RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTERS OF ALEX KEAN & CHYNNA MARSTON

REASONS IN RESPECT OF SUBSTANTIVE CHARGES

Appeal Panel:	**Mr P F Santucci – Convenor**
	Ms J Foley
	Mr J Rouse
Appearances:	**Stewards: O Jones**
	Appellant: V M Heath
Date of Hearing:	**29 – 30 May 2025 (substantive hearing)**
	27 June 2025 (submissions from Stewards), numerous extensions granted to Appellants to file submissions after hearing until 5 December 2025 but none filed.
Date of Reasons:	**18 May 2026**

REASONS FOR DECISION

Table of contents to these reasons

A INTRODUCTION AND OVERVIEW....3
B JURISDICTION....5
B1 Statutory foundation of the powers of RNSW....6
B2 Contractual basis for the powers of RNSW....9
B3 The retired horse objection....12
B4 The Panel's jurisdiction based on the facts of the present appeals....14
B5 Evidentiary objection: attendance at the property on 1 June 2023 without permission....15
C HORSES IN THE POSSESSION, CONTROL OR CUSTODY OF THE APPELLANTS....17
C1 Overview....17
C2 Ms Marston's involvement and the Horse Agistment Agreement....18
C3 The salmonella infection of *Belle*....20
C4 The condition of the horses as inspected in June 2023....21
C5 Charges 2 failure to provide veterinary treatment Feb-March 2023....23
C6 Charges 1 malnutrition 27 March 2023 – 5 June 2023....24
C7 Charges relating to failure to comply with directions on 5 August 2023....25
C8 Charges relating to failure to arrange access on 8 and 9 August 2023....26
C9 Charges relating to failure to attend the Stewards Inquiry....27
D Ms MARSTON - *BUDEROO DRAGON & FRANKENBEANS*....27
E Mr KEAN AND *REAL REAL GONE*....31
F CONDUCT PREJUDICIAL....31
G CONCLUSION....32

A INTRODUCTION AND OVERVIEW

1. **The Panel:** These are reasons for the Panel's determination of two separate appeals relating to Mr Alex Kean, and Ms Chynna Marston. The two matters were heard concurrently because of an overlap of some factual matters common to both.

2. On 22 August 2023, Chyna Marston and Alex Kean were found guilty by the Stewards of various charges principally concerned with the welfare of thoroughbred horses which were held to be in their care and agisting in 2023. The charges related to the welfare of these horses following on from an earlier outbreak of the Salmonella virus at their location. Ms Marston was also found guilty of two other charges related to the welfare of two horses in 2017/2018. Mr Kean was also found guilty of one other charge of having euthanised a thoroughbred horse without the prior approval of a veterinary surgeon or Racing NSW, and having euthanised a horse failing to obtain confirmation from a veterinary surgeon that euthanasia had been necessary, and failing to advise Racing NSW that the horse was deceased.

3. With respect to the central charges common to both Appellants, which concerned up to twelve horses, these horses and others were held to be in the custody, or under the care of, Ms Marston and Mr Kean at either 216 and 257 Stadtmillers Lane, Bowning, NSW. The first property was leased by the Appellants as part of their partnership known as "Empire Park", and the second property was owned by them. The horses were all thoroughbred racehorses that had been registered for racing and had been retired, or were eligible to be registered for racing or breeding.

4. The Appellants claim that the majority of the horses are owned by a registered charity known as Recycled Racehorses Ltd, or another person, and in either case not owned by Ms Marston or Mr Kean. The Stewards contended that Mr Kean (including because he was a director) was closely involved with day to day running of the charity. Before the Stewards there was evidence that Ms Marston founded the charity, had previously been a Director and in 2023 was acting as a volunteer helper. Both Ms Marston and Mr Kean owned registered racehorses, and Ms Marston was employed by Sky Racing.

5. The Stewards determined that both Ms Marston and Mr Kean were subject to the Australian Rules of Racing. On 6 September 2023, the Stewards imposed total periods of disqualification of 7 years on Ms Marston and 6 years on Mr Kean. By this Appeal, Ms Marston and Mr Kean challenge the jurisdiction of the Panel to deal with the charges, the findings by the Stewards of guilty and the severity of the penalties imposed.

6. The procedural history of this matter began with a preliminary hearing on jurisdiction in 2024, at which point it was determined that there was a sufficient prima facie case for the matter to proceed to a hearing, but without prejudice to the Appellants taking any jurisdictional points.

7. The matter was set down for hearing in December 2024, and when the appointed day for the hearing arrived, the Appellants through their counsel brought a challenge to the Panel sitting on the balance of perceived bias. That application was heard, and reasons were published dismissing the bias application in January 2025.

8. The matter was then supposed to be being readied for hearing. Unfortunately, due to several delays by counsel for the Appellants the matters could not be heard before May 2025. Following the hearing, time was provided for the filing of written submissions after review of the transcript.

9. Written submissions were received from the Stewards dated 27 June 2025.

10. No submissions were received by the Appellants after the hearing. Several applications for an extension were granted (although sometimes only after prompting from the Panel). A final extension was granted to 5 December 2025, after which the Panel stated that it would determine the matter on the basis of the material it has before it.

11. Given that no written submissions were filed after the hearing, the work of the Panel in trying to understand the Appellants' case is made more difficult. That is regrettable in the present case where both the legal issues as to jurisdiction, and the factual issues on liability are extensive.

12. We have now considered the extensive appeal books, the material tendered at the hearing, including earlier schedules and written submissions provided by both parties, on jurisdiction and liability, and the transcript.

13. For the reasons that follow we are of the view that the Panel has jurisdiction in respect of both Appellants. The Panel was satisfied that Mr Kean was exercising control over the horses by means of his day to day involvement with the horses and his running of the charity Recycled Racehorses.

14. Ms Marston put that point in issue on the basis that she had stepped down as a director, and since 2021 had in place a Horse Agistment Agreement in respect of 257 Stadtmillers Lane by which she disclaimed responsibility for the condition of the horses agisting on that property.

15. As we explain in **Part B**, and **Part C2** below we are satisfied that Ms Marston had the control of the horses of the horses for the purpose of LR114 in the first half of 2023 despite the Horse Agistment Agreement. However, Ms Marston's culpability for the charges in respect of those horses is likely to be diminished by reason of those arrangements.

16. Separately, however, we have found that Ms Marston was in possession, custody, or control of two other horses *Budderoo Dragon*, and *Frankenbeans* over a period in late 2017 and early 2018 in which period we have found her guilty of charges of failing to provide proper nutrition and veterinary treatment: see **Part D.** Those matters occurred before the interposition of the Horse Agistment Agreement, and for that reason it will have no effect in reducing Ms Marston's culpability. But those are matters upon which we will hear further submissions as to penalty.

17. As will be apparent in **Part B4, and Part C** below, by resolving the jurisdictional question primarily on the basis of control of the horses it has not been necessary to review the ownership of each horse, nor the relevance of other activities connected with racing (such as Ms Marston's role as a television presenter) as a basis for jurisdiction.

18. As explained below, for the most part we are satisfied that the Stewards have established their case on the charges against the Appellants, save for Charges 2 in respect of which the appeal has been partially upheld for both Appellants, and Charge 5 against Ms Marston: see our conclusions in **Part G**.

