

**RACING APPEALS TRIBUNAL  
NSW**

**Mr D B Armati**

**22 October 2018**

**Reserved Decision**

**Appeal by Racing NSW in relation to licensed trainer Mr Carl Poidevin in respect of ARR175(g) and ARR 178AB (2 matters)**

**JURISDICTION DECISION**

**ISSUE**

- 1. Power of Appeal Panel to use ARR 182**
- 2. Penalty**

**DECISION:**

- 1. The Appeal Panel was not empowered to use ARR 182**
- 2. New issue of power of stewards to use ARR 175 identified for further submissions**
- 3. Penalty decision deferred**

## BACKGROUND

1. Racing NSW ("RN") appeals against a decision of the Appeal Panel of Racing NSW ("AP") of 20 July 2018.
2. AP had determined an appeal from a decision of the stewards of 8 May 2018 to impose periods of disqualification upon licensed trainer Carl Poidevin ("the respondent").
3. The stewards had dealt with three alleged breaches detailed as follows:

Charge 1-breach of AR178AB (section set out below) and particularised as follows:

The details of the charge under AR178AB(1)(b) being that you, licensed trainer, Mr Carl Poidevin did, without the permission of the stewards, injected the horse Master Agar between approximately 5 PM and 6 PM and 6 April 2018, when Master Agar was engaged to run in race 3-Benchmark 66 Handicap 1600 m conducted at Kembla Grange on Saturday, 7 April 2018.

Charge 2- breach 178AB - being the same particulars except it was for the horse Tony's Princess engaged in race 6.

Charge 3 - breach of AR175 (section set out below) and particularised as follows:

The details of the charge being that you licensed trainer Mr Carl Poidevin during an interview and/or investigation conducted by Racing NSW at your registered stables at 5 Kingston Town Drive Kembla Grange on the morning of Saturday, 7 April 2018 and at a stewards Inquiry conducted at the offices of Racing NSW on 8 May 2018, into whether the racehorse Master Agar was injected or was administered medication in contravention of the Rules of Racing, gave the following false evidence. The particulars of the false evidence are not set out as they extend over four pages.

4. The stewards imposed, for charge 1 a disqualification of 9 months, for charge 2 a disqualification of 13 months, each to be served concurrently, and for charge 3 a disqualification of 9 months to be served cumulatively, with the disqualifications to commence on 8 May 2018 and end 8 March 2020.
5. AP imposed the same periods of disqualification but under AR 182 ordered that from 8 November 2018 the respondent could provide services as a farrier on licensed premises and racecourses but upon four specified conditions. Those conditions are not set out.
6. There are two grounds of appeal advanced by RN. To paraphrase the grounds of appeal the issues are that AP had no power to impose the condition under AR 182 and that in the alternative AP's decision imposing the periods of disqualification should be imposed without the condition. Such a penalty outcome would correspond with the stewards' decision.
7. The respondent maintains that the AP was empowered to impose the condition and its penalty should not be disturbed.

8. The evidence on this appeal has comprised the exhibits before the AP, the decision of Weeks v Queensland Integrity Commission OCR-213-16 of 4 October 2017, Member Olding, (“Weeks”), the AP decision of 20 July 2018 and the transcript before the AP.

9. Because of the submissions made and the decisions that will flow from those submissions and having regard to the issue it is necessary to set out in detail the relevant provisions of the Thoroughbred Racing Act 1996, The Australian Rules of Racing and the Local Rules.

## 10. THE LEGISLATION AND THE RULES

### THOROUGHBRED RACING ACT 1996 (“TRA”)

#### 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) (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.

#### 24 Delegation of functions

- (1) Racing NSW may delegate to an authorised person or body any of its functions, other than this power of delegation.
- (2) A delegate may sub-delegate to an authorised person or body any function delegated by Racing NSW if the delegate is authorised in writing to do so by Racing NSW.
- (3) In this section, authorised person or body means:
  - (a) the Chief Executive or any other member of Racing NSW, or
  - (b) a committee of Racing NSW or any member of such a committee, or
  - (c) a race club or racing association.

