Regulation Review Committee
Parliament of New South Wales

# Report on the Harness Racing New South Wales (Appeals) Regulation 1999

Report No 15/52
June 2001

# Appendices

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# Abbreviations

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| **the Harness Racing Act** | Harness Racing New South Wales Act 1977 |
| **HRNSW** | Harness Racing New South Wales |
| **AHRC** | the Australian Harness Racing Council |
| **the Appeal Regulations** | the Harness Racing New South Wales (Appeals) Regulation 1999 |
| **the Tribunal** | the Harness Racing Appeals Tribunal |
| **RIS** | Regulatory Impact Statement |

[1] The Committee also had the benefit of examining the submissions made to the NSW Office of Racing in connection with regulatory impact statement and the regulatory proposal. Copies of these were supplied to the Committee in accordance with the requirements of the Subordinate Legislation Act

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# Regulation Review Committee

## Members

The Hon Janelle Saffin MLC, Acting Chair
Dr Liz Kernohan MP
Mr Gerard Martin MP
Ms Marianne Saliba MP
Mr Russell Turner MP
The Hon Don Harwin MLC
The Hon Malcolm Jones MLC

## Secretariat

Mr Jim Jefferis, Committee Manager
Mr Greg Hogg, Project Officer
Mr John Wilkinson, Research Officer
Mr Don Beattie, Committee Officer
Ms Patricia Adam, Assistant Committee Officer
Ms Rachel Dart, Assistant Committee Officer

# Functions of Regulation Review Committee

The Regulation Review Committee was established under the *Regulation Review Act 1987.* A principal function of the Committee is to consider all regulations while they are subject to disallowance by Parliament. In examining a regulation the Committee is required to consider whether the special attention of Parliament should be drawn to it on any ground, including any of the following:

- that the regulation trespasses unduly on personal rights and liberties;
- that the regulation may have an adverse impact on the business community;
- that the regulation may not have been within the general objects of the legislation under which it was made;
- that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made;
- that the objective of the regulation could have been achieved by alternative and more effective means;
- that the regulation duplicates, overlaps or conflicts with any other regulation or Act;
- that the form or intention of the regulation calls for elucidation; or that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the Guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.

The Committee may, as a consequence of its examination of a regulation, make such reports and recommendations to each House of Parliament as it thinks desirable, including reports setting out its opinion that a regulation ought to be disallowed.

A further function of the Committee is to report from time to time to both Houses of Parliament on the program for the staged repeal of regulations under the Subordinate Legislation Act 1989. Under this legislation all regulations currently in force in NSW are being re-examined, on cost benefit and cost effectiveness principles, starting on a chronological basis with the oldest of the regulations.

The staged repeal process involves the automatic repeal of existing regulations (except where exempt) made before 1 September 1990 in a staggered process commencing on 1 September 1991. Regulations made after 1 September 1990 are automatically repealed (unless their repeal is postponed) five years after they are made. The Harness Racing New South Wales (Appeals) Regulation 1999 was made in connection with that process.

# Chairman's Foreword

On 23 November 2000 the Regulation Review Committee resolved to inquire into and report to Parliament on the Harness Racing New South Wales (Appeals) Regulation 1999. This review was part of the Committee's periodic oversight of principal New South Wales Regulations and it was conducted in conformity with the Committee's charter under the Subordinate Legislation Act 1989 of reporting from time to time on the staged repeal program. That scheme allows major regulations to be reviewed in the public interest each five years.

The Committee's review highlighted the significant accomplishments in harness racing in recent years, foremost of which was the detailed legislation passed in 1998-99 to restructure the Harness Racing Authority with the objective of giving industry principal management control. A national competition policy review of New South Wales racing and betting legislation, including legislation relating to harness racing has also been completed and further legislation entitled the Racing Legislation Amendment (Probity) Bill has been introduced into Parliament.

The Committee's review shows there is a need for some changes to the supporting rules and regulations of harness racing. That review disclosed a major inconsistency in the Harness Racing Act one provision of which appears to prohibit exercise of the rule making power and put in doubt the entire legal effect of the existing rules.

It is clearly not feasible to address this problem by remaking the harness racing rules as regulations because of the national structure of those rules. The preferable approach recommended is to clarify the legality of the rules by legislation and at the same time to make certain changes to the rules, principally for reasons of natural justice, so as to improve their operation. It is always of importance to the Committee under its statutory charter to examine whether the objectives of subordinate legislation can be achieved in more effective ways particularly when this can promote, as in the present case, the soundness of the disciplinary process.

All regulations made under the Harness Racing Act must be tabled in Parliament and are subject to full review including disallowance by either house. This power can be exercised to produce beneficial changes where that is required. The Harness Racing Rules, unlike the regulations which are made by the Governor, are not subject to Parliament's review even though they are part of a national code. Most other national codes of rules or regulations are reviewable by Parliament because of the significant impact they have in the community. This should also be the case with Harness Racing Rules which form a major component of the disciplinary controls. The Committee's recommendations address this issue.

Evidence presented to the Committee shows that there is scant formal consultation on rules between the three codes governing harness racing, thoroughbred racing and greyhound racing. Those codes have similar objectives, particularly in regard to drug free racing, and the Committee considers it would be useful for the Department of Gaming and Racing and Harness Racing New South Wales, together with representatives from those other codes, to make an examination of the merits of developing greater consistency between the rules and regulations of these codes.

In regard to the making of future regulations the Committee considers that the Department of Gaming and Racing should develop a more deliberative and modern consultation process and that future regulatory impact statements should pay closer attention to examining and evaluating the substantive provisions of the regulation itself. These aspects are detailed in the report.

At the conclusion of the Committee's public hearing on 28 March 2001, I expressed the thanks of the Committee to the Minister and his senior officials for their time and co-operation. I also thanked all parties for their useful testimony and detailed submissions. The appendices to this report list all those who took part and those who made submissions to the Inquiry. I again thank all these persons.

**The Hon Janelle Saffin MLC**
**Acting Chair**

# Recommendations

**Recommendation 1: Consultation on regulatory proposals**

The Committee recommends that the Department of Gaming and Racing develop a more deliberative and modern consultation process in the case of future regulatory proposals. (Pages 9-11)

**Recommendation 2: Inconsistency in the Harness Racing Act New South Wales 1977 relating to the making of rules and regulations**

The Committee recommends that the Harness Racing New South Wales Act 1977 be amended:

(a) to clarify the legal status of the Harness Racing Rules but with due regard to existing rights;
(b) to repeal section 10A(2) so that any conflict between a rule and a regulation can be resolved in accordance with section 28 which provides that if there is any inconsistency the regulations prevail. (Pages 11-12)

**Recommendation 3: Harness Racing Rules to be disallowable by Parliament**

The Committee recommends that the rules made by Harness Racing New South Wales under section 10A of the Harness Racing New South Wales Act 1977 be made disallowable by Parliament. (Pages 12-14)

*Dissenting Opinion:* At the Committee's meeting on 25 June 2001 Ms Marianne Saliba, MP, Member of the Regulation Review Committee, asked that it be recorded that she opposed Recommendation 3.

**Recommendation 4: Absolute Liability**

The Committee recommends that (in line with Rule 178 of the Australian Rules of Racing) the Harness Racing Rules relating to the presentation of horses free of prohibited substances be amended so as to allow a person the defence that he or she has taken all proper precautions to prevent the administration of a prohibited substance. (Pages 14-16)

*Dissenting Opinion:* At the Committee's meeting on 25 June 2001 Ms Marianne Saliba, MP, Member of the Regulation Review Committee, asked that it be recorded that she opposed Recommendation 4.

**Recommendation 5: Consistency between Codes**

The Committee recommends that the Department of Gaming and Racing and Harness Racing New South Wales together with representatives from thoroughbred and greyhound racing, make an examination of the merits of developing greater consistency between the rules and regulations governing harness racing in New South Wales and those applying under the Australian Thoroughbred Rules and the Australian Greyhound Racing Rules, and that a report on this matter be made to the Minister for Gaming and Racing and tabled in due course in Parliament (Pages 14-16)

**Recommendation 6: Legal representation at Stewards' Inquiries**

The Committee recommends that the merits of retaining the current restriction on legal representation at stewards' inquiries be examined by Harness Racing New South Wales and that a report be prepared for the Minister for tabling in Parliament. That report should take in a review of comparable provisions of sporting codes in other Australian states and relevant overseas jurisdictions. (Pages 16-17)

**Recommendation 7: Natural Justice**

The Committee recommends that Harness Racing NSW review the Harness Racing Rules with a view to amending them to meet the concern expressed by Mr Justice Young in *Gleeson v Harness Racing Authority of NSW* that it was unsatisfactory that rules are made which give the same people the power to adjudicate and the power to investigate. The Committee recommends, in that regard, that the person performing the role of adjudicator be legally qualified and at arms length from the pool of stewards. (Pages 18-19)

**Recommendation 8: Permissible evidence**

The Committee recommends that the terms of regulation 23 be reviewed to determine whether it should be amended to accord with the practice of the Harness Racing Appeals Tribunal. (Pages 19-20)

**Recommendation 9: Register of Tribunal decisions**

The Committee recommends that a regulation be made to make appropriate provision for the setting up and keeping of a register, including a record in electronic form, of judgments and matters before the Harness Racing Appeals Tribunal for the information of the public. (Page 20-21)

# HARNESS RACING NEW SOUTH WALES (APPEALS) REGULATION 1999

## INQUIRY BY THE REGULATION REVIEW COMMITTEE

This report arises from an inquiry by the Regulation Review Committee into regulatory controls governing appeals to Harness Racing New South Wales and the Harness Racing Appeals Tribunal. On 23 November 2000 the Regulation Review Committee resolved to inquire into and report to the Parliament on the Harness Racing New South Wales (Appeals) Regulation 1999.

The inquiry was conducted as part of the Committee's function, under section 9 (2) of the Regulation Review Act 1987, of reporting to Parliament from time to time on the staged repeal program. That program requires the periodic review of existing regulations to ensure they continue to effectively meet the objectives of the Act under which they are made. The purpose of the inquiry was to examine, first, the compliance by the Minister with the provisions of the Subordinate Legislation Act 1989 in the making of this regulation; second, the regulatory impact statement for the regulatory proposal and the consultation conducted in respect of it; third, the adequacy of the existing regulatory controls; and, fourth, related matters.

The general objective behind the Subordinate Legislation Act 1989 is that the principal regulations of New South Wales are adequately reviewed, on the basis of public input, every five years. In the course of those five years the department or statutory body administering them has an opportunity to examine their operation, to note the cost and effectiveness of the regulations in meeting their objectives, and to maintain an ongoing dialogue with interested sections of the public. At the end of each five years this process has, hopefully, put the governing organisation in a strong position to review and republish its regulations with any beneficial changes.

The main areas to be examined by the Committee were listed in the two advertisements calling for submissions which were published on 16 December 2000 in the *Sydney Morning Herald* and the *Daily Telegraph*. As well as these principal concerns the Committee also took note of issues relating to the standard criteria under which the Committee examines regulations. Those criteria are set out in the Regulation Review Act 1987 and include questions of legality, any adverse impact by the regulation on the business community, lack of clarity of the regulation, trespass on personal rights and liberties, and the issue of whether the objectives of the regulation could be accomplished in more effective ways.

On 11 January 2001 the Committee wrote to the Harness Racing Appeals Tribunal to see whether His Honour Judge Thorley and His Honour Judge Perrignon would like to attend the inquiry or make any submission in respect of it. On 18 January they advised that they did not think it proper or appropriate to do so and that accordingly they did not propose to accept the Committee's invitation. Earlier, on 20 May 1999, Judge Thorley on behalf of himself and Judge Perrignon had advised the Department of Racing that they noted the proposed subordinate legislation dealing with appeals was substantially in the same terms as that due to expire and that they offered no comment in disagreement and had no submission.

## AMBIT OF COMMITTEE REVIEW

In a letter dated 27 March 2001 Harness Racing New South Wales questioned the right of the committee to examine matters relating to the harness racing rules. The Committee reviewed the regulation and various parts of the rules where there was a need to do so because of their mutual interdependence. This was principally the case in regard to issues of natural justice which underlie the integrity of both the inquiry and appeals structure.

The committee considers that the recommendations in this report supporting changes to specific harness racing rules will benefit, apart from industry, both the rules and the appeal regulations each of which forms part of the management of harness racing in New South Wales. The RIS went to some lengths to justly stress the inter-relationship between the function of stewards, harness racing clubs and associations with the appeal system as part of the disciplinary framework of the racing industry and how important it was to maintain public confidence and interest in it. The RIS saw a function of the appeals regulation as ensuring the fairness and quality of decisions taken by stewards, HRNSW and harness racing associations and clubs. The Committee's review is consistent with that holistic approach.

It is the experience of the committee that an examination carried out to determine in a particular case the effectiveness of the staged repeal process should proceed from a broad perspective bearing in mind the regulation or regulations the subject of that review will not undergo re-examination for a further 5 years and possibly 10 years if their repeal is successively postponed. The benefits of avoiding an overly legalistic approach are apparent in this instance from the report's recommendations, all of which will enhance the disciplinary provisions and promote public respect for them.

Section 27 of the Harness Racing Act authorises the making of regulations with respect to any matter for which rules may be made. One of the options for consideration in the course of the remaking of any regulations under that Act is whether the ambit of them, presently confined to appeals, should be extended to include other matters currently left to the rules.

Reasons for examining the rules in the present instance arose from considerations of natural justice, the absence of Parliamentary oversight of the rules, their questionable legal status and the impact this must have on proceedings under the Appeal Regulations. These are justifiable considerations both for the Department of Gaming and Racing and for the Regulation Review Committee when examining the Appeal Regulations.

# HARNESS RACING NEW SOUTH WALES (APPEALS) REGULATION 1999

The Explanatory Note accompanying this Regulation states that the object of it is to repeal the *Harness Racing New South Wales (Appeals) Regulation 1994* and to replace it with this regulation which is in substantially the same terms as the regulation to be repealed. This regulation provides for administrative and procedural matters concerning appeals to Harness Racing New South Wales and the Harness Racing Appeals Tribunal.

This Regulation is made under the *Harness Racing New South Wales Act 1977,* including section 20 (regulations concerning appeals) and section 27 (the general regulation-making power).

This Regulation is made in connection with the staged repeal of subordinate legislation under the *Subordinate Legislation Act 1989.*

## ADEQUACY OF PUBLICITY AND CONSULTATION IN REGARD TO THE MAKING OF THE REGULATION

Under the provisions of section 5 of the *Subordinate Legislation Act* the Minister is required to publish a notice setting out details of the regulatory proposal in the Government Gazette and in a newspaper circulating throughout New South Wales and, where appropriate, in any relevant trade, professional, business or public interest journal or publication. This notice must state the objects of the proposed regulation, advise where a copy of the regulatory impact statement and draft regulation may be obtained or inspected, and invite comments and submissions from the public.

Notice of the regulatory proposal was published in the National Trotguide newspaper of 29 April 1999, the Government Gazette of 30 April 1999 and in the racing pages of the Daily Telegraph of 1 May 1999, inviting comments and submissions from interested persons on the proposed statutory regulation. These notices contained the relevant statutory details.

Section 5 of the *Subordinate Legislation Act* contains both the requirements for publicising a regulatory proposal and for consultation on it. Though related, these are separate obligations. Under the Act, consultation has to be commensurate with the impact likely to arise for consumers, the public, relevant interest groups and any sectors of industry or commerce. The provisions of the Subordinate Legislation Act relating to the preparation of regulatory impact statements (Schedule 2) require a statement of the consultation program to be undertaken. The RIS for the proposal did not contain a program for consultation, just advice that the views of the Harness Racing Appeals Tribunal, Judge W Perrignon, and the Acting Harness Racing Appeals Tribunal, Judge B Thorley, would be sought, together with those of the following industry bodies:

Harness Racing New South Wales
Harness Racing Advisory Board
United Harness Racing Association
NSW Trotters' Association
NSW Standardbred Racing Owners' Association
NSW Standardbred Breeders' Association
NSW Bookmakers' Co-operative Ltd

The process followed was detailed in evidence to the Committee by Mr Loewenthal, Deputy Director General, Department of Gaming and Racing:

> *In 1994, pursuant to the provisions of the* Subordinate Legislation Act 1989, *the regulation was due to sunset. Accordingly, consideration was given to the need to remake the regulation. After advertising and circulating the regulatory impact statement in respect of the matter and considering submissions from interested persons, industry organisations and the Harness Racing Appeals Tribunal, the regulation was made with minor amendments, the most significant being clarification that an appellant may be legally represented at an appeal, and the introduction of a minimum period of suspension before an appeal may be made to the tribunal.*
>
> *In 1999 the regulation was again reviewed in accordance with the provisions of the Subordinate Legislation Act. Copies of the proposed draft regulation together with the regulatory impact statement were forwarded to the following organisations inviting their views on the proposal: Harness Racing New South Wales, the Harness Racing Advisory Board, the United Harness Racing Association, the New South Wales Trotters Association, the New South Wales Standardbred Racing Owners' Association, the New South Wales Standardbred Breeders' Association and the New South Wales Bookmakers Co-operative Ltd. The views of the Harness Racing Appeals Tribunal – Judge W. Perrignon- and the acting Harness Racing Tribunal – Judge B. Thorley – were also sought. In addition, advertisements were placed in the National Trot Guide newspaper of 29 April 1999, the* Government Gazette *of 30 April 1999 and in the racing pages of the* Daily Telegraph *of 1 May 1999 inviting comments and submissions from interested persons on the proposed statutory regulation.*
>
> *The department received minimal inquiries in response to the advertisements and, while copies of the regulatory impact statement and the proposed regulation were dispatched to the above interested persons, no submissions were forthcoming. The department was, in fact, disappointed with the failure of the various industry participant groups to respond to the invitation to comment upon the regulatory impact statement and the proposed regulation. Judges Perrignon and Thorley advised that they had noted that the proposed regulation was in substantially the same terms as that due to expire and offered no comment or submission in respect of the proposal. The New South Wales Bookmakers Co-operative Ltd expressed its broad agreement with the proposed regulation and therefore did not wish to make any submissions on the subject. Harness Racing New South Wales advised that after considering the draft regulatory impact statement the board supported the promulgation of the proposed regulation. No other correspondence was received by the department in respect of the regulation.*

*After giving careful consideration to all of the above, on 9 July 1999 the Minister approved of Parliamentary Counsel being instructed to supply a final draft regulation in terms of the regulatory impact statement for consideration of the Executive Council. The Harness Racing New South Wales Appeals Regulation 1999 was subsequently approved by the Executive Council on 18 August 1999 and published in the* Government Gazette *of 20 August 1999, with the commencement date of 1 September 1999.*

These details, together with the evidence give by Mr Peter Baldwin, Assistant Director, Racing, during the course of the inquiry show that the Department provided adequate opportunity for persons to respond to the regulatory proposal. There are two likely reasons why they did not.

The first is that the regulatory impact statement was not structured in a way that presented a separate, detailed examination of each of the substantive matters covered by the regulatory proposal so as to encourage public comment on them. This was a weakness of the regulatory impact statement. It considered only three options: to allow the Appeals Regulation to lapse; to remake the regulation with major amendments or to remake the regulation with minor amendments.

The second reason for the lack of public interest was probably the absence of an actively pursued approach to consultation. The Department appears to have advertised and sent out copies of the draft regulation and RIS to particular bodies and then sat back waiting for a response. When nothing happened the Department proceeded with the remaining formalities incorrectly assuming that the requirement for consultation is satisfied by simply notifying the public of the proposal.

**Recommendation 1:** The Committee recommends to the Minister that the Department of Gaming and Racing should develop a more deliberative and modern consultation process in future regulatory proposals.

## INCONSISTENCY IN THE HARNESS RACING NEW SOUTH WALES ACT 1977 RELATING TO THE MAKING OF RULES AND REGULATIONS

At an early stage of the inquiry the Committee sought advice from the Department on an apparent conflict in the Act. Under Section 10A of the Harness Racing Act Harness Racing New South Wales can make rules, not inconsistent with the Act, relating to the control and regulation of harness racing. Section 27(2) says that regulations can be made with respect to any matter for which rules can be made. In 1998 the Act was amended and one of the new provisions introduced was section 10A(2), which prohibits the making of rules with respect to any matter for which regulations may be made. On the face of it, this prohibits exercise of the rule-making power and puts in doubt the legal effect of the existing rules.

The Committee suggested that the Department should examine whether section 10A(2) should be repealed so as to leave any conflict between a regulation and a rule to be settled in accordance with section 28(1) of the Act which states that if there is any inconsistency between the regulations and the rules, the regulations shall prevail. Mr Loewenthal, on behalf of the Minister, undertook to seek urgent advice

from the Crown Solicitor's Office and to report back to the Committee when that advice had been received.

On 28 March 2001, Mr Peter Baldwin, Assistant Director Racing, in his evidence gave the Committee further information on the matter:

> ***Mr BALDWIN:*** *On the issue that was raised previously, as indicated by Mr Loewenthal on 2 February, we instructed the Crown Solicitor in some detail on this issue and also had discussions with Parliamentary Counsel. The Crown Solicitor particularly indicated the matter was of extreme legal complexity in terms of statutory construction and also the relevant case law. Quite a volume of very high level authority in terms of decisions of superior courts has been provided to us already by the Crown Solicitor and the Crown has indicated that it is looking at finalising the advice at present and we are hopeful of having that final advice in the near future.*
>
> ***ACTING CHAIRMAN:*** *Do you have a time frame on that?*
>
> ***Mr BALDWIN:*** *Well, again it is difficult to hassle the Crown Solicitor, as it were, on a matter which, as we say, certainly is not straightforward, and the Parliamentary Counsel has confirmed that, but let's just say that we will use our best endeavours to indicate to the Crown Solicitor that there is a degree of some necessity in having a final opinion as soon as possible.*
>
> ***ACTING CHAIRMAN:*** *Would you keep us advised of the progress?*
>
> ***Mr BALDWIN:*** *It would be a pleasure.*

On 6 June 2001 Mr Peter Baldwin advised the Committee that the Crown Solicitor has now provided advice on the issue. Mr Baldwin said this advice was being discussed with the Parliamentary Counsel with a view to determining an appropriate course to clarify the legal status of the rules.

**Recommendation 2**: The Committee recommends that the Harness Racing Act 1977 be amended:

(a) to clarify the legal status of the Harness Racing Rules but with due regard to existing rights;
(b) to repeal s10A(2) so that any conflict between a rule and a regulation can be resolved in accordance with Section 28 which provides that if there is any inconsistency the regulations prevail.

## HARNESS RACING RULES TO BE DISALLOWABLE BY PARLIAMENT

The New South Wales Harness Racing Rules are made under the Harness Racing Act by the Regulatory Committee which comprises 3 Directors of HRNSW. These rules are not reviewable or disallowable by Parliament. This contrasts with regulations made under the same act. These can be fully reviewed by Parliament and can be disallowed in whole or in part within fifteen sitting days of their tabling.

In this instance the rules have at least equal importance with the regulations in governing harness racing and should be subject to a similar oversight.

In his evidence Mr Loewenthal said that when the Trotting Authority was formed in 1997 the rules of trotting were required to go through the full formal process of referral to the Parliamentary Counsel and the Governor. He said this position was altered as a result of advice from the Chairman of the Authority as to delays and concerns with having rules made in this way.

> ***Mr LOEWENTHAL:*** *.....The rules have been in a transitional phase for some considerable time. When the then Trotting Authority was formed in 1997 the legislation then provided that the rules of trotting as they were, which at that stage had been adopted by the former controlling authority, the New South Wales Trotting Club, were able to be adopted by the New South Wales Trotting Authority as its by-laws and required the approval of the Governor. So, at that stage they had to go through the full formal process of referral to the Parliamentary Counsel, then referral to the Government and Executive Council for approval. In an amendment to the Act in the early 1980s, on advice from the then Chairman of the Authority as to delays and concerns with delays in having the rules made, particularly as they have a national impact, the legislation was changed to provide that from that time they would be rules made by the authority with the approval of the Minister.*
>
> *That continued until the amendments in 1998 when the Minister took the decision that as part of this overall deregulation process—there is a deregulation of the three ministries going on—it was more appropriate that all rule making be the province of the regulatory committee of the authority and not one for the Minister in which to be involved, even though the Minister does retain under the Act an overriding power of direction and control over the regulatory committee and its functions. I will do some research this afternoon and get back to the Committee.*

Although this change may have expedited the making of rules it is evident that it has its drawbacks as seen in the admission by Mr Loewenthal that the rules have never been reviewed to ensure natural justice and procedural fairness. The fact that the rules become part of a national set of rules that form with the regulations the disciplinary framework for harness racing in New South Wales is a compelling reason for Parliament to have a review power consistent with that applying to most other national codes.

The change proposed by the committee will involve no alteration to the rule making powers of HRNSW or the way the rules are made. It could be implemented by the inclusion in the next Statute Law (Miscellaneous Provisions) Bill of a requirement making those rules disallowable for the purposes of section 41 of the Interpretation Act 1987.

**Recommendation 3:** The Committee recommends that the Rules made by Harness Racing New South Wales under section 10A of the Harness Racing New South Wales Act 1977 be made disallowable by Parliament.

*Dissenting Opinion:* At the Committee's meeting on 25 June 2001 Ms Marianne Saliba, MP, Member of the Regulation Review Committee, asked that it be recorded that she opposed Recommendation 3.

## DECISIONS FROM WHICH AN APPEAL LIES TO THE HARNESS RACING APPEALS TRIBUNAL

Regulation 17 of the Appeals Regulation sets out the decisions from which an appeal lies to the Tribunal. The RIS states these were developed in consultation with industry, the Tribunal and Harness Racing New South Wales and that they are generally accepted as appropriate.

The Committee received two submissions on the issue stating that regulation 17(1) should be amended to allow an appeal to the Tribunal regarding the disqualification of a horse from a race. The appeal provisions cover only a permanent disqualification and one for a period of four weeks. One of the persons making this submission claims the amount at stake could range from $200 to $200,000 depending on the race, and that the incidence of such a disqualification was now more likely with the introduction of marker pegs. It seems there have been frequent instances in the past six months of drivers being charged with going inside the pegs and that stewards are not infallible in this matter.

Mr Loewenthal advised the Committee that the Minister had received a similar submission and that it was under consideration by the Department with a view to advising the Minister who would then decide if an amendment was justified.

## ABSOLUTE LIABILITY

Rule 190 of the Australian Harness Racing rules states that a horse shall be presented for a race free of prohibited substances. If a horse is presented for a race otherwise than in accordance with this rule the trainer of the horse is guilty of an offence. The rule states that an offence is committed regardless of the circumstances in which the prohibited substance came to be present in the horse. This provision is the source of many of the appeals that go to the Tribunal. The only way in which a person can escape responsibility for presenting a horse with a prohibited substance is by showing that there was a major flaw in the testing procedures (Rule 191).

The strong industry grievance arising from the application of Rules 190 and 191 is essentially that persons are denied the right to prove they are innocent of any intent or negligent behaviour that could have given rise to the offence.

A different situation operates under the Australian Rules of Racing governing thoroughbred racing in NSW. Rule 178 states that when any horse which has been

brought to a racecourse for the purposes of a race is found by the stewards to have had administered to it any prohibited substance the trainer may be punished unless he satisfies the steward that he had taken all proper precautions to prevent the administration of the prohibited substance.

On 28 March 2001, Mr Francis Martin, Assistant to the Chief Executive, Australian Racing Board, in his evidence said this provision operated in the same way as an absolute rule:

> *Mr Martin: It is the same rule, the absolute rule, in harness racing. It looks as though there is an out, but it does not work out that way.*

Later in evidence Mr Martin agreed that Rule 178 worked sufficiently well to justly its continuance. Mr Mullins, Chief Executive Officer, Harness Racing New South Wales, was asked during the inquiry, to outline the policy basis for the absolute liability rule in harness racing. In his reply Mr Mullins summarised the development since 1994 of the harness racing rules but he did not refer to the policy basis of the absolute liability rule. Some clarification as to the operation of the rule, but not its policy basis, was given earlier by Mr Dennis English, Solicitor for Harness Racing New South Wales in reply to a question from a member of the Regulation Review Committee:

> ***MEMBER OF THE COMMITTEE:*** *Just so that I can crystallise it in my own mind, without getting too specific, in a case where there had been a finding of $TCO_2$ and the appeal judge said he was convinced that the person charged had not been guilty or responsible for the drug being in the horse—but the proof was there or the evidence has been accepted that the level is above prescribed limits—the appeals judge does not have the ability to dismiss the charge against him, because of that evidence.*
>
> ***Mr ENGLISH:*** *You are confusing the term "not guilty". We are using different words for the term "not guilty". This goes to the heart of an absolute liability rule. An absolute liability rule states that mens rea, which is the intention to commit the crime, does not need to be proved. So you are guilty of the offence if those elements are proven. The trade-off is that if the appeals tribunal is satisfied that the trainer had no knowledge whatsoever, was in a different country and was not involved in it, the tribunal will impose no penalty.*
>
> ***ACTING-CHAIR:*** *The answer is that you cannot be found not guilty but you can end up with no penalty?*
>
> ***Mr ENGLISH:*** *You can be found not guilty only if you are not guilty of the offence; in other words, if one of the elements is missing. You have to satisfy the tribunal that the swab was contaminated, the chain of custody was wrong, or some other procedural matter was wrong, otherwise you are guilty of the offence.*

An examination of a number of Australian Thoroughbred Racing Appeal decisions shows that the defence of the trainer having taken proper precautions to prevent the administration of drugs is examined carefully on a factual basis. The defence was

accepted in the Western Australian Appeal of Treloar (Racing Appeals Reports, 398) where circumstances existed to convince the Tribunal that all proper precautions had been taken. There are probably other examples to demonstrate that Rule 178 is not comparable to the absolute liability provisions of Harness Racing New South Wales.

The Harness Racing Appeals Tribunal is also the Racing Appeals Tribunal for the purpose of Hearing Appeals from the Appeal Panel under the Thoroughbred Racing Board Act 1996. It is an anomalous situation that the Tribunal under one set of rules is obliged to take into account the defence that a person had taken all proper precautions to prevent the administration of a prohibited substance but must under the other set of rules, disregard such a defence. No explanation was put forward to justify the different approach.

The Committee considers that the integrity of the appeals process would be enhanced by suitable changes to Rule 190. The Committee considers that the rule is operating to prohibit a matter coming before the Harness Racing Appeals Tribunal that should be examinable from the point of view of fairness and relevancy. There is no evidence that the objective of drug free racing would be compromised by the right of a person to be absolved from an offence on the ground that he or she had taken all proper precautions to prevent the administration of a prohibited substance. The change the Committee recommends would produce greater industry respect and support for the harness racing rules and appeal proceedings. Rule 190 is part of the national code and this recommendation would mean a state variation for the purposes of New South Wales. This is a common feature of such codes including the current rules. For instance New South Wales already has variations in the case of at least 21 rules relating to bookmakers and betting. Similar exceptions apply in the case of Queensland, South Australia, Tasmania and Victoria. The whole body of New South Wales Appeal Regulations also constitutes a state variation.

**Recommendation 4:** The Committee recommends in line with Rule 178 of the Australian Rules of Racing that the Harness Racing Rules relating to the presentation of horses free of prohibited substances be amended so as to allow a person the defence that he or she has taken all proper precautions to prevent the administration of a prohibited substance.

*Dissenting Opinion:* At the Committee's meeting on 25 June 2001 Ms Marianne Saliba, MP, Member of the Regulation Review Committee, asked that it be recorded that she opposed Recommendation 4.

**Recommendation 5:** The Committee also recommends that the Department of Gaming and Racing and Harness Racing New South Wales together with representatives from thoroughbred and greyhound racing make an examination of the merits of developing greater consistency between the rules and regulations governing harness racing in New South Wales and those applying under the Australian Thoroughbred Rules and the Australian Greyhound Racing Rules and that a report on this matter be tabled by the Minister in due course in Parliament.

## LEGAL REPRESENTATION AT STEWARDS' INQUIRIES

A person is not entitled to have a legal representative present in the inquiry room unless this is permitted by the steward (Rule 182). HRNSW estimates that the question of legal representation is raised in approximately 20 percent of stewards' hearings. Mr Ron Bottle, Deputy Chairman of Stewards, advised the Committee Secretariat that representation was permitted only in exceptional circumstances. The issue of concern here is whether Rule 182 provides an adequate balance between the need to expedite the stewards' inquiry and the rights of a person to adequately protect their livelihood. Where legal representation is permitted the conditions of it are likely to require the legal representative to sit outside the inquiry room to be consulted when permitted by the stewards.

This arrangement was the subject of criticism during the inquiry. One difficulty is that stewards have no legal qualifications upon which to judge in a particular instance whether representation should be allowed in the interests of a fair hearing. The matters that require to be taken into consideration include "the ability of the person to present his or her own case, together with the seriousness of the allegations and the potential penalty, the complexity of the issues, factual or legal, and procedural rights (for example cross examination) and hurdles which may have to be negotiated....."(Review of Administrative Action, Mark Aronson and Nicola Franklin) The basis of the prohibition on representation was outlined in the evidence of the Chairman of Stewards :

> ***Mr NEBAUER:*** *Where legal representation is involved at an inquiry, be it a positive swab inquiry or running and handling inquiry, not only can the inquiry become extremely difficult because of the arguments put from each side of the table, but it can also become extremely expensive to the industry. Whatever costs Harness Racing New South Wales incurs must come out of industry funds. I believe you would appreciate that if an inquiry carries on over a number of sittings, that would be at an expense. I do not bear expense, nor does the board: the industry pays for it, and there are limited funds available.*

The Committee feels that the merits of retaining the current restriction on representation should be carefully re-examined particularly as bodies such as the Court of Arbitration for Sport in its rules permit parties to be represented or assisted by persons of their choice. Another significant precedent can be found in the National Rugby League Competition Rules which expressly apply the principles of natural justice and provide that a person can appoint representatives including a solicitor or counsel. Such provisions suggest the Harness Racing Rules may in this respect be dated. In his evidence, Mr Loewenthal, Deputy Director-General Department of Gaming and Racing, conceded the rules had never been reviewed against the needs of natural justice. It now seems time to do so.

**Recommendation 6:** The Committee recommends that the merits of retaining the current restriction on legal representation at stewards' inquiries be examined by Harness Racing New South Wales and that a report be prepared for the Minister for tabling in Parliament. That report should take in a review of the comparable

provisions of sporting codes in other Australian states and relevant overseas jurisdictions.

## NATURAL JUSTICE

The committee received a number of submissions on the subject of natural justice. The Regulatory Impact Statement stresses its importance. In the course of the inquiry the issue was specifically raised in the context of Mr Justice Young's comments in the 1990 Supreme Court case of Gleeson v New South Wales Harness Racing Authority. In that case, referring to the rules governing stewards' inquiries, he said:

> *"It is most unsatisfactory that rules are made which give the same people the powers to investigate and the powers to adjudicate."*

The Chairman of Stewards and the Chief Executive Officer of Harness Racing New South Wales gave the following evidence to the committee on the issue:

> ***Member of Committee:*** *In relation to the conduct of the inquiry by the stewards, you would probably be aware of some criticism that the system that exists within harness racing in New South Wales—and probably other jurisdictions, but we will restrict it to New South Wales—that the stewards are perceived to be the accuser, judge and jury. In terms of the normal legal system you could say there is a denial of natural justice. That is one argument. Are you aware of that? Is there any sensitivity within your organisation that the same people who are laying the charge may well be the people hearing it and proceeding with the penalty?*
>
> ***Mr NEBAUER:*** *I have heard those comments over an extended period of time and I understand it has been challenged through the courts on previous occasions. The matter is under review by Harness Racing New South Wales at the moment and therefore I am not at liberty to comment any further, other than stating that.*
>
> ***Mr MULLINS:*** *With your permission Madam Chair, I might be able to assist Mr Martin. This is a matter of policy for Harness Racing New South Wales. We are aware of the problem and at this point in time we do have a number of matters we are currently considering at board level to address the very issue you have raised. I would like to take that question on notice and I would be only too happy to bring the Committee up to date in camera as to where we are with that particular matter.*
>
> ***ACTING-CHAIR:*** *Why would you need to take that question on notice? It seems to me a fundamental question that you would be able to at least give some observation on if not a complete answer at this stage.*
>
> ***Mr MULLINS:*** *I would not be able to because it is currently being considered by the board as a matter of policy and they have not reached a final decision. I would be prepared to assist the Committee in camera and let the Committee know exactly where the matter is with the board. At the moment the*

*board has not resolved to make any changes, but they are considering a number of matters.*

***ACTING-CHAIR:*** *That would be fine. It would assist the Committee to have that information in camera.*

Eleven years have elapsed since Justice Young made his criticism of the ambit of functions vested in stewards and it is clear to the Committee that Harness Racing NSW has been remiss in disregarding the natural justice implications of His Honour's remarks.

