

RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF THE APPEAL OF MARC LAMBOURNE AND GLEN POLLETT

Appeal Panel: **Mr T Hale SC – Convenor**
Mr T Carlton
Mrs S Skeggs

Appearances: **Racing NSW: Mr M Van Gestel, Chairman of Stewards**
Appellant: Mr A Capelin, Solicitor

Date of Hearing: **1 October 2020**

Date of Reasons **6 October 2020**

REASONS FOR DECISION

The Convenor gave the decision and following reasons on behalf of the Panel.

Introduction

1. Mr Marc Lambourne, Mr Glenn Pollett and Mr Gordon Sutherland are the presenters of a thoroughbred racing program “Racing Rant”. Mr Lambourne produces the program. Access to the program is by paid subscription.
2. There are about 700 members or subscribers. They obtain access by computer, using a username and password. Access can be obtained by a Racing Rant app. According to a report by Benjamin Ramirez of 28 August 2020 prepared on behalf of Mr Lambourne and Mr Pollett (Ex 1), the site has sophisticated security controls, which limit access to subscribers.
3. As the name implies, Racing Rant is intended to be irreverent. It is suggested in the evidence that the program is intended to have a larrikin style of humour like *Roy and HG*.
4. On 20 April 2020, Racing Rant contained a segment in which the well-known jockey, James McDonald, was referred to. He was not referred to by name. Rather, he was referred to as *J Mac*. The transcript of the segment is annexed as Annexure A.
5. On 30 April 2020, the Stewards, Mr MF Van Gestel (Chairman) and Mr WR Birch, commenced an enquiry into the segment of Racing Rant. Mr Lambourne, Mr Pollard and Mr Sutherland participated in the enquiry, which was held by videoconference. At the conclusion of the hearing that day, the hearing was adjourned to 7 May 2020. On 7 May, the enquiry continued and was then further adjourned.
6. The enquiry resumed again on 11 August 2020. In the meantime, on 17 May 2020, the Stewards had issued three charges against Mr Lambourne and one against Mr Pollett. No charges were brought against Mr Sutherland. At the resumed hearing on 11 August 2020, both Mr Lambourne and Mr Pollett had legal assistance from Mr A Capelin solicitor. The hearing was at the offices of Racing NSW.
7. The three charges brought against Mr Lambourne were for alleged breaches of:
 - (i) AR228(a);

- (ii) AR228(d); and
- (iii) AR232(b).

8. Only one charge was brought against Mr Pollett. It was for an alleged breach of AR228(a).
9. The basis upon which the Stewards alleged that Mr Lambourne and Mr Pollett were bound by the Rules of Racing, and that therefore they were the subject of the jurisdiction of the Stewards, was that they were both registered owners with Racing NSW, they both attended NSW racecourses and both placed bets on NSW thoroughbred racing.
10. AR228(a) and (d) relevantly provide:

A person must not engage in:

- (a) conduct prejudicial to the image, interests, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere;
- (d) publishing or posting on any social media platform or channel any material, content or comment that is obscene, offensive, defamatory, racist, threatening, harassing, discriminatory or abusive to or about any other person involved in the racing industry.

AR 232(b) provides that:

A person must not:

- (b) fail or refuse to comply with an order, direction or requirement of the Stewards or an official.

11. The Stewards found Mr Lambourne guilty of each of the three charges and fined him:
 - (a) \$2,000 for the breach of AR228(a);
 - (b) \$2,000 for the breach of AR228(d);
 - (c) \$2,000 for the breach of AR232(b).

12. The Stewards also found Mr Pollett guilty of a breach of AR228 (a) and fined him \$5,000.

The Appeal pursuant to section 42 of the *Thoroughbred Racing Act*

13. Both Mr Lambourne and Mr Pollett appeal to this Panel pursuant to s 42 of the *Thoroughbred Racing Act* 1996 against the findings of the Stewards both as to conviction and as to penalty. Pursuant to s 43(1) the appeal is by way of a new hearing and fresh evidence or evidence in substitution to or in substitution for the evidence before the Stewards may be given.

14. At the hearing before this Panel:

- (a) the Stewards were represented by Mr Marc Van Gestel (Chairman of Stewards);

- (b) Mr Lambourne and Mr Pollett, by leave, were represented by Mr A Capelin.
15. Before this Panel, Mr Lambourne maintained his plea of not guilty in relation to the charges under AR228(a) and (d). However, he changed his plea from not guilty to guilty in relation to the charge under AR232(b). Mr Pollett maintained his plea of not guilty in relation to the charge against him of breach of AR228(a).
16. At the hearing before us, we received the Appeal Book into evidence which became Exhibit A. We received as Exhibit 1 the report by Mr Benjamin Ramirez dated 28 August 2020, which was tendered by the Appellants. As previously mentioned, it addressed the security controls that were in place in relation to Racing Rant.
17. The hearing originally commenced by way of audio-visual link, however, due to audio difficulties the hearing was adjourned and later in the morning resumed at the offices of Racing NSW, where the hearing continued with the parties present.