#### 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,
- (2) A racing authority means:
  - (a) the stewards of Racing NSW,
- (7) An appeal is to be made in accordance with the local rules of racing of Racing NSW.

#### 43 Procedure on an appeal

- (1) An appeal to the Appeal Panel is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the decision appealed against was made, may be given on the appeal.

#### 44 Determination of appeal

- (1) The Appeal Panel may do any of the following in respect of an appeal:
  - (a) dismiss the appeal,
  - (b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the racing authority,
  - (c) refer any matter relating to the decision appealed against to the racing authority for rehearing (in accordance with directions given by the Appeal Panel),
  - (d) make such other order in relation to the disposal of the appeal as the Appeal Panel thinks fit.

(2) ...

### **AUSTRALIAN RULES OF RACING (“ARR”)**

AR 1. In the interpretation of these Rules, (and of any programme of a race meeting held thereunder), the following words unless the context otherwise requires, shall have or include meanings as follows: -

The expression “Principal Racing Authority” means: -

- (a) a body, statutory or otherwise, that has the control and general supervision of racing within a State or Territory (provided any Member thereof is not a direct Government appointee), and means in the State of New South Wales, the NSW Thoroughbred Racing Board; ...

“Stewards” means the persons appointed as such in accordance with the Local Rules of a Principal Racing Authority and includes Deputy Stewards duly appointed.

AR 7.

### **POWERS OF A PRINCIPAL RACING AUTHORITY**

A Principal Racing Authority shall:

- (i) not have reserved to it the right to make new Rules (other than Local Rules) or to rescind or alter these Rules, and a Principal Racing Authority which does not comply with this requirement shall ipso facto cease to be a Principal Racing Authority;
- (ii) have the control and general supervision of racing within its territory;
- (iii) in furtherance and not in limitation of all powers conferred on it or implied by these Rules, have power, in its discretion: -

- (a) To hear and decide appeals as provided for in its Rules or by law.
- (b) To license jockeys, trainers and others on such terms and conditions as it shall think fit, and at any time to suspend, vary or revoke any such licence without giving any reason therefore.
- (c) To inquire into and deal with any matter relating to racing and to refer report and/or for hearing and determination and, without prejudice to the and/or delegate any such matter to stewards or others for investigation and generality of the foregoing power, to inquire at any time into the running of any horse upon any course or courses, whether a report concerning the same has been made or decision arrived at by any Stewards or not.
- (d) To penalise:-
  - (i) any person contravening the Rules or disobeying any proper direction of any official, or
  - (ii) any licensed person or official whose conduct or negligence in the performance of his duties has led, or could have led, to a breach of the Rules.
- (e) At any time to exercise any power conferred on Stewards by the Rules.
- (f) To confirm, adopt or enforce any penalty imposed upon any person by the Committee or Stewards of any Club in the Commonwealth.

## **STEWARDS**

AR 8. To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Racing Authorities, with the following powers:-

- (d) To regulate and control, inquire into and adjudicate upon the conduct of all officials and licensed persons, persons attendant on or connected with a horse and all other persons attending a racecourse. [amended 20.11.02]
- (e) To penalise any person committing a breach of the Rules.
- (y) To exercise any other powers and duties laid down for them by the Principal Racing Authority concerned.
- (z) Notwithstanding anything contained within these Rules, and not in limitation of any power conferred by these Rules, where a person has been charged with a breach of these Rules (or a local rule of a Principal Racing Authority) or a person has been charged with the commission of an indictable criminal offence, the Stewards pursuant to the authority delegated by the Principal Racing Authority, if of the opinion that the continued participation of that person in racing might pose an unacceptable risk to, prejudice or undermine the image, interests or integrity of racing, may:
  - (a) suspend any licence, registration, right, or privilege granted under these Rules to that person;
  - (b) prevent any horse owned (or part-owned) or leased by that person from participating in any race or official trial;
  - (c) order that any registration of the transfer of ownership and/or training of a horse related to that person not be effected;
  - (d) make any other direction or order related to the person which is in the interests of racing, pending the hearing and determination of the charge under these Rules, the relevant local rule or the relevant criminal charge.