**Recommendation 7:** The Committee recommends that Harness Racing NSW review the Harness Racing Rules with a view to amending them to meet the concern expressed by Justice Young in *Gleeson v Harness Racing Authority of NSW* that it was unsatisfactory that rules are made which give the same people the power to adjudicate and the power to investigate. The Committee recommends, in that regard, that the person performing the role of adjudicator be legally qualified and at arms length from the pool of stewards.

## PERMISSIBLE EVIDENCE

Regulation 23 of the appeals regulations imposes restrictions on the evidence that can be considered on appeal. The regulation states that only the evidence adduced at the stewards' inquiry can be considered by the tribunal unless the tribunal decides otherwise. Justice Young was critical of that provision and this was the reason he allowed the appellant to go straight to the Supreme Court rather than to the tribunal. He said words to the effect, "The restriction imposed by the regulation on the allowable evidence meant that an appeal to the tribunal would not take away the prejudice that had occurred at the stewards' inquiry." He drew attention to a further undesirable aspect, as he saw it, of the regulation. He said, "As a result of that the appellant cannot bring any further evidence but the tribunal can inform itself of any matter it likes." This regulation is still in the same terms.

At the Committee's Inquiry the Acting Chair asked Harness Racing NSW and the Department of Gaming and Racing whether the regulation had been reviewed to take account of those concerns.

***Mr MULLINS:*** *I seek leave for Mr English to answer. He will be able to help the Committee on this matter.*

***Mr ENGLISH:*** *I can answer from a practical aspect. This has been deliberated on by the tribunal on a number of occasions. I do not have the appeal decisions with me, but the tribunal has always taken the attitude that appeals before it are hearings de novo and it will not, as a matter of course, refuse appellants the right to lead further evidence. As I said, it is a matter of record that the tribunal has said that on a number of occasions. It does not limit the appellants to the evidence that was given at an inquiry.*

*ACTING-CHAIR: The regulation does, does it not? In the reading of the regulation there appears to be a limit, but the tribunal for practical purposes has said it will not restrict it.*

*Mr ENGLISH: I do not know the reading of the regulation but I presume it says "without the leave of the tribunal".*

*Mr CALLAGHAN: That is my experience also. I do not know of any occasion where I have appeared at an appeal before the tribunal that an application to lead to further evidence on behalf of the appellant has been refused. Indeed, I am sure I have heard one or more of the judges make the comment that one of the conditions is that the tribunal has to be satisfied that there is good reason why the evidence was not presented at the earlier hearing. The comment has been made, I am sure, that at the stewards' hearing there was no legal representation, otherwise at an appeal, and that alone is sufficient reason to constitute good reason why it was not presented at the earlier hearing—the appellant was unrepresented and unguided by legal advice for the further information he now has.*

*ACTING-CHAIR: Perhaps it might be wise to have a look at the regulation for further consideration by the parties.*

*Mr BALDWIN: Going back to the original drafting of the regulations in 1980, the tribunal—the proposed tribunal at that stage—assisted with the drafting. It was very strong on the point that the regulation be drafted in that manner. On each occasion that the regulations have been reviewed they have been discussed with the appropriate tribunal at that time. There has never been any concern expressed by the tribunal that it has reflected on their ability to make a decision.*

**Recommendation 8:** The committee recommends that the terms of regulation 23 should be reviewed to determine whether it should be amended to accord with the practice of the Tribunal.

## REGISTER OF DECISIONS OF THE HARNESS RACING APPEALS TRIBUNAL

The Committee did not take specific evidence on this matter, but from inquiry at officer level it seems there is not in place any formal system regarding the publication and availability of Tribunal decisions. The Committee understands that the various Australian Appeals Tribunals originally had an informal arrangement under which they exchanged decisions so that each was aware of other precedents. This also included New Zealand Appeals Tribunals.

This method of exchange was improved when a Racing Appeals Reporter was appointed to receive all decisions and to prepare a digest. Since August 1991 three issues a year of Racing Appeals Reports have been made available. The various Racing Appeals Tribunals contribute an annual fee for this service and copies are available to the legal profession and others.

**Recommendation 9:** The Committee recommends that a regulation be made to make appropriate provision for the setting up and keeping of a register, including a record in electronic form, of decisions and matters before the Harness Racing Appeals Tribunal for the information of the public.

## $TCO_2$ IN HARNESS RACING HORSES

The subject of $TCO_2$ levels in racing horses was considered in several of the submissions made to the Committee, and it was also the central concern of some witnesses who gave evidence before the Committee on 2 February 2001. That evidence presents a picture of confused perceptions amongst the harness racing industry and it is timely for it now to be the subject of a national review by the Australian Harness Racing Council.

In a letter to the Committee dated 25 January 2001, the Minister for Gaming and Racing said that review was now nearing completion and that it had the support of the harness racing controlling bodies in every Australian State and Territory. He said the review had been undertaken in recognition of both the need to examine the $TCO_2$ situation thoroughly, and the benefits of a national approach. He advised the Committee that the review has involved the use of top-level veterinary, scientific and statistical expertise.

The Minister in his letter stressed the thoroughness of the Australian Harness Racing Council review, and that it represented an effort to examine developments in this area in a balanced manner with a view to developing policy that could be implemented throughout Australia.

The Minister urged the importance of allowing the Australian Harness Racing Council $TCO_2$ review to run its course, without the risk of a separate review by the Regulation Review Committee of the $TCO_2$ issue compromising its integrity and validity.

Consistent with the Minister's wishes, the Committee wrote to the Australian Harness Racing Council on 8 March 2001 and made available to the Australian Harness Racing Council a transcript of the evidence taken on 2 February 2001 and copies of submissions relevant to the Australian Harness Racing Council review. This was done so that the $TCO_2$ Sub-Committee of the Australian Harness Racing Council would have an opportunity to consider this material prior to the finalisation of the $TCO_2$ review.

In its letter the Regulation Review Committee suggested, for the consideration of the Australian Harness Racing Council, that the Council conduct some group meetings with industry so that an exchange of views could take place with industry participants, so as to gain some further understanding of the practical and financial difficulties that owners, trainers and drivers face in meeting the complexities of $TCO_2$.

This would compensate somewhat for the lack of formality of the review.[1] The Committee feels that consultation with industry participants would help to alter the belief held by industry participants that they comprise a group more to be regulated than to be actively joined in the decision-making process.

On 22 March 2001 the Australian Harness Racing Council replied to the committee and that letter is set out in Appendix 7 to this report.

On 30 March 2001 the TCO2 Review Committee presented its report to the Executive of the AHRC. The report made three recommendations:

(a) That Australian Rule 188 (A)(2)(a) be amended by substituting the figures 36.0 for the figures 35.0.

(b) That a Subcommittee be appointed to redefine protocols, procedures and policies for all states to follow in respect of the detection of prohibited substances.

(c) That the AHRC work with the state controlling bodies to establish workshops to further the education of industry participants and associated professional bodies/advisers to ensure the integrity of harness racing. This will include knowledge of feeding practices and the understanding of feed additives for the welfare of the standardbred horse.

On 30 April 2001 the AHRC met and adopted these recommendations. This left it up to each state to separately consider these recommendations. On 8 May 2001 HRNSW issued a press release stating that the Regulatory Committee had made changes to the rules so that the new level of 36.0 mmol/L would be applicable to harness racing in New South Wales on and from 1 May 2001.

A summary of evidence presented to the Regulation Review Committee on $TCO_2$ appears as Appendix 8 to this report.

[1] On January 2001 Mr Peter Baldwin, Deputy Director, Harness Racing NSW, advised the Committee as follows: *I spoke to Mr Rod Pollock, Chief Executive, Australian Harness Racing Council. Rod indicated that the current milkshake review does not have a geographical base (nor public hearings, etc) but has rather been conducted by way of conference hookups, etc*

# APPENDIX ONE

1999 No 436

New South Wales

# Harness Racing New South Wales (Appeals) Regulation 1999

under the

Harness Racing New South Wales Act 1977

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Harness Racing New South Wales Act 1977*.

J. RICHARD FACE, M.P.,

Minister for Gaming and Racing.

## Explanatory note

The object of this Regulation is to repeal the *Harness Racing New South Wales (Appeals) Regulation 1994* and to replace it with this Regulation which is in substantially the same terms as the Regulation to be repealed. This Regulation provides for administrative and procedural matters concerning appeals to Harness Racing New South Wales and the Harness Racing Appeals Tribunal.

This Regulation is made under the *Harness Racing New South Wales Act 1977*, including section 20 (regulations concerning appeals) and section 27 (the general regulation-making power).

This Regulation is made in connection with the staged repeal of subordinate legislation under the *Subordinate Legislation Act 1989*.

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# Harness Racing New South Wales (Appeals) Regulation 1999

## Part 1 Preliminary

### 1 Name of Regulation

This Regulation is the *Harness Racing New South Wales (Appeals) Regulation 1999*.

### 2 Commencement

This Regulation commences on 1 September 1999.

### 3 Definitions

In this Regulation:

***the Act*** means the *Harness Racing New South Wales Act 1977*.

### 4 Notes

The explanatory note and table of contents do not form part of this Regulation.



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# Part 2 Appeals to Harness Racing New South Wales

## 5 Appeals to HRNSW

Appeals to HRNSW under section 18 of the Act are to be made in accordance with this Part.

## 6 No appeal from certain decisions

An appeal may not be made to HRNSW in respect of a decision:

(a) given on a betting dispute by a betting supervisor employed by a harness racing club or harness racing association, or

(b) to impose on any person a fine not exceeding $50, or

(c) which affects only a right or privilege of a member of a harness racing club, being a right or privilege arising from his or her membership of that club.

## 7 Procedure for initiating and hearing appeals

(1) An appeal is to be initiated by the lodging of a written notice of appeal with the chief executive officer within 7 days of the date on which the appellant is notified of the decision appealed against.

(2) A notice of appeal must specify the grounds of appeal and, except by leave of HRNSW, the appeal is limited to those grounds.

(3) The chief executive officer is, on receiving a notice of appeal:

(a) to send the harness racing club or harness racing association concerned a copy of the notice of appeal, and

(b) to serve on the appellant a transcript of the evidence taken at the hearing in respect of the decision appealed against, and

(c) to send the members of HRNSW a copy of the notice of appeal, along with any such transcript of evidence.

(4) The date, time and place for the hearing of an appeal is to be fixed by the Chairperson. The chief executive officer is to give at least 7 days' written notice of such date, time and place to the appellant and the harness racing club or harness racing association concerned, and to such other persons as the Chairperson thinks fit.

(5) HRNSW is to commence the hearing of an appeal as soon as practicable within 28 days of the lodging of the notice of appeal.

(6) HRNSW may, in a particular case, extend any period of time specified in this clause if in its opinion the circumstances of the case so require.

### 8 Fees

(1) A notice of appeal must be accompanied by a fee of $100 when it is lodged.

(2) The fee may be paid at a later time with the consent of HRNSW.

(3) On the determination or withdrawal of the appeal, HRNSW may, if it thinks fit, direct that the fee (or part of the fee) is to be repaid to the appellant.

### 9 Suspension or variation of decision pending determination of appeal

(1) HRNSW may, on written application by an appellant lodged with the chief executive officer, order that the decision appealed against:

(a) is not to be carried into effect, or

(b) is to be carried into effect only to the extent specified in the order,

pending the determination of the appeal. Any such order has effect for the period it is in force.

(2) HRNSW may, in making any such order, impose conditions. The order is taken not to be in force for any period during which any such condition is not complied with.

(3) An order remains in force until it is revoked by further order by HRNSW or the appeal to which it relates is dismissed, determined or withdrawn (whichever happens first).

### 10 Withdrawal of appeal

An appeal duly lodged may not be withdrawn except with the leave of HRNSW. In granting any such leave, HRNSW may impose such conditions as to the payment of costs or otherwise as it thinks fit.

### 11 Evidence on appeal

(1) HRNSW, when hearing an appeal, is to consider as the evidence in the matter the evidence presented at the hearing in respect of the decision appealed against.

(2) HRNSW may not consider any other evidence unless it is satisfied that it is relevant to the subject-matter of the appeal and that there is good reason why it was not presented at the earlier hearing. If any new evidence is presented at the hearing of the appeal, the harness racing club or harness racing association concerned is to be given an opportunity to make submissions in respect of that evidence at the hearing.

(3) HRNSW, when hearing an appeal, is not bound by the rules of, or practice as to, evidence but may inform itself of any matter in such manner as it thinks fit.

### 12 Costs where appeal dismissed

(1) On dismissing an appeal, HRNSW may order the appellant to pay to it the actual costs incurred by HRNSW in hearing the appeal, including costs of any lawyer retained to assist HRNSW in determining the appeal (but not including any costs incurred by members of HRNSW in hearing the appeal).

(2) On service on an appellant of such an order for the payment of costs, the amount of the costs specified in the order becomes a debt payable by the appellant to HRNSW.

### 13 Certain persons not to participate at certain meetings of HRNSW

A member of HRNSW who participated in a race as an owner, breeder, trainer or driver may not participate as such a member at a meeting of HRNSW at which an appeal arising out of the running of that race is heard or determined.

### 14 Determination of appeal

(1) HRNSW may do any of the following in respect of an appeal:

(a) adjourn or dismiss the appeal,

(b) uphold, reverse or vary the decision appealed against,

(c) order the refund of any stake paid in connection with any race to which the appeal relates,

(d) refer any matter in which the decision appealed against was made for re-hearing (in accordance with directions given by HRNSW) to the committee of the harness racing club or harness racing association which made that decision,

(e) make such other order in relation to the disposition of the appeal as it thinks fit.

(2) On service on a person, personally or by post, of an order made under subclause (1) (c) requiring the refund of any stake paid to the person, the amount of the stake becomes a debt payable by that person to the person to whom the stake is required by the order to be refunded.

### 15 Conduct of appeal

HRNSW may, subject to the Act and this Part, direct the manner in which any appeal before it is to be conducted.

# Part 3 Appeals to Tribunal

## 16 Appeals to Tribunal

Appeals to the Tribunal under section 19 of the Act are to be made in accordance with this Part.

## 17 Decisions from which an appeal lies to Tribunal

(1) An appeal may be made to the Tribunal only in respect of a decision:

(a) to disqualify, either permanently or temporarily, any person from participating in or being associated with the harness racing industry, or

(b) to suspend for more than 14 days any right or privilege conferred on any person by the Act or the rules, or

(c) to cancel the registration of any person under the rules, or

(d) to disqualify, either permanently or for a period of 4 weeks or more, any horse from participating in harness racing meetings, or

(e) to impose on any person a fine of $50 or more, or

(f) to reduce in grade a driver for a period of 4 weeks or more.

(2) A reference in subclause (1) to a person does not include a reference to a harness racing club or harness racing association.

## 18 Procedure for initiating and hearing appeals

(1) An appeal is to be initiated by the lodging of a written notice of appeal with the chief executive officer within 7 days of the date on which the appellant is notified of the decision appealed against.

(2) The chief executive officer is, on receiving a notice of appeal:

(a) to forward notice of it to the Tribunal, and

(b) if the placing of any horse may be affected by the result of the appeal, to give a copy of the notice of the appeal to the owner of the horse (if the owner is not the appellant) and to the harness racing club or harness racing association concerned, and

(c) to serve on the appellant a transcript of the evidence taken at the hearing in respect of the decision appealed against.

(3) Within 7 days of receiving the transcript of evidence, the appellant is to lodge with the chief executive officer a written notice of the grounds of appeal. The appeal is to be limited to such grounds, except by leave of the Tribunal.

(4) On receiving notice of the grounds of appeal, the chief executive officer is to forward 3 copies of the notice to the Tribunal along with a transcript of the evidence taken at the hearing in respect of the decision appealed against.

(5) The date, time and place for the hearing of an appeal is to be fixed by the Tribunal. The chief executive officer is to give at least 7 days' written notice of such date, time and place to the appellant and to such other persons as the Tribunal thinks fit.

(6) The Tribunal is to commence the hearing of an appeal as soon as practicable within 28 days of the lodging of the notice of the grounds of appeal.

(7) The Tribunal may, in a particular case, extend any period of time specified in this clause if in its opinion the circumstances of the case so require.

### 19 Expedited hearing

(1) If the Tribunal is of the opinion that an appeal should be heard and determined as a matter of urgency, the Tribunal may, by order made with the concurrence of the appellant:

(a) dispense with the requirement for a transcript of the evidence taken at the hearing in respect of the decision appealed against to be served on the appellant and forwarded to the Tribunal, and

(b) shorten the time fixed under clause 18 (5).

(2) If such an order is made:

(a) the Tribunal may rely on such evidence as is available to it concerning the hearing in respect of the decision appealed against, and

(b) the appellant must lodge a notice of the grounds of appeal in such manner and within such time as the Tribunal directs. The appeal is to be limited to the grounds specified in that notice, except by leave of the Tribunal.

### 20 Fees

(1) A notice of appeal must be accompanied by a fee of $100 when it is lodged.

(2) The fee may be paid at a later time with the consent of the Tribunal.

(3) On the determination or withdrawal of the appeal, the Tribunal may, if it thinks fit, direct that the fee (or part of the fee) is to be repaid to the appellant.

### 21 Suspension or variation of decision pending determination of appeal

(1) The Tribunal may, on written application by an appellant lodged with the chief executive officer, order that the decision appealed against:

(a) is not to be carried into effect, or

(b) is to be carried into effect only to the extent specified in the order,

pending the determination of the appeal. Any such order has effect for the period it is in force.

(2) The Tribunal may, in making any such order, impose conditions. The order is taken not to be in force for any period during which any such condition is not complied with.

(3) An order remains in force until it is revoked by further order by the Tribunal or the appeal to which it relates is dismissed, determined or withdrawn (whichever happens first).

### 22 Withdrawal of appeal

An appeal duly lodged may not be withdrawn except with the leave of the Tribunal. In granting any such leave, the Tribunal may impose such conditions as to the payment of costs or otherwise as it thinks fit.

### 23 Evidence on appeal

(1) The Tribunal, when hearing an appeal, is to consider as the evidence in the matter the evidence presented at the original hearing in respect of the decision appealed against.

(2) The Tribunal may not consider any other evidence unless it is satisfied that it is relevant to the subject-matter of the appeal and that there is good reason why it was not presented at the earlier hearing. If any new evidence is presented at the hearing of the appeal, HRNSW or the stewards of HRNSW concerned are to be given an opportunity to make submissions in respect of that evidence at the hearing.

(3) The Tribunal, when hearing an appeal, is not bound by the rules of, or practice as to, evidence but may inform itself of any matter in such manner as it thinks fit.

### 24 Hearings in absence of a party and representation at hearings

(1) The Tribunal may hear an appeal in the absence of a party to the appeal.

(2) The Tribunal may grant leave for each party to be represented by a lawyer or agent at the hearing of an appeal.

### 25 Assessors

(1) One or more assessors may assist the Tribunal in hearing an appeal if the Tribunal, whether before or during the hearing, so directs.

(2) The Tribunal is to determine the assessors who may assist the Tribunal in hearing the appeal concerned.

(3) The Tribunal may, at any time during the hearing of an appeal, dispense with the services of any assessor assisting the Tribunal.

(4) An appellant or other party is not entitled to make any submission or objection in relation to the exercise of the Tribunal's functions under this clause.

### 26 Costs

(1) On determining an appeal, the Tribunal may make such orders as to the payment of costs as the Tribunal thinks fit.

(2) On service on a party to an appeal of an order for the payment of costs, the amount of the costs specified in the order becomes a debt payable by the party to the person specified in the order as the person to whom the costs are to be paid.

### 27 Determination of appeal

(1) The Tribunal may do any of the following in respect of an appeal:

(a) adjourn or dismiss the appeal,

(b) uphold, reverse or vary the decision appealed against,

(c) refer any matter in which the decision appealed against was made for re-hearing (in accordance with directions given by the Tribunal) to the stewards of HRNSW or to HRNSW,

(d) order the refund of any stake paid in connection with any race to which the appeal relates,

(e) make such other order in relation to the disposition of the appeal as the Tribunal thinks fit.

(2) On service on a person, personally or by post, of an order made under subclause (1) (d) requiring the refund of any stake paid to the person, the amount of the stake becomes a debt payable by that person to the person to whom the stake is required by the order to be refunded.

### 28 Conduct of appeal

The Tribunal may, subject to the Act and this Part, direct the manner in which any appeal before it is to be conducted.

# Part 4 Miscellaneous

## 29 Service of instruments

Any instrument to be served on any person under this Regulation may be served:

(a) personally, or

(b) by leaving it, at the person's last place of residence or business known to HRNSW, with some other person, or

(c) by post addressed to the person at the person's last place of residence or business known to HRNSW.

## 30 Persons required to attend hearings or produce documents

(1) HRNSW or the Tribunal may, by written notice served on any person, require the person to attend at a time, date and place specified in the notice for the purposes of:

(a) giving evidence relating to an appeal being heard or to be heard by HRNSW or the Tribunal, or

(b) producing any document, relating to such an appeal, specified in the notice that is in the person's possession or under the person's control.

(2) HRNSW or the Tribunal may do so either on its own motion or on application by the appellant.

(3) A person who is served with such a notice, and to whom is tendered at the time of service an amount sufficient to cover the travelling and any other expenses likely to be incurred by the person in attending at the time, date and place specified in the notice must not, without reasonable excuse, fail or refuse to comply with the requirements of the notice.

Maximum penalty: 5 penalty units.

## 31 False statements

A person appearing before HRNSW or the Tribunal in connection with an appeal must not knowingly make a statement that is false or misleading in a material respect.

Maximum penalty: 5 penalty units.

## 32 Repeal and savings

(1) The *Harness Racing New South Wales (Appeals) Regulation 1994* is repealed.

(2) Any act, matter or thing that, immediately before the repeal of the *Harness Racing New South Wales (Appeals) Regulation 1994*, had effect under that Regulation is taken to have effect under this Regulation.

BY AUTHORITY



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# APPENDIX TWO

Gaming and Racing

A NEW SOUTH WALES GOVERNMENT DEPARTMENT

# REGULATORY IMPACT STATEMENT

## SUBORDINATE LEGISLATION ACT 1989

## PROPOSED HARNESS RACING NEW SOUTH WALES (APPEALS) REGULATION 1999

DEPARTMENT OF GAMING AND RACING

MAY 1999

# Regulatory Impact Statement

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**1. Title of Proposed Regulation:**

Greyhound Racing Authority (Appeals) Regulation 1999

**2. Proponent and Responsible Minister:**

**2.1 Proponent**

Department of Gaming and Racing

**2.2 Responsible Minister**

The Hon J R Face MP, Minister for Gaming and Racing
and Minister Assisting the Premier on Hunter Development

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**3. Background**

**3.1** The Greyhound Racing Authority Act 1985 (which established the Greyhound Racing Authority as the controlling body for greyhound racing in this State) provides that a person aggrieved by certain decisions of the stewards or the committee of a greyhound racing club, or of a steward appointed by the Greyhound Racing Authority (GRA) may, *in accordance with the regulations*, appeal against the decision to the GRA or to the Greyhound Racing Appeals Tribunal, *as determined by the regulations.*

**3.2** In addition, the Act provides that a person who is aggrieved by a decision of the GRA itself (other than a decision on an appeal mentioned at 3.1 above) may, *in accordance with the regulations*, appeal against the decision to the Greyhound Racing Appeals Tribunal.

**3.3** The Greyhound Racing Appeals Tribunal is an independent body comprising a "qualified person" appointed under the Greyhound Racing Authority Act by the Minister for Gaming and Racing on the recommendation of the Attorney General.

**3.4** The Act also provides that the Minister may appoint persons who, in the opinion of the Minister, have special knowledge of, and experience in the racing industry, to be assessors of the Tribunal. In this regard, the Tribunal may, in hearing appeals, be assisted by one or more assessors.

3.5 Section 20 of the Act provides, inter alia, that the regulations may make provision for or with respect to:

- appeals to HRNSW and to the Harness Racing Appeals Tribunal under the Act;
- the procedures to be followed at or in connection with appeals under the Act;
- the suspension of a decision appealed against under the Act, pending determination of the appeal;
- the payment of fees and costs in respect of appeals under the Act; and
- any matters incidental to or connected with appeals under the Act.

In addition, Section 20 provides that the regulations may prescribe classes of matters in respect of which appeals may not be made under the Act and may provide that no appeals may be made under the Act, except in respect of prescribed classes of matters.

3.6 Section 27 of the Act provides that the Governor may make regulations for the purpose of carrying out the provisions of the Act.

3.7 The Harness Racing New South Wales (Appeals) Regulation 1994, which will sunset on 31st August 1999, facilitates appeals to HRNSW or the Harness Racing Appeals Tribunal, as envisaged by the provisions of the Harness Racing New South Wales Act.

3.8 It should be stressed that the power of stewards, harness racing clubs, harness racing associations and HRNSW to impose penalties is fundamental to the effective control and regulation of this State's harness racing industry. Further, the exercise of such punitive powers by the various racing authorities is essential to maintaining public confidence and interest in what is a significant industry in New South Wales.

3.9 At the same time, it is equally important that persons deprived of their livelihood, or otherwise significantly aggrieved by such decisions, can seek independent review of those decisions. Consequently, the appeal system is an integral part of the disciplinary framework of the racing industry.

## 4. Objectives of Regulatory Proposal:

**4.1** The proposed statutory regulation will provide for the continued operation of an appeals mechanism for the harness racing industry.

**4.2** The objectives of the proposed regulation are:

(a) to make provision for appeals to HRNSW and to the Harness Racing Appeals Tribunal in respect of certain decisions;

(b) to specify the classes of cases in which such appeals may be made;

(c) to prescribe the procedures to be followed at or in connection with such appeals;

(d) to provide for the payment of fees and costs in respect of such appeals; and

(e) to make provision for all matters incidental to or connected with such appeals.

## 5. Options to Achieve Objectives:

### 5.1 Option 1

*Allow the Harness Racing New South Wales (Appeals) Regulation to Lapse.*

**5.1.1** The Harness Racing New South Wales (Appeals) Regulation 1994 will sunset on 31st August 1999. Should the regulation lapse, then there will be no provision to facilitate appeals to HRNSW and to the Harness Racing Appeals Tribunal. In this regard, Sections 18 and 19 of the Act stipulate that appeals to HRNSW and to the Tribunal respectively must be in accordance with the regulations.

**5.1.2** Therefore, should the regulation not be made, the right of an aggrieved person to appeal to HRNSW in respect of certain decisions of a harness racing association or a harness racing club will effectively be removed.

**5.1.3** Similarly, an aggrieved person's right to have a decision taken by the stewards or by HRNSW itself independently reviewed will also be removed.

**5.1.4** Consequently, if the appeal mechanism were to be maintained, it would be necessary to make substantial amendments to the Harness Racing New South Wales Act, to provide for the appeals process and relevant procedures.

*Comment*

**5.1.5** It is clearly the intent of the legislation to provide an appeals mechanism to the harness racing industry. Accordingly, the operations and procedures of HRNSW and the Tribunal in respect of appeals are required to be prescribed either in the principal Act or the regulations.

**5.1.6** It is considered that installing provisions for the appeals process and procedures in the Act would be unwieldy. Further, such provisions would then become more inflexible and would hamper the ability of racing administrators to quickly adapt the operations and procedures of the appeals system to the changing needs of the industry and the public interest.

**5.1.7** In the circumstances, it is felt that the retention of the regulation in some form is clearly in the best interests of the harness racing industry.

## 5.2 Option 2

*Remake the Harness Racing New South Wales (Appeals) Regulation With Major Amendments*

5.2.1 The current regulation stipulates the types of decisions which may or may not be subject to appeal and a new regulation could be promulgated to allow for an extended right of appeal to HRNSW in respect of any decision of a harness racing association or club.

5.2.2 Similar action could be taken to allow for an extended right of appeal to the Harness Racing Appeals Tribunal in respect of any decision taken by the stewards or HRNSW itself.

5.2.3 Conversely, action could be taken to further limit the decisions which may be appealable to HRNSW and/or the Tribunal (ie to increase the level of monetary penalty or period of suspension which may be appealed against). Such action could reduce the number of appeals lodged and in turn reduce the operational costs of the appeals mechanism.

5.2.4 The existing regulation presently prescribes the procedures to be followed at or in connection with an appeal, the payment of fees and costs in respect of such appeals and both HRNSW and the Tribunal's discretionary powers in respect of the manner in which appeals are dealt with. In this regard, both bodies have a rather wide discretion in respect of such matters and such discretionary powers could be restricted or broadened by way of major amendment to the regulation.

*Comment*

5.2.5 The specification of the present classes of appealable decisions in the current regulation was developed in close consultation with the industry, the Tribunal and HRNSW and the prescribed classes of cases from which an appeal may be made to HRNSW and/or to the Tribunal have been generally accepted by the industry as appropriate.

5.2.6 The decisions which are currently subject to the appeals provisions are considered to be already sufficiently broad (eg minimum fines of $50 and suspensions of more than 14 days).

5.2.7 On the other hand, it is felt that it would be inappropriate to further limit the classes of cases which are appealable. Such action would erode an industry participant's existing appeal rights.

5.2.8 As to the question of the appeals procedures, it is felt that due to the peculiar nature of harness racing appeals, the impact on the livelihood of those involved and the public interest in the industry, both HRNSW and the Tribunal should be flexible in their operations and have broad discretion in respect of the manner in which appeals are dealt with.

5.2.9 At the same time, it is important that the procedural arrangements are prescribed to ensure consistency and natural justice for appellants. In this regard, the administrative procedures prescribed in the present regulation have been found to be satisfactory.

## 5.3 Option 3 (Preferred Option)

*Remake the Harness Racing New South Wales (Appeals) Regulation With Minor Amendments.*

**5.3.1** The proposed statutory regulation is in substantially the same terms as the regulation to be repealed and has been structured in line with present day drafting practices and language.

**5.3.2** The proposed regulation will provide for the continued operation of an appeals mechanism for the harness racing industry and for the administrative and procedural matters concerning such appeals, as contemplated by the Harness Racing New South Wales Act.

*Comment*

**5.3.3** It is vitally important that persons deprived of their livelihood, or otherwise significantly penalised by a decision of the stewards or by HRNSW itself, can seek an independent review of those decisions.

**5.3.4** It is no less important that a person aggrieved by a decision of a harness racing association or club can have such decisions examined by the industry's controlling body.

**5.3.5** It is equally imperative that justice be done, as well as seen to be done, and that actual or perceived conflicts of interest be removed from the industry's disciplinary system.

**5.3.6** The independent Harness Racing Appeals Tribunal achieves these aims and the present appeals system has been universally accepted by racing administrators and industry participants alike.

**5.3.7** The existence of the Harness Racing Appeals Tribunal also plays a major role in maintaining the integrity of the racing product and in ensuring public and participant confidence in the harness racing industry.

**5.3.8** Such confidence is essential to the ongoing viability of the industry which provides significant employment and recreational opportunities to the community and a significant contribution to the State's economy.

## 6. Cost/Benefit Assessment of Options:

### 6.1 Option 1

6.1.1 Allowing the Regulation to lapse will result in the cessation of the operations of the Harness Racing Appeals Tribunal and remove the right of appeal to HRNSW in respect of decisions taken by harness racing associations and clubs. Consequently, the direct costs of the Tribunal ($50,000 - $100,000 per annum) which are met by the harness racing industry would be negated.

6.1.2 At the same time, however, this Option would effectively remove the right of an appeal to an independent "higher court" in the more serious cases, which would impact adversely on persons who largely derive their income from the industry.

6.1.3 In addition, two of the necessary integrity checks and balances within the industry's disciplinary framework will be removed. This could result in a lack of confidence in the industry and effect its long term viability.

6.1.4 Any such effect on the industry's viability would adversely impact upon the incomes of those who derive their livelihood from the industry. The community would also ultimately be effected as the Government derives significant revenue from the industry.

6.1.5 Should the proposed regulation not be made, but with the intention that the appeals mechanism remain in operation, it will be necessary to make substantial amendments to the Harness Racing New South Wales Act, to provide for both HRNSW's and the Tribunal's process and procedures in respect of appeals.

6.1.6 This course would be a costly and time consuming exercise for the Government, as it would draw on the resources of the Department of Gaming and Racing, the Parliamentary Counsel, various other Agencies and the Parliament. Any impact on Government revenue ultimately impacts on the wider community.

6.1.7 Finally, enshrining the appeals processes and procedures in principal legislation would remove the flexibility currently available to racing administrators to quickly adapt to the changing needs of industry participants and the public interest.

## 6.2 Option 2

6.2.1 Given that the classes of matters from which an appeal may lie to HRNSW and/or the Harness Racing Appeals Tribunal is already quite broad, it is considered that any further deregulation is unnecessary, particularly bearing in mind that a monetary penalty of less than $50 or suspension of less than 14 days would only be imposed in respect of the most minor offences or where mitigating circumstances existed.

6.2.2 Conversely, it is considered that any benefit through savings in appeals costs by further restricting appealable decisions would be outweighed by the resultant erosion of appeal rights available to industry participants.

6.2.3 Insofar as the discretionary powers afforded to HRNSW and the Tribunal in dealing with appeals are concerned, it is felt that these powers are sufficiently broad to cater to the needs of industry participants and are appropriate for appeals of this nature.

6.2.4 The necessary practices and procedures to be followed in connection with such appeals and the fees involved are not considered onerous to industry participants and are the minimum and least complex necessary for the efficient operation of the appeals system.

## 6.3 Option 3 (Preferred Option)

6.3.1 The cost of maintaining an appeals mechanism for the harness racing industry is in the order of $50,000 - $100,000 per annum ($65,882 in 1997-98), depending on the number and nature of appeals. It is anticipated that with the introduction of the proposed regulation, costs will be maintained around that level.

6.3.2 It should be noted that the administrative costs of the Tribunal are met by HRNSW from the harness racing industry's share of funding under the agreement between the racing industry and TAB Limited. Further, HRNSW provides the Tribunal with administrative assistance which is funded from the same source.

6.3.3 As the cost of maintaining the present appeals structure, by way of remaking the Harness Racing New South Wales (Appeals) Regulation, does not form a charge against the Government there will be no negative impact on the community through the making of the proposed statutory rule.

6.3.4 The wider community will, however, benefit from the proposal in that the appeals structure is integral to the regulation and control of the harness racing industry and most importantly, plays a role in ensuring the integrity of the industry.

6.3.5 In this regard, during 1997-98 financial year some $510 million was wagered in New South Wales on harness racing, from which the Government derived revenue of $32.8 million for the benefit of community. Further, the industry generates significant employment and contributes directly and indirectly to the State's economy.

6.3.6 Consequently, the public has an expectation that the industry is controlled in a manner which ensures the integrity of harness racing administrators, participants and the harness racing product itself.

6.3.7 The existence of the Harness Racing Appeals Tribunal plays a major role in maintaining public confidence in the harness racing product, which is essential to the ongoing viability of the industry.

6.3.8 The proposal will also be of benefit to harness racing industry participants who derive their income from the industry, as the right to an appeal to an independent judicial body in respect of decisions which may seriously impact upon their livelihood will be maintained.

## 7. Overall Assessment of Preferred Option:

7.1 The appeal structure is a necessary part of the overall effective control and regulation of the harness racing industry and assists in maintaining the integrity and viability of the industry. The current regulation which deals with the operations of HRNSW and the Harness Racing Appeals Tribunal in respect of appeals was carefully developed with this in mind.

7.2 Consequently, it is considered that the making of the proposed regulation, which will maintain the current appeals structure, will provide the most benefits to the harness racing industry and in turn the wider community in that it will:-

(a) retain a persons right of appeal to HRNSW or the Harness Racing Appeals Tribunal;

(b) assist in maintaining the integrity of the harness racing industry's disciplinary framework;

(c) ensure fairness and quality of decisions taken by harness racing associations and clubs;

(d) ensure fairness and quality of decisions of the stewards and HRNSW itself; and

(e) assist in maintaining industry participant and public confidence in the harness racing industry by ensuring that justice is not only served, but is seen to be served.

## 8. Consultation Program:

8.1 The views of the Harness Racing Appeals Tribunal, Judge W Perrignon, and the Acting Harness Racing Appeals Tribunal, Judge B Thorley, will be sought, together with those of the following industry bodies:-

Harness Racing New South Wales
Harness Racing Advisory Board
United Harness Racing Association
NSW Trotters' Association
NSW Standardbred Racing Owners' Association
NSW Standardbred Breeders' Association
NSW Bookmakers' Co-Operative Ltd

8.2 In addition, an appropriate notice of intention to make a statutory regulation, inviting comments or submissions on the proposal from interested persons is to be published in the Government Gazette and a daily newspaper circulating throughout New South Wales.

