QCAT

Queensland Civil and Administrative Tribunal

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| **CITATION:** | *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236 |
| **PARTIES:** | Darren Ian Hooper<br>(Applicant)<br>v<br>Queensland Racing Integrity Commission<br>(Respondent) |
| **APPLICATION NUMBER:** | OCR 212-16 |
| **MATTER TYPE:** | Occupational regulation matters |
| **HEARING DATE:** | 22 June 2017 |
| **HEARD AT:** | Brisbane |
| **DECISION OF:** | **Member Olding** |
| **DELIVERED ON:** | 11 July 2017 |
| **DELIVERED AT:** | Brisbane |
| **ORDERS MADE:** | **1. The decisions of the Respondent dated 4 November 2016 confirming conviction for the three offences are confirmed.**<br>**2. The decisions as to penalty are set aside and substituted with a penalty of 12 months disqualification for each offence, three months of each penalty to be served concurrently, making an aggregate disqualification period of 30 months.**<br>**3. The disqualification commences 14 days after midnight on the date of this decision.** |
| **CATCHWORDS:** | PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – Harness Racing Trainers – failure to present a horse free of prohibited substances – whether strict compliance with testing and certification requirements – standard of proof – penalty – period of disqualification – previous disciplinary history – cumulative or concurrent penalties |

*Australian Harness Racing Rules*, r 190, r 191, r 257 and r 309
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20
*Racing Act* 2002 (Qld), Chapter 4, Part 4

*Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34
*In the matter of Bruce Stanley*, unreported, Racing and Wagering Western Australia Stewards Inquiry (2 June 2016)
*In the matter of Daryl Hansen*, unreported, Queensland Racing Disciplinary Board (30 August 2016)
*David Crawford v Stewards of Greyhound Racing Victoria*, unreported, Racing Appeals and Disciplinary Board (13 July 2016)
*Day v Harness Racing New South Wales* (2015) NSWLR 764; [2014] NSWCA 423
*In the matter of the appeal of Garry McCarney*, unreported, Racing Appeal Panel of New South Wales (24 April 2017)
*Kavanagh v Racing Victoria Limited* [2017] VCAT 386
*In the matter of Mark Lutter*, unreported, Queensland Racing Integrity Commission Stewards' Report (2 August 2016)
*Mill v R* (1988) 166 CLR 59; [1988] HCA 70
*In the matter of L Paton*, unreported, Queensland Racing Disciplinary Board (13 September 2016)
*Queensland Racing Integrity Commission v Belford* [2017] QCATA 42
*Queensland Racing Integrity Commission v Gilroy* [2016] QCATA 146
*In the matter of Rochelle Smith*, Queensland Racing Disciplinary Board (31 August 2016)
*In the matter of Shaun Grimsey*, Racing Queensland Stewards Report (7 July 2015)
*Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; [2014] FCAFC 93

**APPEARANCES:**

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| **APPLICANT:** | Mr T Ryan of Counsel, instructed by Butler McDermott |
| **RESPONDENT:** | Mr R.J. Anderson of Queen's Counsel, instructed by Lander & Rogers |

## REASONS FOR DECISION

[1] The Applicant, Mr Hooper, is a licensed horse trainer. On 6 October 2016, a Stewards Inquiry found he committed three breaches of the *Australian Harness Racing Rules* ("the Rules"), which require a horse to be presented for a race free of prohibited substances. A penalty of 12 months disqualification was imposed for each offence, to be served cumulatively, in total a three-year period of disqualification.[1]

[2] The Respondent Commission conducted an internal review and on 4 November 2016 confirmed the decisions, both as to the commission of the offences and the penalties imposed.

[3] Mr Hooper has applied for review of that decision by this Tribunal. He argues against conviction for the offences and, in the alternative, against the severity of the penalties.

[4] The Tribunal's task is to consider the matter by way of a fresh hearing on the merits "to produce the correct and preferable decision".[2]

[5] I have decided to confirm the decision in relation to commission of each of the offences and to maintain a disqualification period of 12 months for each offence, but with 3 months of each 12-month period to be served concurrently, so that the total disqualification period is reduced to 30 months. My reasons follow.

### Summary of the legal framework

[6] Mr Hooper was charged under Rule 190 of the Rules, which provides that:

> "(1) A horse shall be presented for a race free of prohibited substances.
>
> (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
>
> . . .
>
> (4) An offence under sub rule (2) . . . is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse. . . ."

[7] The offence is one of strict liability: if a horse is presented to race other than free of prohibited substances, the offence is committed without more. The trainer's intention is irrelevant to establishing whether the offence was committed (but may be relevant to determining the appropriate penalty).

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1 A horse that is presented to race with a prohibited substance is disqualified from the race and any prize money is required to be refunded. These outcomes occur by operation of Rules 195 and 200 respectively and are therefore not part of the decisions under review.

2 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20

[8] Rule 191 provides for evidentiary certificates of testing results. Broadly, the rule has the effect that certificates of positive results from two samples – referred to as an A sample and a B sample – together are conclusive evidence of the presence of a prohibited substance, unless there were material flaws in the testing and certification processes.

[9] Because these provisions are central to the challenge to the convictions, it will be necessary to return to them in greater detail.

[10] Rules 191(5) and 191(6) make it clear that the presence of prohibited substances or that a horse was presented not free of such substances respectively may be proved in other ways; that is, without reliance upon the conclusive effect of evidentiary certificates.