The Charges

18. The charges against Mr Lambourne are in summary:
- (i) The first charge, being a breach of AR228(a), that he engaged in conduct prejudicial to the image of racing by reason of him:
- [P]roducing and making the thoroughbred racing program Racing Rant available to the public through subscription including through the YouTube platform on 20 April 2020 and/or the comments you made as detailed in paragraph 5 [which set out extracts from the program] being prejudicial to the image of racing in that they would give rise to a particular suspicion in the mind of a reasonable person that jockey James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing, when [he had] no such evidence to support those allegations.
- (ii) The second charge, being a breach of AR228(d), was that he engaged in publishing defamatory comments about licensed jockey James McDonald:
- Such comments being defamatory of licensed jockey James Donald as it carried the imputation that jockey James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing.
- (iii) The third charge, being a breach of AR232(b) was that *he did fail and/or refuse to comply with a direction of the Stewards*. The direction of the Stewards that he was alleged to have breached was a direction given to him by Mr Van Gestel on 8 May 2020 when providing him with a recording of the video conference of the Stewards enquiry conducted on 7 May 2020. The direction was that “[t]he recording is not to be provided to any third party other than your legal representative as previously advised and remains the property of Racing NSW”. It was alleged that on or about 17 May 2020 *he posted on the social media platform Twitter under the Racing Rant handle a section of the recording of video conference of the Stewards enquiry conducted on 7 May 2020, which resulted in the recording of the enquiry being provided to third parties.*

19. There was only one charge against Mr Pollett. That was the charge that he breached AR228(a). The details of the charge were that Mr Pollett engaged in conduct prejudicial to the image of racing in that his involvement in the segment of Racing Rant on 20 April 2020:

[W]ould give rise to a particular suspicion in the mind of a reasonable person that jockey James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing, when you have no such evidence to support those allegations.

AR228(d)

20. It is convenient to firstly consider the alleged breach of AR 228(d), which is the second charge against Mr Lambourne. The terms of AR228(d) have already been referred to. In summary it provides:

A person must not engage in... publishing or posting on any social media platform or channel any material content or comment that is... defamatory ... about any other person involved in the racing industry.

21. The particulars of the charge allege that the comments contained in the segment of Racing Rant were:

Defamatory of licensed jockey James McDonald as it carried the imputation that jockey James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing.

22. The first matter to be observed is that that the rule cannot have been intended to be interpreted literally. A matter published about a person may be defamatory but nonetheless defensible. For example, to publish that the Stewards had found a jockey guilty of careless riding would be defamatory of the jockey, even though the report was absolutely accurate. To interpret the rule literally would mean that a person bound by the Rules of Racing could not accurately report charges brought by Stewards against licensed persons, or the outcomes of hearings before the Stewards if the licensed person was found guilty of the charge. Nor could the outcome of appeals before this Panel be reported if the Appellant were found to be guilty of a breach of the Australian Rules of Racing. The rule must be interpreted as intending to apply only to the publication of unjustifiable or indefensible defamatory matter. On behalf of the Stewards, Mr Van Gestel accepted the rule must be interpreted in this way. The outcome of this appeal does not depend on this issue of interpretation.

23. The second matter is that, in its natural and ordinary meaning, the segment could not be held to be defamatory of Mr James McDonald. James McDonald is not named or otherwise identified in the segment. The program refers to *J Mac*. The ordinary reasonable viewer would not know that *J Mac* is a reference to Mr McDonald. Only those well acquainted with the racing industry would know that *J Mac* was a reference to James McDonald and that James McDonald was a jockey.

24. Nor would the ordinary, reasonable viewer understand that there was anything improper about *J Mac* betting on thoroughbred racing or that for him to do so would be a serious breach of the Australian Rules of Racing. Again, this would only be conveyed to a viewer with knowledge and understanding of thoroughbred racing.