B JURISDICTION

19. The substantive issue involves several charges against the rules of racing, but the significant factual overlap between the cases relates to charges against LR 114(2)(a) in which it is alleged that both Mr Kean and Ms Marston failed to provide sufficient nutrition to horses (being "Eligible Horses, Unnamed Horses and Named Horse") in the possession, control or custody of Mr Kean and Ms Marston.

20. The Appellants were represented by Ms V M Heath of counsel who submitted the actions taken by the Stewards are outside their jurisdiction. A corollary of that submission is that the Appellants submit the matter is beyond the jurisdiction of the Panel. The Appellants refer to the fact that neither of them are licenced persons, that the horses the subject of the allegation were allegedly "*owned and controlled by Recycled Racehorses Ltd and other third parties"*: AS [15]. The Appellants say it is for Stewards to establish how they have jurisdiction to investigate these matters.

21. A directions hearing was convened in this matter and directions were made on 13 December 2023 requiring the parties to exchange written submissions in respect of the jurisdiction of the Panel, and in respect of Ms Marston an application in which Ms Marston would either attempt to prove that the application was filed in time or would seek leave for the appeal to be heard out of time.

22. The Panel received helpful written submissions from the parties in respect of jurisdiction.

23. The Panel accepts that its first duty is to be satisfied of its own jurisdiction.

B1 Statutory foundation of the powers of RNSW

24. Racing New South Wales (**RNSW**) is established by statute, and accordingly the starting point for the analysis is the functions and powers of RNSW set out in sections 13 and 14 of the *Thoroughbred Racing Act 1996* (NSW). The relevant parts of the Act are as follows:

> **3 Definitions**
> (1) In this Act -
> **…**
> **Australian Rules of Racing** means the Australian Rules of Racing as adopted by the Australian Conference of Principal Racing Clubs.
> **exercise** a function includes perform a duty.
> **function** includes power, authority or duty.
> **Rules of Racing** means the rules for the time being governing and relating to horse racing under the control of Racing NSW (being an amalgamation of the Australian Rules of Racing and the local rules of racing of Racing NSW, together with the regulations made under those rules).
>
> **13 Functions of Racing NSW**
> (1) Racing NSW has the following functions—
> (a) all the functions of the principal club for New South Wales and committee of the principal club for New South Wales under the Australian Rules of Racing,
> (b) to control, supervise and regulate horse racing in the State,
> …
> (c) to initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the horse racing industry in the State and the protection of the public interest as it relates to the horse racing industry,
> …
> (e) such functions as may be conferred or imposed on Racing NSW by or under the Australian Rules of Racing or any other Act,
> (f) such functions with respect to horse racing in New South Wales as may be prescribed by the regulations.

14 Powers of Racing NSW

(1) Racing NSW has power to do all things that may be necessary or convenient to be done for or in connection with the exercise of its functions.

(2) Without limiting subsection (1), Racing NSW has power to do the following—

…

(b) register or licence, or refuse to register or licence, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, stablehand, bookmaker, bookmaker's clerk or another person associated with racing, or disqualify or suspend any of those persons permanently or for a specified period,

(c) supervise the activities of race clubs, persons licensed by Racing NSW and all other persons engaged in or associated with racing,

(d) inquire into and deal with any matter relating to racing and to refer any such matter to stewards or others for investigation and report and, without limiting the generality of this power, to inquire at any time into the running of any horse on any course or courses, whether or not a report concerning the matter has been made or decision arrived at by any stewards,

…

(l) impose a penalty on a person licensed by it or on an owner of a horse for a contravention of the Rules of Racing,

…

(w) take such steps and do such acts and things as are incidental or conducive to the exercise of its powers and the performance of its functions.

42 Right of appeal

(1) A person aggrieved by any of the following decisions of a racing authority has a right of appeal against the decision to the Appeal Panel—

(a) a decision to disqualify or warn off any person,

25. The very broad terms of section 13 and 14 of the Act explain both the scope of RNSW's functions (being defined to include powers and authority) and its powers.

26. On the basis of that statutory footing, it appears to the Panel that RNSW will have been acting within its functions when it commenced an investigation into Mr Kean and Ms Marston, provided the matters touch upon the supervision of horse racing or the protection of the public interest as it relates to horse racing. Said another way, such an investigation would be consistent with its function in, among other things, exercising control and supervision of horse racing (s13(1)(b)); the implementation of policies considered conducive to the welfare of the horse

racing industry and protection of the public interest as it relates to the horse racing industry (s13(1)(c)); and consistent with the functions conferred under the Rules.

27. Moreover, Racing NSW will be acting within the powers conferred by section 14 of the Act, by doing "*all things that may be necessary or convenient to be done for or in connection with the exercise of its functions*": s 14(1) of the Act. Those very wide words of power are further explained (but not limited) in s14(2)(c) and (d) to include supervision of "*all other persons engaged in or associated with racing*"; and to "*inquire into and deal with any matter relating to racing"*.

28. To enliven the statutory power in sections 14(2)(c) and (d) of the Act for Racing NSW to investigate a matter it is necessary only to demonstrate that a person was "engaged in or associated with racing" or that there is a "matter relating to racing".

29. In respect of the source of those investigatory powers Payne JA of the New South Wales Court of Appeal, considered without finally determining the scope of those powers in *Racing New South Wales v Fletcher* (2020) 379 ALR 778 at [42]-[43]:

> It is at least arguable that the investigatory powers conferred upon Racing NSW by the Rules of Racing of Racing NSW are conferred as a statutory power by ss 13(1)(a) and (e) of the Thoroughbred Racing Act. One of those powers is the power, conferred by AR 15(a), to investigate "any matter relating to racing" and to delegate any such investigation to the stewards. Section 14(2)(d) of the Thoroughbred Racing Act specifically empowers Racing NSW to "inquire into and deal with any matter relating to racing and to refer any such matter to stewards or others for investigation and report".
>
> Although in the absence of a contrary argument being advanced by the respondent it is undesirable finally to decide the issue here, I tentatively incline to the view that the power to investigate a matter relating to racing is given a statutory character by s13(1) of the Thoroughbred Racing Act. On this construction, the power to require the production of, and to examine, mobile phones in relation to an investigation of a matter relating to racing is a power whose force derives from statute. This is not to deny the proposition that the Rules of Racing of Racing NSW depend for the most part on agreement for their force, but recognises that s 13(1) of the Thoroughbred Racing Act gives the provisions of the Rules of Racing of Racing NSW which confer investigative powers efficacy independent of any agreement.

30. The Panel considers it is appropriate to rely upon that reasoning of Payne JA, which while not expressed to be a final conclusion, appears to the Panel to be, respectfully, the correct resolution of the statutory question. For that reason, if the facts are sufficient to come within a matter relating to racing, or a person "associated with racing", RNSW and the Stewards will have power to investigate.

B2 Contractual basis for the powers of RNSW

31. But before turning to the facts that enliven those powers, it is necessary to note the further basis for the Stewards power as sourced in the Australian Rules of Racing.

32. Section 13(1)(e) provides scope for further specific functions to be conferred or imposed on Racing New South Wales by reason of the Australian Rules of Racing.