# APPENDIX THREE

## Submissions received by the Regulation Review Committee

| Date | Name |
|---|---|
| Undated | David Snow, BSc(Vet) DVSc PhD MRCVS |
| 19/12/00 | Dr Pender Pedler<br>Edith Cowan University |
| 12/01/01 | Luke Abbott |
| 14/01/01 | Stanley T Beal<br>Retired Solicitor |
| 15/01/01 | Dr Michael Lindiger<br>University of Guelph, Canada |
| 15/01/01 | Noel Shinn |
| 18/01/01 | Michael Formosa, Harness Racing Trainer |
| 18/01/01 | Dr Nicholas Kannegieter, Specialist Equine Surgeon |
| 18/01/01 | Peter Rosher<br>Dunsborough Veterinary Hospital |
| 18/01/01 | Peter Trevor-Jones |
| 18/01/01 | James S Walsh |
| 19/01/01 | Garry Anderson<br>Faculty of Veterinary Science<br>University of Melbourne |
| 19/01/01 | A B Halpin |
| 19/01/01 | Matthew Hammond, Harness Racing Trainer |
| 19/01/01 | Tony Turnbull |
| 21/01/01 | B J (Charlie) Stewart, BVSc |
| 24/01/01 | Derek Major, President<br>Australian Equine Veterinary Association |
| 24/01/01 | Dr John Vine<br>Racing Analytical Services Ltd |
| 25/01/01 | W R Maumill |
| 29/01/01 | Frederick R Kersley |
| 30/01/01 | Ross Olivieri |
| 27/02/01 | Andrew F Clarke, Professor of Equine Studies<br>The University of Melbourne<br>Faculty of Veterinary Science |
| 22/03/01 | Phil Houston |

# APPENDIX FOUR

# List of Witnesses at the Inquiry

| Hearing Date | List of Witnesses at the Site Inspection, Australian Racing Forensic Laboratory, Randwick |
|---|---|
| 29 January 2001 | **Dr D Stanley, Official Analyst**<br>Australian Forensic Laboratory<br><br>**Mr M J Hill, Chief Executive**<br>NSW Thoroughbred Racing Board<br><br>**Mr P Baldwin, Assistant Director**<br>Racing, Department of Gaming and Racing |

| Hearing Date | List of Witnesses at the Inquiry |
|---|---|
| 2 February 2001 | **Peter S Baldwin, Assistant Director**<br>Racing, Department of Gaming and Racing<br>323 Castlereagh Street, Sydney<br><br>**Darrell C Loewenthal, Deputy Director General**<br>Department of Gaming and Racing<br>323 Castlereagh Street, Sydney<br><br>**Anthony G Mullins, Chief Executive Officer**<br>Harness Racing New South Wales<br>22 Meredith Street, Bankstown<br><br>**Robert J Marshall, Member, Regulatory Committee**<br>Harness Racing New South Wales<br>22 Meredith Street, Bankstown<br><br>**Roger G Nebauer, Chairman of Stewards**<br>Harness Racing New South Wales<br>22 Meredith Street, Bankstown<br><br>**Ronald J Bottle, Deputy Chairman of Stewards**<br>Harness Racing New South Wales<br>22 Meredith Street, Bankstown |

| | |
|---|---|
| **2 February 2001** | **Peter R Callaghan, Senior Counsel**<br>Nigel Bowen Chambers<br>169 Phillip Street, Sydney<br><br>**Dennis C English, Solicitor**<br>Paul A Curtis and Company, Solicitors<br>120 Castlereagh Street, Sydney<br><br>**Michael A Formosa**<br>38 Eighth Avenue, Toukley<br><br>**Luke Abbott**<br>72 Bathampton Road, Wimbledon<br><br>**Gregory F Sarina**<br>34 West Road, Riverstone<br><br>**Peter D Trevor-Jones**<br>334 Ryans Road, The Lagoon<br><br>**Garry A Anderson, Biometrician and Computer Support**<br>250 Princes Highway, Werribee<br><br>**Anthony D Turnbull, Former Trainer-Driver and Farmer**<br>The Lagoon via Bathurst<br><br>**Brent J Stewart, Equine Veterinary Surgeon and Horse Trainer**<br>114 Bushy Grove, Canning Vale, Western Australia<br><br>**James S Walsh, Company Director**<br>122 Gow Street, Padstow<br><br>**Stanley T Beal, Retired Solicitor**<br>24 Hancott Street, Ryde |
| **28 March 2001** | **Francis R Martin, Reporter and Assistant to Chief Executive**<br>Australian Racing Board<br>38 Glen Street, Belrose<br><br>**Derek A Major, Veterinarian and President of Australian Equine Veterinary Association**<br>5 Price Lane, Agnes Banks |

| | |
|---|---|
| **28 March 2001** | **Paul R J Fitzpatrick, Professional Horse Trainer**<br>80 Weelsby Park Drive, Cawdor<br><br>**Brian Paul Hancock, Professional Horse Trainer**<br>Teeny Lodge, Calderwood Road, Albion Park<br><br>**Tony McGrath, President, Australian Harness Racing Council**<br>390 St Kilda Road, Melbourne<br><br>**Peter Baldwin, Assistant Director Racing**<br>Department of Gaming and Racing<br><br>**Tony Mullins, Chief Executive Officer**<br>Harness Racing New South Wales |

# APPENDIX FIVE

# List of Evidence Tabled by Witnesses

| Name | Evidence Tabled |
|---|---|
| Mr L Abbott | **Tabled 2 February 2001**<br>1. Transcript of Stewards Inquiry conducted at Bathurst Parkway on 23 February 2000<br>2. Letter received from Harness Racing Appeals Tribunal dated 8 March 2000<br>3. Report chaired by Justice B R Thorley into the appeals of P Abbott and B Greenhal<br>4. Letter dated 5 April 2000 addressed to Harness Racing Tribunal of New South Wales by Mr Mike Hammond |
| Mr J Walsh | **Tabled 2 February 2001**<br>1. Letter dated 23 August 1990 to Mr B W Judd from the Freedom of Information Unit<br>2. Application by Miss T Gleeson for a re-hearing under s19(a) of Harness Racing Authority Act<br>3. Strict Liability v Absolute Liability |
| Mr S T Beal<br>Retired Solicitor | **Tabled 2 February 2001**<br>Proposed reforms to the Harness Racing Rules and Appeal Regulations |
| Mr P R Callaghan<br>Senior Counsel<br>Nigel Bowen Chambers | **Tabled 2 February 2001**<br>Copy of judgment of Young J in Gleeson v The Harness Racing Authority of New South Wales (1995) Supreme Court of New south Wales – Unreported |
| Mr D C Loewenthal<br>Deputy Director General<br>Department of Gaming & Racing | **Tabled 2 February 2001**<br>Overview of the development of the Harness Racing New South Wales (Appeals) Regulation 1999 |
| Mr A G Mullins<br>Chief Executive Officer<br>Harness Racing NSW | **Tabled 2 February 2001**<br>Details relating to the Board of Harness Racing New South Wales and its achievements |
| Mr A G Mullins<br>Chief Executive Officer<br>Harness Racing NSW | **Tabled 28 March 2001**<br>Letter dated 27 March 2001 addressed to The Hon Janelle Saffin, MLC, Acting Chair, Regulation Review Committee from Harness Racing New South Wales |
| Mr P Baldwin<br>Assistant Director Racing<br>Department of Gaming & Racing | **Tabled 28 March 2001**<br>Letter dated 27 March 2001 from the Minister of Gaming & Racing |

# APPENDIX SIX

# REPORT OF PROCEEDINGS BEFORE

# REGULATION REVIEW COMMITTEE

## INQUIRY INTO REGULATORY CONTROLS GOVERNING HARNESS RACING APPEALS

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**Site Inspection at the Australian Racing Forensic Laboratory**
**Alison Road, Randwick**

**on**

**Monday 29 January 2001**

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**PRESENT**

Mr P. R. Nagle (Chair)

| **Legislative Council** | **Legislative Assembly** |
|---|---|
| The Hon. D. T. Harwin | Dr Elizabeth Kernohan |
| The Hon. M. I. Jones | Mr G. Martin |

Mr J. Jefferis, Committee Manager
Mr J. Wilkinson, Research Officer
Mr P. Baldwin, Assistant Director, Racing, Department of Gaming and Racing
Mr M. J. Hill, Chief Executive, NSW Thoroughbred Racing Board
Dr S. Stanley, Official Analyst, Australian Racing Forensic Laboratory

The Chief Executive of the NSW Thoroughbred Racing Board, Mr M. J. Hill, welcomed the Committee and introduced Dr Shawn Stanley, Official Analyst of the Australian Racing Forensic Laboratory.

Mr Hill advised that four groups of racing laboratories throughout the world have National Association of Testing Authorities [NATA] accreditation, which requires them to meet certain standards. Samples are sent from the Australian Racing Forensic Laboratory to other laboratories for confirmatory analysis, in the knowledge that the testing procedures at those laboratories are essentially the same as those at the Australian Racing Forensic Laboratory.

He added, as a matter of interest, that Dr Stanley was leading an international study into the detection in horses of peptide hormones, including EPO, which was the subject of some publicity during the Olympic Games. The Sydney laboratory is leading the study in conjunction with laboratories in the United Arab Emirates and France. Mr Hill also demonstrated the sophisticated security system used by the laboratory. Dr Stanley noted that the foyer to the entrance is retained for use by visitors, and not for the receipt of samples.

**Receiving Bay**

**Dr STANLEY:** You have arrived just as a secure delivery has been made by Armaguard. We check the seals to make sure that they are still intact. This is where the process starts. We have sent out kits, with secure documentation that we are able to recognise when it is returned. What we have sent out should tally with what is returned. The paper work is part of the chain of custody. We make sure that every stage is documented, so that in an inquiry, if there is any debate about how the sample was transported from say a Bulli meeting to the laboratory, each link in the chain can be identified. If required, that person can be interviewed and explain the passage of the sample from one person to another.

Each of the sample kit bags has a unique number on it. Bag 143, which has had probably 40 to 50 uses already, has unique identity number in a bar code. That number is used once and is never used again. I know what is in the kit. If you were to ask me on any day what is contained in sample 1352, I will be able to tell you what sample numbers are in there. If, when the bag came back today, we checked and the documentation did not match with what was known to be inside it, we would know there has been the potential for someone to have tampered with it. This procedure eliminates that uncertainty. Most times, when the documentation is incorrect, it is because people have taken out documents and forgotten to send them back. Normally, within four or five hours, I get urgent faxes from people who go into panic mode.

**Mr HILL:** For clarification, when Dr Stanley says that he knows what is in there, he knows the sample number but he does not know the name of the horse that the sample came from. At no stage during the testing procedure does the laboratory know that information. Of course, if he goes to the subsequent inquiry he will then learn the trainer's name.

**Dr STANLEY:** That is correct. The documentation is made up in such a way that there are three layers to it: one layer goes to the stewards for their record; the second layer goes to the trainer from whose horse or dog the sample has been taken; and the third layer has minimal details on it. The third layer is a manila card with a number on it, stating that the sample is either blood or urine, and that it was taken on a raceday. The sample can also be taken for elective testing purposes. At race tracks, if people become suspicious that something unusual has happened, we might receive a sample that is not taken after the race but is taken as a special elective sample. Thirdly, it will have a unique identifier, such as sample No. 12345. All our reporting will be based on that number. We send back to the racing authority, or association, the negative or positive result based on that number. The association involved will then crack that code. If the sample is negative, the sample is all-clear, and the prize money can be paid out on say the eighth race at Randwick.

On the other scenario, if a sample turns out to be positive to a prohibited substance, the bad news is broken to the person whose horse has tested positive, and then an inquiry is started. At that inquiry, the trainer can challenge the steps that were involved in the analysis. That is the first instance

in which the laboratory becomes aware of the identities of the person involved and of the horse from which the sample was taken. This system is very good; it is independent. There is no pressure on the laboratory to find something, or to not find something. You can imagine that there could be pressures if we knew that the sample was from a horse of the top trainer in New South Wales, or from a less financially secure trainer. There may be some pressure, one way or the other, to say, "I am not going to call this one" or "I am going to call this one." We are strictly independent, and we judge everything on the same criteria, because we simply do not know those identities and we cannot do anything else.

So this is our interface with the outside world. This is where the samples come in. From this moment onwards, we document where the sample goes to and what is tested. If NATA auditors come in, which they do occasionally, they might say, "On 29 January samples were received. Take us through the procedure." They will want to see negative results, and they will want to know how we determined a sample was declared negative. If anything comes up as positive, they will want to know our reasoning and procedures to arrive at that declaration. We have to justify our procedures to them on a regular basis. Normally, every two years, we have a full audit. We also have here a quality control department that audits us internally, to make sure that we comply with what we say we are going to do. That, really, is what NATA accreditation is.

**Log-in area**

**Dr STANLEY:** Here the samples are recorded in a log-in book. We do not allow the staff to come in here on a regular basis. Two people are involved in receiving the samples, opening the bags, and giving them unique sample numbers. So, when sample No. 12345 arrives here, it will then be given an Australian Racing Forensic Laboratory number, which may be No. 6002. With urine, we have a three-bottle system. One contains the control solution. That solution is used to wash out the utensils used to collect the urine. The sample from the horse or the dog is then split into two equal portions and decanted into two separate bottles, which are then secured separately from each other.

We take the first bottle. It could be either of the two urine samples. We do not allow the people sending us the samples to decide which is the first bottle and which is the second bottle, and that is for obvious reasons. From the first bottle we take a small portion of urine, which is poured from the bottle straight into another bottle, making no contact with the container and the first bottle. That is re-sealed and taken to a secure area for later analysis.

Our procedure simply involves screening samples. If we see something in a sample, we then go back to the sample and have a totally independent look at it for a second time. That is to make sure that what we saw the first time is confirmed by a second test. That second test can involve two distinct types of testing methodologies. So we may test it in one way, and then test it in a second way. This all leads to a situation when, if we see something, we are ultimately certain that the sample contains phenylbutazone or something else. When we know that with absolute certainty, we go on to notify the association of the irregularity and send the sample to another accredited racing laboratory for confirmatory analysis.

**Cool Room**

**Dr STANLEY:** Essentially, you can see that the samples here have been opened, and have then been packaged and put in containers that are numbered, so that I know what sample number it is. Only a few people have access to that information. Most of the laboratory staff do not have it. I have access to all areas. Some of the newer people, especially those in training, will not have access to a lot of areas. I will have to make this part of the tour very quick because the door triggers an alarm after a minute if it is not closed. I and one other person have a key to the caged area. Inside it are all the first bottles, controls and the second bottles of samples. The first bottles have been cracked, and the second bottles remain intact at that time for further analysis if required. This area is secure. The staff can come in here routinely by scanning in, but they cannot get into that caged area unless myself or another senior member of the staff is present.

**Testing Area**

**Dr STANLEY:** We have what we call a panel of tests. We are looking for different things, in different ways. Obviously, we are much more interested in very low levels of etorphine than we would

be in very low levels of phenylbutazone. So we match our resources to what we are looking for. So that the drugs that have the greatest potential to affect the outcome of a race have a lot of time spent on them. If they are therapeutic substances, they are looked at, but mainly as a welfare issue. We are concerned about animals that are racing sore. After a certain number of days, we do not carry on the tracking.

Each sample is put through the same panel. Each day, each week, each month, if your horse's sample comes here, it is tested in the same way. There may be one or two occasions when the equipment breaks down. If that happens, we wait until the equipment is working again before we declare the sample negative. That is a little bit frustrating to the associations that send the samples to us, but they just have to put up with that because we want the same treatment for all the samples that come through here.

Wet Chemical Area

**Dr STANLEY:** Here we take the urine samples and put them into a form in which we can analyse them for drugs. Urine has a terrible matrix. Urine, especially horse urine, contains a lot of material that we are not interested in. So we try to bring out the stuff that we are interested in, and throw away the material that we are not interested in. We have a whole bunch of procedures involved in what we call the extraction process. The technology puts the sample in a form that enables us to carry out instrumental analysis of the samples. Typically, it takes a couple of days for the samples to pass through here. Then we use instruments that look for the signatures that we recognise as the marks of illegal substance, such as etorphine. Substances have different patterns that we recognise.

**Mr JEFFERIS:** On $TCO_2$, given the level that you allow for error, does that become the official 35 or 37 result, or is the official result 35 or 37 plus or minus the allowance?

**Dr STANLEY:** The uncertainty is a method uncertainty. We know that something is so long. For example, take this pen. If I were to measure it several times with a very inaccurate instrument, I would probably get the same result every time. But, the more accurate I get, the more I realise that, depending on where I take the measurement, I get very, very small variations in my reading. That means that the real length of the pen is within a range: it might be a little bit above, or it might be a little bit below.

Because we are in an environment in which we have a rule, we have to say that anything that we see has got to be above the uncertainty in measurement. As an example, in harness racing the threshold is set at 35 mmole/litre. We have a grey area between 35 and 36.2. It is possible that a sample that we read as 35 can be in that zone. The further it is above 35 and the closer it gets to 36.2, the less likely is the possibility of error. You would be familiar with a bell-shaped distribution curve. At 35, 50 per cent of samples are going to be below 35 and 50 per cent of them will be above 35. But, as you start to trace it towards 36.2, it tapers off, until you get to 36.2, when the likelihood that a sample that is below 35 will test positive is negligible. We have actually factored that level out.

That allowance for error of 1.2 is something of a historical uncertainty. Over the years we have got better at doing what we do as we have got more knowledge about how the testing works. So, really, it is a very generous level of allowance. But, given the environment that we are in, we have decided to keep it stable until it can be changed in a more satisfactory way.

**Mr HILL:** When Shawn reports, he reports that the level of the sample was 36.

**Dr STANLEY:** Yes. We report the real value that we get. We do not subtract the allowance.

**Mr JEFFERIS:** The national standard says 35, and I was wondering how you can make an allowance in the level.

**CHAIRMAN:** Perhaps we can talk about that later. This room is where we analyse the extracts we prepared next door. It has a lot of equipment, some of which would cost $1 million. It is an expensive part of our operation, but is gives us a more reliable result. This mass spectrometry equipment gives a fingerprint unique to the compound. We can say with absolute certainty that the substance we detected is atorphine, for example. We have invested heavily to be able to give results

with certainty. The equipment has different abilities and is targeted towards the best resources. The samples turn out to be either suspicious, which means they get looked at again—we go back to the first bottle and do a re-extraction—or negative, in which case they are written off and nobody ever hears about the sample except that the result is forwarded to the association declaring it negative and to pay the prize money to the person concerned.

The laboratory next door contains the $TCO_2$ measurement equipment. Our two Beckman EL-ISE machines have prime position in this laboratory. At all times the temperature in this area is more stable, cooler than anywhere else to make sure the results are as stable as possible over a long period of time. It is one of the few types of testing which involves urgency. Samples arrive at approximately 10 o'clock or 11 o'clock and are analysed as soon as practicable. That involves setting up the instruments and calibrating them to get the same reading as last week or last year. We measure the tube and any samples that show a sign above the level are re-analysed as if we were conducting an external confirmatory analysis.

**The Hon. M. I. JONES:** The terms "pH levels" and $TCO_2$" have been bandied around. What precisely is the $TCO_2$ level?

**Dr STANLEY:** Total carbon dioxide is a reflection of the amount of basifying agent, which has the ability to release carbon dioxide. For example, bicarbonate is one substance that,, when treated with acid for example, will liberate $CO_2$. The pH level is affected by bicarbonate; the more bicarbonate the more basic the pH. It is a less reliable indicator than $TCO_2$. Over the last 10 years we have conducted quite a lot of surveys using the Beckman EL-ISE equipment to determine the normal level for horses. The survey of the population in 1992 resulted in a 30.8 level and the 1998 survey resulted in a 30.77 level. It is a measure of the amount of bicarbonate in the blood system. When bicarbonate is administered to a horse the value shifts in the level of $TCO_2$. The same thing happens in measuring the pH level, but that is a less reliable indicator. It is not as easy to say "That horse has been given bicarbonate and this one has not" when you look at the pH alone. Other factors go into it.

**The Hon. M. I. JONES:** Does the giving of bicarbonate to horses have the potential to mask the level of drugs?

**Dr STANLEY:** Taking bicarbonate has two effects. It will affect a very potent stimulant and make it difficult for us to pick up because of the way it holds it in the body. Instead of finding this type of level in the urine, we find that level. If the sample were from a horse that had been doped close to the race, we will simply miss those. They will come through this laboratory and disappear. We would not be aware that they had used, for example, etorphine—elephant juice. The other effect of $TCO_2$ is to delay the onset of fatigue by mopping up lactic acid. A lot of people do not use milkshakes for masking drugs; they use them for performance enhancing.

**The Hon. M. I. JONES:** You constantly refer to urine tests. Is urine the best substance to test or are there times when blood is tested?

**Dr STANLEY:** That is a difficult question to answer. At the moment urine has advantages, but blood is showing itself as having potential to be tested for peptide hormones, for example. We would want to be looking at blood for the use of EPO and growth hormones. So, it is horses for courses; it depends on what we are targeting.

**The Hon. M. I. JONES:** Thoroughbreds are allowed a $TCO_2$ level of 36 and in harness racing the level is 35. In your opinion, is it reasonable to have this discrepancy?

**Dr STANLEY:** As analysts, we just work with the rules. The difference is a tolerance for risk. What is acceptable to one group is different for another. Essentially, to quote ballpark figures, one in 10,000 tests will return an abnormal positive to $TCO_2$ at 35. At 36 the number balloons out to many hundreds of thousands. Is one group being too conservative and the other not conservative enough? Is there a middle ground on which the two could agree? Or are both levels too conservative? I do not know. I can give suggestions as an analyst and we can conduct population surveys, but at the end of the day the question I cannot answer at the moment is what risk you think is acceptable.

**Mr MARTIN:** What is the potential for a $TCO_2$ level to be elevated by natural circumstances such as stress, excitement or whatever?

**Dr STANLEY:** We believe it is very low. We have done a lot of work in this area: we have transported horses backwards and forwards, and in all circumstances they have had no significant increase in the $TCO_2$ level. We do not believe it has a major effect. In all cases when this has been put forward at an inquiry as a possible scenario, that is, we had this horse, which is potentially excitable, or whatever, the horse has then been taken and treated in the same way and the levels never get to that level, provided that the horse has been kept under adequate security. In cases where they have returned a high level, once they have been put under security the level has dropped to that of the normal basal population.

**Dr KERNOHAN:** How do you count the animals at the end of your normal distribution? You have the bell-shaped curve with normal distribution of very low and very high levels, which is normal and standard. Are there animals like this? How do you deal with them?

**Dr STANLEY:** If those animals are in that part of the tail that you talk about, they should test like that all the time. Stewards have asked us to re-test samples. When these animals that have been in this tail part of the graph have been put under adequate security the levels drop to the population levels.

**Mr HILL:** A lot of research work we have done with $TCO_2$ with horses is that you have to give them a bucketful of bicarbonate to move them anywhere near the 35. Generally on average the level is somewhere around 31 or 32. To increase that to 35 we have given horses a kilo of bicarbonate.

**Dr STANLEY:** We gave them half a kilogram and then denied them water. Of the two horses, one did not get across the threshold; the other did, but for a window of about 15 minutes.

**Mr HILL:** It is fair to say that many difficulties people encountered were a combination of the feeding regime with horses being fed citrates and trainers really not understanding that that will affect the $TCO_2$. When you move the base from 31 to 32, 32½ or 33 with general feeding and then give the horse a big bucketful, you will go over. We are certainly confident. The thoroughbred level is probably a bit conservative. We are working on an international standard and it is constantly being reviewed.

**Dr STANLEY:** Part of the process is to constantly review the levels and make sure that something else has not changed. Horses try to avoid being pushed to extremes—that is a natural mammalian system. When we get hot we start sweating. There is a natural defence in a horse. Where it is given large quantities of bicarbonate it will try to get rid of it. That is what I mentioned before: when we gave horses half a kilogram of bicarbonate we had to keep them away from water. One of the first things an animal does when it gets a large load of bicarbonate or its sodium level increases—is that it will go and drink a large quantity of water to help it eliminate bicarbonate from the system. The only way you can get those levels high is by keeping the animal dehydrated during that period. So, those curves at the end of the graph do not happen very often.

That concludes the inspection of the process. The results are put into our system and reported back. We keep records of everything for about five years so that when NATA comes along it may want to look at results to make sure we have them properly archived. We have a computerised system to do that. We are getting to a stage where it is easier to check to find the results of a particular analysis on a sample number.

**Mr MARTIN:** If there is an appeal against a finding, for example, in the thoroughbred industry, what access has the appellant to your data?

**Dr STANLEY:** Typically they are given everything relevant to the sample. For example, if the sample shows a higher level in the first tube, we take a second tube, do a fresh calibration curve and provide them with that data. We will run a quality control and provide them with those results. We provide them with the results of the analysis of the particular sample. To us, that is the relevant data: quality control, the level of quality control on the day and the calibration curve, how did we get the result. I have received requests for data going back to 1995 and 1996. Much of that data is not easy

accessible. It is not kept on a computer database, so it will take much time and effort to produce it. In those circumstances we would consider the request on its merits. If someone can show us good reason to produce the data, we will try to comply.

**CHAIR:** Would a good reason for providing it be that someone might lose their occupation and livelihood?

**Dr STANLEY:** The important thing is that we base our results on a rule. If harness racing has written a rule saying 35 is the level, what is important for us is to show that it was above 35. Essentially, when people are asking for historical data, often they are challenging the rule. They are trying to say the rule being set at 35 is not correct. We try to help wherever we can, but some of this data would take a long time to produce. It would take one person perhaps two months to go through the books and put it into a format for use and then it would have to be checked.

**Mr HILL:** People have to rely on the scientists. Dr Stanley has shown you that it is screened and if it proves positive it goes back to be thoroughly tested. If that is positive, it goes to another laboratory and that further laboratory, which is also accredited, must test it. At some stage what the scientists says must be accepted. They do not know the animal and never have any idea who the trainer is until such time as the matter goes to appeal when all the testing has been done. We impose a quality control on ourselves together with the NATA accreditation and the fact that we screen samples from all over the world. We do referee samples for the United Kingdom, France, Hong Kong, Mauritius, Singapore, Malaysia and some from the United States of America.

Similarly, we send our samples to those laboratories. It is not just a little club in Australia. We will send positives to those sorts of laboratories and say, "This is what we found." They will use tests for which they are accredited, but at some stage you have to say the scientist is right. I understand what you are saying about people losing their livelihoods, but the scientists have no vested interest. They have to make sure the results are scientifically accurate. It is very hard for a trainer to argue with the way the laboratory conducted a test. To start with, he would have to argue with two laboratories and with worldwide standards. The most important thing is for us to keep on top of those standards.

Dr Stanley travels regularly overseas to meet with people. He is going again in March. Last year he went to Cambridge and is off to Dubai this year to work on international projects so that we are all keeping in touch and these people are keeping on top of their professional experience and expertise. We hear so often, "They've changed the way they run the tests. That's why would suddenly get a little rush of this or that." More likely what has happened is that the manufacturer has changed the way the product is developed and something has gone astray with its measurements rather than what happens here. It is difficult, but it is very hard to come in and say, "You've done it wrong here" unless you have multimillion-dollar equipment behind you with all the available standards and have subjected yourself to the same quality control procedures.

**CHAIR:** Every trainer receives a copy of the swab and urine test at the time of taking it so that they can have their own laboratory look at it, is that right?

**Mr HILL:** No. In the thoroughbred industry, the only laboratories they go to are accredited laboratories here or internationally.

**CHAIR:** The trainer does not receive a copy of the sample?

**Mr HILL:** No. If the trainer were to take a copy of that sample to a laboratory that was not operating under the same scientific protocols and principles as here, it would not have much validity as far as a racing authority was concerned.

**CHAIR:** Who provides the funds for your organisation?

**Mr HILL:** This is funded by the thoroughbred racing industry. For harness racing and external clients we charge a fee for the service.

**The Hon. D. T. HARWIN:** Is this the only equipment used in Australia for bicarbonate testing?

**Dr STANLEY:** That is correct. This has become the standard. The main reason being that there are some doubts about blood gas analysers. It mainly relates to horses that have had exercise. If you exercise a horse the blood gas analyser becomes a little unreliable.

**Round Table Discussion**

**Mr HILL:** I understand your role is to review the regulations.

**CHAIRMAN:** Yes.

**Mr HILL:** Shawn mentioned population surveys that have been done across Australia. To do a population survey, you need to do a very large number of horses. The $TCO_2$ level, obviously, is the measurement of the bicarbonate in blood plasma. We have a question, which is not be dealt with now, as to whether the current legislation on animal research is adequate to allow us to take blood from horses stabled in natural situations. To do a population survey to determine a mean, you use a very large number of animals.

**CHAIRMAN:** We will try to help you with that. What is the problem with the current legislation?

**Mr HILL:** At the moment, the legislation appears to prohibit basic techniques, like taking blood.

**CHAIRMAN:** It has been suggested to me that the way to determine, once and for all, what is a correct mean—whether it be 34, 35 or 36—would be to do exactly as you just said: to take blood from horses in training, and from horses that are not in training, at different times, assess the feed and water regimes, then work out what would be a non-contestable level, if there is such a thing.

**Mr HILL:** It has been done a couple of times. There has been at least one major survey in Australia, and one in Hong Kong, as I recall. There is now a question about our ability to be involved in those population surveys in this State. That is something that I have briefly touched on with the department, so you might see that question come up one day.

**Dr KERNOHAN:** There would be no problem with you doing such research in association with a university, though, would there?

**Mr HILL:** This facility is actually an accredited research facility. We could probably do it under that authority, giving ourselves a very specific authority.

**Dr KERNOHAN:** Who is splitting hairs on the legislation?

**Mr HILL:** The Department of Agriculture mainly. That arose from issues that were thrown up by the ICAC inquiry. Some difficulties were encountered there. The same situation arises with the taking of blood from greyhounds. We are still looking into that, but we are having some difficulty with that department, which seems keener on proceeding to criminal prosecution than sorting out the problem.

**Mr MARTIN:** Even though the inquiry is not about $TCO_2$, it has a bearing on some of the practices. Did the testing regime change from what was called the Casco to ASE? And were there reasons for doing that?

**Dr STANLEY:** There were. We use these standards to calibrate our instruments, so that we will get the same results week in and week out. Originally, the standards were sourced in the USA and were made by a company called Casco. Their quality control dropped quite significantly. We were getting batches that were all over the place. As a result, laboratories across Australia took the decision to change to a locally manufactured standard. That has turned out to be very good. The batches are very consistent. That means that with samples that are analysed in Melbourne, Sydney or Western

Australia we are getting pretty much the same result. Unfortunately, the problem that came up with Casco occurs within commercial arrangements. Sometimes they do not produce what they are supposed to be producing.

**Mr MARTIN:** You might have mentioned this matter earlier, and it may be difficult for you to answer this question. Are the different levels for the harness racing industry and the racing industry the result of subjective decisions taken by someone?

**Dr STANLEY:** There are difficulties with the setting of rules. As an example, whenever the rule has been changed, the raceday data for horses has changed as well. That seems to suggest that horses somehow have known that the rule changed and have therefore changed their physiology. The truth of the matter, I think, is that trainers have changed their procedures. We set the bar at a particular level, and people try to get as close as they can to the bar without going beyond it. That changes the population mean. What the correct level of risk is, I do not know. It is a very difficult question. It changes, depending on what the practices and trends are in, say, harness racing circles. At the 36 level for thoroughbreds, there is a 1in 600,000 chance. At 35, it drops to one in 13,000. So you can see that, by changing the threshold by 1 millimole, our chances have gone from 1in 13,000 to 1 in 600,000. I do not know what the appropriate level of risk is.

**Mr HILL:** Supplementary to that response. From the administrator's point of view, I have sat around the table with the thoroughbred industry discussing this question, which is discussed on an annual basis. We look at the statistics that are derived from population surveys of a very large number of horses over a long period of time, but we do not have available to us the depth of statistical information that probably is available in relation to the harness horse. They are, to some degree, different animals. They are not as different as cat and dog, but they certainly are as different as the Burmese is to the moggy.

I suppose thoroughbred industry administrators can be a little more relaxed than those in the harness industry because bicarbonate is not a major problem in thoroughbreds. The reason is that trainers and scientists, in the main, believe that bicarbonate is only of benefit to horses racing over fairly extended distances. The majority of our sprint races are up to 1,400 metres, the middle distance event is over the mile, or 1,600 metres, and we have the occasional 2,000-metre race and rarely over 2,400 metres, and about twice a year a race at 3,200 metres. In harness racing, the average race is about 2,200 metres, which is at the top end of our scale. In theory—and probably in practice, as has been demonstrated—I think we have had one bicarbonate positive in the last five years in thoroughbred racing in New South Wales, and that was fairly recently.

We still test for it on a fairly regular basis. You can almost be assured that if we had a 2,400-metre race we would test five or six of the horses pre-race for bicarbonate. We do a few of the shorter distance races now and then, just to let it be known that we are on the ball. It is no excuse, but bicarbonate testing does not exercise our mind as it does the minds of harness racing officials. Their horses really are much more hardy animals: they race week in and week out. The thoroughbred horse would probably run half a dozen times in a preparation. I have had harness racing horses. I had one that ran 43 times in a year, running about 32 placings, and I was delighted! But you would never dream of expecting anything like that from a thoroughbred; you would be lucky to get it to run that many times in its life.

**The Hon. M. I. JONES:** Correct me if I am wrong, Dr Stanley, but you commented that if you move the bar the physiology of the horse seems to move towards that bar. You have extensive scientific equipment here. How would the trainer, having that knowledge, be able to test for $TCO_2$ levels?

**Dr STANLEY:** How would he titrate it? They call it titration. This is pure speculation, and it is from anecdotal evidence that is given to me, but there are people out there who provide this service. You go to them and say, "Here are my horse's blood samples. I gave it 400 grams," or, "I gave it 0.7 kilograms of bicarbonate. What does it read?" They will give you a value, and you will go back and try something again, experiment in the background, until you get to the stage where you think, "This is the threshold, this is how much I can give this particular horse."

**The Hon. M. I. JONES:** The people that provide the service can do that with relatively unsophisticated equipment?

**Dr STANLEY:** They do not use the same equipment as us and this is what we believe is part of the problem. Horses are not as easy to program as it would seem. You cannot plug in some figures and give them 700 grams. You get this natural variability in that they may absorb more bicarbonate than others and testing is done on different equipment. So, they are giving them a result not from the same equipment.

**The Hon. M. I. JONES:** How many tests would you do annually for harness racing?

**Dr STANLEY:** A couple of thousand.

**The Hon. M. I. JONES:** Would you say 2,000?

**Dr STANLEY:** Maybe 2,000.

**The Hon. M. I. JONES:** Of that estimated 2,000 how many positive results would you get?

**Dr STANLEY:** The positive rate is in the low percentage. Maybe 0.5, maybe less would test positive. We get a lot of samples from harness racing because their choice of sampling is to go for $TCO_2$ rather than other types of testing.

**The Hon. M. I. JONES:** Are you the only laboratory in Australia that tests for $TCO_2$ in harness racing?

**Dr STANLEY:** No. There are laboratories in Melbourne, South Australia, Perth and Queensland.

**Mr MARTIN:** I assume they are all accredited at the same level as your laboratory?

**Dr STANLEY:** I can speak for the laboratories in Perth, Melbourne and Queensland. I am not sure if South Australia is accredited.

**(The Committee adjourned at 10.45 a.m.)**

**At entrance foyer:**

**Dr STANLEY:** The United States of America has a level that has no certainty. The rule has been written with tolerance built into it.

**Mr JEFFERIS:** The tolerance becomes part of the official result.

**Mr BALDWIN:** If a horse were to return a level of 36.1 on your equipment here, it will not be in breach of the 35 rule?

**Dr STANLEY:** No, mainly because we report that we cannot be certain that it is above 35.

**Mr WILKINSON:** In the early 1990s when the issue of milkshakes became a problem the level was 37 and in 1996 was dropped to 35. Is that right?

**Dr STANLEY:** I think so. The original rule was written without an uncertainty and it was changed to 36 plus an uncertainty. I was not there at the time. This is anecdotal but I believe that is how we went from 37 to 36.