25. For the publication to be defamatory of Mr McDonald, the person to whom the matter was published must have knowledge of particular extrinsic facts which, taken together with the publication, would give rise to a defamatory imputation.
26. The position was put this way in *Lewis v The Daily Telegraph Ltd* [1964] AC 234 at 278, where Lord Devlin, in this famous passage, said:

“I have said that a derogatory implication might be easy or difficult to detect; and, of course, it might not be detected at all, except by a person who was already in possession of some specific information. Thus, to say of a man that he was seen to enter a named house would contain a derogatory implication for anyone who knew that that house was a brothel but not for anyone who did not.”
27. Since the publication could only be defamatory of Mr McDonald if it was published to someone with sufficient knowledge of the racing industry so as to enable Mr McDonald to be identified and for the defamatory imputation to be conveyed, it is necessary to determine to whom it was that Mr Lambourne and Mr Pollett published the segment.
28. The evidence establishes that Mr Lambourne and Mr Pollett only published the segment to paying subscribers to Racing Rant. The cyber security was apparently sufficient to prevent its publication to others. Mr Van Gestel, however, points to the fact that on 21 April 2020 Mr Mark Guest sent him an email which enabled Mr Van Gestel to view the segment of Racing Rant. Mr Van Gestel, therefore, submits that the program was available to the public. However, Mr Van Gestel also acknowledged that when he accessed the Racing Rant website, he was unable to obtain access to enable him to view the program of 20 April 2020. Mr Van Gestel does not know, and the evidence does not reveal, how it was that Mr Guest was able to send the program to him. Mr Lambourne and Mr Pollett contend that however this was achieved it was achieved in breach of copyright. They contend that they cannot be held responsible for any publication to anyone other than to the subscribers to Racing Rant.
29. It may be inferred that only those with an interest in and understanding of thoroughbred racing would subscribe to Racing Rant, and that therefore, it may be inferred that those 700 subscribers had sufficient knowledge to understand the reference to *J Mac* and to understand that for a jockey to bet on a race is a serious breach of the Rules of Racing.
30. Also, the subscribers are likely to have known that James McDonald had previously been disqualified by the Stewards for a lengthy period for placing a bet contrary to the Rules of Racing. In that context and with that knowledge, they would view the program. This is relevant to their understanding of what was conveyed by the program.
31. Further, it is to be inferred that the subscribers fully appreciated the irreverent and larrikin nature of Racing Rant. In Exhibit 13 before the Stewards (which was part of Exhibit A before this Panel) are emails from 11 subscribers to Racing Rant that were sent to Mr Van Gestel. In substance, those emails each state that they viewed the relevant program and understood the comments about Mr McDonald as being a joke. They each did so based upon their experience as viewers of Racing Rant and their

understanding that the humour or intended humour of the program was not intended to be taken seriously.

32. It is in this context that the second charge against Mr Lambourne is also to be considered. As stated above, it alleges that in breach of AR228(d) the publication conveyed the defamatory imputation that a jockey, James McDonald, was betting on thoroughbred racing in breach of the Rules of Racing.
33. In determining whether the imputation was conveyed to the subscribers, it is, in my view, necessary to consider whether those subscribers were likely to have understood that what was published was intended as an assertion that Mr McDonald placed bets on horses or whether what was published should be understood only as an absurd joke and was not intended to be taken seriously. It should be noted that there is no evidence that any of the subscribers who saw the program took it seriously.
34. In *Gatley on Libel & Slander*, 12th ed at [3.36], the authors refer to the often-quoted statement in *Donoghue v Hayes*:

The principle is clear, that a person shall not be allowed to murder another's reputation in jest. But if words be so spoken that it is obvious to every bystander that only a jest is meant, no injury is done, and consequently no action would lie.¹

35. *Gatley* continues:

The same applies to written words which the reasonable reader would regard as nothing more than an absurd joke.

36. In *Coleman v John Fairfax Publications Pty Ltd* [2003] NSWSC 564, Levine J said this about a claim that a particular publication was defamatory:

22 However, I have come to the view, which I will state now, that this matter complained of is incapable of defaming either plaintiff in the way pleaded (or indeed, in my view, at all). My reason for so stating is that this could not, in my view, be a clearer case where the ordinary reasonable reader would understand from reading whole of the material that none of its contents was to be taken seriously. If a reader took the whole of this material, or any part of it, as a joke but nonetheless felt there was something "beyond a joke", in my view that reader would be neither ordinary nor reasonable. In the course of submissions, I was referred to standard authorities in the areas of "jesting" and "at one's peril", that line of authority commencing with *Donoghue v Hayes* (1831) *Hayes* (Ir Ex) R 265 at 266. Reference has also been made to *Hepburn v TCN Channel Nine Pty Ltd* (1983) 2 NSWLR 664 at 667; *Anderson v Mirror Newspapers Ltd* (1986) 6 NSWLR 99; *Darbyshir v Daily Examiner Pty Ltd* (Levine J, unreported, 29 August 1997); *McGuinness v J T Publishing Australia* (Levine J, unreported, 21 May 1999); *Wild v John Fairfax & Sons Ltd* (Levine J, unreported 8 August 1997). The last three mentioned cases have had various outcomes. What became of

¹ (1831) *Hayes* (Ir. Ex.R 265)

them, as a matter of history, is unknown to me. A further case of my own, *Falkenberg v John Fairfax & Sons Ltd* (NSWSC, unreported, 16 December 1994) was one in which the case did not go to the jury on the basis of absurdity.