33. Among other things the Australian Rules of Racing provide:

> **AR 3 Application of these Australian Rules**
>
> Any person who takes part in any matter or race meeting coming within these Australian Rules agrees with Racing Australia and each PRA to be bound by and comply with them.
>
> …
>
> **AR 5 Breaches of these Australian Rules and their consequences**
>
> (1) A person breaches these Australian Rules if:
>
> (a) a rule expressly provides as such;
>
> (b) the person is required to do something under a rule but does not do it; or
>
> (c) the person is prohibited from doing something under a rule but does it.
>
> (2) If a person breaches any of these Australian Rules the person may be penalised, regardless of whether or not the rule expressly provides that the person may be penalised.
>
> **AR 6 Exercise of rights, powers or authorities to be final and conclusive**
>
> Any act done or decision made by a PRA or by the Stewards in the exercise or intended exercise of any right, power, function or authority conferred by or under the Rules is, except where otherwise provided in the Rules, final and conclusive.
>
> **AR 12 General powers**
>
> PRAs have the following powers:
>
> (a) to control and supervise racing within its State or Territory;
>
> (b) at any time to exercise any power conferred on Stewards or another person employed, contracted or approved by a PRA, under the Rules;
>
> …
>
> (d) to make Local Rules;
>
> **AR 15 Investigations, inquiries and hearings**

Without limiting any other PRA powers, a PRA has the following powers in relation to the facilitation of investigations and inquiries and the determination of matters arising under the Rules:

(a) to investigate, inquire into and deal with any matter relating to racing or the running of any horse on any course, and to refer and/or delegate any such matter to the Stewards or others for investigation, inquiry, report and/or for hearing and determination;

(b) to investigate alleged breaches of any Code of Practice;

(c) to appoint persons to undertake investigations at the direction of the PRA and those investigators will have and may exercise the powers, perform the functions and carry out the duties conferred on Stewards by AR 20(f), AR 22(1)(d), (h), (i), (k) and (l) and AR 22(2);

(d) to appoint persons as the PRA thinks fit to hear and adjudicate upon any matter or charge brought by a PRA or the Stewards relating to a breach of the Rules, and to delegate to any appointee so much of its powers as would enable the appointee to discharge the responsibilities of the appointment;

(e) to hear and decide appeals as provided for in the Rules or by law; and

(f) to appoint persons as the PRA thinks fit to hear and adjudicate upon any matter, charge, application or appeal arising under the Rules, and to delegate to any appointee so much of its powers as would enable the appointee to discharge the responsibilities of the appointment.

AR 16 Disciplinary action

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

(a) to warn off any person whose presence on a racecourse or involvement in racing is, in the opinion of the PRA, not desirable;

(b) to penalise:

(i) any person who breaches the Rules;

(ii) any person who disobeys any reasonable direction of any official;

(iii) any licensed person or official whose conduct or negligence in the performance of his or her duties has led, or could have led, to a breach of the Rules;

(iv) any person who breaches a Code of Practice.

AR 20 General powers

The Stewards have the following powers:

(a) to regulate and control, investigate, inquire into, hear and determine matters relating to the conduct of all officials, licensed persons or registered persons**, persons connected with a horse**, persons attending a racecourse, and **any other person connected with racing**;

…

(e) to refuse or reject the nomination of any horse at any time for any period and/or until that horse has satisfactorily participated in an official trial or a jump-out, or passed any required veterinary examination;

(f) to enter upon and control all lands, buildings and other structures or places used for the purposes of a race meeting, and to expel or exclude any person from the same;

…

(j) to exercise any powers or perform any functions conferred on them by the relevant PRA and/or through any valid government statute or legislative instrument which confers powers or functions on them (as applicable).

34. In respect of similar provisions the Australian Rules of Racing have been described as providing a standing offer, and any person who engages in an activity that comes within the rules agrees to be bound by those rules.

35. In *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 at [92], Griffiths and Derrington JJ explained the basis for the contractual relationship by reason of a predecessor to ARR 3 (being AAR 2 at the time):

> The argument that the relationships between persons who participate in the thoroughbred racing industry are contractual in nature is well-founded in authority. It has its origins in ARR 2, which provides that any person who takes part in any thoroughbred racing "thereby agrees with the Australian Racing Board" and the Principal Racing Authorities to be bound by the rules. It creates a standing offer to persons intending to participate in the industry to the effect that, if they choose to participate, then they are agreeing to be bound to comply with the prescribed rules. The acceptance by the person choosing to participate in the race forms the agreement between them and other participants to be bound to each other to comply with the rules.

36. Their Honours went on to refer to a number of authorities that had applied that approach.

37. The New South Wales Local Rules contain a standing offer in similar terms:

> **LR 3.** Any person who takes part in any matter coming within the Rules of Racing, or to which the said rules apply, thereby agrees to be bound by them.

38. Provided therefore, that there is a sufficiently clear prima facie case that the Mr Kean and Ms Marston have "taken part" in a matter that comes within either the Local Rules or the ARR then RNSW will have power to investigate.

B3 The retired horse objection

39. The central charges against each of the Appellants that related to the welfare and malnourishment of horses were alleged to be breaches of LR114.

40. A further jurisdictional point was taken at the hearing to the effect that a retired horse did not fall within the supervision of the rules of racing and was not an "Eligible Horse, Unnamed Horse, or Named Horse" within the meaning of the ARR. Ms Heath had foreshadowed developing that submission by reference to various updated forms of the rules over the years. However, the Panel was never presented with the final form of that argument.

41. The starting point of the analysis is the proper construction of the Local Rules.

42. According to the form of rules available from the Racing NSW website LR 114 is headed "EQUINE WELFARE (Effective 1.10.17)". On that basis the Panel concludes that the rule is applicable to conduct alleged in the present case and in respect of Charge 7 against Ms Marston to so much of the conduct as is alleged to have occurred after 1 October 2017.

43. LR 114 provides:

> **LR 114.**
> (1) The purpose and objective of this Local Rule 114 is to ensure the welfare of thoroughbred horses
> from birth, during their racing careers and on retirement.
> (2) A registered owner, trainer or any person that is in charge of or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named Horses) must ensure that any such horses are provided at all times with:
> (a) proper and sufficient nutrition and water;
> (b) proper exercise;
> (c) stabling and paddocks of a standard approved by Racing NSW, which are adequate
> in size, which are adequately maintained and kept in a clean and sanitary condition;
> (d) veterinary treatment where such treatment is necessary or directed by Racing NSW.

44. Without repeating the full text of the Rule, it is enough to note for present purposes that LR114(4) imposes a prohibition on euthanising the same cohort of "*any horses (Eligible Horses, Unnamed Horses and Named Horses)*". Similarly, LR114(5) imposes significant obligations on retirement that are additional to AR290 and AR297 (or in the form originally published additional to AR64JA(1)). Those obligations included a prohibition on transferring

a horse into circumstances where minimum welfare standards will not be met, and a prohibition on a horse being sent directly or indirectly to an abattoir.

45. The Appellants argued that a retired horse cannot fall within the definition of "Eligible Horses, Unnamed Horses and Named Horses" used in the rule: Appellants' Written Submissions on Jurisdiction [22].

46. We reject the argument. We conclude that the clear intention of LR114 is evident from its text: to "*ensure the welfare of thoroughbred horses from birth, during their racing careers and on retirement*."

47. It would be entirely inconsistent with the stated purpose of LR114(1), and render that purpose ineffective, if LR 114(2), and (4) were construed so as not to apply to horses upon their retirement.