## **OFFENCES**

AR 175. The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise;

(g) Any person who gives at any interview, investigation, inquiry, hearing and/or appeal any evidence which is false or misleading in any particular

AR 178AB.

- (1) A person must not, without the permission of the Stewards, inject a horse, cause a horse to be injected or attempt to inject a horse, which is engaged to run in any race:
  - (a) at any time on the day of the scheduled race, prior to the start of such event; and
  - (b) at any time during the One Clear Day prior to 12.01am on the day of the scheduled race.
- (4) Any person who breaches, or is a party to a breach of, AR.178AB(1), commits an offence and may be penalised.
- (5) For the purpose of this rule:
  - (a) injection includes, but is not limited to, the insertion of a hypodermic needle into a horse;
  - (b) it is not necessary to establish whether any substance was injected, or the nature of any substance injected.

AR 182.

- (1) Except with the consent of the Principal Racing Authority that imposed the disqualification, and upon such conditions that they may in their discretion impose, a person disqualified pursuant to these Rules must not, during the period of that disqualification:
  - (a) enter upon any racecourse or training track owned, operated or controlled by a Club or Principal Racing Authority or any land used in connection with such properties;
  - (b) enter upon any training premises, complex or establishment of any Club, Principal Racing Authority or licensed person;
  - (c) be an office holder, official, member or employee of any Club or Principal Racing Authority;
  - (d) be employed by, or otherwise engaged to provide any service in any capacity to, any thoroughbred racing stable;
  - (e) ride any racehorse in any race, official trial, jump-out or test;
  - (f) enter or nominate any horse for a race or official trial whether acting as agent or principal or in any other capacity;
  - (g) subscribe to any sweepstakes;
  - (h) race or have trained any horse whether as owner, lessee or in any other capacity;
  - (i) share in the winnings of any horse;
  - (j) participate in any way in the preparation for racing or training of any racehorse;
  - (k) open a betting account, operate an existing betting account, transact a bet or have a bet transacted on his/her behalf, have any interest in or share in any bet, receive a benefit from any bet placed with a licensed wagering operator in connection with any thoroughbred race meeting held in Australia;
  - (l) conduct or assist with thoroughbred breeding in Australia;
  - (m) attend or participate in thoroughbred racehorse sales or related events;
  - (n) permit or authorise any other person to conduct any activity associated with thoroughbred racing, thoroughbred race horse sales and/or breeding for or on behalf of the disqualified person; and/or
  - (o) receive any direct or indirect financial or other benefit derived from thoroughbred racing and/or breeding in Australia.

- (2) In addition to any of the restrictions that may apply in respect of a disqualified person, including those set out in AR.182(1), the Principal Racing Authority or the body which imposed the disqualification may order the disqualified person:
  - (a) not to participate in social media or mainstream media in relation to any racing or wagering matter;
  - (b) to adhere to such other restrictions as may be necessary or desirable to prevent conduct by the disqualified person that could be prejudicial to the image or interests or welfare of racing.
- (3) Except with the consent of the Principal Racing Authority that imposed the disqualification, no person who in the opinion of the Principal Racing Authority is a close associate of a disqualified person shall be permitted to train or race any horse.
- (4) A disqualified person who breaches an order made pursuant to AR.182(2) is guilty of an offence and may be penalised.
- (5) Unless otherwise determined by the Principal Racing Authority that imposed or adopted the penalty, the period of disqualification of any person who contravenes any of the provisions of rule AR.182(1), shall automatically recommence as from the most recent date of such contravention, and the person may also be subject to further penalty.
- (6) The provisions of subrule (5) shall apply to any person to whom AR.182(1) applies, regardless of when such penalty that gives rise to the application of the rule was imposed.

AR 183A. ((2) Except with the consent of the Principal Racing Authority or the Stewards who imposed the suspension, a rider suspended by the Principal Racing Authority or the Stewards shall not during the period of that suspension be registered as a stablehand or be employed or work in any racing stable.