[11] Part 4 of Chapter 4 of the *Racing Act* 2002 (Qld) ("the Act")[3] contains provisions that relate to dealing with and analysis of substances. Broadly, these provisions contemplate the testing analyst providing a notice of results of the analysis, including a certificate stating various things about the analysis. Again, it is necessary to examine these provisions closely.

**Agreed facts**

[12] As will be seen, the arguments made on behalf of Mr Hooper raise a number of statutory construction and related issues. These mainly challenge the admissibility of the evidentiary certificates relating to the testing of the horses for prohibited substances.

[13] In that regard, the parties' representatives helpfully lodged a statement of agreed facts. Without setting it out in full, the statement confirms the following:

(a) At the relevant time, dexamethasone was a prohibited substance and cobalt was a prohibited substance at a mass concentration of more than 200 micrograms per litre in urine.

(b) The allegations relate to three horses Mr Hooper presented to race, as follows:

i) "Oozinville" – on 11 May 2016;

ii) "Ashleys Angel" – on 26 May 2016; and

iii) "Zac Mac NZ" – on 4 June 2016.

(c) On each occasion:

i) The horse was subject to a urine test (a post-race test for Oozinville and pre-race tests for Ashleys Angel and Zac Mac NZ).

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[3] The parties agreed that the relevant provisions are those contained in the Reprint of the Act effective at 1 May 2016.

ii) The then "control body"[4] delivered the sample to the Racing Science Centre (RSC).[5]

iii) Two samples, an A sample and a B sample, were tested, with different analysts being responsible for each test.

(d) In relation to **Oozinville**, the RSC reported that the samples contained:

i) A sample – cobalt, at a mass concentration of 288 micrograms per litre in the urine, and dexamethasone;

ii) B sample – cobalt, at a mass concentration of 339 micrograms per litre in the urine, and dexamethasone.

(e) The RSC also reported that cobalt was detected in the control solution[6] for the Oozinville test at a mass concentration of less than 1 microgram per litre.

(f) In relation to **Ashleys Angel**, the RSC reported that the samples contained:

i) A sample – cobalt, at a mass concentration of greater than 400 micrograms per litre in the urine;

ii) B sample - cobalt, at a mass concentration of greater than 400 micrograms per litre in the urine.

(g) Cobalt was not detected in the control solution for the Ashleys Angel test.

(h) In relation to **Zac Mac NZ**, the RSC reported that the samples contained:

i) A sample – cobalt, at a mass concentration of greater than 400 micrograms per litre in the urine;

ii) B sample - cobalt, at a mass concentration of greater than 400 micrograms per litre in the urine.

(i) Cobalt was detected in the control solution for the Zac Mac NZ test at a mass concentration of less than 1 microgram per litre.

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4 Racing Queensland.

5 A functional unit within the Queensland Government Department of National Parks, Sport and Racing at the relevant time.

6 A control solution is a solution used to detect contamination of sampling equipment.

[14] In summary:

(a) Cobalt at concentrations in excess of the permitted level was found in all three samples;

(b) Additionally, dexamethasone was found in the Oozinville samples; and

(c) Cobalt at a mass concentration of less than 1 microgram per litre was detected in the control solutions for the Oozinville and Zac Mac NZ tests.

**Summary of the Commission's submissions – the offences**

[15] Mr Anderson QC for the Commission submitted that, the requisite dual testing having been carried out and the required certificates issued, and there being no material flaw in the testing and certification procedures, the two certificates issued by the RSC in each case together provided conclusive evidence of the presence and level of prohibited substances. Being a strict liability offence, it followed that the charges were proved.

[16] Alternatively, if, contrary to the Commission's submission, the testing and certification procedures were materially flawed, so that the certificates did not provide conclusive evidence of the presence of the prohibited substances, they were nonetheless admissible as evidence of the truth of the statements in the certificates. Approaching the certificates this way, they provided sufficient evidence that I should be satisfied to the applicable standard of proof – which Mr Anderson submitted was the civil standard (that is, on the balance of probabilities), applying the *Briginshaw*[7] principle – that the elements of the offences were proved.

**Summary of the Applicant's submissions – the offences**

[17] Mr Ryan submitted that the testing and certification procedures were "materially flawed" in various ways. Accordingly, under Rule 191(7), the evidentiary certificates "do not possess evidentiary value". It followed that the certificates were inadmissible and, since there is insufficient other relevant evidence, the charges must be dismissed.

[18] Alternatively, if the certificates, although not conclusive evidence because of the alleged flaws, were nevertheless admissible as evidence of the truth of the statements they contain, I should not be satisfied to the criminal standard of proof, which Mr Ryan submitted applied at the relevant time, that the offences were committed.

[19] I first examine in turn each of the reasons put forward by Mr Ryan in support of his submissions regarding the evidentiary certificates.

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7 *Briginshaw v Briginshaw* (1938) 60 CLR 336; see further at [87] below.

## The "agreement" issue

[20] Mr Ryan submitted that the Rules and the Act taken together had the effect that, for a valid evidentiary certificate to issue, the testing must be undertaken pursuant to an agreement between a control body and a testing facility which expressly stipulates the level at which the presence of a prohibited substance would be reported. It is common ground that there was no such express provision in the relevant service agreement under which the RSC provided the testing services in this case.[8]

[21] The consequence that the certificates are invalid was said to flow from section 147(4)(b), which says that the analyst is not required to report the presence of a substance at a level below that stated in an agreement between the testing facility and a control body. This was said to be reinforced by the fact that section 143(4)(b) contemplates samples being delivered under such an agreement.