48. It would lead to circumstances where a horse could simply be retired so as not to fall within the operation of the local rule and avoid, for example, the prohibition on euthanisation. That would have the effect of rendering LR114(4) a protection only for healthy horses that remain in work. Such a construction would undermine the purpose of the rule, because healthy horses in work are not those at risk of being wrongly euthanised.

49. In attempting to achieve a consistent application across each of the sub-rules in LR114 that employ the same phrase "any horses (Eligible Horses, Unnamed Horses and Named Horses)" we consider that it should be construed as imposing additional obligations in respect of such horses into their retirement. Therefore, the construction we adopt is to read the rule as if it said "any horses (<u>that have at any time been</u> Eligible Horses, Unnamed Horses and Named Horses)…".

50. LR114(2) must then be read as imposing obligations on any person with "possession, control, or custody" of such a horse, to provide proper nutrition and veterinary treatment.

51. Accordingly, we are satisfied LR114 applies to the retired horses the subject of the charges.

52. While we think that meaning is plain on the face of the text, should there be any doubt in respect of the scope of the rules we would have considered it appropriate to resolve such constructional choice in a manner that imposes greater obligations in respect of the welfare of horses.

B4 The Panel's jurisdiction based on the facts of the present appeals

53. Given that the present issue is whether this Panel has authority to decide any appeal before it under section 42 of the Act, the Panel needed to be satisfied that there were facts, matters and circumstances that are within the power of the Stewards.

54. As to horses being in the possession, control or custody of Mr Kean and Ms Marston, the Panel at the earlier jurisdictional hearing considered there was sufficient evidence in the transcripts of the Stewards inquiry to establish a triable issue in that respect. Accordingly, at the preliminary hearing on jurisdiction the Panel was satisfied that the matter should proceed to a hearing on all issues.

55. For the reasons we have determined in **Part C and D** below, we are satisfied that the Panel has jurisdiction on the basis that relevant horses were in the possession, control, or custody of both of the Appellants in the respective times alleged.

56. For completeness, we also reject any argument that the Appellants needed to be licenced persons at the time of the alleged conduct. The scope of LR114 applies to "*any person*". It means just that. It is not necessary for a person to be a licenced person in order to fall within the rule, and therefore within the jurisdiction of Racing NSW, and the Panel.

57. We are also satisfied that the Appellants were subject to the ARR on the basis that they had ownership interests in horses, consistently with their acceptance of the "standing offer" described above as the contractual basis of jurisdiction. Mr Kean was the owner of "*I am the Kilda*" and "*Prometio Mas*", and Ms Marston was on her own admission a part owner of *I am the Kilda*. The disposal of *Prometio Mas* in June 2023 did not deprive the Stewards of power to investigate and charge conduct that occurred while he was an owner of a horse. So too the fact that the horse *I am the Kilda* was in Griffith NSW and not in the Appellants' immediate possession or control did not undermine the jurisdiction founded on ownership.

58. An argument was raised at the level of jurisdiction that neither of the Appellants could be guilty of charges in respect of horses in their control but that were owned by Lilly or Charlotte Newton – in particular *Gave Me You,* or *Dashing Stars*. We reject that argument below. The touchstone of liability under LR114 is the possession or control over the horses that was satisfied for the reasons given below.

B5 Evidentiary objection: attendance at the property on 1 June 2023 without permission

59. A separate but related issue was the Appellants' objection to the admission of material that was obtained by an inspection conducted by the Stewards on 1 June 2023. At T3.138;

> I'll do it this way, because it's going to come down to factual submissions that are best made at the end of the matter. I make a global objection to any material obtained on, or product derived as a result of, the attendance of by the Stewards and anyone else on the 1st of June, 2023

60. Notably the "global objection" was one that was said to be best explained by factual submissions received at the conclusion of the hearing.

61. The Stewards noted the unfairness to their position given that the Appellant had put on no opening submission and had given no notice of the point. After some discussion, the Panel ruled that it would allow the objection to be made, especially insofar as it may overlap with the jurisdictional objection. The Panel indicated that in light of the way the objection had been put, we would (at T5.213-217):

> ask Ms Heath to identify precisely which documents it is that she objects to and I'll invite separate submissions on that. It may be that the jurisdictional objection is one that is a complete answer to all of this. Then it might be that if the panel is ultimately against you on the jurisdiction question in respect of investigations, then it will follow that the material is entitled to be before the panel as well.

62. As has been indicated no submissions were received from the Appellants' counsel despite the several opportunities given.

63. The Panel considers, doing the best it can in the circumstances, that the objection must relate at least to the Racing NSW "Welfare Inspection Report- Marston/Kean" (AB145), and the photographs of the horses enclosed therewith.

64. That report identifies that on 1 June 2023 Racing NSW Investigator Jared Rodger and RSPCA Inspector Liberty Deaman attended the properties "*after receiving a report detailing concerns for the thoroughbreds housed on both properties".*

65. Section 24E of the *Prevention of Cruelty to Animals Act 1979* (NSW) provides that an inspector may carry out such an inspection without consent if the inspector believes on reasonable ground that an animal (2)(a) "has a life threatening condition that requires immediate veterinary treatment"; and (2)(b) "it is necessary to exercise the power of inspection to ensure

that it is provided with veterinary treatment". Section 24M of the same Act, provides that an inspect may be accompanied by such assistants as the inspector considers necessary.

66. The Stewards submitted that the RSPCA Inspector was such an authorised inspector, who had formed the relevant belief which could be inferred from the business record and the fact she had decided to conduct the inspection based on the reports "detailing concerns". In those circumstances, it was submitted, the Racing NSW investigator Jared Rodger was providing assistance to the RSPCA inspector.

67. The Stewards further relied on the presumption of regularity to the effect that in the exercise of a public power "a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled": *Minister of Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154 at 164C. That presumption was said to be of central importance to the Stewards case in circumstances where the point was belatedly raised, and not further raised in written submission, where evidence could have been marshalled to meet the challenge if it had been notified.

68. In the present circumstances the Panel rejects the objection to evidence based on illegality. Our reasons are as follows.

69. The Panel accepts that the Stewards retain an onus to establish the relevant conduct to make good each charge before Appeal Panel, which (despite being called an appeal) is a de novo hearing.

70. From the face of the document prepared by Racing NSW it is possible to establish that there were in fact reports "detailing concerns" about the thoroughbreds, that seems to have motivated the inspection in the first place.

71. In those circumstances it is appropriate to determine the matter on the operation of the presumption of regularity. While the precise scope of the presumption of regularity remains unsettled in the authorities (see Aaronson et al *Judicial Review of Administrative Action and Government Liability* (7ed, 2022) [5.490]), we consider it is best understood as imposing an evidential burden on the person seeking to establish the absence of regularity. In that respect it is a presumption that need not be accepted by the trier of fact (ie it is "rebuttable").

72. In those circumstances we are satisfied that the Stewards advanced sufficient evidence to establish facts consistent with the regular exercise of the power such as to impose an evidential burden on, or "shift the onus", or impose the risk of persuasion on, the Appellants (see Heydon, *Cross on evidence* (2017, 11 ed) [7205]-[7225]).

73. The Appellants did not succeed in overcoming the evidence that was consistent with the regular exercise of the power. In fact, no evidence was tendered on this point by the Appellants.

74. In those circumstances we do not think it is appropriate to insist that the regularity of the exercise of the power be proved by direct evidence from the relevant inspector demonstrating that she held the relevant belief as to the life-threatening state of the animals at the time of entering the property. We consider it appropriate to infer from the business record that such state of belief was held based on the reports referred to in that document.