AR 183B. Except with the consent of the Principal Racing Authority or the Stewards who imposed the suspension, a suspended trainer or a person holding a permit to train shall not during the period of that suspension:-

- (a) As a trainer, or permit holder, nominate a horse for a race, official trial or jump-out.
- (b) Train or participate in any way in the training of any racehorse; or
- (c) Be registered as a stablehand, or be employed or act or be involved in any capacity in any racing stable.

AR 183F. In addition to any of the restrictions that may apply to a suspended person under the Rules, the Principal Racing Authority or the body which imposed the suspension may order the suspended person:

- (1) not to enter designated places at racecourses except at times or on conditions as may be specified in the order;
- (2) not to participate in social media or mainstream media in relation to any racing or wagering matter; and
- (3) to adhere to such other restrictions as may be necessary or desirable to prevent conduct by the suspended person that could be prejudicial to the image or interests or welfare of racing.

AR 190. When a Principal Racing Authority disqualifies any person it may disqualify for the same or any term all or any horses in which he has an interest.....

AR 196. (1) Subject to sub-rule (2) of this Rule any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so By disqualification,

suspension, reprimand, or fine not exceeding \$100,000. Provided that a disqualification or suspension may be supplemented by a fine.

- (2) In respect of a breach of AR137A the Stewards may in addition to the penalty options conferred on them under subrule (1) of this Rule order the forfeiture of the rider's riding fee and/or forfeiture of all or part of the rider's percentage of prizemoney notwithstanding that the amount exceeds \$100,000.
- (3) Unless otherwise ordered by the person or body imposing the penalty, a penalty of disqualification or suspension imposed in pursuance of subrules (1) and (2) of this Rule shall be served cumulatively to any other penalty of suspension or disqualification.
- (4) Any person or body authorised by the Rules to penalise any person may in respect of any penalty imposed on a person in relation to the conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding two years upon such terms and conditions as they see fit

## **THE LOCAL RULES ("LR")**

LR 1. The Local Rules of the NSW Thoroughbred Racing Board (inclusive of the Rules of Betting) for the time being and the Australian Rules of Racing for the time being must be read, interpreted, and construed together, and as so combined will be and be known as The Rules of Racing of the NSW Thoroughbred Racing Board and such rules apply to the administration, supervision and control of racing throughout New South Wales and the Australian Capital Territory.

LR 5. In the interpretation of the Local Rules (and of any programme of a race meeting or conditions of a race to which they apply), unless the context otherwise requires, words defined in Australian Rule 1 have or include the meanings as set out therein and the following words have or include the following meanings:

"Racing authority" means the Stewards appointed or approved by the Board, or a Racing Association, or Registration Board, when exercising by delegation any of the powers conferred on the Board by paragraphs (b), (c), (d) and (e) of AR 7; or the Committee or the Stewards of any race Club or race meeting registered by the Board under the Rules of Racing.

## **POWERS OF STEWARDS**

- LR 12. (1) The Stewards referred to in LR 10 have jurisdiction to officiate as directed by the Board at any race meeting conducted in New South Wales or the Australian Capital Territory.
- (6) The Board, or the Chairman of Stewards, may authorise a Steward or Stewards to exercise all the powers vested in the Stewards by the Rules to inquire into, adjudicate upon, and deal with any matter or incident related to racing.
  - (7) The Stewards, when exercising the powers of inquiry and adjudication conferred upon them under the Rules are authorised to:
    - (a) inquire into the conduct of all officials and licensed persons, persons attendant on or connected with a horse, persons attending a racecourse, all other persons bound by the Rules and any matter or incident related to racing;
    - (b) lay charges against any person committing a breach of the Rules; and
    - (c) adjudicate upon any such charges including but not limited to penalising any person committing a breach of the Rules.

LR 17 - Racing NSW (or the Stewards exercising powers delegated to them) may penalise any person who has in his or her possession a stockwhip:....

## **APPEALS**

LR 107 (1)..