[22] Mr Ryan also noted that the agreement includes a provision in these terms:

> "**Agreed reporting levels**
>
> The parties have agreed that if the RSC detects the presence of specified veterinary therapeutic medications or recognised environmental contaminants in a sample, the RSC will report such presences as positive results only if they are detected above a level that has been agreed to by the Department and the control bodies."[9]

[23] Under cross-examination, Mr Simon Stephens of the RSC confirmed that there is no other agreement between the RSC and the control body specifying the levels of prohibited substances to be reported.

[24] Referencing several cases, to which I will return, Mr Ryan submitted that strict compliance with testing and certification procedures is required. Accordingly, Mr Ryan submitted, without the concentration of prohibited substances being specified *in the agreement*, evidentiary certificates could not lawfully be issued.

[25] However, prohibited substances, and specifically the concentration level for reporting the presence of cobalt, are specified in the Rules. Testing for prohibited substances in accordance with those Rules is also specifically mentioned in the agreement, as follows:

(a) The first category in the list of services to be provided, as specified in Schedule A to the agreement, appearing under the heading "Sampling and Analytical Services", is:

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8 Agreement date 1 August 2006, between the State of Queensland and the Queensland Harness Racing Board.

9 At page 17 of the agreement.

> "manage the provision of the agreed Sampling and Analytical Services Program in accordance with the *Racing Act 2002*, Rules of Racing of each Control Body . . ."

(b) The "Sampling and Analytical Services Program" is in turn defined in the agreement as:

> "The Sampling and Analytical Services Program provided to the Control Bodies, is based on a suite of Sampling and Analytical strategies. The strategies and associated services delivered by the RSC have been developed to provide strategic and tactical programs to meet the Control Bodies' legislative requirements under the *Racing Act 2002*, to test for prohibited substances as identified in the rules of racing and to implement and enforce policies for animal welfare and drug control in racing."

[26] Rule 191(7), which is in the following terms, repays careful reading:

> "Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed."

[27] The first point to observe, as Mr Anderson submitted, is that the focus of the rule is upon "the certification procedure" and "any act or omission forming part of or relevant to the process resulting in the issue of a certificate". In other words, and not surprisingly, the focus is on testing and certification of the results of the testing. It is not on any antecedent processes or the contractual framework for the provision of testing services.

[28] The second point is that not every shortcoming is sufficient to invalidate a certificate. The flaw must be material.

[29] Materiality is not assessed in a vacuum. One must ask: material to what? The answer, in my view, is material to the focus of the provision; that is, material to testing and certification of testing.

[30] Whether the prohibited substances and concentrations are specified within the pages of an agreement or specified in rules referenced in the agreement is, in my view, immaterial to the testing for such substances or certification of that testing.

[31] I have considered the potential impact of Rule 309, which is in these terms:

> "In the interpretation of a rule a construction that would promote the purpose or object underlying it, whether expressly stated or not or which would facilitate or extend its application, is to be preferred to a construction that would not promote that purpose or object or which would impede or restrict its application."

[32] The purpose or object of Rule 191 is to provide an efficient process for proving the elements of the strict liability offence provided that rigorous, double testing is carried out as specified in the Rule. That object is, in my view, evident from the terms of the rule. But if confirmation is required, this statement of the object of the rule is consistent with the characterisation of

the scheme of the provisions by the New South Wales Court of Appeal in *Day v Harness Racing New South Wales*:

> "The assumption underlying the scheme of r 191 is that two properly obtained certificates are sufficient in themselves to provide conclusive evidence of the offence, unless it can be shown that *the method by which they were obtained* was materially flawed, in which case they do not "establish the offence"." (Emphasis added)[10]

[33] A construction that stymies that scheme merely because prohibited substances and concentrations are specified in rules referenced in the agreement, rather than in the agreement itself, would defeat the object of the rule and in accordance with Rule 309 should not be preferred. The more so if, as Mr Ryan submits, that feature would render the certificates not only not conclusive but of no evidential value and therefore inadmissible.

[34] However, in addition to the common legislative command to prefer a construction that promotes the object of a provision, Rule 309 also requires a construction which would "facilitate or extend" the application of a rule to be preferred to a construction that would "impede or restrict" its application.

[35] It might be said that Mr Ryan's submitted construction would "facilitate or extend" the negativing operation of Rule 191(7). On the other hand, if one looks to Rule 191 as a whole, the opposite effect might be said to flow from this aspect of Rule 309. That is, a construction that would "impede or restrict" the evidentiary certificates regime, indeed render the certificates inadmissible, on the basis of the feature that Mr Ryan submitted applies, which bears not at all on the veracity of the testing or certification, should not be preferred.

[36] Mr Anderson also pointed out that Rule 191(7) operates only "where it is proved" that the procedures were materially flawed. This, he submitted, puts the onus on the Applicant to prove that the procedures were materially flawed. That observation is no doubt correct, but likely to be of more relevance in a controversy about underlying facts than in a case such as this where the argument is about whether essentially agreed facts are properly characterised as amounting to material flaws in the procedures.

[37] For completeness, I note that in emphasising that strict compliance is required and maintaining that extends to the requirements relating to the agreement pursuant to which testing is carried out, Mr Ryan referred to the decision of Garde J, sitting as the President of the Victorian Civil and

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10 (2015) NSWLR 764, 781.

Administrative Tribunal (VCAT), in *Kavanagh v Racing Victoria Limited*,[11] as well as three decisions[12] of the Queensland Racing Disciplinary Board.

