subsequently resiled from this position. But no satisfactory explanation was offered for why Mr Hensler gave that evidence before the Stewards in the first place.
44. As to the incident particularised in the Charge, there are some aspects of Mr Petith's evidence that we do not accept. It seems that he has either exaggerated or been significantly confused as to how far he was driven backwards by the horse. Whatever it was, it was not 30 metres. Moreover, given that it is accepted by all parties that some coffee ended up on the Appellant but that Ms Wright having witnessed the events that constituted Charge 1 admitted that she had not seen any coffee spilled, it appears to the Panel, that the coffee may have come into contact with the Appellant earlier in time. That is to say closer to the time when Mr Petith had been told to "fuck off" but before he had commenced walking away. But we are satisfied that the coffee was either cold or not hot enough to scold the Appellant or spook the horse, and that contrary to the Appellant's submission (AWS at [23]) the coffee was not thrown in her face.
45. Moreover, and in any event, even if it had been thrown by Mr Petith at the Appellant it did not justify, or explain the subsequent actions of the Appellant as "self-defence". Those actions were not immediate and part of the same simultaneous sequence of events they could not be explained by a genuine need by the Appellant to "defend" herself

from the coffee. Rather we address further below our findings in respect of the Appellant's intention in riding her mount in the manner she did.

46. We are satisfied that those inconsistencies in Mr Petith's evidence can be explained by the chaotic nature of the events and do not undermine the central findings that are relevant to the charges against the Appellant. Those charges can be made out on the evidence of Ms Wright, and the admissions of the Appellant alone.
47. As to Particular (i) of the Charge relating to whether the Appellant rode her mount in an aggressive manner in an attempt to either make contact with Mr Petith or to frighten or intimidate him, we consider that the evidence of Ms Wright should be accepted. That is, the Appellant, having had an aggressive verbal exchange with Mr Petith in relation to which they both played a part, and coffee may have been spilled or even thrown onto the Appellant, she did ride her horse in an aggressive manner towards Mr Petith in an attempt to either make contact with him or to frighten him. Ms Wright described this as a sooling of the horse towards Mr Petith. We are completely satisfied that Ms Wright was a truthful and reliable witness, who was careful to state those matters about which she could not be certain but which were not essential to any of the charges (for example whether the horse had in fact made contact Mr Petith: AT 55.2705-2709).
48. We consider then that the incident that occurred was generally that described by Ms Wright. In particular Ms Wright's evidence was clear that the Appellant rode the horse towards Mr Petith in a manner that was consistent with intending to intimidate him and at a pace that was consistent with the concession of the Appellant as fast walk to a trot (AT 98.4822-4830). Ms Wright had explained that riders would normally just walk their horse out of the area (AT 60.2949)
49. Ms Wright explained her observation of the events while accepting she had not witnessed anything to do with the coffee incident (AT 56:2766-2769):

M. WRIGHT: I can see that the horse was distressed with what I witnessed, yep. I didn't see the coffee incident, but I can definitely see a horse getting kicked and a horse getting pulled in whichever direction.

50. Before the Panel the Appellant's explanation was that she was simply trying to encourage her horse to go forward after it had taken "*two or three steps backward*":
AT 96.4720- 4729

so I just kept going forward up past him and then I went to clean the wash bays and the tearoom and out the other gate rather than try and turn the horse around when I'd just got the horse in a forward manner. So by that stage my only concern was now I've got the horse going back forward, I've just got to get the horse out on the track and get him worked. So yes, I was upset about the incident but I dropped the anger. All I was concerned about was getting the horse forward before anything else happened.

51. And further at lines 4734-4738:

I was upset and angry at the time he threw the coffee on me, yes, but then as soon as I realised the situation was diffused and I had an option to push the horse forward for my and the horse's safety, I took that option, which happened to be in the same direction as him but he was a couple of metres away from him and I did not once get close to him.

52. We do not accept that explanation. The Appellant explanation was tested in cross-examination as to whether she remained angry with Mr Petith at this time. The exchange was as follows 4758-4812:

Mr JONES: You knew, Ms McEwen, that Mr Petith was in front of you at this stage, didn't you?

APPELLANT: He was in front, yeah, but he was also by this stage a metre to my right. A metre or a couple of metres to my right. He was nearly at the tearoom and I was a couple of metres behind him and a couple of metres further around to the right, which is why I didn't have enough room to turn the horse around and why it was the option to keep going up past him. At all times by this stage he was no closer than two metres to my, slightly in front of the horse, slightly to the side. He was up against the building. By the time he got to the corner of the building closest to the wash bay I would have been level with him. He stopped and waited there and I went another four, five strides forward and went out the other gate.

Mr JONES: You were chasing him with the horse, weren't you?

APPELLANT: No. I was trying to get my horse forward so that it didn't flip over backwards.

Mr JONES: And at one stage you said, "Get out of the road cunt", is that right?