C HORSES IN THE POSSESSION, CONTROL OR CUSTODY OF THE APPELLANTS

C1 Overview

75. The present appeal concerns the treatment of horses which it is alleged were in the custody, or care of:
    (a) the Appellants in the period of 14 February 2023 and 27 March 2023,
    (b) the Appellants in the period of 27 March 2023 and 5 June 2023.
    (c) Chynna Marston in the period 24 March 2017 and April 2018 in respect of two horses known as *Budderoo Dragon* (aka Pedro) and *Frankenbeans* (aka *Beans* or *Banjo*), these horses were the subject of Charge 7 against Ms Marston
76. The subject horses were located on two properties known respectively as 216 Stadtmillers Lane, Bowning, and 257 Stadtmillers Lane, Bowning, NSW.

77. From the available evidence we conclude that Mr Kean and Ms Marston own 257 Stadtmillers Lane, and that 216 Stadtmillers Lane is leased by "Empire Park" (19 June 2023, T-18.848 [KAB 51]). The evidence also suggests that Empire Park was a partnership between Ms Marston and Mr Kean. The Appellants through their partnership "Empire Park" used 216 Stadtmillers Lane primarily as a horse-riding school which also offers pony riding to the public, whereas 257 Stadtmillers Lane was used primarily as agistment.

78. Insofar as someone was agisting horses at 257 Stadtmillers Lane, Ms Marston suggested that such agistment was paid to Empire Park. Insofar as someone wanted to take a horse for a ride through Empire Park that would occur by someone sending a text to Ms Marston (T2836). It seems also that both Mr Kean and Ms Marston had access and control over the horses at 216 Stadtmillers Lane and horses were moved interchangeably between both properties, and riding

kit was only kept on one of them (T2894- 2920). It also was the case that each of the horses on either of the properties were available for use by Empire Park if they were well enough.

79. Empire Park is not a separate corporate entity, but a partnership conducted by the two individual Appellants. In those circumstances we are satisfied that Empire Park was a partnership in respect of which both the partners Ms Marston and Mr Kean had joint responsibilities, and by that reason both the Appellants continued to maintain custody or control over horses at 216 Stadtmillers Lane. That is in addition to having control over the horses agisting on their property they owned at 257 Stadtmillers Lane.

80. It is necessary, however, to address a defence peculiar to Ms Marston's case by which Ms Marston argues she was no longer in relevant possession, custody or control of any of the horses the subject of the present appeal from 1 March 2021 onwards.

C2 Ms Marston's involvement and the Horse Agistment Agreement

81. One of the central defences raised by Ms Marston in relation to the charges concerning the welfare of the horses in 2023 was that she could not be found to be a person with custody or control of the relevant horses after 1 March 2021.

82. On 6 June 2025 the Panel received the "Further Production and Application for Leave to Tender" bundle of six documents, that included a copy of the Horse Agistment Agreement dated 1 March 2021, and its associated metadata.

83. The Agistment Agreement was described as being between Chynna Marston as the "Agistor/Landholder", while Recycled Racehorses was named as the "Owner", and Alex Kean identified as a "director" of that entity.

84. The terms of the Agistment Agreement were such that the Agistor agreed to Agist the Owner's horse at 257 Stadtmillers Lane, Bowning on conditions that:

> 1. The horse is at the Owner's risk at all times. It is the Owners responsibility to insure the horse and any progeny against all risks while they are at the Agistment property or being transported to and from the property. The Agistor shall not be responsible for any disease, accident, illness or injury howsoever caused or arising to the horse while transporting to or from the Agistment property, or at the property. The Agistor has no responsibility for the horse care, control or upkeep.
>
> 2. The Owner must notify the Agistor immediately the Owner becomes aware that the horse suffers or has been in contact with any significant or notifiable sickness, disease or

injury. The Owner will pay all veterinary and other charges incurred while the horse is at the Agistment property.

85. Notably, no Agistment fee was charged by the "Agistor" for providing the agistment.

86. Included in the tender bundle were relevant minutes of meetings of the board of Recycled Racehorses, which explained that Ms Marston's desire to separate herself from the "*the charity in respect to the agistment of charity owned horses on 257 Stadtmillers lane"*. The document was said to be based off other agistment agreements. The minutes (with a metadata date of 24 May 2021) record that the intention was that "*sole responsibility of the care and upkeep will be that of Recycled Racehorses with Chynna able to volunteer when no one else is available."*

87. Ms Marston also mounted an argument to the effect that if an agistment agreement such as this was not effective to divest herself of responsibility, then every landowner upon whose land horses were agisted would be subject to be charged by Racing NSW for the malnutrition of horses on the property.

88. The Panel does not accept that submission. An assessment needs to be made on the specific facts of each case. This is not a case of a completely disinterested and absent owner of a property, or lessor, or sub-lessor of land permitting an agistment.

89. Rather both of the Appellants exercised control over the properties themselves and were there on a day to day basis. Both of the Appellants had access to and control over the horses on each of the properties. The properties had about 38 or 39 thoroughbred horses on them, and a number of other ponies. Ms Marston exercised that practical control by using some of the horses for the purpose of riding lessons, taking temperatures of the horses, and being the feeder of last resort. It is also relevant that Ms Marston had intimate knowledge of the particular horses on the property, knowing their names and their histories. In addition, she had experience as a horse woman, who was capable of taken horses riding, fitting tack and equipment, and providing a base level of care for the horses including by feeding them, taking temperatures, changing rugs, and understanding whether a horse was losing weight, or was lame.

90. As the Stewards observed in their submission and we accept, even on the terms of the Minutes themselves, Ms Marston would remain the carer of last resort.

91. As the facts transpired in the present case, it became clear that Ms Marston and Mr Kean were both involved in taking the temperature of the sick horses, and Ms Marston stated that she was attempting to observe the horses the whole time.

92. Taken together we are satisfied that despite the interposition of the Horse Agistment Agreement, Ms Marston had the opportunity and capability to influence and safeguard the welfare of the relevant horses in the period March to June 2023 such as to satisfy the definition in the LR114 of being a person with "control" over the relevant horses.

93. However, the Horse Agistment Agreement and the *degree* of Ms Marston's day to day involvement will be relevant to culpability and any penalty to be imposed. The Panel is of the view that Mr Kean will bear greater responsibility for the care and welfare of the horses after 1 March 2021 than Ms Marston.

C3 The salmonella infection of *Belle*

94. The central factual defence of both Appellants was to seek to explain the condition of the horses on the property in 2023 as arising from a bout of contagious salmonella that passed through the properties.

95. We accept that in sometime in January 2023 one of the horses "*Belle*" was diagnosed with a salmonella infection by the CSU Veterinary Centre. Ms Lily Newton gave evidence to the Stewards (19 June 2023) that she had attended at the clinic with Ms Marston and recalled that she was advised to be aware how contagious the infection could be, that it would affect horses in certain age brackets more than others, that they should monitor the horses keep an eye out for any that "go downhill" and to try to keep the horses separate. The symptoms would include diarrhoea, and a temperature: KAB 100.

96. Ms Newton's evidence was that they had attended at the CSU vet clinic in Wagga on the referral from a vet in Yass, who felt there was nothing further that could be done for *Belle* at Yass: KAB 102

97. After the attendance at CSU from the evidence, it appears to the Panel that Ms Marston's mother Cheryl was the primary contact with any of the vets and CSU and was relaying some information to Ms Marston.