[38] True it is that these decisions adopt the principle that strict compliance with the testing regime is required. But examination of the reasons for decision in each case reveals that they are concerned with shortcomings in the testing procedures, such as lack of accreditation of analysts or testing facilities. Not surprisingly, it was held that strict compliance with those testing requirements is required.

[39] These cases are not about non-compliance with provisions relating to an antecedent service agreement or otherwise unrelated, other than indirectly, to the testing or certification requirements. To hold that strict compliance with *every* requirement related in any way to the framework for the testing and certification regime would be inconsistent Rule 191(7), which, as noted, operates only where the process is "materially" flawed.

[40] For the reasons outlined, on a proper construction of the provisions and characterisation of the surrounding circumstances, there has been strict compliance with Rule 191 in this case.

**The "notice of results" issue**

[41] Mr Ryan submitted that the RSC in each case failed to issue a "notice of results" of the testing which complies with the requirements of sections 147(2) and 147(3). While a certificate was issued in each case, which included the test results, Mr Ryan seemed to submit that it was necessary for a separate document called a notice of results to be issued. Failure to issue such a document meant that there was not the required strict compliance. It would follow, on Mr Ryan's argument, that the certificates were inadmissible.

[42] Section 147(2) provides that an analyst at an accredited facility must "give a notice stating the results of the analysis (the ***notice of results***)" to the accredited veterinary surgeon for the facility. Section 147(3) goes on to require that "[T]he notice of results must include a certificate signed by an accredited analyst stating" various things, such as information to identify the thing analysed and the place and date on or period over which the analysis was carried out.

[43] Mr Ryan did not submit that any of those things required to be included were missing from the document issued by the RSC analysts. He also did

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11 *Kavanagh v Racing Victoria Limited* [2017] VCAT 386 (I was advised from the bar table that an appeal against this decision was recently heard, the decision on the appeal remaining reserved at the time of the hearing of the current review.)

12 *In the matter of Daryl Hansen*, Queensland Racing Disciplinary Board (30 August 2016).
*In the matter of Rochelle Smith*, Queensland Racing Disciplinary Board (31 August 2016).
*In the matter of L Paton*, Queensland Racing Disciplinary Board (13 September 2016).

not deny that the correspondence in evidence showed that the documents issued by the RSC analysts, although not addressed to, were in fact given to, the veterinary surgeon as required and I find accordingly. Based on the evidence of Mr Stephens, I also accept that no other document purporting to be a notice of results was issued.

[44] The question then is whether the documents issued were properly characterised as a notice of results as defined in section 147(2) and otherwise met the requirements of section 147.

[45] The documents in each case were headed:

"CERTIFICATE OF ANALYSIS

Section 147, *Racing Act 2002*"

[46] They set out, against a subheading "Results of Analysis", the concentrations of substances found in the sample.

[47] I am unable to understand how it could be said that these documents do not meet the requirements of a notice of results. True, they are not so headed, but it is uncontroversial that they contain all of the information required by section 147.

[48] At worst it might be said that each document is a certificate that includes a notice of results rather than, as section 147(3) contemplates, a notice that includes a certificate. Even if that could be described as a flaw in the procedures, which I do not accept, it would not in my view be a material flaw.

[49] I reject the submission that the certificates are inadmissible for this reason.

**The definition of "code substance" issue**

[50] At the relevant time, section 332(3) of the Act provided that an evidentiary certificate is evidence of the presence of a "drug or code substance" and its concentration. It is common ground that cobalt is not a "drug" for this purpose. Mr Ryan submitted that it is also not a "code substance".

[51] As defined in the Act's dictionary, a "code substance" is a substance that is relevant to a control body's code of racing. Mr Ryan, with respect correctly, did not contest that cobalt meets that description.

[52] However, Mr Ryan submitted that a second requirement of the definition – that the substance "is mentioned in an agreement between the control body and an accredited facility" – was not satisfied. This was said to be because, as outlined above, the agreement does not specifically mention by name the substances for which the RSC is engaged to carry out testing.

[53] Mr Anderson submits that it is sufficient that the agreement references the Rules in which cobalt is specified. He notes that the definition uses the

broader expression “mentioned” rather than more prescriptive terms such as “specified” or “particularised”.

[54] I respectfully adopt Mr Anderson’s construction. That construction is reasonably open and is consistent with the evident object of the provisions of Chapter 4. The alternative would see that object defeated merely because the substances and concentrations are specified in rules referred to in an agreement rather than appearing within the pages of the agreement.

**The “contamination” issue**

[55] As noted above, cobalt was detected in the control solutions for the Oozinville and Zac Mac NZ tests, in each case at a mass concentration of less than 1 microgram per litre.

[56] Mr Ryan submitted that the unexplained presence of cobalt in these control solutions evidences a material irregularity in the testing procedures, such that Rule 191(7) is engaged.

[57] Professor Paul Mills, Professor of Veterinary Pharmacology at the University of Queensland Gatton Campus, gave largely unchallenged evidence, which I accept and accordingly find, that:

(a) In equine urine testing procedures, the testing bowl is cleaned with tap water and using the control solution a control sample is collected before the urine is tested.

(b) Cobalt is a naturally-occurring substance but is unlikely to be found in tap water although that may happen if water is collected from run-off in a cobalt-rich environment.

(c) Not being present at the testing, Professor Mills could not explain the reason for the presence of cobalt in the control solutions.

(d) However, the levels of cobalt detected in the control solutions were so low that they would be classified as too small to be quantified.

(e) Any contribution of the contamination of the urine samples would be less than or equal to this minimal limit of detection. Thus, the contribution of this potential contamination to a sample exceeding the threshold of 200 micrograms per litre would be negligible, particularly when the samples for both horses significantly exceeded the threshold.