23 Of course, each case is determined on its merits in accordance with principle. I have come to the view that this article itself, and the more so by reference to the surrounding material, is self-evidently absurd. The ordinary reasonable reader would understand that what was being published was to be understood only as an absurd joke. That reader, if ordinary and reasonable, simply could not draw from the matter complained of imputations of the kind pleaded here. No ordinary reasonable reader would understand this article to convey anything disparaging of the plaintiffs and thereby hold them up to hatred, ridicule or contempt, or by its mere publication, or any reference at best to psychological deficiencies or incidents of upbringing, to bring about them being shunned and avoided. A fortiori, in my respectful view, do these considerations apply to the second plaintiff.

37. In my opinion, the laughter, the irreverent tone and the attempt at humour is an indicator that what is said about *J Mac* placing bets was not intended to be taken seriously. This is the impression I formed after seeing the programme twice. Mr Van Gestel accepts that if the references in the program to James McDonald and betting would be understood by subscribers as a joke and were not to be taken seriously then the charge of breach of AR228(d) would not be established. Mr Capelin accepted that if those parts of the program would not have been understood by subscribers as a joke, then the charge would be established.
38. Similarly, Mr Van Gestel accepted that if what was said in the program about James McDonald was not to be taken seriously then what was published would not give rise to a particular suspicion in the mind of a reasonable person that James McDonald was betting on thoroughbred racing. Accordingly, in those circumstances, the charge of conduct prejudicial to the image of racing would not be established.
39. The vision and the sound of the segment was played for us twice. I had previously read the transcript. On both occasions, I watched the program with the transcript in front of me (Annexure A to these Reasons) and by reference to the words on the transcript made notes where I observed laughter, chuckles and smiles. The relevant part of the segment is line 38 on page 1 and extends to line 100 on page 2.
40. The publication contains the following statements about *J Mac*:
- (i) "You can see he's had 1500 each way or something ...": line 41-42 page 1 said by Glenn Pollett;
 - (ii) "So maybe he was punting there too": line 50 page 1 said by Glenn Pollett;
 - (iii) "I think J Mac is back on the punt": line 55 page 2 said by Glenn Pollett;
 - (iv) "He loves it. If you love a bet you don't stop betting": line 59 page 2 said by Glenn Pollett;
 - (v) "But J Mac is consistently trying and I'm telling you he is consistently having a little wager. Good on him": line 75 page 2 said by Glenn Pollett.

41. There are other references to *J Mac* betting, but these are the main ones. If taken literally, the imputation is conveyed that *J Mac* was betting on thoroughbred racing.
42. As I have mentioned, whether or not the imputation is conveyed to subscribers depends upon the context in which the words were stated. Would subscribers understand that what was said about *J Mac* was not to be taken seriously but was part of a joke?
43. As to (i), when the words were spoken there was immediate laughter and there were smiles on the faces Mr Lambourne and Mr Pollett. The passage begins by reference to *J Mac* having to be more careful when he talks about horses he has ridden. The basis upon which Mr Pollett is recorded as saying that he had 1500 each way is because of what Mr McDonald had said about the horse and how good it was:

He goes, "Oh I rode this during the week and it's just like I knew if I just sat there and steered it, it would just – it would lengthen out and have them covered" and it was just like, "What a beauty" and you just go, "Man, you have to back this", and you just go "Oh".

They are making fun of Mr McDonald's comments about the chances of horses. Mr Lambourne and Mr Pollett laugh as Mr Pollett suggests that Mr McDonald's comments indicate that he is betting on the horse. To suggest that such a conclusion can be drawn simply from Mr McDonald's comments was, in my view, intended to be understood as absurd. When taken with the laughter it would suggest to subscribers that this was a joke (although many might say not a particularly funny joke).

44. The joke continues in the words in (ii) when Mr Pollett says "...and then he wasn't giving a wrap to **Collette** the week before so maybe he was punting there too". There is then laughter. The laughter and the way in which Mr Pollett said this does not suggest he is serious but that it is a joke.
45. It is in that context that Mr Pollett makes the comments referred to in (iii), "I think *J Mac* is back on the punt".
46. The words referred to in (iv) that "if you love a bet, you don't stop betting" are said in the context of the joke that is at lines 58-64. When this is said there is laughter, chuckles and smiles, indicating to the viewer that this is a joke. What is said in these lines, is clearly intended to be humorous.
47. At line 68 Mr Sutherland appears to seek to inject some seriousness into the discussion when he said, "I think when you've been rubbed out for a couple of years... like Nash getting done in, you know, Hong Kong, I think you can pretty safely say you're consistently doing the right thing". What he is saying is that when jockeys, like Mr McDonald, have been disqualified for a lengthy period "you can pretty safely say you are consistently doing the right thing". That is, he is saying that the disqualification would be a sufficient deterrent to deter Mr McDonald from betting again. He is expressing his view that Mr McDonald would not be betting because he has learnt his lesson.
48. However, Mr Sutherland is interrupted in mid-sentence after saying, "when you have been rubbed out for a couple of years". Mr Pollett interrupts and says, "you need to bet bigger". There is then laughter. The subscribers viewing the program would