98. It then appears from the evidence that the first symptoms for other horses at the property started showing in early February 2023 those included, *Melomaniac, Gave Me You, Scene of the Crime, Mortarman, Grey Mantra,* and *Desert Digby.* The diarrhoea was described by Ms Marston as serious and appears to have continued for two months. Despite eating, the horses were losing body condition throughout that period: KAB 84, 19 June 2023.

99. Diaries were kept for the horses that recorded their temperatures and were in evidence. In evidence also was a graph that showed the readings of the horses over time: KAB 636. That graph shows that the horses had fever or above fever temperatures throughout February, and March and into April 2023.

100. The relevant question for the Panel is whether those facts are sufficient in explaining the condition of the horses such that the Stewards will not have made out their case on the relevant charges.

C4 The condition of the horses as inspected in June 2023

101. On 1 June 2023 RNSW and the RSPCA attended the property to assess the welfare of the horses and produced a report. In that report they recorded numerous horses in poor body condition at 257 Stadtmillers Lane. So concerned were they as to call the RNSW Official Veterinarian Dr Carly Garling. Photographs were taken on scene (and are central to the evidence in this case).

102. On 5 June 2023, Jacqueline Johnstone a RNSW investigator sent an email to the Appellants (KAB 600), copied to Dr Garling (among others), enclosing a copy of the 1 June inspection report.

103. The 5 June email also set out that Dr Garling had reviewed the photographs taken on 1 June and had found that each of *Melomaniac, Desert Digby, Gave Me You, Paris Carver, Scene of the Crime* were all found to be in poor body condition. There were then directions to the effect that (KAB 600):

(a) it was necessary to separate the horses from the herd and split them into two paddocks

(b) each horse required veterinary examination included blood and faecal tests to determine the likely cause;

(c) it was necessary to implement a particular feeding regime with access to a round bale of hay, twice daily feeding with good quality lucerne (2 biscuits morning and night), and extra supplements set out in the email.

104. The email also set out a number of other horses who were said to be of poor-moderate body condition. These included *Grey Mantra, unidentified Grey horse, Totolo, Dashing Stars, Bay filly.* Directions were given for their care.

105. Racing NSW followed up with further emails asking for details of the horses and owners, evidence of compliance with the directions by email on 7 and 8 June 2023: KAB 605-607.

106. On 10 June 2023, Racing NSW inspected the property including with Dr Garling. Dr Garling made body condition assessments of the horses at the property: KAB 314. The body score explains the amount of fat and muscle distribution on a horse. The score is expressed out of 5 and a healthy horse should sit about 2.5. The evidence was that a horse should not be allowed to become less than a score of 2 as this can compromise the horse's welfare.

107. The outcome of the body condition scores by Dr Garling on 10 June was:

(a) Scene of the Crime 1

(b) Melomaniac 1

(c) Desert Digby 1

(d) Gave Me You 1

(e) Paris Carver 1

(f) Unknown "Forrest" 1.5

(g) Grey Mantra 1

(h) Mortarman 1.5

(i) Divine Dream 1.5

(j) Totolo 1.5

(k) Dashing Stars 1.5

(l) Bay filly 1.5

108. On 10 June a further inspection was carried out by Lloyd Varga from Clinton Street Veterinary Clinic in Goulburn. His results reflected poor results as well, but notably he scored Divine Dream 2 (KAB 416), Mortarman 2 (KAB 421), Bay filly 2 (KAB 422),

109. The Stewards have supplied each of the Appellants with annotated charge sheets that show where each of the facts they contend for can be identified in the evidence. We have had reference to those documents, including the photographs and do not reproduce them all here.

110. On 14 June 2023 Racing NSW issued further directions to Mr Kean requiring among other thing the provision of veterinary reports.

111. On 23 June 2023, the Appellants were directed to attend the hearing of charges against them, that was adjourned until 10 July 2023. Mr Kean suffered ill health that meant the hearing was adjourned until 31 July 2023, and it was further adjourned until 22 August 2023.

112. We return to the failure to comply with relevant directions below.

C5 Charges 2 failure to provide veterinary treatment Feb-March 2023

113. Charge 2 for each of Mr Kean and Ms Marston alleges a failure to provide veterinary treatment between 14 February 2023 and 27 March 2023 in breach of LR 114. The Charges relate to the same 6 horses: *Melomaniac, Gave Me You, Scene of the Crime, Mortarman, Grey Mantra, Desert Digby.*

114. The date range has been explained by the Stewards as relating to the elevated temperatures throughout that period that commenced with *Scene of the Crime on* 14 February 2023 recording a temperature of 38.7 degrees.

115. The Stewards case was that Veterinary treatment was required for a number of reasons.

116. First as to temperatures. We accept that temperatures of 37.5- 38.5 are considered normal, with anything over 38.5 "*being a fever which requires consultation with a vet*": Stewards Submissions 27 June 2025 [68]. We are reluctant to accept that every fever over 38.4 required veterinary attention.

117. But it was further submitted based on the evidence of Dr Garling, and we accept, that a horse with a temperature of 39 and above is considered very unwell and extremely concerning: KAB 80.

118. In the present cases there were numerous days when *Melomaniac, Gave Me You,* and *Scene of the Crime,* had temperatures above 39 and on one day it appears Scene of the Crime hit 40: KAB 636.

119. Second as to the condition of the horse, we were asked to infer from the condition of the horse as witnessed on 1 June 2023, that their condition would have been that obvious from February and March. It was said that we should take into account a failure of the Appellants to explain the condition of the horses at that earlier point in time.

120. The Panel does not accept that the evidence from the body scores in 1 June 2023 is sufficient to allow us to draw the inference that their conditions in February and March would have been sufficient as to require the Appellants to have called for veterinary assistance. We also do not accede to the invitation to draw any adverse inference against the Appellants for a failure to call evidence in this regard, given that they did in fact keep diary records, that have been the source of the temperatures of the horses throughout that time.

121. Third, the continuation of the symptoms of the horses including diarrhoea and temperatures continuing for over two months ought to have prompted the Appellants to arrange for veterinary treatment. It was submitted by the Stewards that this was consistent with the advice from CSU Vet clinic in respect of *Belle* such that each of the Appellants ought to have been aware of the need to call a vet for each of the horses.

122. It was also submitted based on Dr Garling's evidence that the horses would have been likely to be sick and shedding weight at that time, and if horses have fevers they tend to stand in corners and not eat or drink, get more dehydrated and can get colic leading their condition to further decline. It can then be necessary to intervene with fluids or intubating to give the horses fluids even if admission to an equine hospital is not possible.

123. In light of the material above, the Panel can only be satisfied of the failure to obtain veterinary treatment in respect of the three horses (*Melomaniac, Gave Me You, Scene of the Crime*) recorded in the graph at KAB 636 who had ongoing high temperatures including above 39 degrees, that there was a relevant failure to obtain veterinary treatment. Those facts ought to have put the Appellants on notice.

124. However, on the evidence before us we are not satisfied that there was a failure to obtain veterinary treatment in respect of the other three horses the subject of Charge 2 for each Appellant.

C6 Charges 1 malnutrition 27 March 2023 – 5 June 2023

125. Charge 1 against each of Mr Kean and Ms Marston related to a failure to provide sufficient nutrition to each of the 12 horses identified in those charges and the subject of the body scores recorded at paragraph 107 above.