[58] Given these findings, and noting that a microgram is one thousandth of a milligram, I am satisfied that the testing and certification were not materially flawed on the basis of the minimal presence of cobalt in the two control solutions.

[59] Having rejected the various bases on which the admissibility of the evidentiary certificates was challenged, it follows that the presence of the

prohibited substances, in the case of cobalt above the specified concentrations, is taken to be conclusively proved. On that basis, I must conclude that the three offences were committed and in that respect confirm the decisions under review.

[60] It is therefore not necessary for me to decide whether Mr Ryan is correct in his submission that, if the testing and certification procedures were materially flawed, the certificates would be inadmissible or if they would be admissible but not taken to be prima facie or conclusive evidence, and in the latter event whether the civil or criminal standard of proof would apply if the offences fell to be proved without reliance on the conclusive nature of the certificates. But in case I am wrong regarding the certificates being valid, and in deference to the submissions made by counsel, I set out below some observations in relation to these other issues.

[61] However, before doing so, it is necessary to consider further the circumstances surrounding alleged offences to provide context for the discussion that follows.

**Circumstances surrounding the alleged offences**

[62] Mr Hooper provided a sworn statement in which he maintained that he did not administer cobalt to any of the horses. At the Stewards Inquiry, Mr Hopper gave evidence of giving his horses multiple products, some of which contained cobalt or vitamin B12.[13] However, he maintained that he ceased giving these products to the horses more than 48 hours before the respective races.

[63] Professor Mills gave evidence that, even allowing for the potential of several cobalt-containing supplements being administered concurrently, it would be "highly unlikely" that the threshold would be exceeded if the supplements were administered over 48 hours before testing. In the case of injectable preparations, Professor Mills said that it was "highly unlikely, if not impossible, for a urine cobalt concentration to exceed the threshold (200 micrograms per litre) if these products were administered at least 48 hours prior to the urine collection".

[64] Asked about the likely cause of the cobalt levels in the samples, Professor Mills' evidence was that:

> "It would either have to be much higher amounts of cobalt being administered to the horse and/or cobalt supplementation occurring much closer to the racing than indicated. It would be highly unlikely that the supplements that were indicated to have been given at least 48 hours prior to racing (or sample collection) could have resulted in the reported concentrations of cobalt in the urine."

[65] Mr Hooper was not called to give oral evidence so these opinions were not put to him. I have considered whether it would be a denial of procedural

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[13] Dr Caldwell, who assisted the Stewards Inquiry, advised that vitamin B12 has a cobalt atom in it.

fairness to accept Professor Mills' evidence without giving Mr Hooper this opportunity.

[66] In that regard, I note that Mr Hooper was represented by experienced solicitors and counsel and had ample opportunity to consider Professor Mills' evidence, which was set out in a written report copied to Mr Hooper's solicitors over 2 months before the hearing.[14] Further, Professor Mills was cross-examined but his evidence on these issues, while explored, was not contradicted. In those circumstances, I have concluded that there is no unfairness in making a factual finding adverse to Mr Hooper on these issues.

[67] I accept Professor Mills' evidence and find that the exceeding of the threshold was the result of one or more supplements or preparations given or administered at levels collectively in excess of the manufacturers' recommendations and/or much closer to the race times than the minimum of 48 hours indicated by Mr Hooper in his evidence to the Stewards Inquiry.

[68] On the evidence presented, I do not find that the presenting of the horses for racing while not free of prohibited substances was deliberate. However, having regard to my findings on the basis of Professor Mills' evidence, and in the absence of any other proffered explanation, I infer that it was at least the result of the lack of due care by Mr Hooper and find accordingly.

**If the testing and certification were materially flawed, would the certificates be inadmissible?**

[69] As noted, Rule 190(7), provides that certificates:

> "do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed".

[70] Taken literally and in isolation, those words would seem to preclude giving *any* "evidentiary value" to certificates tainted by a material flaw in the testing and certification. However, there are two reasons why I would not take that view.

[71] The first is the need to construe the provision in its context, particularly the other parts of Rule 191.

[72] The scheme of the rule is that a single certificate is *prima facie evidence* of the matters certified, but combined with a second certificate by another analyst is *conclusive evidence of the commission of the offence*. This two-level approach to the evidentiary value of a certificate is reflected in the statements in Rule 190(7) that materially flawed certificates "do not possess evidentiary value" (inferentially, prima facie evidentiary value in the case of

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[14] Compare *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555 per Logan J at [50].

a single certificate) and "nor establish an offence" (when combined with a second certificate).

[73] Considered in that context, and having regard to the Rule 309 command to prefer a construction that has regard to the purpose or object of a provision, I would not accept that a flawed certificate is wholly inadmissible. The evident purpose of Rule 190 to establish an efficient mechanism for determining whether a strict liability offence has been committed, by elevating the evidentiary status of test certificates that comply with strict requirements, would not be served by automatically rendering entirely inadmissible material that is otherwise potentially of probative value and capable of informing a decision-maker (though not in itself to be taken to be prima facie or conclusive evidence).

[74] Second, and more compellingly, section 332(3) of the Act provides that a certificate purporting to be signed by an accredited analyst stating that a stated drug or code substance was found or its concentration "is evidence" of those things. Rule 191(7), whatever its correct construction, cannot prevail over this clear statement in the Act; section 91(5) confirms that the Act prevails over the Rules to the extent of any inconsistency.