appreciate the joke. Mr Pollett is anticipating what Mr Sutherland is about to say, namely the deterrence would ensure Mr McDonald did not bet. Mr Pollett turns this on its head by saying that the period of disqualification would mean “you need to bet bigger”. This is why there is the laughter.

49. The words referred to (v) about Mr McDonald “consistently having a little wager, good on him” follow the same attempted humour. It is followed by laughter. The fact that Mr Pollett says, “Good on him”, emphasises that this is not to be taken seriously.
50. Between lines 78 and 98 on page 2, Mr Lambourne made a reference to *J Mac* having been fined “1,500 bucks last Monday at Warwick Farm”. A few lines later, Mr Pollett picked this up when he said, “well, it’s funny. He did speak to the Stewards afterwards about the 1,500, could he get it out of his TAB account.”
51. The absurdity of *J Mac* asking the Stewards if he could pay the fine out of his TAB account would have been obvious to the subscribers of *Racing Rant* who saw the segment. This emphasises that, in context, what was said about Mr McDonald betting on racing was intended as a joke and was not to be taken seriously. Mr Lambourne then referred to *J Mac*’s TAB account as having “been frozen because he had taken a quaddie payout” to which Mr Pollett said “took an early quaddie payout, exactly”. This is, of course, a reference to the controversial malfunction the TAB had in April in which punters were mistakenly offered large sums for an early quaddie payout, which many took. The payments were later reversed by the TAB. This also was clearly intended as a joke.
52. In defamation cases it is usual for a plaintiff to call witnesses to give reputation evidence, about how the plaintiff’s reputation was affected by the publication. This may be relevant to the extent of the damage to reputation. There is nothing in this appeal which suggests that the publication caused any harm to Mr McDonald’s reputation. The evidence is to the contrary. The 11 emails from subscribers to *Racing Rant*, in substance, state when they viewed the segment, they did not regard it seriously. This reinforces my view that subscribers were in on the joke and no defamatory imputation was conveyed to them by the publication
53. For these reasons, I am not satisfied that the Stewards have established the charge that Mr Lambourne breached AR228(d). I would allow Mr Lambourne’s appeal against conviction on Charge 2.

AR228(a)

54. The charge under AR228(a) is that the comments made in the publication of *Racing Rant* were prejudicial to the image of racing in that they would give rise to a particular suspicion in the mind of a reasonable person that jockey James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing when Mr Lambourne and Mr Pollett had no such evidence to support those allegations.
55. This comes down to the same issue as the charge in relation to AR228(d) against Mr Lambourne. What would have been conveyed to those subscribers of *Racing Rant* who saw the segment? If the publication did not convey to subscribers that James McDonald was betting on thoroughbred racing, then the segment could not be relevantly prejudicial to the image of racing.

56. Both Mr Van Gestel, for the Stewards, and Mr Capelin, for the Appellants, both submit that in order to establish a breach of AR228(a) the following three elements of conduct must be established:
- (i) public knowledge;
 - (ii) tendency to prejudice the sport rather than individual itself;
 - (iii) the conduct can be labelled as blameworthy.
57. In the case of Mr Lambourne, the relevant conduct is that he produced the program, took part in it and made particular comments concerning Mr McDonald during the program, although, as I have already noted, most of the comments about Mr McDonald were made by Mr Pollett. In the case of Mr Pollett, the relevant conduct was that he took part in the program as a presenter and made particular comments in relation to Mr McDonald.
58. Mr Van Gestel accepted that if the comments made in the program about Mr McDonald betting were not to be taken seriously, but would only be understood by subscribers as a joke, then neither the second nor the third element of conduct prejudicial could be established. In those circumstances, the conduct could not have a tendency to prejudice the sport and the conduct could not be labelled as blameworthy.
59. Mr Capelin accepted that if subscribers understood the comments about Mr McDonald as giving rise to a suspicion that James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing, then the second and third elements would be established.
60. There was some debate about whether publication to the 700 subscribers was sufficient to amount to public knowledge. However, Mr Capelin accepted that if the publication to subscribers was understood to be serious and intended to suggest that Mr McDonald was betting, then this would be likely to find its way into the public domain.
61. In my opinion, when the segment of Racing Rant is considered as a whole, the subscribers who saw the segment would not consider that the presenters had evidence or suspected James McDonald of betting on racing in breach of the rules.
62. For that reason, the charges under AR228(a) against Mr Lambourne and Mr Pollett have not been made out. I would allow the appeals against both convictions.