(2) On the hearing of an appeal, the Appeal Body has the following powers:

- (a) remit the matter in dispute to be reopened or reheard by the racing authority from whose decision the appeal is brought,
- (b) in the case of an appeal against conviction, may confirm, quash, or set aside the decision appealed against; or in the case of an appeal against penalty, may confirm, quash, set aside, mitigate, reduce, alter, vary, increase or add to the penalty imposed by the racing authority,
- (c) upon dismissal or upon the granting of leave to withdraw any appeal, if such appeal is deemed to be frivolous or vexatious, to impose such punishment or penalty as it thinks fit,
- (d) to make such order as it thinks appropriate as to the amount of costs and expenses of any appeal and for the payment of same, and with reference to the disposal of any deposit.
- (e)...

LR108(4) At the discretion of Racing NSW (or the Stewards exercising powers delegated to them), a period of disqualification may be backdated, but only if:

- (a) a person has been suspended pursuant to AR 8(z) pending the determination of the relevant charge, in which case it may be backdated to a point no further back than when the suspension commenced; or
- (b) Racing NSW (or the Stewards exercising powers delegated to them):
  - (i) have communicated in writing to a person (whether or not following an application from the person) prior to the Racing NSW (or the Stewards exercising powers delegated to them) determining the penalty for a charge against the person, to the effect that any period of disqualification may commence from a date the person ceased doing all the things set out in AR 182(1); and
  - (ii) consider that backdating the period of disqualification to the date on which the person ceased do all the things set out in AR 182(1) or some other date is appropriate at the time of determining the penalty for the relevant charge.

LR 109. Unless otherwise determined by Racing NSW:

- (a) any period of suspension, disqualification, revocation or cancellation of licence imposed upon a person is deferred for any such period that the person is in receipt of racing related workers compensation benefits; and...

## **SUBMISSIONS**

### **Common Ground**

11. It is agreed that if the stewards had power under AR182 then so did the AP.

12. It is agreed that the AP used AR182 to condition the disqualification.

13. It is agreed that the stewards, and therefore the AP, did not have all of the powers or authority of Racing NSW
14. It is agreed that Racing NSW is the Principal Racing Authority as defined in AR1 and as referred to relevantly in each of the ARR.
15. It is agreed that the AP did not use AR196(4) in its decision. That is it did not seek to suspend the disqualifications in whole or in part. It is not necessary therefore to consider whether the effect of the AP decision was in fact a suspension of a disqualification in part.
16. It is agreed that the function of the Tribunal on this appeal is to exercise its powers under s17 of the Racing Appeals Tribunal Act 1983 which provides:

**“Determination of appeals relating to thoroughbred racing**

- s17. (1) The Tribunal may do any of the following in respect of an appeal under section 15:
- (a) dismiss the appeal,
  - (b) confirm the decision appealed against or vary the decision by substituting any decision that could have been made by the Appeal Panel, the racing association or Racing NSW (as the case requires),
  - (c) refer any matter relating to the decision appealed against to the Appeal Panel, the racing association or Racing NSW for rehearing (in accordance with directions given by the Tribunal),
  - (d) make such other order in relation to the disposal of the appeal as the Tribunal thinks fit.
- (2) The decision of the Tribunal is final and is taken (except for the purposes of an appeal against the decision under this Act or the Thoroughbred Racing Act 1996) to be the decision of the Appeal Panel, the racing association or Racing NSW (as the case requires).”

17. RN seeks that the decision be to vary the decision by substituting a decision that could have been made by the AP. The respondent seeks that the decision be to dismiss the appeal or confirm the decision.

**RN Submissions**

18. It is submitted that the AP could not clothe itself with jurisdiction.
19. It is submitted that the stewards did not have the power to use AR182.
20. It is submitted that the AP powers are limited by the TRA because the appeal by the respondent to the AP was governed by s 42(1)(a), and (2) read with s 44(1). The Tribunal extends this submission to be that the respondent’s appeal to the AP was from a disqualification -s 42(1)(a)- imposed by the stewards -s 42(2)- because the stewards are a racing authority for the purposes of s 42(1) and in addition s 42(7) requires the appeal to be made in accordance with the LR.
21. Therefore it is submitted that the AP could only vary or substitute a decision on its own behalf being one that could have been a decision available to the stewards.