**Mr WILKINSON:** In the United States of America the level is still 37.

**Dr STANLEY:** But again they do not allow for the uncertainty.

**(Conclusion)**

# REPORT OF PROCEEDINGS BEFORE

# REGULATION REVIEW COMMITTEE

## INQUIRY INTO REGULATORY CONTROLS GOVERNING APPEALS TO HARNESS RACING NEW SOUTH WALES AND THE HARNESS RACING APEALS TRIBUNAL

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**At Sydney on Friday 2 February 2001**

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**The Committee met at 10.00 a.m.**

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**PRESENT**

The Hon. Janelle Saffin (Acting-Chair)

| Legislative Council | Legislative Assembly |
|---|---|
| The Hon. D. T. Harwin | Dr Elizabeth Kernohan |
| The Hon. M. I. Jones | Mr G. F. Martin |
| | Ms Marianne Saliba |
| | Mr R. W. Turner |

**ACTING-CHAIR:** I would like to welcome you all to the Committee's hearing on the Harness Racing (Appeals) Regulation 1999. I understand that those present today include, from Harness Racing New South Wales, Mr Tony McGrath, Director; Mr Tony Mullins, Chief Executive Officer; Mr Robert Marshall, Member, Regulatory Committee; Mr Dennis English, Solicitor; Mr Peter Callaghan, Senior Counsel for Harness Racing New South Wales; Mr Roger Nebauer, Chairman of Stewards; Mr Ron Bottle, Deputy Chairman of Stewards. Present from the Department of Gaming and Racing, New South Wales Office of Racing are Mr Darrell Loewenthal, Deputy Director-General, Department of Gaming and Racing; and Mr Peter Baldwin, Assistant Director, Racing; also Mr Luke Abbott; Dr Garry Anderson, Department of Veterinary Science, University of Melbourne; Mr Stan Beal; Mr Michael Formosa; Mr Greg Sarina; Dr Charlie Stewart, Equitech, Perth; Mr Peter Trevor-Jones; Mr Tony Turnbull; and Mr Jim Walsh.

On 11 January 2001 the Committee wrote to the Harness Racing Tribunal to see whether His Honour Judge Thorley and His Honour Judge Perrignon would like to attend the inquiry or make any submission in respect of it. On 18 January they advised that they did not think it proper or appropriate to do so and that accordingly they did not propose to accept the Committee's invitation.

The members of the Committee and staff here today are the Hon. Malcolm Jones, Member of the Legislative Council; Mr Russell Turner, MP; the Hon. Don Harwin, Member of the Legislative Council; Mr Gerard Martin, MP; Mr Jim Jefferis, Committee Manager; Mr John Wilkinson, Research Officer; Mr Don Beattie, Clerk to the Committee; and Ms Susannah Dale, Assistant Committee Officer.

This is an inquiry by the Regulation Review Committee into regulatory controls governing appeals to Harness Racing New South Wales and the Harness Racing Appeals Tribunal. On 23 November 2000 the Regulation Review Committee resolved to inquire into and report to the Parliament on the Harness Racing New South Wales (Appeals) Regulation 1999.

The inquiry will be conducted as part of the Committee's function, under section 9 (2) of the Regulation Review Act 1987, of reporting to Parliament from time to time on the staged repeal program. That program requires the periodic review of existing regulations to ensure they continue to effectively meet the objectives of the Act under which they are made. The purpose of the inquiry is to examine, first, the compliance by the Minister with the provisions of the Subordinate Legislation Act 1989 in the making of this regulation; second, the regulatory impact statement for the regulatory proposal and the consultation conducted in respect of it; third, the adequacy of the existing regulatory controls; and, fourth, related matters.

The general objective behind the Subordinate Legislation Act 1989 is that the principal regulations of New South Wales are adequately reviewed, on the basis of public input, every five years. In the course of those five years the department or statutory body administering them has an opportunity to examine their operation, to note the cost and effectiveness of the regulations in meeting their objectives, and to maintain an ongoing dialogue with interested sections of the public. At the end of each five years this process has, hopefully, put the governing organisation in a strong position to review and republish its regulations with any beneficial changes. The Committee's role today is to hear from you all concerning the strengths and weaknesses of the regulatory scheme that is contained in the Harness Racing New South Wales (Appeals) Regulation 1999.

In these opening remarks I have mentioned the main areas we are examining. These were also listed in the two advertisements calling for submissions to this inquiry which were published on 16 December 2000 in the *Sydney Morning Herald* and the *Daily Telegraph*. As well as these principal concerns the Committee will also take note of issues relating to the standard criteria under which the Committee examines regulations. Those criteria are set out in the Regulation Review Act 1987 and include questions of legality, any adverse impact by the regulation on the business community, lack of clarity of the regulation, trespass on personal rights and liberties, and the issue of whether the objectives of the regulation could be accomplished in more effective ways.

The appeals regulation we are examining is a principal statutory rule, which means that its preparation was required to be accompanied by a regulatory impact statement. One of the ingredients of such a statement is a consideration of the most effective options for implementing the main aspects of the statutory proposal. One option involves deciding whether a particular matter should be

controlled by means of a regulation or by a rule. Both have different consequences. The main difference, in the case of rules, is lack of ongoing parliamentary oversight and review.

The Committee will be looking at the regulation and at various parts of the rules where there is a need to do so either because of the dependency of the regulation on the rule for effectiveness or because of issues relating to whether the content of the rules should more appropriately have been included in the regulations and vice versa. The Committee will not be examining the full content of the rules as this would be both beyond the relevancy and the time of this inquiry. The issues which we will be examining today will be the subject of a report by the Committee to the Parliament. That report will contain any necessary constructive recommendations for change.

For the information of anyone who is unfamiliar with the work of our Committee, the Regulation Review Committee is a joint committee appointed by the Legislative Council and the Legislative Assembly of New South Wales under the Regulation Review Act 1987 to consider regulations while they are subject to disallowance by the Parliament, and also regulations remade under the staged repeal provisions of the Subordinate Legislation Act.

I intend to keep proceedings as informal as possible and to provide opportunity for full discussion. However, all witnesses will have received a summons and will be sworn in so as to afford them the protection associated with that procedure.

**(Evidence continued in camera)**

**(Public hearing resumed)**

**PETER STEPHEN BALDWIN**, Assistant Director, Racing, Department of Gaming and Racing, 323 Castlereagh Street, Sydney,

**DARRELL CHARLES LOEWENTHAL**, Deputy Director General, Department of Gaming and Racing, 323 Castlereagh Street, Sydney,

**ANTHONY GEORGE MULLINS**, Chief Executive Officer, Harness Racing New South Wales, 22 Meredith Street, Bankstown,

**ROBERT JAMES MARSHALL**, Member, Regulatory Committee, Harness Racing New South Wales, 22 Meredith Street Bankstown,

**ROGER GAVIN NEBAUER**, Chairman of Stewards, Harness Racing New South Wales, 22 Meredith Street, Bankstown,

**RONALD JOHN BOTTLE**, Deputy Chairman of Stewards, Harness Racing New South Wales, 22 Meredith Street Bankstown, and

**PETER RAYMOND CALLAGHAN**, Senior Counsel, Nigel Bowen Chambers, 169 Phillip Street, Sydney, sworn and examined, and

**DENNIS CHARLES ENGLISH**, Solicitor, Paul A. Curtis and Company, Solicitors, 120 Castlereagh Street, Sydney, affirmed and examined:

**ACTING-CHAIR:** Mr Baldwin, in what capacity are you appearing before the Committee?

**Mr BALDWIN:** In my role as Assistant Director, Racing.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr BALDWIN:** I did.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr BALDWIN:** No.

**ACTING-CHAIR:** Mr Loewenthal, in what capacity are you appearing before the Committee?

**Mr LOEWENTHAL:** As Deputy Director General.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr LOEWENTHAL:** I did.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr LOEWENTHAL:** No.

**ACTING-CHAIR:** Mr English, in what capacity are you appearing before the Committee?

**Mr ENGLISH:** I am instructed to appear by my client Harness Racing New South Wales.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before the Committee?

**Mr ENGLISH:** I did, Madam Chair.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr ENGLISH:** No.

**ACTING-CHAIR:** Mr Mullins, in what capacity are you appearing before the Committee?

**Mr MULLINS:** As Chief Executive Officer of Harness Racing New South Wales.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr MULLINS:** Yes, Madam Chair.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr MULLINS:** No, you have not.

**ACTING-CHAIR:** Mr Marshall, in what capacity are you appearing before the Committee?

**Mr MARSHALL:** I am a board member of Harness Racing New South Wales and a member of the Regulatory Committee of Harness Racing New South Wales, and I am appearing as a member of the Regulatory Committee of Harness Racing New South Wales.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr MARSHALL:** I did.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr MARSHALL:** No.

**ACTING-CHAIR:** Mr Nebauer, in what capacity are you appearing before the Committee?

**Mr NEBAUER:** As Chairman of Stewards, Harness Racing New South Wales.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr NEBAUER:** Yes, I did, Madam Chair.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr NEBAUER:** No, you have not.

**ACTING-CHAIR:** Mr Bottle, in what capacity are you appearing before the Committee?

**Mr BOTTLE:** As Deputy Chairman of Stewards, Harness Racing New South Wales.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr BOTTLE:** I did.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr BOTTLE:** No.

**ACTING-CHAIR:** Mr Callaghan, in what capacity are you appearing before the Committee?

**Mr CALLAGHAN:** As sometime counsel for Harness Racing New South Wales, as a consultant to that organisation, and also as a professional observer.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr CALLAGHAN:** I did, thank you.

**ACTING-CHAIR:** Has the Committee received a submission from you?

**Mr CALLAGHAN:** No.

**ACTING-CHAIR:** I would like to begin by asking either the Deputy Director General or the Assistant Director to give the Committee a short overview of the way the Appeals Regulation 1999 was developed, including the consultation involved in the process. It would be useful if that overview could include details of the functions of the Office of Racing so far as they relate to harness racing and the relationship of the department to Harness Racing New South Wales. I wonder if it would be possible to highlight the achievements of the Office of Racing in regard to Harness racing in New South Wales and to list any current problem areas you may be addressing.

**Mr LOEWENTHAL:** Madam Chair, before I commence to address that question, I would like to inform the Committee that I have a prepared statement that gives some of the history of the appeals regulations. If the Committee would like, I could table that, or I can read it.

**ACTING-CHAIR:** If you would speak to it. Then, if you wish, you may table it.

**Mr LOEWENTHAL:** The specialist racing appeals tribunals across the three forms of racing in this State aim at providing affordable justice to aggrieved industry participants within a framework of due regard for the operational needs of the industry, and that a formal legal environment is not necessary to deal with the vast bulk of disciplinary and regulatory matters dealt with by racing stewards, a controlling body or a racing appeals tribunal.

In respect of harness racing, the Trotting Authority Act 1977 provided for the making of regulations for or with respect to appeals against certain decisions within the trotting industry. The Trotting Authority (Appeals) Regulation 1980 was promulgated following lengthy discussions between His Honour Judge J. H. Staunton, Chief Judge of the District Court, Judge A. J. Goran, of the Board of the Trotting Authority at the time, the Minister and the department. The appeal procedure at that time in respect of stewards' decisions was that an appeal lay in the first instance to the Trotting Authority. Failure by the appellant at this stage enabled him or her to appeal to the Trotting Appeals Tribunal, a single judge of the District Court appointed by the Minister upon the recommendation of the Attorney General. With regard to decisions of the Authority, the first and only appeal lay to the Trotting Appeals Tribunal. The regulation also limited the matters upon which an appeal could be lodged.

The Harness Racing Appeals Tribunal, in its present format, was constituted under the Trotting Authority (Amendment) Act 1983, following the report of the Committee of Enquiry into the Finances and Viability of the Trotting Industry in New South Wales. In 1983 a restructure of the appeals system was undertaken in the interests of justice not only being done but being seen to be done, and was aimed at giving a direct right of appeal by persons aggrieved by decisions of the Authority or of its stewards to an independent appeals tribunal.

In reaching its present format, the then Government was mindful of the needs of any racing industry appeals tribunal, which include: easy access for appeals against decisions of stewards; a hearing which is fair to the appellant and is obviously seen to be fair to him or her; and the provision of a forum where the appellant can participate free from legalism and the strictures usually present in court formalities. Further, it was felt that such a structure would give the authority more time to

control and regulate the sport, a reduction in the period of time that lapses between the lodgment of and the hearing of an appeal and the removal of any suggestion of partiality. In addition, the amendment at that time provided for the appointment of assessors to assist and advise the tribunal in respect of aspects of the specialised nature of harness racing. In late 1988 discussions were held between the Harness Racing Authority and the then Harness Racing Appeals Tribunal, Mr Justice J. J. Cahill, in respect of the cost to the authority of the appeals system. In this regard, the authority sought to reduce the cost to the authority of the appeals mechanism, reduce the number of appeals lodged and discourage appeals that had little chance of success. Consequently, in April 1989 the regulation was amended to increase the appeal deposit from $50 to $100 and to clarify the power of the tribunal with respect to the refund of appeal deposits.

In 1994, pursuant to the provisions of the Subordinate Legislation Act 1989, the regulation was due to sunset. Accordingly, consideration was given to the need to remake the regulation. After advertising and circulating the regulatory impact statement in respect of the matter and considering submissions from interested persons, industry organisations and the Harness Racing Appeals Tribunal, the regulation was made with minor amendments, the most significant being clarification that an appellant may be legally represented at an appeal, and the introduction of a minimum period of suspension before an appeal may be made to the tribunal.

In 1999 the regulation was again reviewed in accordance with the provisions of the Subordinate Legislation Act. Copies of the proposed draft regulation together with the regulatory impact statement were forwarded to the following organisations inviting their views on the proposal: Harness Racing New South Wales, the Harness Racing Advisory Board, the United Harness Racing Association, the New South Wales Trotters Association, the New South Wales Standardbred Racing Owners' Association, the New South Wales Standardbred Breeders' Association and the New South Wales Bookmakers Co-operative Ltd. The views of the Harness Racing Appeals Tribunal—Judge W. Perrignon—and the acting Harness Racing Appeals Tribunal—Judge B. Thorley—were also sought. In addition, advertisements were placed in the *National Trot Guide* newspaper of 29 April 1999, the *Government Gazette* of 30 April 1999 and in the racing pages of the *Daily Telegraph* of 1 May 1999 inviting comments and submissions from interested persons on the proposed statutory regulation.

The department received minimal inquiries in response to the advertisements and, while copies of the regulatory impact statement and the proposed regulation were dispatched to the above interested persons, no submissions were forthcoming. The department was, in fact, disappointed with the failure of the various industry participant groups to respond to the invitation to comment upon the regulatory impact statement and the proposed regulation. Judges Perrignon and Thorley advised that they had noted that the proposed regulation was in substantially the same terms as that due to expire and offered no comment or submission in respect of the proposal. The New South Wales Bookmakers Co-operative Ltd expressed its broad agreement with the proposed regulation and therefore did not wish to make any submissions on the subject. Harness Racing New South Wales advised that after considering the draft regulatory impact statement the board supported the promulgation of the proposed regulation. No other correspondence was received by the department in respect of the regulation.

After giving careful consideration to all of the above, on 9 July 1999 the Minister approved of Parliamentary Counsel being instructed to supply a final draft regulation in terms of the regulatory impact statement for consideration of the Executive Council. The Harness Racing New South Wales Appeals Regulation 1999 was subsequently approved by the Executive Council on 18 August 1999 and published in the *Government Gazzette* of 20 August 1999, with the commencement date of 1 September 1999. Madam Chair, I think you then moved onto the role of the Office of Racing.

**ACTING-CHAIR:** Yes.

**Mr LOEWENTHAL:** The Office of Racing is a division of the New South Wales Department of Gaming and Racing. As such, its prime responsibilities are to initiate development and implement government policy on racing and wagering, ensure the protection of the public interest and confidence in the integrity of the betting systems, approve, inspect and evaluate totalisator and bookmakers' operations, support the growth and economic viability of the racing industry in New South Wales and provide a financial and administrative advisory service to harness racing and greyhound racing clubs.

The relationship between the Office of Racing and Harness Racing New South Wales could be described as on the one hand we are a government department servicing the Minister and the Government, and Harness Racing New South Wales is a statutory authority with responsibility for the day-to-day control and regulation of the harness racing industry in this State. As such, we act in many ways as a liaison between the Minister and the Government with the authority to ensure that the Government is informed about what is happening in the industry and that the authority or Harness Racing New South Wales is aware of government policy at the time. I think there was one other matter—achievements of the Office of Racing. I would have to say, as a public service department, we do not claim fame for any achievements. We are there to service the government of the day and the Minister, so any achievements really are achievements of government.

**ACTING-CHAIR:** If you do not lay claim to them, others will.

**Mr LOEWENTHAL:** Others may, yes. On that basis—and I will not try to go through these in great detail—as they relate to harness racing and talking to the Government over the past 20 years or so, probably the major achievements would be in 1997 the creation of the Harness Racing Authority or, then, the Trotting Authority as an industry-representative body to control and regulate the harness racing industry. Prior to that time the industry had been regulated and controlled by a private club. In 1983 the government of the day established the Harness Racing Appeals Tribunal and the associated appeals procedures. In 1991 the major achievement was the creation of the Racing Assistance Fund, which provided significant funds towards the control of race meetings and research into animal health issues.

In more recent times, over the past couple of years, as far as government goes the main achievement would be the privatisation of the New South Wales Totalisator Agency Board, which released further significant funding to all three forms of racing, including harness racing. In 1998-99 Parliament enacted legislation which restructured the Harness Racing Authority or Harness Racing New South Wales and restructured the board to provide a clear distinction between the board's commercial responsibilities and its control and regulation responsibilities. That action was taken by the Government as a result of the privatisation of the TAB, and the Government felt that it was not in the interests of the industry for the Government to be having a say in the day-to-day commercial decisions of the industry itself. That was a matter best left to the industry.

As result, a board of seven was created, with four people coming onto the board as direct representatives of various parts of the racing industry—that is, clubs or participant groups. The remaining three members of the seven man board were appointed by the Government on the recommendation of the Minister. They retain an independent status and are totally responsible for all regulatory matters. They take completely independent decisions. People who go onto the board from the clubs and participant groups and therefore make the bulk of the commercial decisions have no input into the regulation and control of the industry.

The last, I suppose, achievement at this stage, the more recent of the Government, has been in the conduct of a national competition policy review of New South Wales racing and betting legislation, including the legislation pertaining to harness racing. In Parliament at the present time legislation is awaiting debate on the resumption of Parliament that will introduce formal probity checking of designated racing officials, controlling body board members, chief executive officers, chief stewards, et cetera. That is in terms of the Racing Legislation Amendment (Probity) Bill. I think they are the topics of major interest at the present time.

There are no major concerns, I would think, on the Minister's table at the present time with regard to the conduct of harness racing, although the Minister did, when he introduced the legislation I mentioned in 1998 which restructured the authority, give a commitment that that legislation would be kept under review and would be reviewed before the next appointment of the authority. The Minister indicated that ultimately it was his view that the complete control of the industry should be vested in the industry itself, and the legislation that was introduced in 1998 was seen initially as a halfway step to see how it went and whether it was possible to go to the final stage and introduce a system very similar to that which exists in the galloping industry. That industry is controlled by the New South Wales Thoroughbred Racing Board. Although that body is created by statute it is not a government body; it is completely in the control of the industry. The Minister has indicated it would be his wish

that, subject to review, he may go down that path for harness racing, but that is a matter for him at this stage.

**ACTING-CHAIR:** Thank you, Mr Loewenthall. Is it still your wish to have your written statement tabled?

**Mr LOEWENTHAL:** Whatever suits the members of the Committee.

**Document tabled.**

**ACTING-CHAIR:** Is there anything you want to add, Mr Baldwin?

**Mr BALDWIN:** No, not at this stage.

**ACTING-CHAIR:** I would like now to ask a member of Harness Racing New South Wales to give the Committee an overview of the objectives and functions of Harness Racing New South Wales, including the role of the regulatory committee in that organisation. I also wonder if it would be possible, likewise, to highlight the achievements of Harness Racing New South Wales and to list any problem areas you may be addressing.

**Mr MARTIN:** May I ask a question. Will we have an opportunity to question the representatives from the Department of Gaming and Racing?

**ACTING-CHAIR:** We will get an opportunity to question them after we hear from Harness Racing New South Wales, and then we can address questions to both.

**Mr MULLINS:** Thank you, Madam Chair. I do have a prepared couple of pages on the board of Harness Racing New South Wales. I also have a couple of pages on the list of achievements if I may read them out with your permission, and table them later for anyone else who would like to look at them. On the regulatory committee I do have the Act to refer to, which explains the regulatory committee, and I would also with your permission enlist the assistance of Mr Loewenthall, if the Committee sees necessary, regarding the establishment of the regulatory committee.

**ACTING-CHAIR:** Certainly.

**Mr MULLINS:** New South Wales boasts the largest harness racing industry in Australia, and with the successful privatisation of the TAB and the implementation of the Harness Racing New South Wales strategic plan we are slowly regaining our position as the premier harness racing State of Australia. New South Wales' facilities are ranked among the world's finest, in particular, the world-class facilities at our premier track at Harold Park, which now conducts metropolitan races for the highest prizemoney of any track in Australasia.

The industry employs more than 6,000 full-time or part-time people and makes a significant contribution to the economy of New South Wales. Under the Harness Racing Authority Act of 1977, as amended in 1998, the board of Harness Racing New South Wales not only controls and regulates harness racing but also is responsible for commercial decisions. Income is earned by Harness Racing New South Wales from fees and charges levied on clubs and participants for services rendered. Consequently, Harness Racing New South Wales is a self-funded and industry-funded organisation and does not receive any moneys from the Government's Consolidated Fund. Members of the board are appointed by his Excellency the Governor on the recommendation of the Minister. Members hold office for a term of three years and then are eligible for reappointment.

Under the amendment to the Act in 1998 the board is now not only responsible for control and regulation, as I mentioned, but also for the ongoing development and promotion of the industry, including determination of internal funding distributions and the allocation of racecourse development funds. The composition of the board at the present time is as follows. There are seven members of the board. Three members, including the chairman, are nominated by the Minister for Gaming and Racing. These three members also form the regulatory committee, one member nominated by the South Wales Harness Racing Club, two members nominated by other harness racing clubs, one of

which is a representative of the TAB clubs, and finally, one member representing the industry participants.

The current charter of Harness Racing New South Wales is constituted in terms of the Act. The current functions, as set out in section 8 (2), are the control and regulation of harness racing, the implementation of commercial policies directed towards the welfare of the industry, and the protection of the public interest. Our mission statement is to ensure that harness racing meetings throughout New South Wales are conducted in accordance with the rules of harness racing and that proper safeguards are implemented to protect the public interest, and that the harness racing industry is developed in such a manner as to guarantee its continuing viability. Our mission is to develop harness racing by the provision of a range of incentives and services which guarantee the wellbeing of the industry.

Achievement of the following objectives will enable Harness Racing New South Wales to accomplish its mission. To assist in developing a viable industry for the benefit of all participants involved in harness racing, at all times the industry needs to be mindful of the following obligations under the Racing Distribution Agreement with TAB Ltd: to maximise net wagering revenue; to maximise wagering earnings; to encourage public interest in racing in New South Wales; to encourage public attendance at race meetings and otherwise promote the quality and development of the Harness Code in New South Wales; to ensure that harness racing meetings throughout New South Wales are conducted in accordance with the rules and that proper safeguards are implemented to protect the public interest; from a management point of view, to maintain an efficient service organisation to meet the needs of clubs, associations and persons associated with the industry; to expand the range of services available to all sections of the industry by use of modern technology; to keep the costs to the industry of meeting these objectives within a reasonable level, consistent with effective achievement; to ensure that Harness Racing New South Wales, TAB and non-TAB clubs adhere to their obligations, as set out in the various privatisation agreements; and to ensure continued funding.

With regard to the regulatory committee, which commenced from 1 January 1999, I would draw the Committee's attention to sections 7A, 7B and 7C of the 1998 amendment to the Act, which read as follows:

**7B Establishment of Regulatory Committee**

(1) There is established a committee of HRNSW known as the Regulatory Committee.

(2) The Regulatory Committee is to consist of the 3 directors appointed on the nomination of the Minister.

(3) The Chairperson of HRNSW is to be the Chairperson of the Committee and the Deputy Chairperson of HRNSW is to be the Deputy Chairperson of the Committee.

**7C Role of Regulatory Committee**

(1) The Regulatory Committee is responsible for exercising the regulatory functions of HRNSW.

(2) Any act, matter or thing done in the name of, or on behalf of HRNSW by, or with the authority of, the Regulatory Committee is taken to have been done by HRNSW.

(3) The Regulatory Committee is subject to the control and direction of the Minister except in relation to the following matters:

(a) the contents of a report or recommendation made by it to the Minister;

(b) the decision on any appeal or other disciplinary proceedings.

(4) Subsection (1) does not limit the functions of stewards appointed by HRNSW under the rules.

The regulatory functions are set out under Section 7A, and with your permission I will read those functions for the Committee's information:

(1) For the purposes of this Act, the *regulatory functions* of HRNSW are the following functions of HRNSW:

(a) the functions relating to the control and regulation of harness racing as specified in section 9 (including the functions of initiating or conducting inquiries in relation to the control and regulation of harness racing, and any disciplinary or decision-making functions with respect to such inquiries),

(b) the function under section 10B (to the extent that the function is exercised for the purpose of protection of the public interest),

(c) the functions under sections 10C, 10D and 10G (to the extent that the functions are exercised for the purpose of the regulatory functions of HRNSW),

(d) the function of making rules under this Act,

(e) the functions of hearing and deciding appeals to HRNSW and of holding special inquiries under section 19A,

(f) the function under section 21 (to the extent that the function is exercised to delegate regulatory functions),

(g) such functions as the Board may allocate to the Regulatory Committee,

(h) such functions as are determined or designated to be regulatory functions in accordance with subsection (2) of the regulations.

(2) If a dispute arises as to whether a function is a regulatory function, the Minister may resolve the dispute. The Minister's determination is final and conclusive of the matter.

**ACTING-CHAIR:** It may be helpful for the Committee if you could inform us about the role of the regulatory committee. We are reasonably familiar with the Act, and some of us probably had a hand in it.

**Mr MULLINS:** The meetings of the regulatory committee are held separately to the meetings of the full board, and I do the agenda for those meetings. The meetings contain items relating to stewards' reports, handicapping matters, disciplinary matters, any matter relating to our integrity assurance panel, any matter relating to conduct within the industry, and anything to do with licensing. Broadly, anything on the control and regulatory side of our industry comes under the regulatory committee. That regulatory committee meets on the same day as the full board, then the full board will have a meeting on commercial matters.

**Dr KERNOHAN:** When an appeal situation comes to the regulatory committee, who is present at such an appeal and how does the appeal process work?

**Mr MULLINS:** At this point in time we have not had an appeal to the regulatory committee. That is set out under the appeals regulation. Ninety-nine per cent of the appeals go to the appeals tribunal. There is a particular section in the Act that does allow appeals to come to Harness Racing New South Wales regulatory committee, but on a very restrictive basis. I could refer you to that section of the Act, or with your leave I might ask Mr Loewenthal to assist me with it.

**Mr LOEWENTHAL:** That basically only relates to appeals against decisions of harness racing clubs, and they are very minor matters.

**Mr MULLINS:** When the regulatory committee sits on any matter, the committee comprises our chairman, our deputy chairperson, Mr Marshall, and I sit in as the chief executive officer providing secretarial advice.

**Dr KERNOHAN:** What is the quorum for that?

**Mr MULLINS:** A quorum is two.

**ACTING-CHAIR:** Would you like to say anything about your achievements?

**Mr MULLINS:** Yes. I have a brief list here, which I will table later if I may. The major happening in harness racing over the last few years, as Mr Loewenthal mentioned, was privatisation of TAB Ltd, which makes it a whole new world for us. We, along with the other two codes, are signing a number of contracts with TAB Ltd to provide product to that private company, which is responsible to shareholders. It is a totally new ball game for us. We were heavily involved in the participation with those privatisation negotiations, and we believe that from those negotiations we got quite a reasonable deal for the harness racing industry over the next 15 years.

If I may explain for the information of the Committee, in accordance with the contracts that have been signed between the industry and TAB Ltd, there has been set up a company called New South Wales Racing Pty Ltd. That particular company has been appointed as the sole and exclusive agent of the three controlling bodies, as per schedule 3 of the Racing Inter Code Deed. The deed also provides for the establishment of a business and strategy committee, a product supply advisory group and a racing product committee upon which all codes and New South Wales TAB Ltd are represented, and enables the exchange of information between TAB Ltd and the three codes through the one company, which acts on behalf of the three codes. We are currently represented on that company by my chairman, Brian Ross, and Mr Tony McGrath.

Under the new arrangements, Harness Racing New South Wales now has responsibility, which it did not have before, for the distribution of industry funding. We are now required to distribute the product/wagering fee to all clubs, which was formerly carried out on an annual basis by TAB Ltd. We are also responsible for the retention and use of the product/wagering fee for Harness Racing Industry Funds and the Harness Racing Racecourse Development Fund. Those items, particularly the Racecourse Development Fund, were under the auspices of the former TAB; each particular code now controls its own racecourse development fund. We are also now responsible for the payment of all prizemoney for clubs in New South Wales, with the exception of the New South Wales Harness Racing Club at Harold Park. Formerly, the payment of prizemoney was always done by the clubs. Under a new computer arrangement we are now doing that from Harness Racing New South Wales.

One of our major achievements has been the implementation of our strategic plan, which is the first strategic plan for the future of harness racing in New South Wales. That was launched in December 1998 by the Minister for Gaming and Racing, the Hon J. Richard Face, in this room at Parliament House. Entitled "The Way Forward", the strategic plan is a comprehensive document which outlines the 17 major challenges and opportunities the industry faces and more than 100 strategies that have been designed to meet them. I can make copies of that plan available to the Committee upon request.

It is an excellent document, which we firmly believe provides a sound foundation from which the current board can launch into what we believe will be a challenging and exciting new era for the industry. The major focuses of the strategic plan are as follows: developing a commercial focus; ensuring product meets the needs of customers; ensuring product meets the needs of participants; ensuring industry integrity at all levels; and marketing the product. A progress report on implementation of the plan is available at page 30 and ensuing pages of our Year 2000 Annual Report, which I could also provide to the Committee.

One of the most important initiatives for harness racing over recent years is drug-free racing and industry integrity. I wish to say categorically that Harness Racing New South Wales has a long and proud history as the leader of the three racing codes in New South Wales, the leader of all Australian harness racing states, and the leader also of New Zealand and, we believe, the world, in its very firm policies in respect of the control and regulation of drug-free racing and the overall integrity of the industry. As I mentioned earlier, we have set up an integrity assurance panel, which came out of the Temby recommendations. We were the first code to introduce board and staff members' codes of conduct, in conjunction with the ICAC. We were also the first of the codes to develop an anti-fraud and corruption control plan, once again with the ICAC, and we are liaising very closely with the ICAC concerning any effects of the report into the greyhound industry on harness racing, and we are looking very seriously at a number of those recommendations for the harness racing industry.

We were also the first racing controlling body throughout Australasia to implement a system of security guards on our major grand circuit races, the miracle mile and the M. H. Treuer memorial. This has recently been extended to Western Australia and will be discussed by the chief executive officers. I will be attending a meeting of all State chief executive offices in Melbourne on 10 February, when my board will recommend to the council and the inter dominion council that 48-hour security be implemented on all future trotters and pacers grand finals at inter dominion championships conducted in Australia and New Zealand.

Western Australia has been the first State to come along after New South Wales—which has had this implemented since 1994, I might add—and as recently as earlier this week there has been a

major announcement from Harness Racing Victoria; they are also beginning to implement security measures on their major races, albeit, in our opinion, not to the extent that we do. We will be liaising with them in Melbourne when I am down there on 10 February. I mention also that we have been very serious about drug-free racing since well before 1994. It started around 1989-1990, well before the Olympics. I do not know whether members have had the opportunity to read last night's paper, but there even seems to be some problems with drugs in golf. So, they are looking at that also. We believe we are the leaders on that.

We have conducted also an independent review of our swabbing procedures. That arose following a request from the Minister as a result of the report into the greyhound industry. We had an independent report by Dr Vine of Racing Analytical Services in Victoria. All of the recommendations of that report have been adopted and forwarded to Commissioner Moss and the Minister. We have restructured our clubs at all levels to make ourselves more competitive to try to win the dollars against the other two codes of racing. We have recently introduced a major TAFE course in our industry, the first time we have had a TAFE course, to make our industry more professional and to bring more of our younger people through. We have signed a joint venture computer agreement with Harness Racing Victoria.

We now have national rules and a national computer system. Briefly, we have also a very important advisory board. Lines of communication with the industry are continually improving through the advisory board, which represents all sections of our industry. The advisory board's main role is to offer advice to Harness Racing New South Wales on industry policy and strategic direction. The accreditation process and operations and procedures of the advisory board are monitored annually. We held also in Sydney in 1999 at the Regent Hotel the World Conference of Harness Racing and also the World Drivers Championship in New South Wales and Victoria and, to coin a phrase, the world delegates told us it was the best ever, and we were told that before the year 2000. Briefly, that is it. I table that for the information of members.

**ACTING-CHAIR:** How many documents do you seek to table?

**Mr MULLINS:** I seek to table the one on the board and the one on achievements that along the way I have used quite a bit of brevity.

**Documents tabled.**

**ACTING-CHAIR:** Mr Baldwin, do you wish to add something?

**Mr BALDWIN:** In answer to a query of the honourable member for Camden, it is actually in schedule 2, clause 3(b) of the Harness Racing New South Wales Act that it states that the quorum for the regulatory committee is two members.

**ACTING-CHAIR:** I seek clarification on a point relating to the making of harness racing rules and regulations and I address the question to both parties. Under section 10A of the Harness Racing Act the regulatory committee of Harness Racing New South Wales can make rules relating to the management of harness racing. I notice also that section 27(2) says that regulations can be made to cover any matter for which rules can be made. In 1998 the Act was amended and one of the new provisions introduced was section 10A(2), which prohibits the making of rules in any case for which regulations may be made. On the face of it, does this not severely restrict the rule-making power and possibly even put in doubt the legal effect of the existing rules?

**Mr LOEWENTHAL:** That is a matter I would need to take on notice to examine the legislation and get back to the Committee at the earliest opportunity.

**ACTING-CHAIR:** Certainly. Would it be possible to come back later today with an answer to that question? Obviously you are going to seek advice?

**Mr LOEWENTHAL:** If possible.

**ACTING-CHAIR:** That would be useful, because the supplementary question, if the answer had been provided, was as follows: Do you think you should consider repealing the prohibition in

section 10A (2) and leaving any conflict between a rule and regulation to be resolved in accordance with the provisions in the Act, which states, "In circumstances of a conflict a regulation overrides a rule"?

**Mr LOEWENTHAL:** I will take that on notice. I just make one point with regard to the rules. The rules have been in a transitional phase for some considerable time. When the then Trotting Authority was formed in 1997 the legislation then provided that the rules of trotting as they were, which at that stage had been adopted by the former controlling authority, the New South Wales Trotting Club, were able to be adopted by the New South Wales Trotting Authority as its by-laws and required the approval of the Governor. So, at that stage they had to go through the full formal process of referral to the Parliamentary Counsel, then referral to the Government and Executive Council for approval. In an amendment to the Act in the early 1980s, on advice from the then chairman of the authority as to delays and concerns with delays in having the rules made, particularly as they have a national impact, the legislation was changed to provide that from that time they would be rules made by the authority with the approval of the Minister.

That continued until the amendments in 1998 when the Minister took the decision that as part of this overall deregulation process—there is a deregulation of the three ministries going on—it was more appropriate that all rule making be the province of the regulatory committee of the authority and not one for the Minister in which to be involved, even though the Minister does retain under the Act an overriding power of direction and control over the regulatory committee and its functions. I will do some research this afternoon and get back to the Committee.

**The Hon. M. I. JONES:** In the absence of any further presentations, Mr Nebauer, at a race meeting a horse behaves in a very unexpected manner: it is an outsider and it steams in having sprinted all the way through the race, overtakes horses on bends and all sorts of things, and wins by unexpected margin. Can you walk us through the process of the stewards and the appeal process?

**Mr NEBAUER:** In respect to Harold Park all winners are swabbed. So, irrespective of whatever odds they are at and what performance they put in, they are post-race swabbed. In the provincial area we swab a minimum of three horses per meeting. At country meetings we swab a minimum of one horse, that is in respect to post-race swabbing of horses. They do not necessarily have to be winners. They can be horses that perform poorly, below expectation or they could be horses that perform well above their shown form, yet may not win. That has only recently been done at a Bathurst meeting.

**The Hon. M. I. JONES:** What is a swab?

**Mr NEBAUER:** A swab normally is a urine sample collected from a horse, taken normally by an attending veterinarian and if there is not a veterinarian in attendance, say at Harold Park, they have swabbing officials. They are the people responsible for collecting the swab from the horse and ensuring that all the required documentation and swabbing procedures are adhered to.