[75] It follows that a certificate signed by an accredited analyst is evidence that the stated drug, or in this case code substance, was found or its concentration. Of course, that says nothing of the weight to be given to that evidence.

**Standard of proof**

[76] That leads to the next controversy discussed at the hearing, namely whether the civil or criminal standard of proof would apply if the elements of the offences relating to the presence or concentrations of prohibited substances fell to be proved other than by the conclusive effect of evidentiary certificates.

[77] Mr Anderson submitted that the civil standard would apply, subject to the *Briginshaw*[15] principle. As I understood his submission, Mr Ryan submitted that the criminal standard would apply because the events alleged to constitute the offences occurred before certain purported changes to the relevant Policy. In particular, Mr Ryan referred to the presumption against legislation operating retrospectively in the absence of clear words or necessary implication to that effect.

[78] In the reasons for decision of Thomas J, in the capacity of President of the Tribunal, sitting as the Appeals Tribunal, in *Queensland Racing Integrity Commission v Belford*[16], his Honour traced the framework of statutory instruments in the form of Policies of the then control body, Queensland All Codes Racing Industry Board, trading as Racing Queensland, and

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15 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

16 [2017] QCATA 42, [13] and following.

determined that, at the time relevant to that matter (namely, 29 July 2015), the criminal standard applied to integrity-related matters. In short, his Honour concluded that a purported change to the relevant Policy – the Stewards Decision Making Policy – was ineffective because of failure to comply with various requirements, including formal consultation requirements and the statement of a commencement date for the amended policy.

[79] The Tribunal in the present case had the benefit of evidence from Stacey Elizabeth Ward, Senior Legal Counsel employed by Racing Queensland and Jaime Lee Knight, Internal Review Registrar employed by the Commission, previously an employee of Racing Queensland. Those witnesses updated the Tribunal on records that were located following the decision in the *Belford* case.

[80] The evidence included, and I find, that a draft of the amended policy was published for consultation purposes. However, no evidence was presented which would change the view formed in *Belford* that there was a failure to comply with various other requirements, including the requirement to state a commencement date.

[81] On the basis of this uncontradicted evidence, I find that:

(a) On 25 November 2014, the Board considered a proposal to amend the Policy to change the standard of proof from beyond reasonable doubt to the balance of probabilities.

(b) The Board had the benefit of a board paper, which appended a marked-up draft of the proposed amended Policy. Under the heading "Commencement Date", the draft stated:

> "This policy comes into effect on ~~1 May 2013~~ to be advised."

(c) The Board resolved to approve the amendment to the standard of proof to the balance of probabilities.

(d) The minutes of the meeting do not record, and I infer that the meeting did not resolve, that the change would come into effect from a particular date.

(e) With Racing Queensland ceasing to have involvement in integrity or disciplinary matters and the Commission assuming responsibility from 1 July 2016, the Board resolved to repeal the relevant policy from midnight on 30 June 2016.

[82] Section 83(2) of the Act provides that "A control body makes a policy when the policy is entered into the control body's minutes as having been made by it." Mr Anderson submitted that the policy was therefore made when the minutes of the 25 November 2014 meeting were made. But s 83(2) only applies to a policy otherwise properly made; entering a record

of a resolution cannot remedy failure to comply with the requirements for making a policy.

[83] In the alternative, Mr Anderson submitted that by the time the Stewards Inquiry was held on 6 October 2016, the policy applying the criminal standard no longer applied. Mr Ryan submitted that a change should not be construed as having retrospective effect without clear words and that to not apply the former standard to an inquiry into events that occurred before 1 July 2016 would be to give the change retrospective effect.

[84] I respectfully reject Mr Ryan's submission. The act affected by the withdrawal of the former Policy is the *finding* of the relevant facts by the Stewards Inquiry on 6 October 2016, not the events themselves. Additionally, it is the internal review decision, made on 4 November 2016, which is the subject of the Tribunal's review jurisdiction.

[85] In the absence of an applicable policy requiring the criminal standard of proof to be applied, I conclude that the criminal standard of proof would not apply to the Tribunal's review in this case.

[86] However, in case I am wrong I have considered whether in any case I would be satisfied beyond reasonable doubt as to the commission of the offences. In that regard, I note that the agreed facts include that in each case (a) the horse was presented to race; (b) the A sample was analysed by an approved accredited analyst; and (c) the B sample was analysed by another approved accredited analyst. The only challenge to the results of the testing relates to the "contamination" issue which, for the reasons already discussed, I do not accept impacts on the validity of the testing in the two cases where cobalt was detected in the control solution. Noting the dual testing for each of the three horses, I would be satisfied beyond a reasonable doubt that the presentation of the horses for racing not free of prohibited substances occurred.

[87] It follows that, if the criminal standard did *not* apply, but having regard to the gravity of the consequences of the decision for Mr Hooper, whose livelihood is at stake, I would be comfortably satisfied of the commission of the offences.[17]

## Penalty

[88] By way of background to the consideration of penalties which follows, and based on his unchallenged affidavit evidence, I find that: (a) training is Mr Hooper's sole occupation; (b) he has been involved in the trotting industry for at least 15 years, including about the last 10 years as a trainer; (c) he employs two full-time employees and casual workers when required; (d) Mr

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17 Since I would be satisfied to the criminal standard of proof, it is unnecessary to embark upon a detailed analysis of the role of the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 in the light of recent cases such as *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; [2014] FCAFC 93, [98]-[122].

Hooper's wife, Bianca Hooper, also works in Mr Hooper's training business; and (e) Mr Hooper's stables are located at his residence.