22. Neither party made a submission on any possible use of s 44(1)(d)-make such other orders as the AP thought fit. This seems to have been a proper position to have taken as the AP could not use this power to make a decision it could not otherwise have made.

23. Next it is said that the stewards only powers to penalise are found in AR196-the general penalty provision.

24. It is reaffirmed the stewards could not use AR182. This is the key issue on this appeal.

25. It is submitted that AR182 can only be used by a Principal Racing Authority (and it is an agreed fact that that is RN).

26. Reinforcement in that submission is found in the fact that AR182 makes no reference to the stewards.

27. To support ,the provisions which refer to both RN and the stewards in exercising a power are identified. They include:

AR175-"The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise..."

AR183A(2)- "...the Principal Racing Authority or the Stewards who imposed the suspension..."

28. In response to a question from the Tribunal, RN submitted that the words "that imposed the disqualification" in AR182 have work to do because RN itself can impose a disqualification. In support it was also pointed out that AR7 (iii)(i) was another power solely in RN to annul or mitigate any punishment. It was therefore said that limiting a power to lessen the effect of a disqualification was correctly limited to RN in AR182 as it was in AR7.

29. The submission noted that RN has recently used the AR182 power twice to allow a disqualified person to attend a racecourse for both a wedding and for a market stall run by a family member. The point being that the power was exercised by RN and not by the stewards. The Tribunal was involved with the appeal of that trainer and it imposed a disqualification as had the AP below it and the stewards below the AP. The Tribunal notes therefore that it was not the fact that RN met the classification of the body who "imposed the disqualification" (AR182(1)).

### **Respondent's Submissions**

30. It was submitted that the stewards draw their powers from delegation.

31. It was further submitted that the use of the AR182 power was within the umbrella of the stewards' powers.

32. It was next submitted that stewards stand in the shoes of RN for disciplinary matters.

33. Next it was said that RN has delegated its powers to penalise, that is, disqualify.

34. Accordingly the submission is that AR182 should be read so that the word "stewards" is substituted for RN (as the Principal Racing Authority). It is said this is not an unreasonable proposition or interpretation. This must arise as the rule must be there for a reason.

35. In answer to the submission of RN it was said that AR183A(2) is not determinative because AR182 refers to "impose the disqualification".

36. If any other interpretation was adopted to that advanced by the respondent then it was said AR182 would have no work to do

37. Reliance is placed upon AR7(iii)(c) as it gave power to the stewards to penalise.

### **RN Reply Submission**

38. While it was dealt with in opening submissions the submission on the use of Weeks was really a reply submission.

39. The respondent had placed Weeks before the AP on the basis it provided a precedent for a like use of AR182.

40. The recent decision of Weeks led to a decision to disqualify for 6 months for a breach of AR190. After that 6 months a wholly suspended suspension of 9 months was imposed. During the period of disqualification Weeks was allowed to remain living on his property, break in horses and undertake farrier work.

41. RN says this decision should be disregarded as the legislative scheme in Queensland empowering the Commission to make those orders was different. The terms of the local legislation and specific rules of racing were identified and they satisfy the Tribunal that the decision can be distinguished on the basis of those differences so far as they relate to the imposition of a condition. In any event consistent with each of the tribunals or like body decisions in other states and territories each jurisdiction frames its own decisions without the constraints of being bound by other jurisdiction decisions.

42. The submission that Weeks should not be followed was not the subject of any submission in reply by the respondent.

43. It will not be treated as a precedent in this matter.

44. The reply submission re-emphasised provisions in other rules showing the limits to AR182.

45. AR183A was noted to specifically empower the stewards as were AR8(d) and (e) and AR175(1).

### **DISCUSSION**

46. The determination of the issue in this appeal is not made easy because of the inconsistency in the use of expressions throughout the rules.

47. However the difficulty is tempered by the reasoning of Leeming JA in *Day v Harness Racing NSW* [2014] NSWCA 423 at 79-81, that drafting difficulties should not take the interpreter away from finding a meaning which plainly accords with the purpose of the expression or rule.