126. We accept that each of these charges is made out. That conclusion is based largely on the body scores and inspections from 1 June 2023, but even the body scores on 10 June 2023 are consistent with those facts (although occurring 5 days after the end of the date range). It is

appropriate to infer that the poor condition of the horses was from a failure to appropriately feed the horses.

127. We did have in evidence invoices for bales of hay, and some lucerne, and cracked lupin in dates throughout March, April, May and June (although most concentrated in May and June): KAB 614-615. So too were invoices for horse dentistry, and other consumables.

128. Without much context being given to those it is difficult for the Panel to determine other than from the condition of the horses, whether that was sufficient food, and whether that food was making its way to those horses in need. We have inferred that it was not. It would have been possible for the Appellants to be much more specific in explaining what type of systems they had in place to feed the horses, and the steps they took (if any) to calibrate that feeding regime once the horses became ill. But the evidence did not go that high (see the hearing transcript 29 May 2025 T95.4626-4706).

129. Even assuming, favourably to the Appellants that the horses commenced contracting salmonella from *Belle* in February 2023 and onwards, that was not a sufficient excuse to allow the horses to end up with such poor body scores by June 2023.

130. It is accepted in this case that a vet did not attend the property during this time. While we have only found that liability is established under Charges 2 in respect of three horses (see **Part C5** above) we consider it is relevant to the malnutrition (and ultimately to culpability for the purpose of penalty) that no vet attended the property to inspect any horse. Had a vet been called it is likely instructions would have or could have been given as to improve the health of any of the horses.

131. Accordingly, we are satisfied that each of the Appellants should be found liable for Charges 1.

C7 Charges relating to failure to comply with directions on 5 August 2023

132. Charge 5 in relation to Mr Kean and Charge 4 in relation to Ms Marston relate to a failure to comply with directions given by RNSW on 5 August.

133. On 5 August 2023 Racing NSW issued further directions to the Appellants in relation to the welfare of the horses including:

(a) Direction in respect of a particular feeding and nutrition regime;

(b) Direction to arrange a veterinary examination for three horses, *Benny's Jet, Daphne* and *Paris Carver* by no later than 8 August 2023, and a copy of the veterinarian's report to be provided to RNSW.

134. On 7 August 2023, the Appellants were directed to attend additional inquiries into other horses to be held on 10 August 2023. But neither Appellant complied with that direction.

135. Given that no veterinary examination reports were provided, and no clear evidence that the feeding regime had been implemented the Panel is satisfied that each of the Appellants should be found guilty of these Charges.

C8 Charges relating to failure to arrange access on 8 and 9 August 2023

136. Charge 6 in relation to Mr Kean and Charge 5 in relation to Ms Marston allege failure to comply with the directions issued by Racing NSW on 8 August 2023 to arrange access to the Property contrary to AR 232(b).

137. The facts relating to these charges are relatively confined. On 8 August 2023 Nikki Burke from Racing NSW contacted Mr Kean (but notably not Ms Marston) to seek access to 257 Stadtmillers Lane to assess the welfare of horses.

138. By text message on the same day Mr Kean expressed his view that the premises were "private property" and that he was "not happy nor is it appropriate that anyone from RNSW attend my property without permission or without myself or my delegates in attendance."

139. On that basis it is alleged that Mr Kean failed to provide access.

140. The Panel is satisfied that Charge 6 is made out in respect of Mr Kean.

141. In respect of Ms Marston an email was tendered as being sent to Ms Marston's email address @outlook.com that expressed concerns for *Benny's Jet, Daphne, and Paris Carver*, and stated "*You are hereby required to provide access to Racing NSW officials today, 9 August 2023 for the purpose of assessing the health and welfare of the thoroughbred horses.*" There was also a missed call on a telephone showing it to be Ms Marston's telephone at about 9.47am that day: KAB 991.

142. The facts of this charge are more difficult to make out for the Stewards. That is because it concerns an email sent at 10.09am on the same day that the inspection was being requested. We were not presented with evidence for example, that confirmed Ms Marston was at the property when Stewards arrived and refused to allow them in despite this email. The only

material we could identify (including by reference to the submissions of the Stewards) was simply the failure to respond to the email. The missed call itself, of course, did not amount to a direction.

143. Accordingly, Charge 5 against Ms Marston should be dismissed.

C9 Charges relating to failure to attend the Stewards Inquiry

144. Charge 7 in relation to Mr Kean and Charge 6 in relation to Ms Marston are concerned with their failure to comply with directions given to each of them on 7 August 2023 to attend inquiries in relation to various horses (*Blue Missile* for Mr Kean, and *Budderoo* and *Franken Beans* for Ms Marston).

145. The email directions from Ms Johnstone were in evidence, (see the email from Ms Johnstone to Mr Kean dated 7 August 2023 [KAB 913], and the email from Ms Johnstone to Ms Marston dated 7 August 2023 [KAB 827]) and each stated:

> Following an investigation, Racing NSW Stewards hereby direct to attend a Stewards inquiry on Thursday 10 August 2023 via Microsoft Teams.

146. We are satisfied that neither Appellant attended. No case was made to the contrary. If there are mitigating reasons explaining the non-attendance those are matters that can be addressed in submissions on penalty.

147. Accordingly we are satisfied, Charge 7 in relation to Mr Kean and Charge 6 in relation to Ms Marston have been made out.

D Ms MARSTON - *BUDEROO DRAGON & FRANKENBEANS*

148. Charge 7 and 8 against Ms Marston concerned the welfare of two horses known as *Budderoo Dragon* and *Frankenbeans*. Charge 7 alleges that between March 2017 and April 2018 Ms Marston failed to provide proper and sufficient nutrition and water to the horses contrary to LR114(2)(a). Charge 8 alleges that between March 2017 and April 2018 Ms Marston failed to provide veterinary treatment to those horses.

149. Very little was said about these charge at the hearing. The Stewards outlined their case in opening. The following exchange occurred between the Panel and counsel for the Appellants (T1235956-5961):

> CONVENOR: That's why I'm just trying to ventilate these issues. Is there anything you want to say to tell us about that, what your ultimate answer is?

> Ms V. HEATH: No. I'll have to deal with that in writing because I just don't recall, I don't have it in front of me, what the evidence was for the Steward's enquiry in relation to that.

150. As has been noted, no closing written submissions were received.

151. The stable return for *Budderoo* (AB146) records his retirement date at 24 March 2017, and records the horse location as "*Chyna Marsten's propert Canberra NSW"* (sic).

152. The stable return for *Frankenbeans* (AB147) records that the horse was retired on 7 March 2018 and states that the stable location was "*recycled racehorse program, canberra, nsw*".

153. The schedule of horses prepared by the Appellants contended that the Panel should conclude that *Budderoo Dragon* was retired "Jan17", and that *Frankenbeans* was retired "Jul17". There was no other elaboration upon those submissions.

154. The Panel prefers the evidence recorded in the stable returns that are relevant business records and concludes the horses were retired on the dates recorded in the stable returns. But it is not clear how much turns on that fact given we have rejected above at **Part B3** the argument that a retired horse does not fall within LR114.

155. In any event it appeared to be uncontested that each of the horses was on or about March 2018 transferred to Ms Peta Joyce who gave interviews and evidence to the Stewards.