**The Hon. M. I. JONES:** How quickly is a result obtained at that point in time?

**Mr NEBAUER:** At Harold Park swabs are retained by the club in refrigerated conditions and then Armaguard picks them up the next working day. So, if it is a Friday they are usually picked up on Monday and transported to the Australian Racing Forensic Laboratory for analysis. In respect of provincial and country areas, the stewards bring the swabs back to Harness Racing New South Wales where they have a locked area where the samples are refrigerated and transported to the Australian Racing Forensic Laboratory on a regular basis at least twice a week. In regards to the clearing of the samples, it normally takes a minimum of 14 to 21 days for a sample to be cleared. If there is an irregularity—when I refer to an irregularity, that there is a substance that is in the sample on initial testing—then the clearance of that sample or notification back to the controlling body may take some considerable period from then in regard to the period required of that laboratory to ensure that there is a substance in there or it may be as a result of contamination or whatever else.

**The Hon. M. I. JONES:** At the time of the event are the bets paid?

**Mr NEBAUER:** The bets are paid on the all clear, which is given immediately after the race. So, if there is a positive swab that emanates from a particular swab, the bet is not affected by that result. Prize money maybe, but bets are not.

**The Hon. M. I. JONES:** So, you find a positive result in a swab N number of days after the event is finalised. What happens then?

**Mr NEBAUER:** The procedure is that when the samples are sent to the Australian Racing Forensic Laboratory, the swab sample consists of three bottles. Two of them contain urine divided equally and what they refer to as the control sample. The control sample is diluted with acidic acid and all the utensils in which the urine is voided into, in respect to the pan and the three bottles, they are rinsed out before the sample is collected and poured into one of the bottles. We call it the control bottle. So if there happens to be contamination in the pan or in the three bottles, that will show up in the control sample. The urine sample, when collected, is then poured equally into the two other bottles. The cap is sealed and put under security and so forth. When the Australian Racing Forensic Laboratory carries out its analytical procedures, it tests only on one bottle of urine. It analyses that sample for a wide spectrum of drugs. If on its initial testing it finds a drug present, it will then notify the stewards of Harness Racing New South Wales by way of a notification of irregularity that there is a substance in that particular sample.

By way of sample, the laboratory only has a number. It does not have the horse's name, or the name of the trainer, owner or driver. It has no idea of that. Once the laboratory is aware that it has an irregularity, then in accordance with Harness Racing New South Wales policy, that sample is then dispatched to another accredited independent racing laboratory, which means it goes interstate or overseas. There are a number of independent laboratories in Australia—one in Queensland under the directorship of Dr Auer, one in Victoria under Dr John Vine and also one in Western Australia. Samples are also sent, if need be, to Newmarket in England or to Hong Kong. They are the laboratories to which the samples are sent. When I am talking about the samples, the confirmatory analysis carried out by these independent laboratories is on the second bottle of urine and the control. The control is never touched in relation to the initial testing. It is opened and tested when the confirmatory analysis is carried out.

If on analysis by that independent laboratory it confirms the initial findings or the first finding of the laboratory here, then it notifies the Australian Racing Forensic Laboratory by way of written documentation that the confirmatory analysis carried out on sample A, B or C confirms the presence of etorphine, for instance, and then it notifies us, Harness Racing New South Wales, in writing. When we receive that documentation we notify the trainer of the horse of the positive finding. May I just backtrack, we notify them also of the irregularity so they are aware there is a problem in respect to that particular sample. They are then notified when the confirmatory analysis is carried out, be it negative or positive. I suggest to the Committee that is normally returned positive if it has been detected in the laboratory here because the methodology is normally very similar in all laboratories.

When we receive the notification of positive swab, the trainer is notified, the owner is notified and the club at which the sample was collected is notified because prize money is withheld until the swab are cleared. The club is informed that there is a positive swab. Harness Racing New South Wales issues all the prize money for all clubs throughout the State, apart from Harold Park. The club is notified and certainly Harold Park is notified because they are the ones that are responsible for issuing their prize money. Then the inquiry procedures commence in regard to when the inquiry is set and the documentation and so forth. I do not know if you want me to go through that type of document.

**The Hon. M. I. JONES:** Yes, please.

**Mr NEBAUER:** In recent times, in accordance with the rules and advice from Harness Racing New South Wales solicitor, Dennis English, we issue a charge sheet or notification of charge advising them of the positive finding, what drug is involved and when the inquiry will commence. Attached to that is documentation in regard to the initial finding of the laboratory, the laboratory to which it was sent, the confirmatory analysis report, a report from normally the Thoroughbred Racing Board senior veterinarian Dr Craig Suann advising us that the substance found, on confirmatory analysis, comes within the meaning of the rule and therefore is a prohibitive substance, and what

effect that drug has on a horse's system. It goes through all of that. That can be anything up to three or four pages in a detailed document.

That, along with other documentation in respect of the stable return establishing who was the trainer of the horse at the time, a copy of the relevant rules in respect to prohibitive substances, they all now go with the charge sheet so that the trainer. He or she, is given a period of time to digest that information and, if need be, go away and receive scientific advice from their veterinarian or elsewhere; and also go to their legal advisers and receive advice on that; and then to respond to us in regard to the date that we set for the inquiry.

**The Hon. M. I. JONES:** All right. You have a hearing and one of your stewards presides over that hearing, is that so?

**Mr NEBAUER:** The panel in respect to drug-related matters, normally a panel of three will preside the chairperson being myself or Mr Bottle or another senior member of the panel.

**The Hon. M. I. JONES:** But they are all members of your organisation?

**Mr NEBAUER:** Correct.

**The Hon. M. I. JONES:** Let us say that a trainer is found guilty and receives his punishment and that he wishes to appeal because he believes there is an irregularity in the proceedings. What happens then?

**Mr NEBAUER:** When the inquiry comes to its conclusion. As I said, persons coming before the stewards are charged now at the commencement, so when they come they know what the charge is that has been made against them and they have all of that documentation. If they are found guilty and a penalty is imposed by the stewards adjudicating on that inquiry, then they have their right of appeal to the appeals tribunal. That could be within seven days. It is accompanied by an appeal fee of $100, stating the reasons for the appeal. If they do appeal they have, at that same time, the right of applying for a stay of proceedings requesting that, whatever penalty may have been imposed by the stewards is stayed subject to their appeal being heard. That goes to the appeals tribunal secretary, who refers it to either Judge Perignon or Judge Thorley and all decisions from then on are in their hands.

**The Hon. M. I. JONES:** So it leaves your jurisdiction when the appeal process kicks in?

**Mr NEBAUER:** Correct.

**The Hon. M. I. JONES:** At what stage is the trainer suspended?

**Mr NEBAUER:** At the conclusion. It depends. If the inquiry continues over an extended period of time and the inquiry sat five, six or seven times, and a charge is laid, and the charge is found proven yet there are further adjournments, a suspension may be imposed on the person involved—trainer, driver or owner—at that time, subject to the conclusion of the inquiry. That occurs on occasions. If the penalty is not imposed until the finality of the inquiry where the person has been found in breach and has had the opportunity of addressing the stewards on penalty, and then the panel hands down a penalty, it takes effect immediately subject to a decision of the appeals tribunal.

**The Hon. M. I. JONES:** That is determined by your organisation?

**Mr NEBAUER:** It is determined by the panel that presides on the inquiry.

**The Hon. M. I. JONES:** Members of your organisation presiding on that panel?

**Mr NEBAUER:** We have a panel of nine permanent stewards based in New South Wales, which covers the whole State.

**The Hon. M. I. JONES:** In a situation where a swab is found locally to be positive but, on being forwarded to a secondary laboratory either here or overseas, they do not agree that it is positive, what is the situation then?

**Mr NEBAUER:** If a sample is returned initially with an irregularity if it goes to the independent laboratory and is returned as negative, no action is taken. It is not positive so there is no action necessary from Harness Racing New South Wales or its employees, myself, Mr Bottle and the other stewards.

**Mr MARTIN:** In relation to the conduct of the inquiry by the stewards, you would probably be aware of some criticism that the system that exists within harness racing in New South Wales—and probably other jurisdictions, but we will restrict it to New South Wales—that the stewards are perceived to be the accuser, judge and jury in terms of the normal legal system you could say there is a denial of natural justice. That is one argument. Are you aware of that? Is there any sensitivity within your organisation that the same people who are laying the charge may well be the people hearing it and proceeding with the penalty?

**Mr NEBAUER:** I have heard those comments over an extended period of time and I understand it has been challenged through the courts on previous occasions. The matter is under review by Harness Racing New South Wales at the moment and therefore I am not at liberty to comment any further, other than stating that.

**Mr MULLINS:** With your permission Madam Chair, I might be able to assist Mr Martin. This is a matter of policy for Harness Racing New South Wales. We are aware of the problem and at this point in time we do have a number of matters we are currently considering at board level to address the very issue you have raised. I would like to take that question on notice and I would be only too happy to bring the Committee up to date in camera as to where we are with that particular matter.

**ACTING-CHAIR:** Why would you need to take that question on notice? It seems to me a fundamental question that you would be able to at least give some observation on if not a complete answer at this stage.

**Mr MULLINS:** I would not be able to because it is currently being considered by the board as a matter of policy and they have not reached a final decision. I would be prepared to assist the Committee in camera and let the Committee know exactly where the matter is with the board. At the moment the board has not resolved to make any changes, but they are considering a number of matters.

**ACTING-CHAIR:** That would be fine. That would assist the Committee to have that information in camera.

**Mr MARTIN:** With the Committee's indulgence I would like to make a brief statement to the Committee. I will preface it by saying that the nub of this inquiry is really looking at the appeals process and how it works, whether it is just and so on. That is one of the important things to this Committee. Whilst the Committee's inquiry is not related to the appropriate level of $TCO_2$, in many of the submissions to the Committe hat matter has been raised and I know there is another inquiry into that. You will bear with us because that aspect will be raised in some of the questions. I take the point before someone else raises it that we know this inquiry is not about setting the appropriate level of $TCO_2$.

I would like to make some brief general remarks and to ask a question concerning the use of alkalising agents. I address my question to someone from Harness Racing New South Wales. I have previously made some statements in Parliament reflecting my concern about the uncertainties, leading to possible inequities, in the current $TCO_2$ permissible level. I am not going to canvass what the level should be as I have been informed of the authoritative inquiry now ongoing on that subject by the Australian Harness Racing Council. Without ascribing blame or innocence, however, it could be said that a situation ha developed within the sport of harness racing which may be summarised as follows:

The $TCO_2$ level in harness racing is set at the upper range of normal with a relatively small margin for error. On the other hand, alkalising agents are often countenanced as part of horse preparation, particularly since such agents can even be bought in supermarkets. The very availability of alkalising agents seems to have created considerable pressures, on industry participants, to use

them. However many participants do not understand either pharmacology or physiology: consequently they do not comprehend the cumulative effect of alkalising agents. Some industry participants do not realise that different horses have different levels of $TCO_2$ to start off with.

Penalties on the other hand, are mandatory—with relatively little leeway. I do not have to refer to particular cases to demonstrate that. What I would like to see, is some assurance from the rulemaker, Harness Racing New South Wales, that regardless of the level that is finally determined as a result of the national review, every effort will be taken to ensure that the regulations give the tribunal adequate flexibility to dismiss an appeal where the tribunal is satisfied the appellant is not guilty of wrongdoing. In regard to the national inquiry itself, I hope it will produce information that can help reconcile the gulf that exists between the cold complexity of the science in the laboratory and the anguish being experienced by industry participants out on the field. I wonder if you would address my comments about the appeals tribunal?

**Mr ENGLISH:** Perhaps I could respond to that. Certainly the tribunal has the power at the moment to do just what Mr Martin said, to uphold an appeal and to set any penalty that it wishes. There are no minimum penalties, there are no maximum penalties, there are no prescribed penalties.

**Mr MARTIN:** I was under the impression that that was not the case.

**Mr ENGLISH:** There are no prescribed penalties either in the regulations or in the rules.

**ACTING-CHAIR:** The penalty can be imposed on an ad hoc basis.

**Mr ENGLISH:** The penalty can be imposed to the rising of the court, for example.

**Mr MARTIN:** Was there not a case recently where, I think it was Judge Thorley indicated that he considered the person before him had not done anything wrong but that he did not have the power to find him not guilty? All he could do was reduce or alter the penalty but he could not find the person not guilty.

**Mr ENGLISH:** I think you may be confusing the situation with it being an absolute liability rule. We are talking about the drug rule. It is an absolute liability rule in the same way as a prescribed concentration of alcohol charge is an absolute liability rule. The elements of the case are made out, that is, that the horse has been presented other than drug free, the person involved is the trainer, then you are guilty of the offence. That is correct.

**ACTING-CHAIR:** Being found guilty, with no prescribed penalties, you could be acquitted or it could be proved but no penalty imposed.

**Mr ENGLISH:** You would not be acquitted but no penalty could be imposed.

**Mr MARTIN:** But you could not be found not guilty. You could not have the stewards conviction completely quashed. Is that what you are saying?

**Mr ENGLISH:** Not if the offence is proven and the offence is proven if the elements of the offence are proven.

**Dr KERNOHAN:** Has a conviction ever been quashed or a decision changed?

**Mr ENGLISH:** Only in cases where the offence has not been proven. For example, if the appellant were able to convince the tribunal that there was a problem with a chain of custody of the sample, that the sample had been contaminated, or that there was a problem with the testing procedure. All of these matters would lead to a not guilty verdict. But in the situation where the offence is proven, where the elements are there and not successfully challenged, then as a matter of law you are guilty.

**Mr MARTIN:** Just so that I can crystallise it in my own mind, without getting too specific, in a case where there had been a finding of $TCO_2$ and the appeal judge said he was convinced that the person charged had not been guilty or responsible for the drug being in the horse—but the proof was

there or the evidence has been accepted that the level is above prescribed limits—the appeals judge does not have the ability to dismiss the charge against him, because of that evidence.

**Mr ENGLISH:** You are confusing the term "not guilty". We are using different words for the term "not guilty". This goes to the heart of an absolute liability rule. An absolute liability rule states that mens rea, which is the intention to commit the crime, does not need to be proved. So you are guilty of the offence if those elements are proven. The trade-off is that if the appeals tribunal is satisfied that the trainer had no knowledge whatsoever, was in a different country and was not involved in it, the tribunal will impose no penalty.

**ACTING-CHAIR:** The answer is that you cannot be found not guilty but you can end up with no penalty?

**Mr ENGLISH:** You can be found not guilty only if you are not guilty of the offence; in other words, if one of the elements is not missing. You have to satisfy the tribunal that the swab was contaminated, the chain of custody was wrong, or some other procedural matter was wrong, otherwise you are guilty of the offence.

**ACTING-CHAIR:** I would like to return to the question that previously arose to do with natural justice. I know that we will be hearing some in camera evidence on that issue from Harness Racing. You may be able to answer this, but I direct it in particular to the Department of Gaming and Racing. The Committee has received a number of submissions on the subject of natural justice. The regulatory impact statement also stresses it is important. You would be aware of that with your power to make regulations. Is the Office of Racing and Harness Racing New South Wales able to advise the Committee whether the rules and regulations have ever been reviewed specifically to ensure natural justice and procedural fairness? Also particularly as a result of Mr Justice Young's comment in the Supreme Court case of *Gleeson v Harness Racing Authority of NSW*—I understand that that was in 1990, so it is not a new case. In that case, referring to the rules of the stewards' inquiries, Mr Justice Young said, among other things:

> It is most unsatisfactory that rules are made which give the same people the powers to investigate and the powers to adjudicate.

Would you like to comment on that?

**Mr LOEWENTHAL:** In relation to having advice as to natural justice, there has been no specific request for such advice.

**ACTING-CHAIR:** Did anyone ever look at the case and comment on it or think about it?

**Mr LOEWENTHAL:** For that period I could not give you an answer.

**Mr CALLAGHAN:** I had some involvement in it. I do not think I appeared though.

**ACTING-CHAIR:** In what capacity are you commenting, Mr Callaghan? Are you commenting as an observer, or are you commenting as senior counsel?

**Mr CALLAGHAN:** At that stage I had something to do with the authority. I cannot remember. I did not appear in that case but I know of the case. That involved an exercise by stewards in an off-course function—a function not during a race meeting. There are two quite different functions. During a race meeting, in an on-course function, the courts for years at the highest level have recognised the fact that, of necessity, race stewards are the policemen, the investigators, the prosecutors and the judges. That is the way it has to be in protests, for example. Then on the other hand you have off-course functions. One of the Gleeson cases was an off-course function. One of the stewards visited Harold Park and he saw a licensed and registered trainer exercising a horse, but with the assistance of a disqualified trainer, which was not right.

A registered person is not to associate with a disqualified person, certainly in that regard. The stewards had a hearing. During the course of that hearing controversy arose, as I recall it, about the explanation given by the disqualified person. There arose a conflict between the observations or evidence of the registered person and the steward. The steward remained sitting on the panel. So he

was exercising an adjudicative function when he really was also a witness whose credibility was being called into question. That is where that case or that hearing came unstuck. Mr Justice Young, in the context of that situation, made the comment that he did. It is in relation to off-course functions of stewards generally that I gather Mr Mullins wishes the facility of an in camera hearing to explain considerations being given within the authority to that issue. I hope that assists.

**ACTING-CHAIR:** Mr Loewenthal I was specifically directing that question to you. Would you like to conclude you answer?

**Mr LOEWENTHAL:** No advice has specifically been sought by the department or the Minister on that matter. All I can say is that the rules were adopted as by-laws for the trotting authority at the time. They needed to be made by the Governor. So they were viewed and reviewed by Parliamentary Counsel and we received advice back that they could legally be made as by-laws. That is the only advice we have received in respect of it. We have never addressed that issue specifically.

**ACTING-CHAIR:** I appreciate that the circumstances in the case to which I have referred may have related to events on-course and off-course. But it appears, from on my reading of the comment, that His Honour was making a general comment about the powers. He was not directing his comments to the subject matter or the circumstance in which the case arose. That is why we raised it the issue today.

**Mr CALLAGHAN:** For example, one of the cases that Justice Young referred to was *Calvin v Kahn* in the Privy Council in the late 1970s. There is a clear passage in the decision of Privy Council which sets out what I was saying about the needs for stewards to have those functions, certainly on-course.

**Mr ENGLISH:** Part of your question related to whether the authority was aware of the judgment.

**ACTING-CHAIR:** I asked whether the authority was aware of the judgment and had considered it.

**Mr ENGLISH:** I make these points. As I understand it, in that decision there were two aspects. One was a stewards panel changing during the course of the inquiry and the second was a conflict between one the stewards and a witness. Certainly the stewards are aware of that decision. They have been given advice in relation to changing panel structures. They certainly have not done that since that case. There have been occasions when, if there was a conflict between a witness and a member of the stewards panel, the steward stood down from the hearing in accordance with that case. That has occurred on at least a couple of occasions. So they have taken into account what was said in that case in their procedures.

**Dr KERNOHAN:** I ask officers from the Office of Racing or Harness Racing New South Wales to explain the role of assessors in appeals and how often they are used.

**Mr LOEWENTHAL:** When the decision was taken to establish an independent tribunal it was seen at that stage that we would be looking at having a judge or a person qualified for admission as a District Court judge on the recommendation of the Attorney General. More often than not it was seen that that person would have no real knowledge of the harness racing industry. So a decision was taken within the legislation to allow the appointment of assessors—they being people with specialised knowledge of and interest in the industry—to assist the tribunal during the hearing of the appeal, and to give expert advice to the tribunal with regard to racing matters generally, not on the law. The Act is quite specific in that the assessors cannot participate in the determination of the appeal. They can only give advice to the tribunal upon the request of the tribunal. As to the second part of that question, having no day-to-day involvement with the tribunal I understand that the present two judges who sit on tribunals have assessors on all occasions. Mr Mullins may be able to correct that.

**Mr MULLINS:** Yes, that is correct. The tribunal does not hear an appeal without one or two assessors there. Those assessors are drawn from a pool of assessors. As Mr Loewenthal said, that is quite specific in the Act. I have a copy of the Act for the information of Committee members. It is exactly as Mr Loewenthal has said under the Act.

**Dr KERNOHAN:** I ask a further question relating to assessors. It is obvious that assessors help the tribunal in the hearing of an appeal and that they are necessary for the reasons explained, but do you think the appellant is at a disadvantage in understanding the technicalities of the issues and the presentation of the case? For instance, in the course of the Sarina inquiry before the chief steward in July 2000, evidence was presented by the official veterinarian of the New South Wales Thoroughbred Board and by the manager of Equine Pathology Services about testing procedures. The chairman of the inquiry then asked Mr Sarina whether he had any questions about his evidence. His reply was, "No not really. It is all Greek to me the way they go on." So, in other words, the tribunal has expert advice on hand to help it, but what is available to the appellant under these circumstances?

**Mr LOEWENTHAL:** You are referring to the stewards' inquiry I think, rather than the tribunal?

**Dr KERNOHAN:** Yes.

**Mr LOEWENTHAL:** As to any matters before the stewards inquiry, I am not aware.

**Dr KERNOHAN:** I should ask a steward about that.

**Mr NEBAUER:** The rules are quite specific in relation to scientific matters. The person appearing before the stewards is permitted to have a person there to assist him with respect to formulating replies to the analytical proceedings. A person appearing before a steward at a positive swab inquiry is permitted to call a veterinarian or somebody with knowledge of analytical procedures to assist him at the inquiry.

**Dr KERNOHAN:** They are allowed to have an expert to assist them in technical matters but they are not allowed to have a lawyer?

**Mr NEBAUER:** The rules state that, except for specific circumstances, they are not permitted to have legal representation, but the stewards are permitted at their discretion to allow them to enter an inquiry. It is a matter for the panel to adjudicate on, subject to an application from the person appearing before them. It is not unusual for a person to have a solicitor or a barrister outside the stewards' room and a person to seek an adjournment if the application for that person to be in attendance has been refused. It is not unusual for them to be outside and seek adjournments and so forth.

**Dr KERNOHAN:** But the solicitor appearing on behalf of Harness Racing New South Wales and the stewards can be there the whole time?

**Mr NEBAUER:** No, that is not correct. The stewards conduct the inquiry from a panel of three on their own. They do not have a solicitor or barrister in there unless the person appearing before them has been granted permission to have a solicitor or legal representation. On occasions—not always—the stewards panel will also be assisted with legal representation.

**Dr KERNOHAN:** One of the reports stated that, if the appellant lost, he was responsible for solicitors' costs to Harness Racing New South Wales. That was the reason for my question.

**Mr MARTIN:** Could you give the Committee an example of an appellant or someone who has been charged who has been allowed to have legal representation?

**Mr NEBAUER:** I do not believe that I can speak about specific cases. It is a matter for the stewards panel to consider a person's application on the reasons put forward and then to decide whether it is warranted for that person to have legal representation. It is not an uncommon occurrence for a person to have legal representation before the stewards panel.

**Mr MARTIN:** So it does happen regularly?

**Mr NEBAUER:** Not regularly, but it has happened. I can think of at least two occasions in recent years when it has occurred.

**Mr MARTIN:** Without naming anyone, in what sorts of circumstances? Does it have to be an extraordinary circumstance? If it does not happen very often, what makes you come to that conclusion?

**Mr NEBAUER:** With due respect, I am not in a position where I can answer that question.

**Ms SALIBA:** How often are people denied access to legal representation?

**Mr NEBAUER:** I would have to say that it is not a common occurrence for a person to seek legal representation. They may come, certainly. It is quite regular that they come with their veterinarian or somebody knowledgeable in analytical procedures, but it is not a common occurrence for people to come forward seeking to be represented a barrister or solicitor.

**Dr KERNOHAN:** Would it be possible for you to provide figures for the number of people who have asked to be represented legally and have been denied, say, in the last two or three years?

**Mr NEBAUER:** I do not have those records.

**Dr KERNOHAN:** Who does have the records of transcripts of stewards' hearings?

**Mr MULLINS:** We keep the transcripts of the stewards' hearings when they go to appeal. If I may take that question on notice, I will check our records and endeavour to give Dr Kernohan an answer to her question.

**ACTING-CHAIR:** Yes, that would be useful.

**The Hon. M. I. JONES:** I would like to pick up on a comment by Mr Peter Callaghan. We were talking about the powers being retained solely by the stewards and no separation of power, as is usual in the normal course of justice. Mr Callaghan said that it has to be that way. Why does it have to be that way?

**Mr CALLAGHAN:** On course, at the course. The stewards are controlling a race meeting on which a lot of money is being spent. In a feature race at Randwick recently, a six furlong race, there was significant interference, it seemed, at the home turn some 2½ furlongs from the finishing post. The second horse, which was beaten by about 3½ lengths, protested. Until the protest is heard an all clear on the race cannot be given.

**The Hon. M. I. JONES:** We have primarily been discussing drugs at this inquiry. Presumably on course matters are dealt with very quickly. We are talking about an inquiry which might take place three weeks after a race has taken place.

**Mr CALLAGHAN:** I am sorry, I misunderstood you.

**The Hon. M. I. JONES:** At that stage an inquiry is held and the stewards act as the policeman, judge and jury and impose the penalty. You said that it has to be that way. I want you to expand on why it has to be that way.

**Mr CALLAGHAN:** I intended my comments to relate to the on course function, I am sorry. I would classify as an off course function a steward's inquiry into a positive swab.

**ACTING-CHAIR:** I would like to return to the question of natural justice. It is a follow-on question. You may wish to take the question on advice or answer in camera, but for the purposes of the hearing I would like to ask it. The question relates to regulation 23 of the appeals regulations and the restriction about the evidence that can be considered on appeal and to comments by Justice Young. Basically the regulation states that evidence adduced at the stewards' inquiry can be considered by the tribunal unless the tribunal decides otherwise. Justice Young was critical of that provision and that is why he allowed the appellant to go straight to the Supreme Court rather than to the tribunal. He said words to the effect, "The restriction imposed by the regulation on the allowable evidence meant that an appeal to the tribunal would not take away the prejudice that had occurred at the stewards' inquiry."

He drew attention to a further undesirable aspect, as he saw it, of the regulation. He said, "As a result of that the appellant cannot bring any further evidence but the tribunal can inform itself of any matter it likes." It is sort of unequalisation in the process. This regulation is still in the same terms. I ask Harness Racing of New South Wales and the Department of Gaming and Racing: Has the regulation been reviewed to take account of those concerns?

**Mr MULLINS:** I seek leave for Mr English to answer. He will be able to help the Committee on this matter.

**Mr ENGLISH:** I can answer from a practical aspect. This has been deliberated on by the tribunal on a number of occasions. I do not have the appeal decisions with me, but the tribunal has always taken the attitude that appeals before it are hearings de novo and it will not, as a matter of course, refuse appellants the right to lead further evidence. As I said, it is a matter of record that the tribunal has said that on a number of occasions. It does not limit the appellants to the evidence that was given at an inquiry.

**ACTING-CHAIR:** The regulation does, does it not? In the reading of the regulation there appears to be a limit, but the tribunal for practical purposes has said it will not restrict it.

**Mr ENGLISH:** I do not know the reading of the regulation but I presume it says "without the leave of the tribunal".

**Mr CALLAGHAN:** That is my experience also. I do not know of any occasion where I have appeared at an appeal before the tribunal that an application to lead to further evidence on behalf of the appellant has been refused. Indeed, I am sure I have heard one or more of the judges make the comment that one of the conditions is that the tribunal has to be satisfied that there is good reason why the evidence was not presented at the earlier hearing. The comment has been made, I am sure, that at the stewards' hearing there was no legal representation, otherwise at an appeal, and that alone is sufficient reason to constitute good reason why it was not presented at the earlier hearing—the appellant was unrepresented and unguided by legal advice for the further information he now has.

**ACTING-CHAIR:** Perhaps it might be wise to have a look at the regulation for further consideration by the parties.

**Mr BALDWIN:** Going back to the original drafting of the regulations in 1980, the tribunal—the proposed tribunal at that stage—assisted with the drafting. It was very strong on the point that the regulation be drafted in that manner. On each occasion that the regulations have been reviewed they have been discussed with the appropriate tribunal at that time. There has never been any concern expressed by the tribunal that it has reflected on their ability to make a decision.

**ACTING-CHAIR:** When consultations took place on the regulatory impact statement, was any view expressed by any other interested party on those issues?

**Mr LOEWENTHAL:** As I indicated earlier, the disappointing fact is that very few views are put forward. Despite seeking advice directly from the various groups within the industry we get no replies. On the basis that no-one comes in with concerns about the regulations as they are, we take it that they are okay and are serving the purpose at the time.

**The Hon. D. T. HARWIN:** I find it extraordinary that when this inquiry was advertised in December we received almost two dozen submissions and yet the staged repeal and the regulatory impact statement received absolutely no comments whatsoever.

**Mr LOEWENTHAL:** I also. As I said earlier, I expressed some disappointment.

**The Hon. D. T. HARWIN:** I heard that. There seems to be an incredible disjunction between the two responses.

**Mr LOEWENTHAL:** As I say, we advertised in the press where it would be read by people within the harness racing industry and then directly corresponded with all the participant groups, the various groups that represent all of the people within the industry. There was little else we could do.

**Dr KERNOHAN:** Do you think trainers and drivers were hesitant to submit ideas or complaints about regulations, as they were worried about their future in the industry because of the absolute power held by the authority and the stewards?

**Mr LOEWENTHAL:** I do not think so. I think people within the industry have not been reluctant to come forward with complaints and criticisms to government in the past on any number of matters.

**Mr MULLINS:** If I could add to that for Dr Kernohan's information, as I mentioned earlier in my preamble, an advisory board is set up that represents all industry participants. One of the bodies on that particular advisory board to advise the board of Harness Racing New South Wales on policy or any other matters is the UHRA, which is the association involving trainers and drivers. That facility is available to any trainer or driver who wants to raise any particular matter. To add to that, I would like to say that in the past that association has been very fragmented and only in recent times does it appear to have got its act together. They have a seat on the advisory board which meets every two months with the board of Harness Racing New South Wales on any matters concerning not only their particular association, but also the Trotters Association, Media Association, Owners Association and Breeders Association. So there is a facility there for that process to come through. But in our industry trainers and drivers are so busy out there trying to earn a quid that unless there is a chain of communication and regular communication with that parent body I can see a difficulty.

**The Hon. D. T. HARWIN:** My question is to Harness Racing New South Wales, either Mr Mullins or the stewards. One of the submissions we have received claims that when an appeal is under consideration by an affected person, a transcript of the evidence at first instance, that is, in front of the stewards, is not able to be obtained until the appeal has actually being lodged. The submission is that a potential appellant should have access to the transcript to help him consider whether he will appeal to Harness Racing New South Wales so that he can consider whether he will proceed with an appeal, as is the case when he is appealing to the tribunal.

**Mr MULLINS:** You are exactly right. The procedure is that once an appeal is lodged we then order from the shorthand writer or send the tape to the shorthand writer for a transcript to be transcribed. We have had in the past, I recall—and Mr English may be able to help me on this—where an application has been made for a part transcript of the stewards' inquiry to be made. I understand that may have been granted, but, of course, the person would have to pay for that particular transcript. Normal procedure is exactly as you have said—you do not get the transcript until the appeal is lodged and then it is ordered.

**The Hon. D. T. HARWIN:** But it would be available on payment of a fee?

**Mr MULLINS:** I believe so. I will have to check my records but I can recall in a long and protracted inquiry a person who may be seeking some legal advice has made that application and upon payment, I understand, the transcript has been made available. But I will have to check my records. I have been reminded by the Chairman of Stewards that it does happen on fairly regular occasions and the stewards provide that transcript at cost.

**Mr NEBAUER:** During the process of inquiry, which may go on for four or five sittings, depending on requests for adjournments, if the person appearing before the stewards requests the inquiry to be adjourned for whatever reason and requests a copy of the transcript of the evidence so far taken, that transcript is available to the person subject to him paying for the transcript of the evidence. It does raise some problems where the person has said that it is unfair he should not have to bear the cost. They seem to think that Harness Racing New South Wales should carry the cost of having it transcribed. It is a regular occurrence in inquiries for a person to request a transcript so far and it is available so long as that person is prepared to meet the cost of having the evidence transcribed.

**The Hon. D. T. HARWIN:** I am not a lawyer so I declare that I have no interest in this question. Do not jump to any conclusions by the fact I am asking it. I am interested to know from Harness Racing New South Wales and from the stewards your view about having lawyers present in stewards' inquiries at the first instance as opposed to just before the tribunal?

**Mr MULLINS:** We do have a national Rule of Harness Racing which covers this particular matter. I would be only too happy to give that to Mr Beattie to photostat. It is rule 182. From the point of view of Harness Racing New South Wales, the rule is specific enough and can be made available to anyone who wants to make that application. As to attitude, I am not able to specifically answer that question. We abide by the rules.

**The Hon. D. T. HARWIN:** There is no provision to specifically authorise?

**Mr MULLINS:** No, it is not mandatory that it be done. It is a discretion. I think that is where you are coming from, is it not?

**The Hon. D. T. HARWIN:** That is right. If I could direct a question to the Chairman of Stewards, who I imagine would be just thrilled at the prospect of having lawyers involved in stewards inquiries! Could you give me your feelings on how often you are asked to permit legal representation, what your view is, and how you think legal representation would affect your processes?

**Mr NEBAUER:** As I commented earlier, it is not uncommon for a person to request legal representation. It does occur. That does raise difficulties with an inquiry proceeding smoothly if it involves a lot on legalistic argument. Mr Bottle was involved in a case that was virtually taken over by the solicitors and barristers in attendance. I, personally, would like to hand over to somebody else all responsibility for prosecuting, adjudicating on evidence and deciding whether a charge should be laid, then subsequently deciding whether a penalty should be imposed. But that is a matter for the controlling body, my employers, to consider.

**Mr MARSHALL:** Might I ask Mr Harwin a question through you, Madan Chair.

**ACTING-CHAIR:** Certainly.

**Mr MARSHALL:** Are you suggesting that legal representation might be compulsory?

**The Hon. D. T. HARWIN:** No, I am not suggesting it should be compulsory at all. I am seeking your views and responses.

**ACTING-CHAIR:** Obviously, that issue has been raised with the Committee by people who have concerns.

**The Hon. D. T. HARWIN:** I am sorry, I should have clarified that. That was one of the suggestions made in one of the submissions to the Committee. I thought I would put it to you to see what your response is.

**Mr NEBAUER:** Where legal representation is involved at an inquiry, be it a positive swab inquiry or running and handling inquiry, not only can the inquiry become extremely difficult because of the arguments put from each side of the table, but it can also become extremely expensive to the industry. Whatever costs Harness Racing New South Wales incurs must come out of industry funds. I believe you would appreciate that if an inquiry carries on over a number of sittings, that would be at an expense. I do not bear expense, nor does the board: the industry pays for it, and there are limited funds available.

**The Hon. D. T. HARWIN:** Mr Mullins, I am conscious of the fact that we will hear from you in camera on the nature of the review of various aspects of the appeals process, and I am conscious that the board has not made a decision in that regard yet. I am more interested in what preceded the decision of the board to actually have a look at the matter. Why did the board decide to have a look at it? Given that it is now only the beginning of the year 2001 and that there was a process of review of the regulation a matter of only 18 months ago by the department, why is it now taking the view that perhaps arrangements need to be looked at, and yet it did not raise that matter with the department during the staged repeal process?

**Mr MULLINS:** As I said earlier, I would have extreme difficulty mentioning the reasons in a public hearing, mainly because the board is in the process of still considering that matter and has not

made a decision on it. I would be much more comfortable if the Committee would give me leave to respond in camera.

**The Hon. D. T. HARWIN:** I am happy with that.

**Mr MULLINS:** I will be able to answer your question in camera.

**The Hon. D. T. HARWIN:** I was wondering whether the two were not connected. Obviously, there is a connection.

**ACTING-CHAIR:** It would be fine to speak to that in camera, Mr Mullins.

**Ms SALIBA:** Under regulation 30 of the appeals regulation either Harness Racing New South Wales or the tribunal may require a person to attend and produce documents. How often is this power exercised by either the tribunal or Harness Racing New South Wales? When I was reading through the judgment in the Trevor-Jones case I noticed that no mention was made of the power being exercised by either body. I might be wrong, but I gained the impression that the tribunal was leaving it up to the appellant to secure the co-operation of the testing laboratory to produce necessary documents. Could you enlighten me on that matter?

**Mr ENGLISH:** As far as I am aware, the Trevor-Jones case has not been before the appeals tribunal. I am aware that an appeal has been lodged. So, to a certain extent, it is difficult to discuss it because it is sub judice. I think what you are referring to is the stewards inquiry, which of course is not governed by the appeal regulations. Regulation 30 does not apply to a stewards inquiries.

**The Hon. D. T. HARWIN:** Given that I know nothing about racing, I wonder if someone could give me an understanding of the relationship between the harness racing clubs and Harness Racing New South Wales. For instance, Harold Park is run by the New South Wales Harness Racing Club. What is the relationship between those bodies?