48. The Tribunal is troubled by the numerous references to powers delegated to the stewards. For example ARs 7(iii)(c), 8(3), 108(4) and 175. That concern does not strictly arise on an interpretation of AR182 because the word is not used there. Indeed its absence there is implied by RN to reinforce its submissions.

49. The existence or otherwise of delegations by RN to the stewards needs to be considered because they form the basis of the arguments for the respondent.

50. The Tribunal was told by RN in these proceedings, in which it was represented by its legal counsel with the presence of the chief steward, that no delegation in writing or otherwise existed. It was stated that the stewards take their powers from the TRA, the ARR and LR.

51. It is apparent that those provisions are broad enough to empower the stewards to carry out their day-to-day functions. The obvious powers that all associated with racing understand to be the stewards' powers are exercised.

52. Those powers are however not unlimited and must flow from the TRA, ARR and LR. As to what powers in fact flow must be determined by reading each of those provisions in a purposive way.

53. RN made no submission or concession that, absent express provisions, the powers of RN are vested in the stewards. Relevant to AR182 it is said they are not implied.

54. As there is no delegated power either express or implied the submissions for the respondent to that effect must fail.

55. A purposive interpretation of AR182, and the ARR generally, does not enable the finding that there is some implied delegation from RN to the stewards.

56. Such a finding raises another unargued issue in the proceedings.

57. This issue will require the adjournment of the proceedings for further submissions.

58. The issue is that charge 3 is under AR175. The power to penalise under that rule is vested in RN or stewards exercising powers delegated to them. There is no delegation of this power to the stewards on the evidence given to this hearing.

59. Accordingly it appears that there is no power in the stewards to penalise for a breach of the various provisions in AR175. It is acknowledged that this power has been exercised by stewards for a very very long period of time, as it was here.

60. RN cannot imply that the stewards have such power if it is acknowledged, as it does, there is no delegation.

61. It appears therefore that charge 3 is not properly before the Tribunal, could not have been properly before the AP and could not have been dealt with by the stewards.

62. However this matter has not been the subject of an invitation by the Tribunal to the parties and directions will be issued for the future conduct of charge 3.

63. Interestingly a reading of the TRA does not appear to establish specific powers in the stewards. Importantly it does not expressly or impliedly establish that the stewards stand in the shoes of RN. It does not establish any relevant express or implied delegation.

64. S14(2)(d) enables a reference of matters to the stewards for the purposes of an investigation and report, whether they are conducting an investigation or not. The use and breadth of this provision was not the subject of submissions. It seems to be limited to individual matters which themselves require referral rather than creating a general referral power although it may in fact be used in that fashion.

65. S24 is of no benefit to the respondent here as that delegation power is limited to expressed people and bodies and they do not include the stewards.

66. Accordingly in the absence of any delegated power or express statutory power the respondent will have to find comfort in the ARR and LR.

67. A number of those rules only refer to RN. For example:

AR182(3)-except with the consent of "RN"

AR182(5)-unless otherwise determined by "RN"

AR185- "RN" may (after RN or stewards have determined close associate status)

AR190 - "RN" may disqualify a horse if it has disqualified a person.

68. On the other hand a number refer to RN and the stewards. For example:

AR175(1)- "RN" or the stewards exercising powers delegated

AR183A(2)- except with the consent of "RN" or the stewards who imposed the suspension

AR183B- except with the consent of "RN" or the stewards who imposed the suspension

AR183C- suspended by the stewards or "RN"

AR183D- permitted by the stewards or "RN"

AR183F- "RN" or the body which imposed the suspension ( acknowledging the reference is not directly to stewards)

AR185- who in the opinion of "RN" or the stewards.

69. In other examples committees of racing clubs are empowered to act alone or in some circumstances so also are the stewards.

70. In numerous places throughout both rules the stewards are empowered alone to do things. There are so many that examples need not be given.