[89] Rule 256(1) provides that one or more of the penalties set out in Rule 256(2) may be imposed on a person found guilty of an offence under the Rules. Rule 256(2) sets out a number of potential penalties, including fines, suspension and "disqualification, either for a period or permanently". While most penalties may be suspended for a period not exceeding two years, disqualification penalties cannot be suspended: Rule 256(5)(a).

[90] Importantly, Rule 257 provides that unless the controlling body or stewards direct otherwise, a penalty by way of suspension or disqualification shall be served cumulatively to any other penalty of suspension or disqualification. This is important, as the penalties ordered in this case were disqualification for 12 months for each offence, to be served cumulatively.

[91] There is no guidance in the Rules regarding determination of the period of disqualification (or other penalty) or by reference to what criteria a decision to depart from the "starting point" (as Mr Anderson and Mr Ryan both characterised Rule 257) that penalties are to be served cumulatively.

[92] Having regard to the potential financial impact an extended period of disqualification, I raised with counsel whether a combination of a period of disqualification or suspension and a fine might be a more appropriate penalty in this case. However, Mr Anderson and Mr Ryan agreed that if the convictions were upheld, disqualification is the appropriate penalty. Their differences related to the period of disqualification.

[93] Mr Ryan submitted that the total disqualification period should not exceed 18 months, noting a number of cases to which I will return.

[94] Mr Anderson drew attention to the reasoning of Thomas J, in the capacity of President of the Tribunal, sitting as the Appeals Tribunal, in *Queensland Racing Integrity Commission v Gilroy*[18], a case involving a greyhound trainer convicted of presenting two greyhounds with prohibited levels of cobalt. Noting the factors set out in that case, Mr Anderson submitted that a total disqualification period in the range of 18 to 36 months would be appropriate.

[95] Thomas J noted that "A key consideration is to maintain the integrity of the industry as a whole and to demonstrate to participants in the industry and the public, that behaviour which breaches the rules will not be tolerated."[19] This is consistent with the objects of the Act, which include to maintain public confidence in racing, ensure the integrity of all persons involved with racing, and safeguard the welfare of animals involved in racing.[20]

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18 [2016] QCATA 146.
19 *Ibid*, [24].
20 *Racing Act* 2002 (Qld), s 4.

[96] Specifically in relation to cobalt, the Appeals Tribunal in *Gilroy* also endorsed[21] comments in *David Crawford v Stewards of Greyhound Racing Victoria*, including in relation to general deterrence that:

> "a message needs to be sent to the trainers that the cobalt threshold must not be breached as it is not satisfactory that performance enhancing substances are used especially those which may impact on the welfare of greyhounds."[22]

[97] There is no apparent reason why the same considerations should not apply in respect of cobalt usage by trainers in the harness racing industry.

[98] In *Gilroy*, the Tribunal went on to note that it is also appropriate to take into account all of the particular circumstances, which the Tribunal noted may include matters such as:

(a) the concentration of the prohibited substance;

(b) the number of animals involved;

(c) the number of races involved;

(d) any prior disciplinary history;

(e) co-operation with the authorities; and

(f) insight demonstrated by the trainer.[23]

[99] Consideration of these matters generally points towards a more rather than less severe penalty in this case:

(a) The concentration levels of cobalt are considerably in excess of the threshold.

(b) This is not a case of a single, isolated incident involving one horse. There were three horses presented for racing with prohibited substances.

(c) Again, this is not a case involving a single, isolated incident at one race. The horses were presented at three separate races. I have taken into account that, as Mr Ryan pointed out, the races occurred over a single three week period; however, the presentation of the horses with prohibited substances nevertheless occurred on three separate occasions.

(d) Mr Hooper has a lengthy prior disciplinary history, including a previous prohibited substance conviction, as discussed further below.

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21 *Ibid*, [25].

22 Racing Appeals and Disciplinary Board (13 July 2016).

23 [2016] QCATA 146, [26].

(e) Although Mr Hooper chose to contest the convictions, there is no evidence that he was not otherwise co-operative. I regard this as a neutral factor. However, my findings based on Professor Mills' evidence also indicate that he was less than fully truthful regarding the circumstances in which the concentration levels came to be detected.

(f) It is difficult to conclude that Mr Hooper has demonstrated insight into his offending when he has continued to deny guilt by pleading not guilty and pursuing, as he is entitled to, his right to internal and external review. I do not take the exercise of those rights into account in assessing the appropriate level of penalty, but nor can I discount the penalty that might otherwise apply on the basis of demonstrated insight.

[100] A schedule of Mr Hooper's disciplinary history was provided to the Tribunal. The report lists some 29 prior offences in the period from 16 April 2003 to 9 June 2016. Many are of a relatively minor nature, attracting fines in the range of $50 to $500 or, in four cases, a reprimand. Others are more serious and attracted fines ranging from $1000 to $5000, or short suspensions, the $5000 fine being for administering medication to a horse on a race day.

[101] Significantly, on 27 May 2009 Mr Hooper was found guilty of the offence of failing to present a horse for racing free of a prohibited substance.

[102] I am mindful that, as Mr Ryan submitted, Mr Hooper should not, in effect, be punished twice for the same behaviour, once by the penalties imposed for these earlier offences and again by taking them into account in assessing the penalty for the current offences. And I note that the earlier offence of presenting a horse to race with prohibited substances present is not a recent offence, having occurred approximately seven years before the current offences.

[103] Nevertheless, this long history of offences, and in particular the previous offence involving a prohibited substance, is not irrelevant and again weighs against a more lenient approach that might otherwise apply.