The decision of Ms Skeggs and Mr Carlton

63. Ms Skeggs and Mr Carlton, however, take a different view. They both take the view that the words referred to in 65 (a) and (b) below could:
- Give rise to a particular suspicion in the mind of a reasonable person that James McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing, when you have no such evidence to support those allegations.

- Be defamatory of James McDonald as they carried the imputation that Mr McDonald was betting on thoroughbred racing in breach of the Australian Rules of Racing.

64. They take the view that the laughter and the way in which the words were spoken were insufficient to suggest that what was said was a joke.
65. It was the view of Ms Skeggs and Mr Carlton that the following words were not accompanied by laughter, nor were the words spoken with any mirth in the voice:
- (a) If you love a bet, you don't stop betting. (Referring to J Mac).
 - (b) But J Mac, I'm telling you, he's consistently trying and I'm telling you he's consistently having a little wager. Good on him.
66. For this view, Ms Skeggs did not rely on the written transcript, but relied solely on listening to and viewing the video. Ms Skeggs is of the opinion that the way the words were spoken, the intonation used and facial expressions, all critical factors in communication, cannot be conveyed via the written format. So, chose to give 100% attention to the video.
67. It was the view of Ms Skeggs that the laughter, when it appeared was linked to specific jokes and not the comments listed in 65 (a) and (b) eg laughter appeared when the following joke was made: He did speak to the Stewards afterwards about the 1,500, could he get it out of his TAB account?
68. The view of Ms Skeggs is that 11 emails out of 700 subscribers does not provide proof that 'the subscribers' fully appreciate the irreverent and larrikin nature of Racing Rant. It only provides proof of what 11 of them think. We can have no way of knowing what the other 689 subscribers think. 11 out of 700 is not statistically significant. Additionally, there is also no evidence that 689 subscribers did not take it seriously.
69. For these reasons they would dismiss the appeals by Mr Lambourne against conviction in relation to the first and second charges and would dismiss the appeal against conviction by Mr Pollett.

Summary and Conclusion

70. Although, in my opinion, the appeal by Mr Lambourne against his conviction for breach of AR228(a) and (d) should be upheld and that the appeal against the conviction of Mr Pollett for breach of AR228(a) should also be upheld, I am in the minority and therefore the appeals should be dismissed.

APPEAL AGAINST THE SEVERITY OF PENALTY

71. Given that the appeals against conviction have been dismissed in relation to the first and second charges against Mr Lambourne and the charge against Pollett it is now necessary to consider the appeals against the severity of penalty.

AR228(a)

72. Both Mr Lambourne and Mr Pollett have been convicted of breaches of AR 228(a).

73. In the case of Mr Lambourne, the Stewards imposed a penalty of a fine of \$2,000 for breach of a AR228(a). The Panel was provided with a schedule setting out penalties that had been imposed in other cases for breach of this rule, or its equivalent. This became Exhibit B. The Panel has taken these into consideration. The Panel has concluded, that in the circumstances, the appropriate penalty for this offence is \$1,000, and that therefore the fine should be reduced from \$2,000 to \$1,000. The factors which led us to this conclusion are:
- (a) The evidence establishes that Mr Lambourne did not intend to cause any harm to Mr McDonald when he published the program and said the words that he did. Mr Van Gestel accepts this.
 - (b) Mr Lambourne apologised to Mr Donald promptly, once he learned that Mr McDonald was offended by the program.
 - (c) The program had a limited publication, which was intended to be published only to paid subscribers.
 - (d) Mr Lambourne has given considerable service to the racing industry. His program is intended to, and does, promote racing.
 - (e) Although Mr Lambourne participated in the program and spoke, most of the words, which would form the basis of the charges under 228(a), were spoken by Mr Pollett and not Mr Lambourne.
 - (f) Mr Lambourne has no prior convictions.
74. In the case of Mr Pollett, he was fined \$5,000 for his breach of AR228(a). In the opinion of the Panel the fine imposed for Mr Pollett's breach of the rule should be reduced from \$5,000 to \$2,000.
75. We consider that Mr Pollett's conduct was more serious than that of Mr Lambourne. Most of the comments about Mr McDonald that were the subject of the charge were in fact spoken by Mr Pollett. Also, Mr Pollett has a prior conviction for a similar offence in 2016. However, as with Mr Lambourne, we take into account the fact that no harm to Mr McDonald was intended in the program. There was a limited publication. We take into account Mr Pollett's service to the industry.