71. All of these provisions provide examples and guidance as to how AR182 is to be purposively interpreted.

72. It is important to re-emphasise the governing words and they are "Except with the consent of "RN" that imposed the disqualification.

73. There is no reference to stewards. There is no reference to the expression "RN or stewards". There is no reference to "or the stewards exercising powers delegated to them". There is no reference to "the body which imposed the suspension".

74. In interpreting AR182 it is informative to look at other provisions in the same rule. As set out above, (3) and (5) expressly limit a function to RN. Those functions and powers do not incorporate the stewards. That is reinforcement that (1) is limited to RN.

75. But most importantly the fact that the drafters chose to refer to stewards in other provisions expressly is a clear indication that no reference was made to stewards in the subject rule intentionally.

76. Accordingly it is open to conclude that the rule must be read on the basis that the power is limited to RN.

77. Such an interpretation is consistent with the way in which other rules are written, is purposive and does not require any rules of construction to be applied to find an alternative and logical meaning. It is not inconsistent with the remainder of the rules.

78. In particular the words "that imposed the disqualification" do have work to do as RN itself can impose disqualifications.

79. It cannot be implied that because stewards impose disqualifications that they must necessarily have the power to condition disqualifications either at the time of imposition or subsequently.

80. The fact that RN may have mistakenly varied a recent disqualification under this power, if it did so under this power, because it did not impose the disqualification, does not create a precedent that must be followed nor provide comfort in a more expansive definition. There is no equivalent of an estoppel and nor was it argued.

81. There is further reinforcement in this conclusion because the interpretation advanced by the respondent would require the addition of words such as "or the stewards". There is no ambiguity or uncertainty that would acquire the addition of those words so that the rule make sense.

82. Such a finding is not inconsistent with the vesting of such power as is contained in the rule in a head body. It is not inconsistent with considerations that would flow from AR7(i).

83. RN satisfies the Tribunal that no other expansive power should be exercised to read the rule in the fashion advanced by the respondent.

84. The Tribunal finds that the stewards did not have power to use AR182 to condition the disqualifications they found to be appropriate.

85. Accordingly the Tribunal finds that the AP did not have power to use AR182 to condition the disqualifications it found to be appropriate.

86. The Tribunal specifically notes that this power issue was not determined by the AP to be available to it because the parties did not dispute that the power existed but only raised issues as to whether on the facts it should be used. The transcript shows that the AP raised the possibility of its use early in the hearing, the parties went outside to discuss it and came back and informed the AP there was power but its use, not its availability, was in contest. Accordingly the AP was not asked to embark on the exercise undertaken on this appeal.

## **DETERMINATION**

87. The Tribunal upholds the first ground of appeal of RN that the AP did not have power to use AR182 to condition the disqualification imposed by it.

## **FUTURE CONDUCT**

88. On making such a finding on the first ground of appeal RN invited the Tribunal to impose the penalties of disqualification found appropriate by the stewards and the AP without the attachment of the conditions under AR182.

89. It is noted that submissions on penalty were made.

90. However having regard to the concerns expressed by the Tribunal in this decision on the use by the stewards of AR175(g) for charge 3 it is necessary for the proceedings to be adjourned.

91. The Tribunal considers that written submissions by the parties are in the best interests of both the parties and the Tribunal. Submissions for an alternative oral hearing may be made.

92. As the onus will be upon RN to satisfy the Tribunal that charge 3 should be before it it is appropriate that RN be invited to make the first submission with the right in the respondent to reply and in RN to respond to that reply.

93. As this issue has been raised by the Tribunal the timetable must be flexible.

94. The following timetable is suggested:

1. RN to file and serve submissions on the power of the stewards to use AR175(g) in these proceedings on or before 6 November 2018.
2. The respondent to file and serve submissions in reply on or before 20 November 2018.
3. RN to file and serve any submission in response to the respondent's reply on or before 27 November 2018.
4. Liberty to apply.

95. The Tribunal then expects that the future conduct of the matter will involve a reserved decision on this issue and then consideration of the penalty submissions already made. Depending upon the outcome of that reserved decision further submissions on penalty may be appropriate and that will be considered when necessary.