156. Ms Joyce was a veterinary nurse, who had assisted with the care of some of the horses from time to time. Her evidence was clear and was consistent with other documents around that time

157. Ms Joyce came to know of Ms Marston and the horses because her daughter had been attending the riding lessons run by Ms Marston at the properties. Ms Joyce had many conversations with Ms Marston over about a three month period, during which time Ms Marston said words to the effect that she did not have sufficient money to keep feeding herself let alone all of the horses under her care.

158. Ms Marston had also told Ms Joyce that hay was donated to the property from time to time. But to Ms Joyce's surprise she would later see it with a "for sale" sign to sell the hay despite the bare state of the paddock. Ms Joyce formed the view that it was only the horses that were being regularly ridden that were receiving the feed, and the other horses in further paddocks were not being fed.

159. Eventually Ms Joyce came to have available for her use additional agistment space in Canberra. Aware that some of the horses at the property may benefit from separate pastures, Ms Joyce offered to take two of the horses in order to assist Ms Marston. Ms Joyce explained that because she had adequate pastures she wanted Ms Marston to "give me the two worst" – by which she meant the two horses that were fighting to get their fair share of food in the herd of other horse.

160. Ms Joyce intended for the arrangement to be temporary because she did not have permanent access to the agistment space.

161. Ms Joyce understood that the terms of the arrangement would be that Ms Joyce would take two horses to assist Ms Marston. Ms Marston was supposed to provide the feed, and cover any vet bills that may be necessary, while Ms Joyce would provide the location for the horses to agist, and would undertake the manual work of caring for the horse and feeding them twice a day.

162. Much to her eventual frustration and disappointment, Ms Marston only ever provided two bales of hay. But Ms Marston delivered them herself, which appears to be consistent with Ms Joyce's account of the arrangement.

163. Ms Joyce described the circumstances in which the horses were delivered to her:

> *I took the rugs off, because I just wanted to change the rugs because it was a bit cool while I was feeding them and everything. That's when I noticed that the two horses were not just hungry, they were malnutrition, they were emaciated and they had severe – and, as a vet nurse, I say "severe" – rain scald. As I pulled the rugs off and my hands were actually coming off, you know, folding the rugs back, their skin was coming off in my hand. It was completely pus, it was pussy, it was infected, and all over their back, which I have photos of showing the scars, that Banjo is still scarred.*

164. Text messages between Ms Marston and Ms Joyce at the time reveal that Ms Joyce was immediately concerned about the state of the horses. Photographs taken in April 2018 on the day *Frankenbeans* and *Budderoo Dragon* arrived in Ms Joyce's care (AB12, 14 of the Additional Marston Brief) show a skinny looking horse with ribs clearly exposed. That is clearly contrasted with Instagram photos from the recycled.racehorses page showing the horses when they remained in Ms Marston's care looking well and of a healthy weight as at October 2017.

165. On the basis of that evidence we are satisfied that the decline in the health and nutrition of *Frankenbeans* occurred after 17 October 2017 and at a point before being delivered to Ms Joyce in March 2018. It is in that period that proper nutrition and veterinary attention should have been given to the horse.

166. *Budderoo Dragon* was shown on the "recycled racehorses" instagram page in photographs in good health as at March 2017. Given that it was also in poor health, and in need of veterinary attention (which ought to have been provided by March 2018 before being given to Ms Joyce), we are willing to infer that the failure to properly feed the horses occurred around the same time as *Frankenbeans* in the period after October 2017 and before March 2018.

167. From the time Ms Joyce received the horses she made their welfare her primary concern at the cost of her own time and expense. Her conduct can only be described as exemplary.

168. From the time Ms Joyce received the horses it is fair to say that she was shocked and surprised by their poor condition. Ms Joyce took on the trouble of caring for these horses with great determination and a sense of responsibility, by feeding and caring for them, arranging for additional blankets to assist with the recovery of their sores and importantly, arranging for the horses to be seen by a veterinarian.

169. In November 2018, Ms Joyce took photographs of *Budderoo Dragon* to document the improvement in his health, but unfortunately not long after he fell ill. Ms Joyce contacted a vet from Brindabella Vet Hospital, and sought consent from Ms Marston to have the horse put down, with the associated expense.

170. Ms Marston refused to give her consent and refused to pay for the euthanisation on the basis that she could not afford it.

171. Ms Joyce then paid for the horse to be euthanised by the Veterinarian.

172. We are satisfied that Charges 7 and 8 have been made out. Subject to the submissions of the parties on penalty, our present view is that the malnutrition and failure to provide veterinary care appear to be at the more serious end of the scale.

173. We note that on Ms Joyce's account of matters, the failure to provide sufficient nutrition was said to arise from financial pressure on Ms Marston. Those are matters that can be addressed on submissions on penalty.

E Mr KEAN AND *REAL REAL GONE*

174. Charge 3 against Mr Kean related to a contravention of LR114(4) for euthanising *Real Real Gone* without approval.

175. So much was accepted by Mr Kean at the Stewards inquiry on 19 June 2023 after the horse could not be located on the property in the 1 June and 10 June inspections.

176. The explanation given was that it was necessary because the horse had broken its leg and so Mr Kean shot it: KAB 91 T58.2859. Those will be matters relevant to penalty.

F CONDUCT PREJUDICIAL

177. Charge 3 against Ms Marston and Charge 4 against Mr Kean alleged conduct prejudicial to the image, interest, integrity or welfare of racing contrary to AR228(a).

178. The conduct was particularised as the failure to care for the welfare of thoroughbred horses that were in their possession, control or custody.

179. Given our findings in **Part C5**, and **Part C6** above concerning veterinary treatment and malnourishment, and our finding in **Part D** above in respect of Ms Marston we are satisfied that element of the case has been made out.

180. We must also be satisfied that there was some element of public knowledge of the conduct, and it must have a tendency to prejudice the image of the sport: *Waterhouse v Racing Appeals Tribunal* [2002] NSWSC 1143, *Pollett v Racing New South Wales*, Racing Appeals Tribunal, 16 March 2021 [21],[22], [38]-[39].

181. The Stewards particularised various news stories that referred to each of the Appellants and included allegations that horses were underweight and neglected. Our findings above confirm that conduct to that effect took place. We are satisfied that the conduct was both publicly known and prejudicial to the interest of racing as it went to the welfare of thoroughbreds.

182. The extent of prejudicial effect on the image of racing will be a matter for submissions on penalty.

183. Accordingly, we are satisfied that Charge 3 against Ms Marston and Charge 4 against Mr Kean have been made out.

G CONCLUSION

184. Orders will be formally made at the conclusion of the reasons on penalty. For now it is enough to foreshadow that the Panel considers the appropriate orders are to the effect that:

(a) in respect of Ms Marston the appeal be partially upheld in respect of Charge 2 (where the findings relate to failure to provide veterinary treatment to only 3 horses), Charge 5 in respect of failure to provide access has not been made out against Ms Marston, and the appeal is otherwise dismissed.

(b) in respect of Mr Kean the appeal be partially upheld in respect of Charge 2 (where the findings relate to failure to provide veterinary treatment to only 3 horses) and the appeal on liability otherwise be dismissed

185. We direct the parties to provide written submissions on penalty within 28 days of the date of these reasons. Such submissions to be limited to 6 pages, and any authorities to be relied upon be provided with the submissions.

***