**Mr MULLINS:** I know where you are coming from. Many people ask that question about our industry. The clubs themselves are autonomous bodies. We are the statutory body set up to control and regulate the sport and industry of harness racing, and we also have responsibility for commercial decisions. But, under the privatisation arrangements and the contracts set up, we have what we call an intracode agreement, which is a legal document, between Harness Racing New South Wales and the TAB clubs; and we also have an agreement, which is not a legal document, between Harness Racing New South Wales and our non-TAB clubs. The clubs are autonomous bodies, responsible for their own commercial destinies. We control and regulate through the provision of stewards and the handicapping of their race meetings.

**The Hon. D. T. HARWIN:** So you control the sport?

**Mr MULLINS:** Yes.

**The Hon. D. T. HARWIN:** But not the facilities?

**Mr MULLINS:** But not the facilities. The facilities—

**The Hon. D. T. HARWIN:** Harold Park, for example, is entirely autonomous?

**Mr MULLINS:** They are, absolutely.

**Mr MARTIN:** Could I return to the matter we discussed a little bit earlier and my questions to Mr English. I was referring to the statement that every effort will be taken to ensure that the regulations give the tribunal adequate flexibility to dismiss a case where the tribunal is satisfied that the appellant is not guilty of any wrongdoing and is therefore innocent. Say that the level of the substance in a horse was above the prescribed level, but the appeal judge said, "Well, you are the person charged, but in my opinion you did not do it." Currently, because that level is established in the stewards inquiry, the judge does not have the power to find the person not guilty. Is that right or wrong?

**Mr ENGLISH:** The difficulty you have got is that the trainer is not charged with doing it, as you say. The trainer is charged with being the person in charge of a horse that is presented to race other than drug-free. The trainer is not charged with administering the drug, supervising the administration of the drug, or knowing that the drug was administered. The trainer is charged with being the trainer of a horse that is presented for racing other than drug-free. So the trainer is guilty.

**ACTING-CHAIR:** Strict liability.

**Mr CALLAGHAN:** Absolute liability.

**Mr MARTIN:** So, irrespective of whether the appeal judge is convinced that the trainer did not do it, because of the way the regulations are, the judge must find the trainer guilty. I understand that now.

**Mr ENGLISH:** If the tribunal was convinced that the trainer was in Alaska at the relevant time and had left a reputable person in charge of his horses, and was totally convinced that the trainer had not given any instructions to a person to administer the drug, it would be open to the tribunal to give justice by not imposing a penalty. It is an absolute liability imposed by the rule.

**Mr MARTIN:** So there would be a finding of guilt on the person's record?

**Mr ENGLISH:** It must be an absolute liability rule, in my submission. If it is not an absolute liability rule, one cannot control drugs in racing. Given that it is an absolute liability rule, one offsets that by the penalties imposed, and the tribunal has total discretion as far as penalty.

**Mr MARTIN:** That has crystallised the position. I might have a problem with it, but I understand what you are saying.

**ACTING-CHAIR:** I have a few questions relevant to the regulations, and one of those follows on from a question asked by Ms Saliba, who raised a question about regulation 30. From what I understand, either Harness Racing New South Wales or the tribunal may require a person to attend and produce documents. How often is this power exercised by either the tribunal or Harness Racing New South Wales? I ask that question because I may have gained a mistaken impression—which you may be able to clarify—that the tribunal leaves it to the appellant to secure the co-operation of the testing laboratory and to produce necessary documents. I think that could create a difficulty. Could someone please clarify the position?

**Mr MULLINS:** I think those circumstances relate to an inquiry, rather than the appeal process.

**Mr ENGLISH:** These regulations apply to the tribunal. I think the circumstances you are describing relate to a stewards inquiry, and regulation 30 does not apply to a stewards inquiry.

**Mr NEBAUER:** That matter is the subject of an appeal.

**ACTING-CHAIR:** Do you not both have the power to issue summonses?

**Mr NEBAUER:** No.

**ACTING-CHAIR:** You have no power to issue a summons to anybody?

**Mr NEBAUER:** Only to the person licensed with the controlling body, be that a registered owner, trainer or driver.

**ACTING-CHAIR:** If a person wanted to challenge the integrity or some aspect of the testing procedure and wished to get that evidence before you, how does that then happen?

**Mr NEBAUER:** It is their prerogative and right to call whatever witnesses they choose.

**ACTING-CHAIR:** What if those witnesses do not attend?

**Mr NEBAUER:** If a person appearing before the stewards would like somebody to attend the inquiry, and the person will not answer the request, essentially that is where the matter lies.

**ACTING-CHAIR:** It is through you that the testing goes to specified laboratories. If the trainer wanted to question the testing, and the officials would not come to the inquiry, that would be the end of the story?

**Mr NEBAUER:** Madam Chair, I do not wish to be presumptive, but I would suggest that, in respect of the case from which this question arises, the person who was requested to be present was at the inquiry.

**ACTING-CHAIR:** I am asking this question myself, without knowing a particular case.

**Mr NEBAUER:** I believe it relates to the Chief Analyst of the Australian Racing Forensic Laboratory, and perhaps the question would be best answered by him. If it relates to a case that I am aware of, which is a case subject to appeal, when the matter was raised that particular person was at the inquiry and the question was put to that person, and he replied in a manner which he believed was suitable.

**ACTING-CHAIR:** Do you think that could be a matter that could be looked at further? I need this clarified for the purposes of the Committee, because it has not been clarified for me yet.

**Mr ENGLISH:** Could I attempt to clarify a little of what has been said?

**ACTING-CHAIR:** Yes.

**Mr ENGLISH:** The stewards do have the power under rule 187 to direct a person to attend an inquiry, and that person is subject to breach under the rules if he or she does not attend. The practical situation is if the stewards were to issue a direction to any of you people to attend, you could simply say, "I am not going to", because the only powers they have relate to harness racing and people interested in harness racing. If they directed a person associated with harness racing to attend an inquiry and that person failed to attend, they could take action under the rules. If they issued a direction to somebody totally independent and not interested in harness racing, they have no power to require that person to attend.

**Dr KERNOHAN:** Surely someone employed within the industry, say, by a testing laboratory, would be expected to turn up unless they had something to hide?

**Mr ENGLISH:** And always do, as far as I am aware. The only difficulty would be if a further request was made in relation to the production of material or documents that required some expenditure, the question of costs might arise, as it does with any subpoena process.

**ACTING-CHAIR:** I was referring to regulation 30, part 4, miscellaneous, of Harness Racing New South Wales Appeals Regulation 1999. That is the particular section I was referring to, and it says, "Harness Racing New South Wales or the tribunal may by written advice served on any person ..." et cetera—

**Mr ENGLISH:** I am sorry, I think in the context of an appeal it means Harness Racing New South Wales when it is hearing an appeal as Harness Racing New South Wales. To my knowledge we have never had an appeal to Harness Racing New South Wales, because it is limited to appeals from clubs. It is not a power in general for Harness Racing New South Wales to require people to deliver documents or appear. It is in the context of a regulation that deals with appeals, so if an appeal is made to Harness Racing New South Wales it has the same powers as the tribunal under that regulation to require documents to be produced, but we have never had an appeal to Harness Racing New South Wales.

**ACTING-CHAIR:** So, you cannot answer my question, how many times have you asked for documents to be produced?

**Mr ENGLISH:** I am not aware of anybody requiring production of documents under regulation 30.

**Mr MULLINS:** To the best of my recollection, I am not aware of it.

**ACTING-CHAIR:** Would you be able to give us further information in relation to that, perhaps later?

**Mr LOEWENTHALL:** We will consult with the tribunals and get the exact information for you.

**ACTING-CHAIR:** The Committee would appreciate that. The regulatory impact statement says, "The provisions of regulation 17 which set out the decisions from which an appeal lies to the tribunal were developed in close consultation with industry, the tribunal and Harness Racing New South Wales are generally accepted as appropriate." Can you advise the Committee of the range of other matters that the industry has sought to bring within the appeal provision? I have one matter that was the subject of a submission to the Committee that I will outline in the next question, so I will go on with the next question. The Committee received a submission that regulation 17 (1) of the appeal regulation should be amended to allow an appeal to the tribunal regarding the disqualification of a horse from a race. The appeal provisions cover only a permanent disqualification and one for a period of four weeks. The person making this submission says the amount at stake could range from $200 to $200,000 depending on the race, and that the incidence of such a disqualification was now more likely with the introduction of the marker pegs. It seems there have been frequent instances in the past six months of drivers being charged with going inside the pegs and that stewards are not infallible in this matter. Would anybody like to comment on that? It comes within appealable decisions.

**Mr LOEWENTHAL:** When the regulation was made I do not think that was necessarily an issue. The Minister has received representations on this matter from industry participants, or an industry participant. It is very much under consideration. As a result of the representations the Minister has requested that we review that matter. It is under review right now. We will make our recommendations back to the Minister in due course whether or not to amend the regulations, but ultimately, again, it will be his decision.

**ACTING-CHAIR:** I have one other question. It has to do with the $100 for the lodgment of an appeal. As you would be aware, government policy is that these should be set on a cost recovery principle, and it is one of the matters that the Regulation Review Committee looks at. How was that fee of $100 set for the lodgment of an appeal if it is on cost recovery?

**Mr LOEWENTHAL:** You would have to say this is not cost recovery. The original figure set was $50, and I think that may well have been carried over from the previous controlling authority. The whole basis of the appeal tribunal system was to make appeals readily accessible to all people within the harness racing industry. It was not necessarily seen as a cost recovery. As I indicated in the earlier statement, following discussions with the authority and the tribunal some years ago, when there was an excessive number of appeals that were causing a significant cost on the industry, people in the industry were concerned about the costs and therefore there is less prizemoney. It was looked at very closely then as to whether fees should be set higher. The decision was taken that we would only increase it from $50 to $100 to allow participants ready access to the tribunal.

**ACTING-CHAIR:** My last question is how would a person for practical purposes challenge the $TCO_2$ testing procedures, if they wished to demonstrate a material flaw? Is the prospect of doing so even realistic? The Committee, on a site visit to the Australian Forensic Laboratory at Randwick on 29 January, was advised that the owners or trainers do not receive a copy of the sample and it is very hard to argue against the results of the tests of two laboratories and worldwide standards. Should we be considering some sort of technical referee to oversight test results in contentious cases? It seems to me and to the Committee that it would be beyond the appellants to do so. Would anybody like to comment or respond to that question?

**Mr ENGLISH:** Certainly the $TCO_2$ readings have been challenged, and challenged successfully, on the basis of a flaw in the chain of custody, by producing evidence that the swab may have been contaminated in some way.

**ACTING-CHAIR:** So, circumstances surrounding the gaining of the swab?

**Mr ENGLISH:** The taking of the swab, the taking of the swab from—

**ACTING-CHAIR:** You cannot challenge the forensic or technical evidence, though, just the circumstances around it, like the human handling and things like that?

**Mr ENGLISH:** The only challenges I am aware of that I can give you examples of have been in relation to chain of custody and certainly testing procedures, not in relation to $TCO_2$, I believe, but in relation to a case where I think an appellant could show there was some contamination at the laboratory itself. That has certainly occurred.

**Ms SALIBA:** What about horses that produce a higher level? I was just reading from some submissions that one of the criticisms is the actual standard, the level of 35 millimols per litre. There was some criticism about the level. They are saying that there is an international level of 36 and there are also some comments about some horses having a higher level naturally. I am wondering whether that can be challenged.

**ACTING-CHAIR:** I do not think that can be challenged. That is not an issue.

**Mr ENGLISH:** In terms of legality, no, it is exactly the same as 0.05 is the limit for driving with alcohol in your blood in New South Wales. That is the law.

**ACTING-CHAIR:** That last question I asked, Mr Loewenthal, perhaps you could consider that question now or perhaps you could come back to us with some further consideration about that issue.

**Mr LOEWENTHAL:** Which question, I am sorry?

**ACTING-CHAIR:** The one about the challenge to the $TCO_2$ testing procedures. If they wished to demonstrate some material flaw or about some referee oversight. Would you like a copy of the question?

**Mr LOEWENTHAL:** I think I need a copy of the question?

**ACTING-CHAIR:** I will give you a copy of the question.

**Dr KERNOHAN:** My question was because somebody said disqualificat s of six months or 12 months for a trainer or owner do not happen in the thoroughbred racing industry - instead they get hefty fines, et cetera. Can I ask what is the background to the situation where people's livelihoods can be affected for a period of time on what may to them be unfair reasons, when another industry—similar but not the same, and I know they make their own rules—just has massive fines for larger misdemeanours?

**Mr NEBAUER:** Other racing codes do impose disqualifications.

**Dr KERNOHAN:** Not as much as harness racing, though.

**Mr LOEWENTHAL:** Probably the answer is that this is the current policy of Harness Racing New South Wales, to be completely drug free. We cannot comment on what another form of racing may or may not do.

**Dr KERNOHAN:** I was just asking what was the background of harness racing for doing this, when it affects the livelihood of the people who make up the industry and are the backbone of the industry?

**Mr ENGLISH:** I think probably the answer is that Harness Racing New South Wales take drugs extremely seriously.

**ACTING-CHAIR:** Before we break and thank you for your indulgence for going way over time—but it was very instructive for the Committee—Mr Mullins, would it be possible for you to come back at 2.20 and give your in-camera evidence?

**Mr MULLINS:** Yes.

**ACTING-CHAIR:** Then we will hear the other witnesses.

**Mr CALLAGHAN:** Before you break, one of the stewards has given me a copy of the judgment of Justice Young in the *Gleeson* case. This deals with the matter of legal representation and it sets out pretty clearly what stewards have to take into account in dealing with an application for legal representation.

**ACTING-CHAIR:** Are you seeking to table that?

**Mr CALLAGHAN:** I will table that stop

**Judgment tabled.**

**(Luncheon adjournment)**

**ACTING-CHAIR:** Mr Loewenthal will now provide the Committee with some advice in relation to one of the questions put to him earlier. The Committee will then ask Mr Loewenthal a further question, which he may prefer to take on notice.

**Mr LOEWENTHAL:** This morning the question was asked as to an interpretation of the legislation with regard to the rule-making power and the regulation-making power. We have had a brief look at the matter during the luncheon adjournment. It is not a matter on which I believe I am qualified to give an answer at this stage. However, we will seek urgent advice from the Crown Solicitor's office, either this afternoon or on Monday, and will report back to the Committee when we receive that advice.

**The Hon. D. T. HARWIN:** I apologise that this was not put to you before lunch. There has been discussion amongst Committee members about the adequacy of the regulatory impact statement. Under the Subordinate Legislation Act the RIS must address each of the substantive provisions of the regulation. The Committee feels that some were addressed well but others were not.

One of the observations made about the regulatory impact statement is that it was effectively a regulatory impact statement that could be made for any regulation in New South Wales. The most important reason for the Committee conducting this hearing is to take a case study of one particular agency, one particular regulation, to see how the staged repeal process in the Subordinate Legislation Act is working. Frankly, at face value, we do not think it was taken particular you seriously by the Department of Gaming and Racing in this particular instance. In order to make meaningful recommendations about how the Subordinate Legislation Act works, I feel that it is appropriate to ask you about the particular regulatory impact statement you made and some of the concerns we have.

**ACTING-CHAIR:** Would you like to take that question on notice?

**Mr LOEWENTHAL:** I will take it on notice. However, I can give an undertaking or guarantee to Committee members that it was taken seriously. The model we used for that regulatory impact statement is very similar to previous regulatory impact statements we have made in respect of a whole raft of other regulations, and, to the best of my knowledge, there has been no criticism of those.

**(The witnesses withdrew)**

**(Evidence of Mr Mullins and Mr English continued in camera)**

**(Public hearing resumed)**

**MICHAEL ANTHONY FORMOSA,** Unemployed, 38 Eighth Avenue, Toukley,

**LUKE ABBOTT,** Unemployed, 72 Bathampton Road, Wimbledon,

**GREGORY FREDERICK SARINA,** Unemployed, 34 West Road, Riverstone,

**PETER DOUGLAS TREVOR-JONES,** Disqualified Harness Racing-Trainer Driver, 334 Ryans Road, The Lagoon,

**GARRY ALAN ANDERSON,** Biometrician and Computer Support, 250 Princes Highway, Werribee,

**ANTHONY DALE TURNBULL,** Former Trainer-Driver and Farmer, The Lagoon, via Bathurst,

**BRENT JAMES STEWART,** Equine Veterinary Surgeon and Horse Trainer, 114 Bushy Grove, Canning Vale, Western Australia,

**JAMES STEPHEN WALSH,** Company Director, 122 Gow Street, Padstow, and

**STANLEY THOMAS BEAL,** Retired Solicitor, 24 Hancott Street, Ryde, sworn and examined:

**ACTING-CHAIR:** Mr Formosa, in what capacity are you appearing before the Committee?

**Mr FORMOSA:** I was asked to appear because a number of trainers and drivers have received disqualifications.

**ACTING-CHAIR:** So you are appearing as an interested person?

**Mr FORMOSA:** Yes.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr FORMOSA:** Yes.

**ACTING-CHAIR:** Mr Abbott, in what capacity are you appearing before the Committee?

**Mr ABBOTT:** I am just an interested party.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr ABBOTT:** Yes, I did.

**ACTING-CHAIR:** Mr Sarina, in what capacity are you appearing before the Committee?

**Mr SARINA:** I am an interested person.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr SARINA:** Yes.

**ACTING-CHAIR:** Mr Trevor-Jones, in what capacity are you appearing before the Committee?

**Mr TREVOR-JONES:** As an interested party.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr TREVOR-JONES:** Yes, I did.

**ACTING-CHAIR:** Mr Anderson, in what capacity are you appearing before the Committee?

**Mr ANDERSON:** As a biometrician.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr ANDERSON:** Yes, I did.

**ACTING-CHAIR:** Mr Turnbull, in what capacity are you appearing before the Committee?

**Mr TURNBULL:** As an interested party.

**ACTING-CHAIR:** Dr Stewart, in what capacity are you appearing before the Committee?

**Dr STEWART:** As an interested person.

**ACTING-CHAIR:** Mr Walsh, in what capacity are you appearing before the Committee?

**Mr WALSH:** As an interested observer.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr WALSH:** Yes.

**ACTING-CHAIR:** In what capacity are you appearing before the Committee?

**Mr BEAL:** I am appearing in my capacity as a retired solicitor with more than adequate experience before the tribunal I hope to make a contribution of reality, not hyperbole.

**ACTING-CHAIR:** Are you appearing as an interested person?

**Mr BEAL:** As an interested person, yes.

**ACTING-CHAIR:** Did you receive a summons issued under my hand to attend before this Committee?

**Mr BEAL:** Yes, I did.

**ACTING-CHAIR:** Have you all provided the Committee with a written submission?

**Mr SARINA:** No.

**ACTING-CHAIR:** So, with the exception of Mr Sarina, everyone has provided the Committee with a submission. Is it your wish that those submissions be included as part of your sworn evidence?

**ALL WITNESSES:** Yes.

**ACTING-CHAIR:** Do you wish to add or elaborate upon your submissions?

**ALL WITNESSES:** Yes.

**ACTING-CHAIR:** Mr Anderson, as a biometrician, can you advise the Committee of the ways in which you believe the integrity of the appeals process can be improved?

**Mr ANDERSON:** I think that the data that has been collected by the authorities in each State could be made available at a more reasonable cost. Existing data should be made available at a reasonable cost.

**ACTING-CHAIR:** Could you elaborate on your answer a bit? What do you mean when you refer to existing data?

**Mr ANDERSON:** For example, $TCO_2$ readings have been collected by each State. To obtain those over a reasonable period of time, like years, costs thousands of dollars.

**ACTING-CHAIR:** Who is obtaining that data?

**Mr ANDERSON:** The appellant.

**ACTING-CHAIR:** So if an appellant wants that material it costs a lot of money?

**Mr ANDERSON:** Yes.

**ACTING-CHAIR:** Would you give an idea of how much it might cost and how they use that information?

**Mr ANDERSON:** They could use it to establish whether or not the current level of $TCO_2$ is appropriate.

**ACTING-CHAIR:** Could you just explain that?

**Mr ANDERSON:** In the last two years in various laboratories in some States there has been a sudden increase in the mean $TCO_2$ level of pre-race means. This sudden increase is hard to explain, other than there being a change in laboratory practice. It seems that the significance of this increase has not been considered when we look at whether a $TC0_2$ level is above the current threshold and whether or not the person who has been charged is guilty. Some days there was a level of 35 under a certain standard. That standard has changed in some States. There has been a sudden increase. That has ramifications on the interpretation of that value of $TCO_2$—whether it has come from a horse that has been administered an alkalising agent or whether it is a natural level.

**Mr MARTIN:** I am not sure whether or not this comes within your expertise, but I refer to the different levels that apply for standardbreds and thoroughbreds. To the layman they are both horses, but is there any reason why you would set different levels for them because one is a thoroughbred and the other is a standardbred? Have you seen evidence to that effect?

**Mr ANDERSON:** No, I have not seen any evidence. It could have been presumed that thoroughbreds could race under a different regime—that is, the distance of the races could be different.

**Mr MARTIN:** Even assuming they are thoroughbreds?

**Mr ANDERSON:** I do not know. Administering an alkalising agent or increasing the $TCO_2$ may or may not alter the performance of that horse.

**ACTING-CHAIR:** I refer to your earlier answer. You said that in some States the reading has jumped. Does that come under the national rules? Do you mean that the level has actually been increased?

**Mr ANDERSON:** The mean level for horses that have been swabbed pre-race has increased.

**ACTING-CHAIR:** Who increased it?

**Mr ANDERSON:** The laboratory readings are reporting higher values, on average.

**ACTING-CHAIR:** So based on that, the mean increases?

**Mr ANDERSON:** Yes. In my submission there is a graph on the last page. That particular example is from Victoria. It is just that there has been a sudden increase, which has ramifications on the interpretation of a positive test.

**ACTING-CHAIR:** Has that sudden increase been explained to the industry?

**Mr ANDERSON:** There is one suggestion it has been because of a change in standards used by the laboratory. However, I do not know whether the sudden increase is due to a change at the laboratory or to, say, the majority of trainers within a two week or so period administering alkalising agents to increase this mean. It is one of the two: either laboratory methods have changed or a large proportion of trainers have instantaneously administered alkalising agents to increase the $TCO_2$.

**Mr MARTIN:** As to the change at the laboratory, when we were at Randwick last Monday the chief analyst explained that they had moved from Casco to ASE. The reason given was that Casco had become a bit unreliable. Do you understand the difference between Casco and ASE? Is it just moving from one company to another to supply the equipment or is it a different system? Should they still get the same result irrespective of who they use?

**Mr ANDERSON:** They would not necessarily get the same result. It could be a change, but it is the ramifications of that change that should be considered before that change is put into effect. You cannot have an increase in the mean level of horses without it having some detrimental effect on the interpretation of that test or a change in the interpretation.

**Mr MARTIN:** Could the fact that they changed from Casco to ASE be a reason for these elevated levels or is that not feasible?

**Mr ANDERSON:** Yes, it could be a reason. There may be other reasons too. It is the fact that it has changed.

**Mr R. W. TURNER:** Mr Anderson, you talk about this dramatic increase in the number of levels over 35.

**Mr ANDERSON:** No, I did not say that.

**Mr R. W. TURNER:** The number of increased incidence or cases of disqualification.

**Mr ANDERSON:** No, I said that the pre-race mean had increased.

**Mr R. W. TURNER:** Has that not led to an increased number of people being disqualified at the same time?

**Mr ANDERSON:** In some States it may have, in other States it may not have.

**Mr R. W. TURNER:** Do you have any idea of the number of trainers who have been disqualified compared to, say, two or three years ago? How dramatic has the increase been?

**Mr ANDERSON:** I do not know the numbers on how it has changed, the incidence of trainers being charged since the change.

**Mr R. W. TURNER:** Would anyone else know?

**Dr STEWART:** I do not have that with me in written form but there certainly has been a dramatic increase in Western Australia and South Australia. I would like to leave it at that at the moment in regard to the other States. It appears it has also occurred in New South Wales.

**The Hon. M. I. JONES:** Could someone tell me when this change took place?

**Mr ANDERSON:** It varies between States.

**The Hon. M. I. JONES:** You are from Victoria. When did it take place in Victoria?

**Mr ANDERSON:** In Victoria there was a change, as I said in my submission, around about the beginning of May 1998.

**The Hon. M. I. JONES:** Does anyone else have any dates similar in other States?

**Dr STEWART:** Western Australia was about the same time and I have also backed up Mr Anderson's figures in Victoria in my submission.

**Mr TREVOR-JONES:** In New South Wales I wrote to the Australian Racing Forensic Laboratory asking for this information when they introduced ASE. I got a letter back saying it was introduced over a six-month period between June 1998 and December 1998. I said surely there must have been a time when they ceased using Casco and started using ASE. They said they phased them in simultaneously doing a comparison because, as Mr Martin said, Casco was not performing as well as they hoped so they put ASE in hoping it would be more accurate. I asked for that information from the Australian Racing Forensic Laboratory which I was told was required and I kept being denied it. This Verichem control data we feel will show that this increase is attributed to the change to ASE, but they continue to refuse to give this information.

I took Dr David Snow with me, who runs a lab at Macquarie university. I was guided by him; he was costing me $180 an hour. He said I need this Verichem control data, so I requested it too and they said no. The stewards would not subpoena the information. They said "No, if they said you cannot have it, you cannot have it." The immediate reaction is: What are they hiding? He tells me that this Verichem control data will show this change from Casco to ASE has caused an increase. Statistically people like Gary are proving that, yet it is continually being ignored. When we require information to show it categorically, we are denied the information. We are trying to show, as you said before, that there is a material flaw in the process leading to the finding of a positive substance. That is our only hope of getting out of it. Yet we are constantly denied all this information. How fair is that?

**ACTING-CHAIR:** Mr Anderson, you have given us a comprehensive submission. Is there anything else you would like to add?

**Mr ANDERSON:** Not at this point.

**ACTING-CHAIR:** Dr Stewart, would you like to make some comments to your submission? Is there anything you want to add?

**Dr STEWART:** Given my experience in various harness racing inquiries in several States over the last couple of years, I would like to pass some general comments, although my particular interest is in $TCO_2$. I have directed the general comments knowing where this inquiry is coming from and where this Committee is headed. I would like to read it onto the record.

**ACTING-CHAIR:** Please proceed.

**Dr STEWART:** I have been involved with numerous harness racing $TCO_2$ inquiries in many States within the past two years. I do not hold a standardbred trainer's licence. I am an equine veterinarian.

**ACTING-CHAIR:** Would you keep your voice up, please?

**Dr STEWART:** I do hold a thoroughbred trainer's licence. I pass the following comments on a system I perceive to contravene the principles of natural justice and civil rights, even basic human rights, a system resulting in both innocent individuals suffering draconian penalties and the destruction of the harness racing industry. The stewards are the prosecutors and the decision makers. They simply change hats to assess their own case. This appears to be less of a problem in thoroughbred jurisdictions. Harness racing stewards do not have the background to weigh the merits of scientific evidence. They blindly apply rules. They appear to justify their guilty determinations in the absence of credible evidence of wrongdoing by relying on advisers with obvious vested interests and selectively ignoring independent experts and contrary evidence.

**ACTING-CHAIR:** I note that Mr Walsh will read Dr Stewart's paper.

**Mr WALSH:** I will read Dr Stewart's submission: Harness racing stewards will not concede they would benefit from independent expertise. Cases in point: The Harness Racing Victoria [HRV] stewards were implored to have present an independent scientific adviser in the Shinn $TCO_2$ case, someone capable of evaluating the merits of the evidence presented by myself, Dr Vine, Dr Pedler, Professor Clarke, et cetera. They refused to do so. The WATA stewards were requested to obtain the advice of independent scientific experts in the Humphries, Olivieri and Nolan $TCO_2$ cases. The stewards elected not to do so. Thus in the absence of any real understanding of the facts they found guilt—and wrongdoing in the cases of Humphries and Olivieri—and imposed penalty, albeit penalty according to the rules.

Harness racing advisers may be less than forthright with the stewards. Mr Reilley, ARFL, did not give forthright answers to questions relating to the problems with the Casco standards in the S. Hunter inquiry. In my view this amounted to obstruction of contrary evidence. It could be said harness racing stewards may be less than open. In the R. Butt case with Harness Racing New South Wales the violate $TCO_2$ horse was secured for 48 hours—at Mr Butt's cost—on the understanding that several on course $TCO_2$ tests would follow. I confirmed that this would happen during the period of security with a senior steward, Mr Ron Bottle. Yet despite this confirmation, the agreed protocol was not followed. This could also be seen as evidence of obstruction of discovery of contrary evidence.

It could be said the stewards selectively misinterpreted data and advice in an attempt to manufacture confirmatory evidence of wrongdoing, yet oppose the discovery of contrary evidence. Contrary evidence is mostly dismissed as unreliable. For example, reliance on the $TCO_2$ Classy Colt whilst incarcerated, yet rejecting the evidence whilst Classy Colt, Kyalla Special and Ryan's Day were secured by means and methods determined as appropriate by the stewards. The harness racing stewards are easily perceived to be biased: Wayne Sullivan's comments to K. Rosher after he tore up and returned a courtesy copy of a critique of the New Zealand survey prepared by her husband, "Don't send me any more of this rubbish"; various comments from Mr Denny along the lines that he knows what trainers got up to, he was one, and inferring that Mr Humphries got the recipe wrong; and then there is Mr Delaney inferring prevalence of pre-administration was high based on $TCO_2$ values greater than 32! and scuttlebut.

The rule makers also have a lot to answer for. Some rules have been written that can clearly be broken in the absence of wrongdoing—$TCO_2$, morphine, bufoteine. Yet the rules deem wrongdoing, disallow reasonable defences and result in the innocent trainers wearing the indelible brand "drug cheat". I often need to remind myself the harness racing stewards may have their hands tied by indefensible rules and vocational pressures. The obvious solution to the above problems are: one, to review the rules allowing appropriate challenge; and, two, for the stewards to act as prosecutors before an independent arbitration panel, with the power to call on independent experts, in all cases whereby the finding or penalty is significant.

As to matters specifically relating to $TCO_2$, it is doubtful if it was ever open to the HRBNSW, WATA or AHRC, et cetera, to set a zero tolerance threshold of 35 mmol per litre. Professor Rose opposed this threshold in letters to the New South Wales Harness Racing Board. Retrospectively frequentist surveys based on stable data—not pre-race data, thus unlikely to be representative—have been used to justify the $TCO_2$ rules. This retrospective defence does not stand independent scrutiny because, firstly, $TCO_2$ is a dependent variable, not tightly controlled and thus a distribution is expected to be leptokurtic and cannot be assumed to be gaussian, or to be the same as in the at rest stable situation. Secondly, it is not important how frequent an exceedence is predicted to

occur. It is imperative to know what an exceedence means—what the positive predictive value is—before branding a trainer as a cheat.

In any absence of matrix matched standards—in fact, any gold standard—accuracy is likely to be poorly controlled. The $TCO_2$ threshold is variable. An increment in analytic bias of 1.2 mmol per litre can be clearly shown at RASL, and RCL, in May 1998. The Rahaley correction factors introduced, and then abandoned, in South Australia reflect the poor control of accuracy and the failure to adopt laboratories best practice. In summary, the exceedence of any arbitrary yet reasonable threshold will result in overages in the absence of administration wrongdoing. The question is not there will be innocent overages but what proportion of all overages are likely to be innocent overages. Once the prevalence of administration has decreased the proportion of all positives that are likely to be due to administration—that is, wrongdoing—is likely to be very low. The proportion of all overages that were likely to be innocent overages was estimated at less than 50 per cent by Pedler—that is, independent consultant statistician to WATA—advice ignored by the stewards and administrators alike. Despite this fact, and a great deal of contrary evidence to administration, trainers are indelibly branded as cheats. In essence, an overage cannot be declared as a guilty overage in the absence of supporting evidence. In the presence of contrary evidence an overage is likely to be an innocent overage.

**ACTING-CHAIR:** Dr Stewart, I appreciate that you are not a steward but obviously you would know something about the processes involved. How would the stewards become informed on scientific evidence? Do they have a scientific advisory panel?

**Dr STEWART:** They are advised. Generally speaking, the advisers are very careful. The advisers have a vested interest. Most of their advisers come from the laboratories, though not all of them.

**ACTING-CHAIR:** The laboratories that do the testing?

**Dr STEWART:** From the laboratories that do the testing, yes. Therefore, those advisers are at least perceived to have a vested interest. The other comment that I would make about stewards taking information from advisers as being gospel is that, over a number of years, the stewards have established a position that various trainers have been deemed guilty, or it has been found that there has been an administration of a substance, and that has become the stewards' position. It is very difficult for the advisers to then change their on-record position. Those people essentially advise the stewards. I do not perceive that to be as big a problem as the fact that, in something as complex as $TCO_2$, the stewards generally do not have the background to understand the evidence. That is an enormous problem. It is all right if the issue is clear-cut, if it is black and white, but we are dealing with a strict liability rule and some very cloudy evidence. If the evidence cannot be understood, the whole system falls down. I think that is why all these trainers are here today.

**Mr MARTIN:** Dr Stewart, Committee members asked questions at the Australian Racing Forensic Laboratory on Monday. Obviously, the officials did not want to be drawn on the questions and express an opinion. However, information given to us was that the difference between setting a threshold of 36 as against 35, for instance, is that at the level of 36 the risk factor was 1 in 600,000 whereas at 35 it is 1 in 13,000. That would indicate that getting this right is crucial, given that the figures really blow out if the level is not set correctly. Do you think that is fair comment?

**Dr STEWART:** No, I do not think it is fair at all. It is based on a number of assumptions. Firstly, the data is based on stable data, on samples taken from horses mid afternoon in their stables. They have taken a number of samples, those have been analysed, and they have come up with some results. Secondly, the assumption is that the distribution is gaussian, that it is a completely normal distribution. I do not think either of those assumptions is entitled to be made when you are playing with people's livelihoods.

This really is a very simple issue. Any time you have an endogenous substance, you cannot set a threshold and not expect innocent overages. The question always comes back to: What proportion of overages are innocent overages? You cannot, in my view, convict someone unless you have some sort of supporting evidence. It does not really matter what calculations you can do on stable data. They are helpful and will give you a guideline. Earlier, I think it was Mr Martin who

spoke about the difference between thoroughbred and standard levels. My answer to that question would have been that they are both arbitrary. They are different. So what? They are both arbitrary. It is no harder than that.

**ACTING-CHAIR:** Do you put anything in your oral or written evidence on what you think would be a fair and scientific approach?

**Dr STEWART:** In my view, the 35 level is supportable, provided there is ancillary evidence of wrongdoing.

**ACTING-CHAIR:** Could you give an example?

**Dr STEWART:** Other tests, someone saw the horse being tubed, or something like that. The problem is that that evidence, under the current system, is not available in most cases. But you can do other tests on the horse at the time. I do support the 35 level. In the absence of that, I think you will have problems with trainers titrating. If you have a level of 37 or 38, I think you will have trainers titrating up to that level. I do believe that is the reality, more so in thoroughbreds than in standardbreds.

My personal view is that that means targeted post-race testing. I am not sure where the horses of the trainers here finished, but neither the stewards nor anyone else had any interest in where their horses ran. That certainly is the case in Western Australia. The horses were starting at long prices and performing as expected, which was poorly. Those horses would never have been tested, and unless they test they cannot get false positives. If you are going to do a post-race test, even if there is room for error in your test, if you have the horse in front of you at the time there are a number of other test that you can do which may support administration. That will then leave you with very good evidence of administration, or it may leave you with the absence of evidence of administration. In my view, in the absence of evidence of administration, trainers should not be penalised. It is not good enough to have just the results of a single threshold test on an endogenous substance to penalise a trainer.

**The Hon. M. I. JONES:** Could you enlighten us on what the form of these other tests might be?

**Dr STEWART:** I believe there is a veterinarian on the Committee. Is that correct?

**Dr KERNOHAN:** No, not true.

**Dr STEWART:** One of those tests could be—and it could be adopted even at country tracks—to take a blood sample at the same time as taking the urine sample. Then you could get a whole bunch of fractional excretions. The alkalising agent must go in with a positive ion as well. You can get a bunch of fractional excretions with positive ions. For examples, if the fractional excretion of say sodium was very high—in other words, the horse was trying very hard to get rid of sodium at the time of the test sample being taken—you would have very good evidence of the administration of a sodium-based alkalising agent. This is not only with sodium: you can do it with any of the other ions, with potassium or whatever you like. I was just using sodium as an example.

Another test that particularly interests me is analysis of blood gases. But the practicality of doing blood gases at some country venues is not good, and you might miss out on some information there. Blood gases seem to be able to show that there possibly has not been an administration. We have a case in point in Western Australia of an entirely normal pH and yet the $TCO_2$ level was something in the order of 37. The entirely normal pH means to say that if the trainer did alkalise the horse he was not successful. The less strict way of looking at that is that this horse was not alkalised. So it can actually provide very useful evidence in a trainer's defence. But, even in the absence of blood gases, I think fractional excretions could be very useful. It is just not a black and white test. You cannot have a test like that on an endogenous substance on which a threshold level is set.