[104] The Tribunal in *Gilroy* also noted that it is appropriate to take into account sanctions that have been imposed across Australia with respect to similar offences.[24]

[105] In that regard, Mr Ryan submitted that the case of *Shaun Grimsey*,[25] where an 18 month disqualification for cobalt offences was imposed by a Stewards Inquiry, provided useful guidance for this case. However, that case involved two offences, rather than three as in this case, with lower cobalt levels, and there the trainer had no prior breaches of this rule. Comparison with this case suggests that, comparatively, 18 months disqualification would be low for the current case.

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24 *Ibid*, [27].

25 Racing Queensland Stewards Report (7 July 2015).

[106] Mr Ryan also drew attention to the case of *Garry McCarney*[26] in which a 15-month disqualification was imposed for cobalt offences involving two horses, but presented for racing on the same day, and to which Mr McCarney pleaded guilty. Again, this suggests that 18 months would be at the low end for a case involving three horses presented separately over a period of three weeks and with no guilty plea.

[107] On the other hand, the case of *Mark Lutter*,[27]also brought to attention by Mr Ryan, involved seven offences on various days over a period of three weeks, with Mr Lutter pleading guilty to five and not guilty to two of the seven charges for which he was convicted. The total period of disqualification imposed by the Stewards was 3 years. This case seems more egregious than Mr Hooper's, at least in terms of the number of offences.[28]

[108] Mr Anderson drew attention to the case of *Bruce Stanley*.[29] Mr Stanley pleaded not guilty to, but was convicted of, cobalt offences involving two horses separately presented at two races separated by approximately three weeks. A Racing and Wagering Western Australia Stewards Inquiry imposed a penalty of 12 months disqualification for each offence, with six months to be served concurrently, resulting in a total disqualification period of 18 months.

[109] The Commission also provided a schedule of penalties imposed in various Australian jurisdictions. Due to the range of circumstances and, to some extent, penalty regimes, it was difficult to glean a consistent thread to these cases. Mr Anderson suggested that, broadly speaking, the cases indicated a starting point of 12 months disqualification for offences of this kind is appropriate. That is consistent with a comment of the Stewards in the *Bruce Stanley* case that the starting point for the broadly comparable cobalt offences in that case would be a penalty of 2 years disqualification for the two offences, subject to consideration of individual circumstances and mitigations that might apply; and subject to the limitation mentioned earlier is broadly within the range of penalties imposed in the other cases cited.

[110] Adopting that proposition as providing a basis for some degree of consistency, along with observing the Rule 257 requirement, a starting point in this case would be the one year of disqualification for each offence, to be served cumulatively, as ordered by the Stewards Inquiry.

[111] As noted, few of the factors discussed above point to leniency in Mr Hooper's case. The prior disciplinary history and multiple offences in this case, with relatively high concentration levels, do not assist his case. Because of the prior offence involving a prohibited substance, albeit some years ago, and taking into account the comments in the *Gilroy* case

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26 Racing Appeal Panel of New South Wales (24 April 2017).
27 Queensland Racing Integrity Commission Stewards' Report (2 August 2016).
28 Unfortunately, there is little detail of the surrounding circumstances in the report.
29 Racing and Wagering Western Australia Stewards Inquiry (2 June 2016).

reproduced above, both specific and general deterrent considerations must apply.

[112] However, I note that, as Mr Ryan submitted and consistent with the totality principle, I should stand back from the assessment of penalty for each offence and consider whether the total level of the penalty is appropriate.[30]

[113] I accept that an extended period of disqualification would be financially devastating for Mr Hooper and there would be other restrictions as a consequence of Rule 259.[31] This is a predictable consequence of disqualification for which the Rules provide and must be taken to contemplate. Although of grave impact, such consequences are a risk that any trainer who is not careful to avoid committing these offences runs. Nevertheless, I take into account the severe impact of an extended period of disqualification, in particular having regard to Mr Hooper's long history in the industry and the restrictions that attend disqualification under the Rules.

[114] Approaching this matter afresh, taking into account all of these factors and doing my best to give them appropriate weight, I have concluded that the penalty in this case should be disqualification for 12 months for each offence, with three months of each 12-month period to be served concurrently, resulting in a total disqualification period of 30 months. The penalty decisions will be varied accordingly.

[115] While the appropriate period of disqualification in the event that I decided to confirm the convictions was discussed at the hearing, unfortunately the question of the date from which the disqualification should commence was not.

[116] The decision of the Stewards Inquiry was that the disqualification would be "effective immediately". That decision having been confirmed on internal review by the Commission, on 22 November 2016 the Tribunal stayed the Commission's decision "until the determination of the external review". It follows that, unless the Tribunal orders otherwise, the disqualification will commence upon the Tribunal making its orders in this review.

[117] However, given the need for Mr Hooper to make arrangements relating to his business and employees, and possibly his living arrangements, it may be a practical impossibility, or at least unduly harsh, for Mr Hooper to comply immediately with the Rule 259 prohibitions that attend disqualification. I therefore propose to order that the disqualification period will commence 14 days after the Tribunal's decision.

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30 *Mill v R* (1988) 166 CLR 59, 62-63.

31 Rule 259 prohibits disqualified persons from undertaking various activities including participating in any manner in the harness racing industry; associating with persons connected with the harness racing industry for purposes related to that industry; entering a racecourse; and entering premises used for the purposes of the harness racing industry.

[118] I record my appreciation of the thorough and balanced submissions made by Mr Ryan and Mr Anderson.