APPELLANT: No. My words to him were as I got the horse forward, I said "If you ever throw coffee over me and a horse again, I will get off and level you, you cunt." That was my words.

Mr JONES: When did you say that?

APPELLANT: That was as I was trying to get the horse going forward when I got the horse forward past him.

Mr JONES: So were you angry again at this stage?

APPELLANT: Not overly. I was just voicing my opinion.

PRINCIPAL MEMBER: Is that something you normally say when you're just voicing your opinion?

APPELLANT: Ah, yes. I have been known to have a very colourful vocabulary at the track.

Mr JONES: Ms McEwen, you're saying you weren't angry because you know that's consistent with you directing this horse towards Mr Petith, correct?

APPELLANT: I wasn't angry. Look, I was probably angry, but my focus was getting the horse forward and, yes, I made a smart-arse comment towards the bloke as I passed him.

Mr JONES: You were still angry at him because you were still swearing at him?

APPELLANT: I'm still angry at him today for putting me at risk.

Mr JONES: And so it's not right that you just completely forgotten about him at that stage, had you?

APPELLANT: Well, I hadn't completely forgotten about it, but my focus had changed on just getting the horse to go forward.

53. We find that the Appellant remained angry with Mr Petith and that is what motivated her to turn her mount in the direction of Mr Petith and ride in an aggressive manner and raise her whip in an aggressive manner. The Appellant's own words confirm an intimidatory intention was threatening to "level you you cunt" if coffee were ever thrown again. Those words could not be mistaken for a mere "*smart arse comment*", nor could they be passed off as colourful language that may be used sarcastically between friends or acquaintances without an intention to wound. Rather in the context of the Appellant's dislike for Mr Petith we find that the words reveal the Appellant's anger, and demonstrate her conduct was intended to frighten or intimidate Mr Petith.

54. We do not accept the Appellant's assertion that Mr Petith grabbed the horse's reins. This would have been difficult to do in the manner described by her for the reasons outlined by the Racing New South Wales Stewards in their submissions.
55. As to Particular (ii), the Appellant has admitted that she attempted to strike Mr Petith with the whip on his head. We consider that this was clearly done in an aggressive manner, probably in anger and is a concluding part of her sooling the horse towards Mr Petith. We do not consider that this was done in circumstances that could remotely be described as self-defence, nor for that matter was the Appellant's actions in riding the horse aggressively towards Mr Petith done in self-defence.
56. In the circumstances, we are comfortably satisfied that the facts alleged in the particulars of the Charge are made out. A reasonable person would certainly take the view that this conduct of the Appellant was "improper" (see [31] above). It is clear that the Appellant intended to use her mount to intimidate Mr Petith. While we consider the Appellant to be someone who is generally concerned for the welfare of racehorses, and an accomplished horsewoman, she must accept that the necessary consequence of her actions was to subordinate the welfare of the horse, and those around her to the whims of her own personal dislike for a fellow participant in the racing industry. That conduct has no place in the racing industry and amounts to something improper. It must be appropriately sanctioned in due course which we will consider separately.
57. The Appeal against the finding of breach or AR 228(b) is dismissed and breach of the Rule is confirmed.

Penalty Appeal

58. The Appellant has also appealed against the severity of the penalty imposed upon her. The Panel makes the following comments in relation to that:
- (a) Our current view is that the Panel would not be assisted by oral submissions in relation to penalty. Instead, we intend to make an order for limited written submissions. We will, however, grant leave to either party to make a short written submission to the Panel as to why oral submissions should be allowed.

(b) There is currently a stay of penalty. That stay should remain in place until determination of the Penalty Appeal. That is because whilst the Panel has formed no view whatsoever as to the appropriateness of the penalty or otherwise, it is at least arguable that the Panel could impose a lesser penalty, which might include a suspension of all or part of the suspension, or instead impose a fine. While a possible outcome of the Penalty Appeal is that the Appeal could be dismissed, in circumstances where it is arguable that a lesser penalty could be imposed by the Panel, we consider it appropriate for the stay to remain in place until a final decision is made.

59. Final Orders in this Appeal will be made when the Penalty Appeal is resolved. In the meantime, we make the following Orders:

- (1) Appeal against finding of breach of AR 228(b) dismissed.
- (2) Finding of breach of AR 228(b) confirmed.

As to the Appeal against severity of penalty:

- (3) The parties to exchange and file with Racing New South Wales written submissions on the Penalty Appeal within fourteen (14) days of the date of these Orders. Those submissions should be limited to no more than 10 pages.
- (4) Should the Appellant seek to tender any character references or any other documents in support of her Penalty Appeal, they should be supplied with the written submission with the request that they be admitted into evidence.
- (5) Should either party consider that leave should be granted by the Panel to hear oral submissions on penalty, that application should be made in writing, limited to three pages, and be provided to the other party and filed with Racing New South Wales within seven (7) days of the date of these Orders.