**The Hon. M. I. JONES:** The differential between a $TCO_2$ test and a pH test, in the example you have used, can be quite different, thereby demonstrating that alkalising of the horse has not taken place.

**Dr STEWART:** That is correct.

**The Hon. M. I. JONES:** Is it fair for me to assume that the intended alkalising of the horse has not taken place?

**Dr STEWART:** Yes. That is why I put it in the framework of saying that if your pH is normal, even if the horse had been alkalised, it was not successful.

**The Hon. M. I. JONES:** What if the pH had gone up?

**Dr STEWART:** If the pH had gone up, the alkalisation might have been successful, and that would be supportive evidence of administration.

**The Hon. M. I. JONES:** For the prosecution?

**Dr STEWART:** Yes. That would be supportive evidence of administration. But, because it is a similar batch of tests, it is not as good as having also a sodium test. It is more evidence for the defence to put: My pH is normal, my $TCO_2$ was high, and therefore the horse was not alkalised or, at the very least, the alkalinisation was not successful.

**The Hon. M. I. JONES:** PH testing is inexpensive, is that right?

**Dr STEWART:** Not really, no. It is difficult, and it has to be done fairly soon after the sample is taken.

**The Hon. M. I. JONES:** Would it be reasonable to make samples for pH testing available at the time of the swab at the trainer or owner's expense, and for that to be analysed at an independent laboratory each time there is a swab? I realise now that that would be expensive for the individuals, but would that be (a) pragmatic and (b) feasible?

**Dr STEWART:** I think it is practical that, if you are going to do $TCO_2$ testing, and if you are going to have targeted post-race testing, you can pick what horses you choose, which is very much what the stewards to at the moment. They pick the winners, and they may pick a few other horses. If a $TCO_2$ sample that is taken happens to exceed the threshold, then the other analyses could be done. It is very little extra work. The complication comes in with the blood gas and storage, as well as the precision and accuracy of the blood gas machine that will be used. It could be useful only for the trainer, if there is a local hospital. I do not see any reason why the sample could not be sent to the local hospital. But it would be the trainer trying to obtain evidence.

**The Hon. M. I. JONES:** It would have to be maintained in a secure form.

**Dr STEWART:** Yes. That is why I am so strong about urine. I do not have a problem with doing blood gas, which is where you get your pH from, on city tracks. The problem arises at country tracks where there is no access to a blood gas machine.

**ACTING-CHAIR:** Before adjourning, I would like to hear from one of the trainers. Mr Turnbull, would you like to start by outlining, from your experiences, the strengths and weaknesses of the current regulatory controls governing harness racing appeals? I will ask the same question of each of the other trainers.

**Mr TURNBULL:** The only thing that I think is wrong is this $TCO_2$ business.

**ACTING-CHAIR:** What do you think is wrong with it?

**Mr TURNBULL:** I have been training horses for 53 years, training winners right throughout. I have trained winners in Western Australia and every either State in Australia except the Northern Territory, as well as in New Zealand. My horses have been blooded and swabbed in all of those places, where necessary, and I have never had one that looked like having any drugs in it whatsoever. I sent two horse to the Forbes trots. I had two horses in the race. One horse could beat the

other every time they met, and my son drove it, and it won and the other horse ran second. The one that won had a high $TCO_2$ reading.

At that particular time I had injuries from an accident at Parkes. I had a broken shoulder and hand, along with a few bruises and everything else. I had my arm in a sling, and it was impossible for me to treat the horse. I can guarantee that none of the people who work for me treated the horse. So the horse never had any treatment whatsoever. I was disqualified for nine months over it. I appealed to Judge Thorley, who said, after considering all the evidence, that I was not guilty, more or less, but owing to rule 190(1) if your horse has 35 or over you are out and that is it, you have just got to stay out, even if you are not guilty, more or less. All my family is in trotting. Five of my children have been successful, plus four of my grandchildren, and here I am disqualified.

**ACTING-CHAIR:** Does the law seem odd to you, if you can have a judge say you are not guilty, yet you suffer a penalty?

**Mr TURNBULL:** It does not seem real fair to me or to anyone else I have spoken to. I mean to say, the rules says if the horse is over, you are out, irrespective of how it got there.

**ACTING-CHAIR:** That is the strict liability that we have heard about.

**Mr TURNBULL:** The rules says you are out if you are over 35, and out I go, after 53 years of being in the business.

**ACTING-CHAIR:** I think we all heard evidence earlier when they were talking about how the strict liability issue arose but you did not have to suffer a penalty?

**Mr WALSH:** Can I have a word there? You were referring that question to Dennis English and Mr English responded that the rules were absolute and not strict.

**ACTING-CHAIR:** But then he gave an exception.

**Mr WALSH:** Yes. He said under the absolute rules you will get convicted but the penalty maybe zero if in the opinion of the tribunal you are innocent. In my view this is a long way short of an adequate standard of proof. Tony's case perfectly illustrates the problems. Hunt CJ—that is a Supreme Court judge—in a recent case said a very relevant thing, and I have paraphrased it. He said an absolute liability will not assist in preventing the presentation of a horse with drugs in its system where the trainer honestly believes upon reasonable grounds that it is drug free. All that the imposition of such a liability will do is obtain convictions for conduct which is manifestly not unlawful in nature by any recognised standards of justice.

I think Mr Turnbull's case illustrates that perfectly. We have a system in harness racing where innocent ople can be and are convicted, and I do not think anybody disputes that. They will dispute the definition of "innocence". Those who hold for absolute liability say the horse has drugs in its system equals guilt. Those who hold for strict liability, in other words guilty intent or where it must be proved that the trainer did something, will hold that it is not just. We have to get very clearly in our minds where absolute liability leads, and I have something to say on this but it will take a while and if you do not want me to go into it now I will stop.

**The Hon. M. I. JONES:** Mr Walsh just made the comment that if the horse has drugs in its system you are guilty. It is not even that, is it? It is just that the $TCO_2$ level is higher than a certain amount. It is not saying there are drugs in its system.

**Mr WALSH:** Yes, the $TCO_2$ level is accepted as evidence of the a drug in the system. Proof actually, not just there is a drug in the system. The drug rules say that any substance exogenous to the horse in its system is in breach of the rules. If the authorities cared to test widely enough and at a low enough level, every horse presented for every race throughout the entire world would be in breach of that rule, because all horses and all humans have exogenous substances in their bodies. All of us at this table have caesium-137 in our bodies as a result of the nuclear tests in the 1950s. Does that mean we have taken drugs? I do not think so, yet we would all be guilty under such a rule.

**Mr MARTIN:** Mr Turnbull, in relation to the system of going before the stewards and then on to the appeal, are you happy that the system is okay, except in this case where you got outed for different reasons, but the actual process of how the stewards take the evidence, conduct the process and then the appeal, are you comfortable with that or would you rather see some changes to a more open, fair system?

**Mr TURNBULL:** As I have said, I have been in the stewards rooms plenty of times and you always reckon they are wrong even if they might be right—but this particular $TCO_2$ business, they have a Dr Suann from the laboratory there to give the evidence. Any question you ask the stewards, they ask him and then he looks in the book and reads it out. If he is an expert, he should know what he is talking about without having to go to the book and read out the answers. If you get him cornered, Dr Suann, he just changes the subject to something else, which I do not think is very fair when you are dealing with a man's reputation.

**Mr BEAL:** At this point I would like to contribute something that might clarify or even make manifestly clear how the injustice Mr Turnbull is suffering comes about. Fundamentally it comes about because the judges in the appeal tribunals—and I have been before three of them with various cases—cling to the concept that in relation to $TCO_2$ liability is absolute and not strict. Although you can argue until you run out of voice before them, it avails nothing, because in one particular case—the learned justice has gone to his maker now but nevertheless the case is relevant—I was acting for a client before this particular judge and I had evidence of tests in New Zealand, conducted under stewards' supervision, that showed that they were not satisfied that there could be a natural variation, an increase, in the $TCO_2$ level of a horse. They did not believe it.

Therefore, the trainer, who was going down the shute anyway, said, "You people are so certain, let us do some trials." They impounded the horse for days and tested and tested it. They were all on the legal limit. Then they put the horse into a closed float, which was what he said could cause this increase by arrival at the track and then they monitored that. They had a vehicle trail it and it was all done with maximum security. When the horse got to the other end they tested it and its $TCO_2$ level went up not one but five points. I brought that to the notice of the learned judge and he said, "Mr Beal, don't waste my time. That is irrelevant." I said, "Why?" He said, "Because you have not yet understood that this is absolute liability." I said, "Where is that in the law?" He said, "I am telling you it is absolute and that is enough for you." I said, "I am sorry, it is not."

**ACTING-CHAIR:** Where is it in the law?

**Mr BEAL:** It is not in the law. But here is the interesting thing, this concept of absolute or strict liability—and I have a stack of cases at home now and I went through them all—but in this situation for strict or absolute liability has recently been examined by a very high and reputable court in this land, none other than the Court of Appeal of New South Wales presided over by our Chief Justice. He makes this point in the case of *Hill v Green* 48 New South Wales Law Reports 1999 that if strict liability is not expressly excluded by the legislation or the delegated legislation, it can and should be applied. He said that if it is contended that strict liability cannot be applied, you have to go to the legislation and find the express wording of plain intent. It is not there. So now, at this late hour—it was a decade ago that I had this wrestle with the learned judge who has gone to his maker—light is starting to come through the darkness, and people are recognising that these judges are sending not only Tony Turnbull but stacks of them down the road of despair, people whose livelihoods have just been snatched away because, they say, the level is over the permitted one and therefore under absolute liability they must convict. That is demonstrably wrong and it has been wrong for years.

**ACTING-CHAIR:** Mr Beal, where is it expressly excluded, the strict liability? Is strict liability expressly excluded in the regulations?

**Mr BEAL:** You do not have to worry about it unless strict liability is expressly excluded. But you can get legislation that provides that for the purposes of and for the interpretation of this section absolute liability shall apply. If that is there, you are gone, but that is not in and has not been in the rules of harness racing. These learned icons that have been trampling around the scene here for years will not get flexibility in their minds enough to concede it is not absolute liability. The second-last one I had was another situation where the judge simplified the case and said, "Mr Beal, this is absolute liability."—the same glaring inaccuracy and error perpetuated.

**ACTING-CHAIR:** Was this after the Court of Appeal case or before it?

**Mr BEAL:** No this was before the Court of Appeal case. I am hoping that that Court of Appeal decision will ring in the ears of that raft of people who came here today. I am sorry they are not here now, because I have trucked with them for a long time, they are my sparring partners. What I am concerned about—and I am favourably impressed with what has been happening here—is that now people are starting to realise that licensed people under our harness racing rules are human. They are entitled to basic human rights and they are entitled to a proper deal, and they are not getting it.

**(Short adjournment)**

**ACTING-CHAIR:** I am aware that Mr Beal wishes to table certain documents and recommendations and that Mr Walsh wishes to make some comments. I would like to ask one of the other trainers the question I asked Mr Turnbull. Mr Trevor-Jones, would you like to outline to the Committee, from your experiences, the strengths and weaknesses of the current regulations governing harness racing appeals, and make any comments that you would like the Committee to hear?

**Mr TREVOR-JONES:** I had a solicitor, Greg Harris, helping me along the way. He is very good. He is an owner and is quite passionate about the industry, and he has been very helpful to me. I wanted to take him along with me. Earlier today they said that we are able to take legal advice. I asked if I could have a solicitor and was told that I could not.

**ACTING-CHAIR:** When did you ask?

**Mr TREVOR-JONES:** They say there must be extreme circumstances. I do not know what I had to do to constitute extreme circumstances. Maybe I did not push it. I just thought, "Oh well, everyone said that was the standard procedure, that you cannot take a solicitor in." I actually had him outside the room. Maybe if I had pushed on with it, if I had known there was a clause saying that they did have the power to let him in—but, as you said, they would have to bring their solicitor in and it all becomes very expensive. It hurts me when they start bringing costs into it when they are taking my livelihood off me; they have destroyed me.

They are saying, "We haven't got the money to take you in." It is like saying they have not got the money to do these tests that Mr Stewart was talking about. I have spoken to people, and they have said in America they do these other tests that Mr Stewart was talking about, which are more definite than we have done. They say they cannot afford this. But we are dealing with people's livelihoods in such a big call; surely costs should not be coming into it. If there is a test available that can absolutely say we have not done it, it should be done. This drug testing is all about protecting the punter. The way the present system is, you could load your horse up, he can race, and, as we spoke about before, the bets are collected.

**ACTING-CHAIR:** The bets are not affected by the outcome.

**Mr TREVOR-JONES:** No. So you could load your horse up. Really, it should be pre-race blood testing. That test should be done. As it is now, your horse can go around loaded up. As you said, cost-wise they cannot do all the pre-race testing. I realise it cannot be done, but ideally it should be that way.

**ACTING-CHAIR:** When you say you asked for your solicitor, was that at the hearing or the appeal?

**Mr TREVOR-JONES:** Do not quote me. A lot of friends have been in there before. It was just word of mouth. Everyone said, "You can't take a solicitor with you to your inquiry."

**ACTING-CHAIR:** So once you heard that, you did not ask?

**Mr TREVOR-JONES:** No. I certainly had his advice. I took Dr David Snow with me. He runs the laboratory at Macquarie University and he is very passionate about this, as is Charlie Stewart. They have been very helpful to us and they understand it all. He was the one who said to me that I

needed that Verichem control data, and that is why I requested that, but then I was denied it. They say they have not got the power to subpoena that information. That side of it seems unfair.

I sent a request to be Australian Harness Racing Council asking for a summary of the data that they used to establish a level of 35. In the early 1990s, I think it was, it was 37, then they lowered it to 35. I asked for a summary of the data that they used, and I got a letter back saying that it was commercial minutes in confidence. Then I sent a letter to the Australian Racing Forensic Laboratory asking for the Verichem control results, and the reply was, "For various reasons, we cannot accede to your request." They are not very good answers, are they, but we have to accept them? I have all of this material in my briefcase; I have things to back up what I am saying. As I have said, I am only a horse trainer, and I am only being guided by an expert who is saying that I need this information. Noel Shinn, in Victoria, has been trying to get this Verichem control data. They quoted him $440 an hour to retrieve the information.

**Dr STEWART:** A total of $40,000.

**Mr TREVOR-JONES:** They told me I could not have it. On my understanding of it—and I am not an expert—it will show this upward drift from the Casco to the ASE, and they reckon it will assist our experts to show that. Whether it will or will not, we do not know, but we will not know if we do not get it.

I flew a guy across from South Australia. He runs a laboratory at Lindsay Park. He has been in the industry for 28 years, and he used bell graphs and everything to show statistically that since the introduction of the ASE the mean $TCO_2$ has gone up around 2mmol. In New South Wales it might have been 1.3, but there had been an increase. He showed statistics on bell graphs that illustrate why industry people like us are being caught up in this system. Once again, the level of 35 is beyond our control. The bottom line is you broke the rule, and yet they let us go to all the expense of paying expert witnesses $180 and hour, flying a guy across from South Australia, and then just ignoring it. Mr Sarina's case is fantastic. He has paid $3,400 to have his horse impounded under the stewards' care with security guards there, and on the fourth day they came and tested his horse. It went up to 36.9. They went there, saw what the horse was fed and what was happening to that horse. He went to his inquiry with a barrister, spent thousands and thousands of dollars, and after Pat Saidi, the barrister, explained the situation and put forward a fantastic case, Mr English just jumped up and in a two-minute sentence said, "Your Honour, the bottom line is the rule is 35. All of that is irrelevant." You could bring the Pope, it would not matter.

**ACTING-CHAIR:** When the rule changed to set it at 35, were you notified that that had changed and why?

**Mr SARINA:** They notified that they dropped it from 37 to 35.

**Mr TREVOR-JONES:** That was back in 1993.

**Mr MARTIN:** 1994.

**Mr SARINA:** But they did not notify the change of the system.

**Mr TREVOR-JONES:** You are talking about lowering it from 37 to 35?

**ACTING-CHAIR:** Yes.

**Mr TREVOR-JONES:** I think that was publicised. They sent me a letter called "$TCO_2$ Questions and Answers", but it was just a great sidestep of the issue. I might be corrected, but I think the reason they dropped it from 37 to 35 was that they found alkalising agents were camouflaging more sinister performance-enhancing drugs. It was commonly called a milkshake because of that reason. They got a bucket of sodium bicarb that grandma uses and whacked a few handfuls in the bucket, but they threw other things in with it and found that these were being camouflaged. Their testing procedures were unable to detect those other things. So they thought, "We'll fix them. We'll drop the level to 35."

**ACTING-CHAIR:** Did that then pick up what was camouflaged?

**Mr SARINA:** No, it still did not pick up other things.

**Mr TREVOR-JONES:** But from my understanding, they did not then look into the fact—

**Mr SARINA:** They only did that to stop them using the bicarb. That is the only reason they dropped the level.

**Mr TREVOR-JONES:** They dropped it to 35, but from my understanding, at that stage when they did that, they did not realise that a horse can naturally have that level. I am not an expert, but Mr Stewart and David Snow and people like that would probably be more aware of that issue.

**Mr MARTIN:** What you are saying is that it does not matter that you have legal advice or how good your evidence is or how well you present it, they have that absolute value. In trying to get any sort of justice, it does not matter how good you are or how compelling your case is, they stick with this absolute level.

**Mr BEAL:** It is mandatory sentencing.

**Mr TREVOR-JONES:** I have a letter from Sir Walter Kendall, Chairman of the Senate at Oxford University, saying that testing in Australia is unjust. It would not matter who you got evidence from.

**Mr BEAL:** If God walked in, those judges on the appeals tribunal would not take any notice. They would not recognise him.

**Mr TREVOR-JONES:** I do not know whether this has been brought up, but the leading trainer-driver in New South Wales recently was charged under this very same rule 190/1 for producing a horse at the races with a prohibited substance. His name is Darren Hancock and the substance was bufotemine. It is a prohibited substance. He was charged and found guilty and then he produced evidence from an agronomist, who would not have the qualifications of the people we have supporting us, that said, "This horse consuming phalaris grass could lead to this." Our veterinary advice is that it would have to eat a complete paddock of all of this stuff to produce this level. This guy trains 30, 40, 50 horses. None of his other horses ate phalaris grass, only this one horse which went and ate out the whole paddock.

**ACTING-CHAIR:** What was the outcome?

**Mr TREVOR-JONES:** They have come back and let him off. They found him guilty and the horse was disqualified from the race.

**ACTING-CHAIR:** No penalty was imposed?

**Mr TREVOR-JONES:** They found him guilty because he broke the rule. What they were alluding to before, no penalty because of mitigating circumstances. If what these fellows here who have supported us know does not constitute mitigating circumstances, I am a shocking judge. If that is not the biggest case of double standards, that is a disgrace. Because he is a leading trainer. He said he was going to take is bat and ball and go to Canada. Then when he got off, all of a sudden the trip to Canada has been put off. Oh, he is right, he will stay in New South Wales now. How does that make guys like us feel sitting here doing nothing wrong battling our butts off to try to make a living?

**Dr KERNOHAN:** How has the $TCO_2$ measurement been a standard for so long yet no-one in this world has conducted a thorough study of factors affecting it such as exercise, sex, age, dates, temperature, time of year et cetera?

**Mr ANDERSON:** In my submission I list some variables that can affect $TCO_2$. It must cost some funds to set it up to determine the correct level. It seems to be that it was set by—

**Dr STEWART:** I know what you are getting out. I think the answer is that it is difficult work to do because what you are looking at is the frequency of a very high level and what happens when you have a high level. Since they are infrequent, say about one in 1,500, you are looking at 1,500 tests before you come across one. If you start at looking at doing that work, you will find it very difficult to even identify the horse to do the work on. What tends to be done in the absence of that is that they take a population, which is not necessarily representative, and talk about the average of that population, what its standard deviation is and then make the assumption that that is going to be entirely normal, that distribution, and what the frequency is going to be outside it. That is what has been done. But it is simply too hard to do the work to be very specific.

**Mr ANDERSON:** It should be done because it is a horse at the track that is being tested, not under some other conditions.

**Dr KERNOHAN:** I cannot see why an experiment could not be set up with horses that are in training and in conditions in which they are working to be tested regularly to find out what effect various things have on it.

**Mr SARINA:** When I got my horse tested, as I said, it cost me a fair bit of money, the stewards stayed with him for four days. But before this happened, when I got notified that he went a high bicarb, me and my vet did 10 or 12 tests on the horse to see whether he was a high thrower. Every test we did, the horse went above average. My argument was we put him on the float one day and drove him down to Harold Park where he got tested and then come back and tested him. Well, he went up three points just with the float trip. So, when I brought in all this at the hearing, they did not want anything to do with it. So, when I got the horse impounded, they stayed with him for three days. Three stewards with the vet turned up at 5 o'clock in the morning on the fourth day. I said, "Look, if you are fair dinkum about giving me a fair go, you would take the horse's blood closer to the time that you took him when he went high." They said, "These are our rules. You do it our way." They took his blood, he went high after all that, after taking his blood so early in the morning. I took it all into court with me with my solicitor. The horse showed he is a natural high thrower and the judge just did not even listen to it, just threw it out of court.

**ACTING-CHAIR:** What did the judge say to you?

**Mr SARINA:** It is a complete rule. The rule states no matter how the stuff got there, if you have gone over 35, you are guilty.

**ACTING-CHAIR:** Did you argue about the penalty? Did you understand or know about that?

**Mr SARINA:** I got it reduced. They gave me 10 months and I argued and they reduced it to six months, but it is still a long time out of your work.

**Mr TREVOR-JONES:** It is still a slur on your name.

**Mr SARINA:** I have been a trainer for 23 years and never had a conviction. As I said, I spent a heap of money. The bottom line is, no matter how it got there, I could have had a video camera catch one of my son's giving the horse a drench and I still would have done the time. That is the bottom story.

**ACTING-CHAIR:** Perhaps it needed to eat a particular type of grass.

**Mr SARINA:** Yes, that is right.

**ACTING-CHAIR:** Mr Abbott, did you want to make a comment?

**Mr ABBOTT:** Yes. I do not have anything to do with the swab. I am here on a different matter, but what astounds me is people saying, "Why aren't the tests done?" We have been getting horses $TCO_2$ tested. The lab has the results. Instead of working on some study done in England or New Zealand, or a small case study of 10 horses, why can they not take the result of every horse swabbed, divide it by the amount of horses swabbed and say, "That's not a level of fantasy. That is not

something we have dreamed up. That is the actual level that you blokes have brought your horses to the races for the last seven years and we have done 25,000 tests. That is the level and it has come from your horses." I do not think anyone would complain if they came up and said, "We have done 50,000 tests and we have worked out that the mean should be 35.9 because that has come from your horses."

I do not think anyone would be complaining, but people are saying the results are not there; there is no background information as to where they got the results. Why does Harness Racing New South Wales not just bite the bullet, do the right thing by the participant and take the results they already have sitting over there that they will not let anybody else look at? Why are trainers not notified? If Mr Peter Trevor-Jones takes his horse to the races at Bathurst today and he is $TCO_2$ tested, they know the results within 14 days and they notify the stewards, "Okay, the prize money is cleared" or whatever. Why do they not tell Mr Trevor-Jones in a fortnight, "Peter, your level was 34.6" and he goes back and looks over the past six months and that horse has gone 34.6, 34.6. The stewards would know. They would not be calling him in if it went 34.9 or 35 because they would then know that the horse has already had a level like that and it only took a minor bit of excitement or just one little thing to upset him to change the level. I just think it is commonsense.

**Mr TREVOR-JONES:** I had one horse tested. One week he was 28.5, and the next week he was tested he was 34.8. They obviously just said that was the time I dosed him up and tried to win. But I know in my heart and I will swear over my children's bodies, I did not give him anything, but there is 6.3 mmol he varied in a week. I know in my heart the testing is just a joke. Just on another topic when you asked me before about the injustices, we used to have the right to an independent analysis years ago. They have denied us that right. They used to have a designated sample that you could have an independent analyst check. We also used to have the choice of the confirmatory laboratory. There were five laboratories that were accredited and we could choose one. They have taken away that right. Now it is Melbourne, who they say is an independent lab. I question the independence of it. They are all under a similar umbrella at least. They have taken away a lot of the independent testing that we used to have the rights to.

**The Hon. D. T. HARWIN:** My question is to Mr Anderson and Dr Stewart, but some of the trainers might also comment. On Monday we met a gentleman called Mr Hill from the New South Wales Thoroughbred Racing Board at the Randwick testing laboratory. He made this statement:

> A lot of research work we have done with $TCO_2$ with horses is that you have to give them a bucketful of bicarbonate to move them anywhere near the 35. Generally on average the level is somewhere around 31 or 32. To increase that to 35 we have given horses a kilo of bicarbonate.

The people from the Kensington testing laboratory said a substantial amount of alkalising agent would have to be administered to bring the horse up to 35, confirming Mr Hill's comments. Is it standard practice to administer some alkalising agent to improve performance? What is your instinctive reaction to the comments of Mr Hill and people at Randwick who say those sorts of things?

**Dr STEWART:** Firstly, the comments are wrong and irrelevant. It is true that you can exceed 35 in any horse if you give them a bucketful of bicarb. But what has that got to do with the range of naturally occurring levels? Therefore, it is irrelevant.

The second part of your question related to the amount of alkalising agent given to horses. It is best nutritional practice these days to have a dietary cation-anion balance of about 300, which essentially means to say that trainers should feed some alkalising agent to horses because they are on concentrated feeds. I do not know what any of these trainers feed. Some of the trainers in Western Australia I am absolutely certain are innocent. We can prove, I think, in the Classy Colt case that there was no administration. They do not supplement with any alkalising agent and yet we have very high levels there.

One other comment in relation to that. I think it was Peter who was suggesting that they be informed whenever they get a high level. I was instrumental in getting that happening in Western Australia, but the downside of it is that we then have stewards acting as nutritional advisers to trainers and giving them very bad advice because they were out of their depth. That is the downside of letting people know. I agree it is a good idea because if you have one of those horses that is likely to go over you should know about it and you should make it someone else's problem. That is the only response you really can have. There is a downside to that and that is that most trainers in Western Australia

have been advised to do things which that are contrary to current best nutritional practice, by the stewards.

**ACTING-CHAIR:** Mr Formosa, would you like to outline to the Committee some of your experiences. Are there are any issues or views you have about the current regulatory scheme?

**Mr FORMOSA:** Yes, in my case my horse read 35.2. I was not present at that race meeting. I was at another meeting in Sydney. Through my inquiry I employed Dr Snow, the expert witness, and he expressed his concerns over the changing standards from Casco to ASE standards, and that since the standards have changed the results were slightly higher—not a great deal, but in some cases significant—and he produced evidence in the inquiry along those lines. I thought I was in a no-win situation because no matter what evidence you put forward the stewards or the vets on the other side of the table would all say they did not do the study so they could not agree. Basically, whatever we said that looked good for me the other side would just say, "No, we didn't do that study so we can't take any notice of it" or, " We don't agree". This was the case for five months that my inquiry went on. I could not win basically.

**ACTING-CHAIR:** Did you have legal advice?

**Mr FORMOSA:** No. I was told I was not allowed a solicitor because I had not been charged with anything. It was only an inquiry, there was no need for a solicitor.

**ACTING-CHAIR:** Who told you that?

**Mr FORMOSA:** I have been told that a number of times over the years by stewards—not in inquiries, but I have been told a number of times by them no solicitors in the inquiry because I was not charged with anything. It was just the investigation stage so I was not required to have any legal representation. I had never been through this before and I had, I think, five visits from stewards to my place.

**ACTING-CHAIR:** At your home? You had five visits at your home?

**Mr FORMOSA:** Yes, where I was living. Not once was I told they were coming. The first time was a security guard and a race course inspector. They came, parked the car next to the horse's stable and they stayed there for two days. Every time the horse ate or drank they took a sample and sealed it. Everything was tested. There were no additives in that feed or water to put that horse's level up. Two days later it got tested by the Harness Racing vet and a steward as well and it came back 34.5, which is half a mmol under the limit. All this time he was being watched by two people.

When I brought that up in the inquiry they said, "He is under the legal limit so basically count that out." I said, "Isn't it possible for some unknown reason this can go up, for instance travelling and heat and all that sort of thing." I am no expert but from what I have been told it could be a factor. They would just say, "We've got no evidence so we cannot agree with you". Later on in the inquiry one of the Australian Jockey Club vets brought up the fact that bicarb levels or $TCO_2$ levels can vary throughout the day. He said, "They can vary throughout the day but not enough to put them over". If they can vary at all, if a horse is very close it would not take much to put it over. I brought all this up in the appeal. Mind you, by this time I couldn't afford a solicitor because I had spent it all trying not to get to that stage. He listened and he agreed with a lot of things I said and at the end of the day he said—well, actually he said, "What are you here appealing?" and I said, "I believe I am innocent". He said, "No, you are guilty. You have been charged, you are guilty so you have to appeal the severity of the sentence." Straight away the judge is saying I am guilty before the appeal has even been heard.

**ACTING-CHAIR:** Did you not say that you were told it was an investigation?

**Mr FORMOSA:** No, that was after I had been charged. The appeal is after you have been charged. When I first got there the judge said, "What are you appealing?" I said, " I believe I am innocent. I am appealing that." He said, "No, you have been charged. You were found guilty. You must be appealing the severity of 12 months disqualification."

**ACTING-CHAIR:** You were charged and sentenced?

**Mr FORMOSA:** Yes.

**ACTING-CHAIR:** Immediately and together, charged and sentenced?

**Mr FORMOSA:** In one go, yes. That was at the end of the inquiry. The stewards make up their decision

**Mr TREVOR-JONES:** He was charged before his inquiry but then his inquiry proceeded and then they decided that he was guilty. That is when he was disqualified.

**ACTING-CHAIR:** You said that they were making an inquiry. Normally when there is an inquiry one has not been charged.

**Mr FORMOSA:** That is right. The inquiry starts and my inquiry ran for a number of months.

**ACTING-CHAIR:** So you were accused?

**Mr FORMOSA:** Yes, that is just the investigation stage. At the end of the inquiry you are charged if you are found guilty. The next step is to appeal against the stewards. When I was at the appeal the judge asked what was I there for and I said, "I am appealing the stewards decision. I believe I am innocent." He said, "No, you have been charged by the stewards and found guilty." I did not get my sentence reduced. I got 12 months and it was not reduced by the judge and I brought up things like the stewards turned up at my place without even telling me they were coming. They did all the things they wanted to do, hoping to catch me out or whatever they thought they were going to do. Then it has come up that the horse is nearly over the limit at home in the middle of the day. The end result is you are over the level, so it does not matter what the evidence is. All that money I wasted. I should have just copped it straight away and it would have been nearly over by now. I spent a heap of money and I could not even afford a solicitor—for nothing, because I could not win.

**ACTING-CHAIR:** You said you were visited five times and you told me about one occasion. What were the other four occasions?

**Mr FORMOSA:** The first time was just a stable inspection. A steward came. You are never told of these visits. They just come to your place and walk in. That involved looking around the stables, going through cupboards and feed, looking around taking notes, writing everything down. They will not show you what they write down. You are not allowed to look at that. The other time was the two days when the security guard and the racecourse inspector were there. Another day there was a vet there. All up there were four different people on five days or five different people on four separate days. Not once was any permission sought, could they come onto the place. On one occasion they were there at six o'clock in the morning. I was asleep and I thought someone was stealing something or breaking into the stables. It was a vet and a steward unloading things from the car, just walking in the gate. It is just a joke the way things are handled.

**ACTING-CHAIR:** How did the charge against you arise? What happened to cause this inquiry to start, resulting in the charge?

**Mr FORMOSA:** The horse was tested at the races. I was not present at that meeting. I was in Sydney at another meeting. That was on a Friday afternoon. The blood is apparently taken from there to a steward's house under security. From Friday to Monday it is kept at the steward's house. On Monday morning it is taken to the lab and tested at the lab and then you get a phone call. I got a phone call saying that I was over the limit. I asked what the limit was and I was told by the head steward that he did not know. All he knew was that I was over. I found out later on that he does know because he has got the readings there. Through the whole inquiry you are not treated very well.

**The Hon. M. I. JONES:** Am I right in saying that your horse was 35.2?

**Mr FORMOSA:** Yes.

**The Hon. M. I. JONES:** Did anyone advise you that there is a tolerance of 1.6?

**Mr FORMOSA:** That is with the allowance. Actually the limit is 36.2 and I was 36.4. It is just easier to say with the allowance off it was 35.2.

**The Hon. M. I. JONES:** So that it was 36.4?

**Mr FORMOSA:** Yes, a breach of the rule by 0.2. When the horse was tested at my property he was 0.5 under, so he was 35.7 or something like that, but with the allowance he was 0.5 under.

**ACTING-CHAIR:** For how long have you been a trainer?

**Mr FORMOSA:** I have been around horses all my life and I probably started off as a hobby trainer 10 years ago. I have probably been a full-time trainer for the last five years. I have put a lot of money and things into it. I have a loan to pay off and things like that and it is very hard when you have not got any work.

**Mr MARTIN:** Most of the cases are similar, but I note from the written submissions that in Mr Abbott's case it is a different story and a different set of circumstances. To my mind it goes to the inflexibility or lack of justice in the system.

**ACTING-CHAIR:** Perhaps we could hear from Mr Abbott?

**Mr ABBOTT:** Our case we did not think was all that complicated. My mum and dad are both in their late 60s. My mum is 67 and still drives in fast work at the track with dad. Mum, 67, sits up behind dad. He is 66. They have had great success. Over the years they have not had horses that were any good, sort of thing. In the last five years they have bought two horses, one for $200 and one for $700. Collectively they cost $900 and they have won over $40,000 with the two horses. This particular mare she went to Bathurst and drew barrier 1. We thought she would win the race. Obviously so did a lot of other people because she started $1.80 favourite across Australia. She raced three back on the inside for the majority of the race, but approaching the 500 metre point the horse that was behind the leader, driven by Emma Turnbull, Mr Turnbull's granddaughter, she shifted away from the rails to take a run to the outside.

Almost simultaneously the leader has shifted quite clearly up the track away from the inside. The young boy driving our horse just progressed through and the mare was full of running and everything else was more or less struggling. She just strode through and as she got to the point of the turn there was a call from another driver. The driver of the leader looked over his left shoulder, pulled the left rein and the horse's head in two frames of film has gone from being like this to being pulled directly to the inside. It put that much pressure on the boy that he stood up, which he is required to do by the rule. He sat up and tried to restrain the mare, but he actually hit two of the marker pegs on the corner.

When they went into the inquiry the stewards did not actually deem it to be all clear. They said there was going to be an investigation as to whether or not the horse had gone to the inside of the marker pegs. Mr Nebauer then decided that he would instigate an inquiry. Evidence was taken from three drivers and from that the stewards disqualified the mare from the race. We then appealed, or attempted to appeal. We appealed to Harness Racing New South Wales who, under the Act in Part 2 of the legislation we thought had the power to hear the disqualification of the mare. Instead of sending, like you would normally do, your appeal to the appeals tribunal, we did not. We sent it to Harness Racing New South Wales, know that it would actually be directed to Mr Mullins who is the chief executive officer. We were using what we thought was commonsense. If it went to Mr Mullins and it had to go to a different panel he would obviously send it to the correct panel. He referred us to the Harness Racing Appeals Tribunal.

We were then sent a letter on behalf of the judge from the appeals secretary, Mrs Diane Lobb, stating that a preliminary point of jurisdiction had to be established as to whether or not the tribunal could hear the appeal—whether it actually had the power to hear the appeal. Eight days later we sent back eight different points on which we believed we could appeal. We received a letter eight days later stating that the appeal was proceeding and that it would be heard on 5 April. Three days

prior to this, on national television, Mr Nebauer appeared on a show on Sky Channel called *In the Gig*. This was three days before our appeal. Mr Nebauer went on to discuss at length the reason why our horse was disqualified.

**ACTING-CHAIR:** Your case?

**Mr ABBOTT:** Yes. He went on to discuss this at length with the panelists. They then showed him a tape of a race which had been run about three days prior to this where a gentleman at Penrith went inside or ran over 32 marker pegs. He drove inside the marker pegs from approximately turning into the back straight until straightening up in the home straight and he ran second actually to Mr Sarina's horse. That gentleman was not disqualified. He, in fact, lodged a protest against the winner for going inside the marker pegs. So subsequently Mr Nebauer discussed that case. He said, "I haven't seen the tape and I haven't read the transcript. I had a bit of a chat with the stewards at Harold Park on Friday and they tell me that it wasn't that good."