AR228(d)

76. The second charge of which Mr Lambourne was convicted was a breach of AR228(d). The Panel takes the view that the conduct the subject of the second charge is precisely the same conduct as the subject of the first charge of. In our view, Mr Lambourne should not be punished twice for the same conduct. We consider that in those circumstances the fine should be reduced from \$2,000 to nil.

AR232(b)

77. The third charge against Mr Lambourne is that, contrary to AR232(b) he failed or refused to comply with a direction of the Stewards. He pleaded guilty to this charge.
78. The factual background to this charge is that:
- (a) At 1:20 pm on the 30 April 2020, Mr Van Gestel sent to Messrs Lambourne, Pollett and Sutherland a link to the recording of the enquiry on that date. The email stated "the recording is not to be provided to any third party other than your legal representative".

- (b) On the same day (30 April) at 2:33 pm, Mr Lambourne sent an email to Mr Van Gestel, in which, amongst other things, he said (at Exhibit 8, page 25):
I would presume that the notification that today's conference was observed and not "in camera" should therefore allow me to freely disseminate the recording.
- (c) Mr Van Gestel responded at 2:39 pm that day in which, amongst other things, he said:
There were no media present and therefore there was no need to advise you that there was. Once again, I issued the direction that the recording is not to be disseminated to any third party other than your legal representative.
- (d) At 3:08 pm Mr Lambourne sent an email to Mr Van Gestel in which, amongst other things, he said (at page 24):
Could you please clarify whether this is a public enquiry or is it being held "in camera"? If it is a public enquiry, why can't the public be made aware?
Please provide your reasons why the record of the proceedings cannot be shared with the public.
If not allowed to publish the recording, are we, at least, allowed to discuss what is happening in the enquiry, to date?
- On 30 April, Mr Van Gestel replied:
The video is the property of Racing NSW and my directions to you remain in force.
The enquiry is not being conducted in camera and therefore you are not restricted in discussing the enquiry. However, you are cautioned in respect of making any comment which may prejudice the image, interests or integrity of racing.
- (e) On 7 May 2020 the enquiry resumed. The Stewards alleged that at 12:07 pm on 8 May 2020, the Stewards provided Mr Lambourne with the recording of the enquiry conducted on 7 May. In providing that recording Mr Van Gestel directed:
The recording is not to be provided to any third party other than your legal representative as previously advised, and remains the property of Racing NSW.
- (f) On 16 May 2020, Mr Lambourne posted on Twitter a section of the recording of the video. It was only 18 seconds in length.

79. Mr Lambourne has pleaded guilty to this offence.
80. Mr Van Gestel explained that the purpose of the direction was standard practice. It was to protect those under investigation. If a person the subject of enquiry is not charged then the recording of the enquiry should not be made public. This, however, was not intended to prevent any public discussion of what occurred.
81. On behalf of Mr Lambourne, Mr Capelin pointed to the fact that the breach of the direction by Mr Lambourne was on 17 May 2020, which was the same day as the charges. Therefore, he submits, no damage was done and the direction at that time served no purpose.
82. Mr Capelin also points to the fact that the segment of the video posted on Twitter was only 18 seconds.

83. We accept the force of these two submissions. However, Mr Lambourne's disregard of the direction given to him by Mr Van Gestel was brazen and deliberate. His conduct was in contumelious disregard for the direction. It challenged the authority of the Stewards. In that sense it amounted to a challenge to the integrity of racing. The penalty we impose must be sufficient to amount to a deterrent to others who might flout directions given by the Stewards. Nonetheless, we consider that in all the circumstances a fine of \$1,000 is the appropriate penalty. Therefore, the appeal against penalty in relation to charge 3 should be allowed and the fine reduced from \$2,000 to \$1,000.

Orders

Appeal by Mr Lambourne

1. In relation to the first charge for a breach of AR228(a):
 - (1) The appeal against conviction is dismissed.
 - (2) The appeal against severity of penalty is allowed.
 - (3) In lieu of the penalty imposed by the Stewards, Mr Lambourne is fined \$1,000
 - (4) 50% of the appeal deposit is to be forfeited and 50% is to be refunded.
2. In relation to the second charge of breach of AR228(d):
 - (1) The appeal against conviction is dismissed.
 - (2) The appeal against penalty is allowed.
 - (3) In lieu of the penalty imposed by the Stewards, no penalty is imposed.
3. In relation to the third charge of breach of AR232(b):
 - (1) The appeal against severity of penalty is allowed.
 - (2) In lieu of the penalty imposed by the Stewards, Mr Lambourne is fined \$1,000.

Appeal by Mr Pollett

4. In relation to the first charge for a breach of AR228(a):
 - (1) The appeal against conviction is dismissed.
 - (2) The appeal against severity of penalty is allowed.
 - (3) In lieu of the penalty imposed by the Stewards, Mr Pollett is fined \$2,000.

In respect of both appeals

5. 50% of the appeal deposit is to be forfeited and 50% is to be refunded.

EXTRACT FROM RACING RANT

20 APRIL 2020

(between 14:14 and 20:20)

MARC LAMBOURNE: The Packer Plate - well, Gord, you nailed this one **and**, Glen, you nailed this one. **Quick Thinker** got to \$5 and **Kinane** won the race.

10 **GLEN POLLETT:** Well, Gord absolutely nailed **Kinane**. I think we nailed the SP of **Quick Thinker** brilliantly on the Friday show when it was evens and we said, well, this is a 7 to 2 chance. I think the value of that is just unbelievable. I don't want to blow our own trumpet. Fucking it didn't start 2s on, did it? It did start \$5 and Gord - Gord mentioned **Kinane** more than anything I did. Gord is a champion at finding horses that run through the line and he doesn't give a fuck if they want to conserve--

MARC LAMBOURNE: If one more fucking person wants to tell me how good the Wyong win was, I'll throw up. The Wyong run was just a barrier trial. The horse has always had the talent to win this race--

20 **GLEN POLLETT:** Yeah.

MARC LAMBOURNE: --and it just went through its gears at Wyong, didn't it?

GLEN POLLETT: It was \$15 in to start like 5.50, you know, guys, on Friday.

MARC LAMBOURNE: Yeah. It was a great move and well done, Gord. Well spotted.

30 **GORDON SUTHERLAND:** Yeah, it was--

GLEN POLLETT: It owned them in a stride, Gord. Unbelievable.

GORDON SUTHERLAND: Yeah. It was weird there. It looked like it was trying a little bit too hard between about the 7 and the 5. Do you know what I'm saying? Then when it actually balanced up it was awesome, but an interesting 200 metre part of that race.

40 **GLEN POLLETT:** J Mac has got to be careful when he talks after the race. I'll tell you he's got to be a bit more careful. He talks about their chances, what he thought prior to the race and, as he's talking, you can see he's had 1,500 each way or something, the way he - it's unbelievable. He goes, "Oh I rode this during the week and it's just like I knew if I just sat there and steered it would just - it would lengthen out and have them covered" and it was just like, "What a beaut/" and you just go, "Man, you have backed this" and you just go, "Oh."

GORDON SUTHERLAND: What about how - the raps he was giving this horse. He said what was the best feel of the carnival.

50 **GLEN POLLETT:** And then he wasn't giving a rap to **Colette** the week before, so maybe he was punting there too.

GORDON SUTHERLAND: Yeah, **yeah**.

GLEN POLLETT: I think J Mac is back on the punt

GORDON SUTHERLAND: He's fucking (inaudible) something like that.

60 **GLEN POLLETT:** I love J Mac. He's just so fucking sick. He loves it. If you love a bet, you don't stop betting. Be fair dinkum. It's like going, "Oh I enjoyed fucking all those sheilas last month. I might give up fucking." It's not going to happen. If he hasn't backed it, I'm so proud of him. Little bastard he is, but on the flip side, the thing that I like about him is I feel like when he doesn't back them he tries just as hard, which is not like jockeys in the past. I feel like when we've had top jockeys that bet, when they haven't bet they haven't - "Oh fucking, who gives a fuck?"

GORDON SUTHERLAND: I think when you've been rubbed out for a couple of years--

GLEN POLLETT: You need to bet bigger?

70 **GORDON SUTHERLAND:** Yeah. Like Nash getting done in, you know, Hong Kong, I think you can pretty safely say you're consistently doing the right thing.

GLEN POLLETT: Consistently tries. There's no doubt. T Clark consistently tries now. I find he's always putting his horses in good spots, but J Mac he's consistently trying and I'm telling you he's consistently having a little wager. Good on him.

MARC LAMBOURNE: Just on J Mac there, he got fined 1,500 bucks last Monday at Warwick Farm--

80 **GLEN POLLETT:** Yes.

MARC LAMBOURNE: --on **Adana**, which he has ridden into 7th place in a 10 horse field, beaten 8 lengths and he's whacked it about 10 times in the last 100 metres when it's like 7 lengths away. I wonder if he had any interest in that horse. He seemed very unhappy with it and he was reminding the horse that he was very unhappy--

90 **GLEN POLLETT:** Well, it's funny. He did speak to the Stewards afterwards about the 1,500, could he get it out of his TAB account.

MARC LAMBOURNE: What? Which had been frozen because he had taken a quaddie payout.

GLEN POLLETT: He took an early quaddie payout, exactly. They're up to it again, the TAB. I want to talk about the TAB thing later on in part 2.

MARC LAMBOURNE: It's just ongoing, isn't it?

100 **GLEN POLLETT:** It's just like it becomes like the Godfather. Like they're just - I only just noticed something on the weekend, but anyway we'll talk about it later on.