This gentleman had also appealed—Mr Cameron Lowe. So Mr Nebauer has twice commented on a matter that is before the Harness Racing Appeals Tribunal, which we thought was ludicrous. We then went to appeal. It was a three-hour appeal. After two hours and forty-five minutes Judge Thorley sat back and said, "Well chaps, I hate to tell you but I haven't got the power to hear this." Two hours and forty-five minutes we sat there and argued every single point of evidence. We showed him videos. We attempted to show him more but he refused to watch them. We wanted to show him the tape of Mr Nebauer discussing the issue on television. In the transcript that I have here Mr Nebauer gave evidence on television. He gave evidence to the panelists which was completely different from what he said in the appeal.

In the transcript he says, "My evidence is that drivers in New South Wales drive right next to these marker posts and there exists no gap." One of the panelists said, "Well, I do not think that is true Mr Nebauer because in Victoria they seem to drive away from it." He said, "In New South Wales they do not, mate. They drive right next to it. There is no area there." In here he has alluded to cow tracks and grey areas and bits where drivers do not drive.

**ACTING-CHAIR:** What do you mean when you refer to "in here'? Are you referring to a transcript?

**Mr ABBOTT:** The transcript of the inquiry.

**The Hon. D. T. HARWIN:** An inquiry or a tribunal hearing?

**Mr ABBOTT:** No, this is actually the inquiry that was held after the event. Mr Nebauer has alluded to an area that he refers to as the cow track, which is an area on a race track where drivers do not drive. I have been driving for 10 years and I have never been out there when someone yelled out, "Hey, do not drive there. You are not allowed to."

**ACTING-CHAIR:** Do we have a copy of that document?

**Mr ABBOTT:** No, you do not. I actually brought it to give it to you.

**ACTING-CHAIR:** So you would like that included with your evidence?

**Mr ABBOTT:** Yes. I have further information, so I can give you the whole lot. Mr Nebauer has given evidence that is at complete loggerheads to what he said during our appeal, but no-one took notice of that. The judge said, "No, you are not watching it." We said, "But Judge Thorley, the evidence here is imperative to our case. You will see quite clearly what we are getting at." He said, "I do not wish to see it." We left the room and Judge Thorley and the panel watched it. In his finding on our appeal he made clear reference to it and said, "In future it would be hoped that wiser counsel would prevail. Stewards should not go on television and discuss a case that is before the appeal court." The case had not been dealt with. "Just do not do it again Roger." This is the sort of nonsense that goes on. Mr Cameron Lowe also appealed. I do not know whether he was aware that he was discussed well and truly beforehand, but the appeals tribunal saw the race, heard the discussion and watched it well before he ever went to appeal.

**ACTING-CHAIR:** You said that he watched it after you left the room. How do you know that?

**Mr ABBOTT:** He discusses it in his finding. He said, "The tribunal has actually watched the tape that was given to it by the appellants", and he then went on to describe what he thought was wrong with what Mr Nebauer had said.

**Dr KERNOHAN:** Have you got the date on which that was broadcast?

**Mr ABBOTT:** Yes, it was broadcast on 2 April. The gentleman that you can contact is Graham McNiece. He will give you a copy of the tape.

**ACTING-CHAIR:** Is that one document that you have provided to the Committee?

**Mr ABBOTT:** There are about 35 pages. There are different documents. I have stapled them all together.

**ACTING-CHAIR:** We need to identify every single document. The first document is entitled "Steward inquiry into the movement of Darky's Destiny inside the marker pegs in race one at Bathurst on Wednesday 23 February 2000." The second document is a letter from the Harness Racing Appeals Tribunal to Mr P. J. Abbott, dated 8 March 2000. The third document is a report entitled "Harness Racing Appeals Tribunal chaired by Justice B. R. Thorley, appeals of P. Abbott and B. Greenhal, decision." The fourth document a letter addressed to Mr Tony Mullins, New South Wales Harness Racing Association from Mr Matthew Hammond, dated 18 April 2000. The witness has advised the Committee that the third document, which is undated, is dated 5 April.

**Mr ABBOTT:** So we went to appeal and discussed the case. The judge in his finding, which I have given you, stated that upon watching the video on numerous occasions he could see no course which took the driver Greenhalgh inside the line of the marker posts. He criticised Mr Nebauer. He also criticised Mr Greg Westwood who was the steward on the position on the turn out of the back straight where this entire incident happened in front of him. During the entire hearing, which led to the disqualification of the horse, Mr Westwood could give no evidence. The stewards deliberated three times. Mr Westwood had nothing to say at any stage. Subsequently, when the driver was called back in to deal with his suspension, Mr Westwood was able to give an entire page of information, which the judge said was procedurally unfair because it gave the appellant, who at that time would have been my father, absolutely no opportunity to question him or put to him a different scenario.

Mr Westwood was able to give evidence only on the seventh page of the document when he had nothing to say previously. He could not add anything to what Mr Nebauer was saying. So the judge was scathing in his criticism of the stewards. He clearly stated that the driver did not go inside the line of the marker posts at any stage. He looked at the head-on video on three or four occasions; he watched the side-on video on as many occasions. The tribunal ultimately agreed to what it would do under the provisions. Might I also add that when the horse was disqualified from the race the stewards failed to disqualify her under any rule.

So for almost three pages of that document the judge has gone through to try to find some rule under which the horse can be disqualified. He could not. He could not justify the stewards' decision and link it to any rule in the rule book. He just said, "It is a complete error. The stewards have got it wrong." But his former orders from the hearing were that the driver could be found guilty of one offence, that being striking two marker pegs. And, yes, he would have to find him guilty under that. So because of that he actually dismissed his appeal because he said that, under the provision of that rule—rule 163—all that has to be proven to lay a charge and be found guilty is that the driver must strike a marker peg. But that cannot be pushed together and constitute a disqualification.

In the last line of his summing up he stated that it would be in the best interests—or something like that—of the authority to look into the deprivation of the prize money to the connections. So what he actually asked them to do was to refund the prize money because the stewards had clearly got it wrong. Subsequently we wrote back to Mr Mullins and asked him to put this matter to the board to see whether it, looking at all the information, could see what the judge and

the two assessors could plainly see. The stewards had made a clear error. So we waited 2½ months. Mr Mullins wrote back and said, "Sorry, we have looked at all the evidence but we can make no type of ex gratia payment on this occasion.

A member of the board approached a friend of mine and said to him, "Do you know the Abbot family?" He said, "Oh yes, I do." He said, "Well, the word has come down from the board meeting, which was held today, that the boss has said, basically, "Tell your clients to do their best because we are a government department. They can't fight us." He said, "In their letters that they sent to us they are not going to sue us. They are pensioners. So if they want the money we will see them in court." That was essentially their opinion. We again wrote to Mr Mullins and said, "Mr Mullins, please look at this information. It is quite obvious that there is a mistake." Nothing. So we wrote to the Ombudsman et cetera to try to get some righting of the wrong. They wrote again to Harness Racing New South Wales. Mr Mullins wrote back a letter. We had put in our concerns.

Mr Mullins wrote back again to the Minister and he said, "The charge against the driver was ultimately proven." All that was proven was that the boy struck two marker pegs. He did not even go inside them. You can only be disqualified for going inside the marker pegs. This boy struck two markers pegs but Mr Mullins just found one word—"proven". "It is in there somewhere, I am sure. Found it! There is it—'proven'. That will do me. The offence was proven, Minister. Send it back to the Minister." He said that they had no right of appeal to the appeals tribunal either. But we said to the Minister, "That may be correct. But according to what it says in thec t we believe the Harness Racing New South Wales board had the right to hear us in the first place. Why did Mr Mullins send us down the wrong road?"

Only in the last fortnight has the Ombudsman written to Mr Mullins and said, "I have investigated this matter myself. I have looked at Mr Abbott's information. He has now demanded the minutes of the board meeting; he has demanded to know how they came to their answers; and he wants to know why the stewards took no action against a driver who was clearly identified as committing an offence, which if proven guilty is six months." Nothing is done.

**ACTING-CHAIR:** Is this the Ombudsman you are referring to?

**Mr ABBOTT:** This is what the Ombudsman has said. The Ombudsman has said that the stewards made a complete mess of the disqualification. They did not disqualify the horse under any specified rule. These blokes, if you read their appeals or the actual inquiries, the rule will be stated—rule 190 or 191. We could not find that rule in there anywhere. Mr Nebauer just made a complete mess up. Mr Westwood made a complete mess up. Harness Racing New South Wales has done exactly the same. What has the outcome been? Absolutely zero. Why? Because they just closed ranks. They just ignore you. You can understand the stress on two people in their late sixties that do this sport for fun. They just absolutely love the horses. They have got a sick horse. It is not a matter of, "Gee, I do not really want to pay the vet bill or whatever. It is: Oh, God almighty, get the vet out because we do not want to lose that horse."

Ninety-nine of the 100 horses we have got are not much good anyway. But they love the horses. We have got a paddock with 10 horses out the back. I think only one horse in that paddock has won a race but they said, "Oh, he was a nice horse. Gee, he was lovely. The kids can ride him." But they are treated just like they are some sort of criminal. They are the opposition. In my opinion the authority should be attempting to work with people. It should restructure rules so that everyone gets a fair go. It should not say, "Look, Mr Nebauer has made a clear error. The Ombudsman thinks so. Everyone else thinks so. No. We will just close ranks round Roger and protect Roger because we do not want to admit that we are wrong. We know that those two poor old-age pensioners have not got the money to take us to court, so blow them. We will just sit here in our little tin castle and they cannot touch us."

That is what my parents are thinking. My mother has had a licence. She used to drive before women were actually allowed to drive against the men. My mum used to drive in powder puff derbies. That is what they used to call them. It was a bit of a joke to see the women out driving. My mum used to drive in them in the late 1970s. She sat at home that night in the lounge chair and cried and said, "I think I will just give it away. I will sell the horses and I will give my licence back. We did nothing wrong and we got cheated."

I ask you has any steward or official got the right when they are in the wrong to sit there and say, "We know we are wrong. You prove it in court because we have got more money than you." I believe that the rule is wrong. Half of the rules that are in that rule book for appeals to the board are a joke. In my opinion, it should say, especially in our case: "To disqualify or relegate in any way either pre- or post-race any horse in any capacity in relation to harness racing." At the moment the only thing you cannot appeal against in the regulations—not a $10 fine, but a serious offence—is your horse being disqualified. The prize money was $2,200, the horse was $1.80 favourite across Australia. Is that is supposed to boost the public support of harness racing when a $1.80 favourite is being disqualified from the race and the driver is suspended? The gentleman on the television said, "That decision is a joke." What is the public perception of the people sitting at home flicking channels? They will say, "My God, we're not going to bet at Bathurst or we're not going to bet on the trots again because horses that do nothing wrong get cheated out of a race".

**CHAIR:** I would like to hear from Mr Sarina and Mr Walsh and Mr Beal has documents and wishes to table recommendations. Mr Sarina, do you have other comments that you would like to add?

**Mr SARINA:** The hassle is with the appeals is that you are not innocent until proven guilty. You are guilty straightaway as soon as you go in and you have to try to prove yourself. I think it is done wrong. It is done down at the authority in front of a bloke that is employed by the authority, a judge. It should be done in an independent courthouse by an independent judge. It is just like a kangaroo court. When you go down there, you are down at the same place where they gave you the first lot of time and you are before a bloke who has lunch with the bloke who gave you the first lot of time, and you have got no chance as soon as you go down there. It should be done completely away from there so that you get a fair go. As Michael Formosa said, we spent a lot of money. We might as well have just burned it and went and copped our time. My barrister is very good. He said to me, "If this would have gone to a normal court it would not have made it to the front steps. They would have thrown it out of court."

**CHAIR:** Mr Beal, would you like to add anything?

**Mr BEAL:** Yes, I certainly would. I have a lot of material submitted and that would be included in the record of proceedings here. In view of the limited amount of time I will try to confine it to a couple of things. Reference has been made to my "good" friend Mr Nebauer because I will be handing up a decision in the notorious Inskip case which figures prominently throughout my submission. That is a classic case of what can and does go wrong. Interestingly enough, the Inskip case shows the difficulty you have got where the appeal is unsuccessful and the disqualification against the appellant stands. Yet the disqualified appellant seeing the decision notes that there are no less than seven inferences and, he says, every one of them is erroneous.

He said to me, "The judge honestly has referred to a great number of inferences. He has assumed this and that and he has attached all this guilty state of mind to me, which is totally wrong. Can I get an opportunity to have a judge listen to what was the fact?" I said, "I do not know. I will write to the appeals judge and see whether he will review his decision." I did that and there was no success. The judge explained that his function in the case had concluded. However, he was kind enough to suggest that I write to the Harness Racing Authority, which I did. The Harness Racing Authority under section 19A have had for years the power to review a decision of the appeals tribunal. It was there at this time.

**CHAIR:** Is it a discretionary power? How is the power defined?

**Mr BEAL:** It is not compulsory but the power is there. They are not under a duty but you can write to them and ask them to review a judge's decision. It certainly is discretionary. The point about this is that they came back to me saying that they were not empowered to act in any way over a tribunal's decision, they had no power and they were relying on the Crown Solicitor's opinion. That stunned me because I had been in touch with the Crown Solicitor's Office for about 45 years and I had 40 years in the public service before I went out in private enterprise. I contacted the HRA and asked to have a look at the Crown Solicitor's opinion. I said, "It must be a beauty because I cannot follow what you are putting." They said, "No, you cannot look at it." Then I contacted the Crown Solicitor's Office and asked, "Can I get a copy of the relevant Crown Solicitor's opinion which said that they had no

power?" The answer was "No, you cannot." I did not throw the towel in, lie down on the floor and cry. What I did then, I thought I will have to go another way, a bit of lateral thinking.

I wrote to the Minister at that time. The Minister said, "I have got no power to intervene" and he relied on the HRA, which was wrong. He said, "I cannot do anything." But, I must say this. I do not carry a political card for anybody and I am glad I do not because you can retain your independence. But when I got this advice from the Minister that he had no power, he could not do anything about it, I said, "Can you help me get a copy of the Crown Solicitor's opinion, Mr Minister?" I went down to his rooms. He said, "You seem a bit upset about this." I said, "Why wouldn't I'd be? Here is a statutory body representing the Crown operating under the direct control of the Minister and it has given me wrong advice, it has given you wrong advice." He said, "If what you say is true, and it might be"—I said "thank you"—"I will get that opinion for you", and he did. When I got the Crown Solicitor's opinion it was years out of date, it was irrelevant. But Mr Inskip, the victim of all this, fails again.

I thought, "Where will I go next?" I went to my local member. He said that he would make some inquiries. He came back and said to me, "Look, Stanley"—I know him, he is the Mayor of Ryde now—"nothing can be done." I said, "I do not believe you." He said, "You had better believe me." Then I had the great success and the privilege of speaking with the Chairman of the Harness Racing Authority. That was illuminating, I can assure you. He said, "There is nothing that we can do. It is regrettable." So there you are. I was simply trying to get an opportunity for what seems to be on the face of it a very harsh decision reviewed by the judge. The judge said, "No, I am functus officio, I cannot do anything." The HRA said it had no power, the Minister said he had no authority. So I go through this litany of negatives. However, what it does say is that you are in real difficulty. Lo and behold, in the Inskip case, I am handing up a copy of the decision which is a marvellous document and I hope all members of the Committee will read and study it because it speaks volumes. Again, I was landed with the old shibboleth that in this case it was absolute liability.

Here is the fascinating thing about it. What happened was that Mr Nebauer, the gentleman who was here earlier—and I wish he had stayed because I wanted to not address him—was on his way to Newcastle and saw a utility with the bonnet up, a float behind it and a gig on the back. Out of charity he decides to go across and offer help. Wonderful! When he got there he saw that the bonnet was up. There was no water underneath the radiator, he did not do anything about that. Then he got a chance to peep in. He said he saw two men, one of whom was either putting in or taking out a tube from a horse's head. That is what he said. He does not disclose his identity.

He could have walked straight into the float, demanded and took possession of the tube to see how long it was, whether moisture was on it. He could have had a look at the two fellows, warned them they were probably committing an offence, grabbed the tube, the buckets and everything he could find and he would have had all first-hand direct evidence. Does he do that? No. He secretly flies away and leaves it all to the two unfortunate boys. They drive into Newcastle paceway and there the stewards swoop down like vultures on a stricken beast. They then confiscate everything. That is what they should do, of course. He was very nearly an agent provocateur.

The interesting thing is that Mr Nebauer, who was the principal witness, contrary to what the rules provide that a principal witness should not stay in the hearing of the stewards of this matter, did stay. He went better. He put an article in the local *Newcastle Herald*—it is attached, I have got it—which indicated that he was there and he was satisfied how a new steward had conducted the inquiry. It is on the documents he was there. In this article he pointed out that there had been an interception, but the inquiry had been adjourned and it would stay adjourned until a report was back from the AJC laboratory as to the matter of any drugs. Then in the same article we have a little bit of a homily about the evils of $TCO_2$ and how important it is that these matters be adequately policed. Unfortunately for Mr Inskip, Mr Nebauer named him, the case and the circumstances. He put in the reference to the examination of the drug by the AJC laboratory. By innuendo and implication he smeared Dick Inskip, no question about it, because the average person reading that would say that Inskip was involved in doping. He was not.

It gets better because early that morning, the morning of all this, Dick Inskip quite legally went to a property in the Wollongong area and tubed the horse, which he is legally entitled to do. It is nothing to do with the harness racing, it is a galloper actually. Instead of grabbing all the equipment and shotting it safely back home or putting it in a trunk it was left in the float. When the stewards

raided the float at the Newcastle paceway, they grabbed this. The judge then concludes in a judgment that this tube and the buckets and all the equipment were found and obviously to the knowledge and the intent of Mr Inskip were there for use in tubing the horse. It gets better because all that Mr Nebauer could say was that he peeped through and he could see a tube coming from the head of the horse.

**CHAIR:** What did he peep through?

**Mr BEAL:** He peeped through the perspex window on the float. He had a secret observation. All he said was that he did not know whether they saw him or not, the two fellows in that float. I had them at my home for two hours and questioned them from A to Z and they vehemently denied they had been tubing anything. There was a tube there but they did not use it. They reckoned that they pulled up because the radiator was on the blink. Inskip said that he had a ton of extra water because it was leaking and they did not want it to overheat. I then submitted to the tribunal's judge that even if these two were lying, Inskip was lying, everybody was lying and Mr Nebauer was a paradigm of virtue, the fact remains that all he saw was part of a tube in the horse's head. I submitted to the learned judge that just evidence of seeing a bit of a tube in the horse's head is not evidence of stomach tubing.

You do not have to be a rocket scientist to know that stomach tubing means just what it says, it is a tube into the stomach. A tube can go down the windpipe of a horse. If it did and got in 18 inches or so, that cannot be regarded as a stomach tube. I submitted to the judge on the evidence that there was not sufficient proof that there was any stomach tube effected. But what happens? The old absolute liability is trotted out again. I thought "God spare me this but here it is again." In the particular case all he said was that the evidence was adequate by relevant legal authority. He did not identify it, that would be disclosing it. We then were faced with the situation that there was nothing we could do for Mr Inskip. I sent it on to counsel. Mr counsel concurred in my own supposition that what was published by Mr Nebauer in the *Newcastle Herald* was defamatory. Also on appeal there is a good prospect of the New South Wales court in equity division upholding the appeal. But Inskip came to me and said, "Don't fill me up with all this difference between direct evidence and inferences. I have not got the money."

These people face this all the time. They are people on struggle street, they are good honest people, they have families, commitments and burdens. And you get this system whereby their right to liability is snapped away. So much for that. I have here some suggestions. In view of brevity I will read from them and hand them up. I only made five suggestions. I could write a book but I only made five.

**Dr KERNOHAN:** What did those two young men say they were doing with the tube?

**Mr BEAL:** They said that they were giving the horse a drink of water. It was a very hot day. I do not know whether they were or whether they were not.

**Mr SARINA:** They drug tested that horse, and all the tests came back negative.

**Mr BEAL:** That is right.

**Mr SARINA:** And they still gave them time.

**Mr BEAL:** They gave them six months. These two young men emphatically denied tubing the horse. They admitted being in the float, but they emphatically denied tubing the horse.

**ACTING-CHAIR:** Thank you for that information. Mr Beal, could you make your submission really brief in view of the time? I need to hear from Mr Walsh.

**Mr BEAL:** I want to emphasise that I have always been a strong believer in drug-free racing, but I also believe that no matter how commendable an end or objective is, it does not justify recourse to any means to achieve it. Law and justice are not necessarily the same. Law can be an important instrument of justice, but it can also be an instrument of oppression. Even in the administration of our criminal law, criminals and persons investigated for alleged criminal offences are granted the right of legal representation and the right of having their guilt or innocence determined by an independent

magistrate, judge or however, and not by police or investigators who were the informants and the prosecutors who charged the alleged offender.

Why are these two basic human rights denied to people who are licensed under the licensing provisions of the Rules of Harness Racing? Why cannot these men be given the basic human rights that we give to criminals? These men are not criminals. With all this TCO2 business, if ever there was some controversial excuse for dragging people down, that is it. What I suggest is that, except in cases of unavoidable urgency, such as where a race protest has to be decided without delay, the accused trainer, driver, et cetera, should be given the right of legal representation. I am not impressed by the story that they put up about costs. If it involves a cost to give people justice, then incur the cost. Except in cases of unavoidable urgency, such as where a race protest has to be decided without delay, the accused person should have the right to have his case decided by stewards other than those who investigated the alleged offences and decided to charge the accused, after finding on their inquiries that there was a case to answer. I reckon they could do that without taking on any additional staff. They seem to have more than enough now.

Suggestion 2 is that an appeal to the Harness Racing Appeals Tribunal be equivalent to a rehearing and that it not be limited to evidence produced at the original stewards hearing plus whatever additional evidence the Appeals Tribunal judge decides to allow. This is a really important point. I wrote to the judge, under the rules, and asked that Mr Nebauer be brought to the hearing. In particular, I wanted to deal with his role in the matter, his stealth, and his attitude in the Newcastle publication, et cetera. I got a reply back that, yes, he would be there. But when I arrived at the tribunal the tribunal judge said, "Mr Beal, we have reviewed your application. You will not be allowed to advert to or bring any evidence in relation to events other than the evidence of Mr Nebauer and the tubing he allegedly saw." That cut me off right at the base. In that circumstances, I was not going to put Mr Nebauer in the box to have him regurgitate exactly what he said he had seen. That would not have helped. I wanted to get out the denial by Mr Nebauer of the rules, his conflict, the way it was handled, and what I think was his unnecessary and defamatory publication, which was premature, especially as there were no drugs involved, and to deal with that case and his stealth. But I could not do it.

What I am putting here is that an appeal to the Harness Racing Appeals Tribunal be equivalent to a rehearing and not be limited to the evidence adduced before the stewards inquiry or what the judge may allow. That is harsh and unconscionable, because here is a person who has driven in a race and the stewards find some fault with the drive and they drag the person in, and that person sits there without legal representation, with no-one to guide him, and he is hit with questions by three or four different stewards all at once. Is it not the case that these people, who have no training in the law, would not be likely to produce the evidence that they are entitled to adduce? I think that should be altered so that an appeal to the tribunal should be by way of rehearing.

Suggestion 3 is that an Appeals Tribunal judge be expressly empowered to review, before the parties, a decision made by him or her where an application is made to the judge in a prescribed form for such a review for good and sufficient reason. The judge that heard the Inskip case was of opinion that he could not do anything, that his role had expired. So what we have got here is a judge the victim of unjust laws, we have stewards overloaded with unjust powers, and licensed personnel the victims of both of those. Giving full credit to all of those people, the judge and the stewards, it still does not add up to justice.

Suggestion 4 is that the special power conferred upon the Harness Racing Authority by section 19A of its Act authorising the Authority to superimpose its decision over and above that of the Appeals Tribunal be expanded to expressly provide that the Authority's section 19A power still operate where an appeals judge rejects an application for review made pursuant to suggestion 3.

**ACTING-CHAIR:** Mr Beal, would you bear in mind the time? Otherwise, Mr Walsh's time will be curtailed.

**Mr BEAL:** I am on my last suggestion, and then I am functus officio. Suggestion 5 is that the stewards be expressly prohibited from issuing in a case part heard before a stewards inquiry, or likely or possibly going to be referred to a tribunal hearing, any statement implying or inferring that a named accused in a particularised occurrence might have to face a drug or drug-related offence,

thereby possibly denigrating or causing damage to the reputation of the accused prematurely. I will table that, plus the pristine copy of my original letter, plus the decision in the Inskip case. I hand up those three documents, and I thank you for your patience.

**ACTING-CHAIR:** Mr Walsh, we have your written submission as well as a number of other written submissions.

**Mr WALSH:** I might speak briefly to a few of the items mentioned earlier. Firstly, Mr Abbott suggested he was unable to obtain information from the Authority. He did try to get that information under freedom of information legislation.

**Mr ABBOTT:** Yesterday I spoke to the gentleman who is in charge of that, Mr Kelloway, to see if I could get a copy of the board meeting minutes which, according to the Harness Racing Annual Report, are open for inspection if requested. He said he was not aware of it and that he would have to get legal advice.

**Mr WALSH:** It has always been difficult to get documentation out of the Authority. I have here a document from the Freedom of Information Unit of the New South Wales Government, a letter addressed to Mr B. W. Judd, General Manager of the Harness Racing Authority of New South Wales, dated 23August 1990, regarding an FOI application made by me. It says in part that the comments of Mr Judd appeared to be completely inconsistent with my statement that the "Authority has not refused access to a document." I do not see how this can be construed as anything other than a refusal of access. In my view the Authority has no statutory authority to refuse such a review, and in fact is in breach of its legal obligations under the Act by refusing to conduct a review. That is evidence that not much has changed in 10 years.

**ACTING-CHAIR:** Who is a letter signed by?

**Mr WALSH:** It is signed by David W. Roden, Director of the FOI Unit of the New South Wales Government. It has since been wound up. Secondly, the same Mr Abbott referred to appeals to the Authority. When I was on the board of the Authority I myself, as a director, made an application for an appeal by Tess Gleeson to be reheard under section 19 of the Harness Racing Authority Act. That document runs to 14 pages, and I do not intend to read it. However, it does outline the reasons under the Act for an appeal. The reasons in that particular case were fairly cogently argued, if I say so myself. The fact is that it got absolutely nowhere.

I do not believe any other application for a rehearing by the Authority has got anywhere since the first one. That is why the Act was introduced, because the tribunal was unable to deal with a drug case involving Mr Hancock, Mr Aiken and a third driver whose name escapes me at the moment. They were found guilty of producing horses for racing with heroin in their systems. It turned out there was poppy seed contamination of the feed and they were completely innocent. In order to overturn the decision of the Appeals Tribunal, it was necessary to change the Act. They did change the Act. They introduced section 19A, and that is the only time it has been used, notwithstanding that there have been excellent reasons to use it on other occasions.

**ACTING-CHAIR:** This relates to a tribunal decision going back to the board and asking the board to exercise its power under section 19 to review that decision?

**Mr WALSH:** That is correct. The only interest in this is a review of the procedure. I will table that document. The other thing is our old friend strict versus absolute liability. I am quite sure that if Mr English and Mr Mullins were here and we put it to them that there was nothing in the Act or in the second reading speech that indicates that the rules of harness racing are absolute, their response would be that it would be difficult to secure convictions and people may be acquitted unmeritoriously if we do not have the power to convict them no matter what. The courts have addressed that sort of argument. They did so in *Hawthorne v Morcam*. The judge, Hunt CJ, said:

> Neither the difficulty in securing a conviction nor pragmatic concerns about unmeritorious convictions warrant imposition of an absolute liability. The trend of modern authority is clearly to limit offences of absolute liability, and the strength of the presumption that the defendant's knowledge of the wrongfulness of his act is an essential element of every offence has recently been reaffirmed by the High Court in *He Kaw Teh's* case.

I think that just about sums it up. This gentleman here said they are treated like criminals. In fact, they are treated a good deal worse than criminals. Any criminal has the right of strict rather than absolute liability when he goes before the court. In other words, the prosecution must prove a guilty mind, that the person reasonably knew what he or she was doing was wrong. If the prosecution fails do that, the prosecution fails and the person walks free. Not so in harness racing. On numerous occasions, no matter what you do or what you say, if you are innocent and the tribunal agrees you are innocent, it does not matter. The conviction stands anyhow. The best you can hope for is no penalty. I do not believe that is satisfactory. I do not believe that is supported by the law. I do not believe that is supported by the thrust of the law. I believe if it was tested in the Supreme Court today it would fail.

I have read the Acts. I have read the second reading speeches and I have found nothing that supports the view that the rules of harness racing are absolute. I believe it would be useful if this Committee directed a question to Mr English or to the authority or to the department saying, "Where is you authority, where is it spelt out in words clear and without any doubt whatsoever that the rules of harness racing are absolute?" If it is there, fine, I am wrong and we are all done for. I do not believe it is.

**The Hon. D. T. HARWIN:** Gentlemen, I have listened with great interest to what you have said this afternoon. It sounds like there has been very significant cause for aggrievement with the way appeals have been conducted in harness racing for a very long period of time. I suppose my interest is also that some 18 months ago the Department of Gaming and Racing conducted a review of the harness racing appeal regulation and its operation and asked basically for submissions on whether people thought it was adequate. As we heard this morning in evidence, it did not get any reply. So, I suppose I am not so much saying why did you not reply but I am looking at how adequate its degree of consultation was in working out whether the regulation could just be remade exactly as it was, which is effectively what it ended up doing.

The first thing I would be interested in knowing, in terms of correspondence they have had with us, are any of you members of the Harness Racing Association, the New South Wales Trotters Association, the New South Wales Standardbred Breeders Association or the New South Wales Standardbred Racing Owners Association? We have been told that those four organisations were all asked what their views were. I am interested in trying to get some feedback as to why the department goes out and seeks submissions on whether this regulation about appeals is adequate and nothing comes back, yet our Committee was able to find plenty of material pretty quickly. I am just trying to understand what is going on here.

**Mr WALSH:** That is a very good question. I am a member of the UHRA and I was on the committee for eight years. On Wednesday this week I rang one of the present committee members and asked him whether he had received any requests from the department or anyone else for a submission on the appeal regulation.

**The Hon. D. T. HARWIN:** I am sorry to interrupt, but understand this was during 1999. It was during 1999 it conducted this. I did not want to put too much hassle on the department. It was in 1999.

**Mr WALSH:** In 1999 I was on the committee, and I was not aware there was a request.

**The Hon. D. T. HARWIN:** You were not aware there was a request, yet certainly all of you—well, maybe not the younger guys, but some of you—would have had a concern about what was going on back in 1999. Am I right?

**Mr WALSH:** We put in a fairly lengthy submission back in 1994 on the Racing Appeals Tribunal when it was up for review then.

**The Hon. D. T. HARWIN:** Then, five years later, under our State's law it has to be reviewed again, yet obviously you guys—

**Mr SARINA:** Were not informed.

**The Hon. D. T. HARWIN:** There was not any adequate opportunity for input.

**Mr ABBOTT:** I think there are three areas. In harness racing everybody gets the *Trot Guide*, the *Gazette* or the *Australian Standardbred*. If they were advertised in that I can guarantee you there would have been submissions.

**The Hon. D. T. HARWIN:** They say an advertisement was placed in the *Trot Guide* on 29 April 1999.

**Mr ABBOTT:** I do not know about 1999, but this particular matter could have been more comprehensively advertised in publications that we would all read. I only know second-hand because a friend of mine, his father rang and said look at the ad on page so-and-so and I had to look twice to find the ad. I am not having a personal go at anyone, but if it is not advertised in the publications people read they are not going to know. A lot of people do not buy the *Daily Telegraph* on a Saturday, and I know it was advertised in the *Daily Telegraph* on the Saturday.

**The Hon. D. T. HARWIN:** Are any of you guys members of the bodies I read out?

**Mr TREVOR-JONES:** Yes. They only just reformed that UHRA. We went to a meeting a couple of months ago and they are just starting to get it going again. Jim was prominent in it, he was there that night. There was an overwhelming response. There was a good turn up. It had waned.

**Mr MARTIN:** I am just wondering if you might rule on a matter of procedure, whether it is appropriate to do this. We heard today—I was going to say from the horse's mouth, but from the horse trainers' mouth, so to speak—that generally they do not believe they are allowed legal representation at stewards inquiries. We heard from Mr English that they could be and when I questioned the chief steward he said they cannot. When I asked him to give instances he said he would rather not answer the question.

**ACTING-CHAIR:** He actually said not many people ever ask for it.

**Mr ABBOTT:** Because we think we cannot.

**Mr MARTIN:** Can we clarify that, because I think it is important. Can we note in the minutes or should I raise it some other way so that we write to him and ask exactly what the situation is?

**ACTING-CHAIR:** We can raise that in the meeting we will have following the completion of taking our evidence.

**Mr BEAL:** I am sorry to interrupt, but I can add another slice of reality. I was acting for a harness racing driver and he said he particularly wanted me to be there at the stewards inquiry. I said that is probably a difficult situation but I will ring the chief steward who is going to conduct the inquiry and see what prospect I have. I said, "I have been given permission to appear before you at the stewards inquiry." Much to my surprise the steward concerned said, "Yes, come on over. This is a matter for our discretion and I cannot answer on the phone, as you appreciate. You arrive here and you make your application and it will be adjudged by the stewards and if we feel disposed we will allow you." So, I hightailed it way out to Bankstown, which is a lovely place to be coming from. When I got there I made my application and, to my surprise, the chief steward said, "Thank you for your application. We are going to deliberate on this. Wait outside and in 15 or 20 minutes we will be able to give you a decision."

So, I waited outside as directed and after about 20 minutes I was called in to the august presence of the stewards panel, where the chief steward said, "We have considered your application and I have to inform you it has been rejected." He did not give any great reasons, very few of them do in that sort of matter, but he said, "As a concession we are not directing you to leave these premises." He said, "You can wait outside. You stay out there and if your client feels that you could assist him, he can ask us whether he can leave the hearing to talk to you." He said, "Do you understand that?" I said, "Regrettably I do, and I will wait to see whether he needs me." I waited out there and he came out once and said, "This is a big waste of time. I can't be running backwards and forwards. I wanted you on the spot." I said, "I cannot be there." That was an actual experience of making a formal

application and being given the shaft. I did not find that very edifying, I can assure you. It was just like a broken lamp on the boulevard of life.

**Mr SARINA:** Can I just say something about the same sort of thing. It was all at my expense when I got this horse impounded. I requested my own vet be present at the time their vet was present to take the samples, and was denied three times. I was paying for the whole thing. I asked him three times whether I could have my own vet there. Bluntly, no, he will not be there, he is not allowed, and I paid everything. That is the sort of thing we have to put up with.

**Mr ABBOTT:** And if your horse is swabbed and you ask for a sample—and I have had it done on numerous occasions—my father and I have gone to them and said, "You are testing that horse, and we have just seen the outcome of this greyhound inquiry, I would like a sample." They said we cannot have it. It is our horse and our blood, and I said I would pay the vet after, and they said we cannot have it.

**(The witnesses withdrew)**

**(The Committee adjourned at 5.45 p.m.)**

**REPORT OF PROCEEDINGS BEFORE**

# REGULATION REVIEW COMMITTEE

# HARNESS RACING (APPEALS) REGULATION 1999

**Inquiry by Regulation Review Committee into regulatory controls governing appeals to Harness Racing New South Wales and the Harness Racing Appeals Tribunal**

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**At Sydney on Wednesday, 28 March 2001**

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**The Committee met at 9 a.m.**

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**PRESENT**

The Hon. Janelle Saffin (Acting Chairman)

The Hon. D. T. Harwin
The Hon. M. I. Jones

Dr E. A. Kernohan
Mr G. F. Martin
Mr R. W. Turner
Ms M. F. Saliba

**ACTING CHAIRMAN:** The Regulation Review Committee is meeting today to have a short continuation of its inquiry into the Harness Racing (Appeals) Regulation 1999. We previously met on 2 February 2001.

Today we will be taking evidence from Mr Frank Martin from the Australian Racing Board, Mr Derek Major from the Australian Equine Veterinary Association and from Mr Brian Hancock and Mr Paul Fitzpatrick, both of whom are harness racing trainers.

Mr Tony McGrath, President, Australian Harness Racing Council, Mr Peter Baldwin, Assistant Director Racing, Department of Gaming and Racing, Mr Tony Mullins, Chief Executive Officer, Harness Racing New South Wales, and Mr Dennis English, solicitor for Harness Racing New South Wales, are also present and if they wish to address any issues I will seek to make time available.

**FRANCIS ROBERT MARTIN,** Reporter and Assistant to Chief Executive, Australian Racing Board, 38 Glen Street, Belrose,

**DEREK ANTHONY MAJOR,** Veterinarian and President of Australian Equine Veterinary Association, 5 Price Lane, Agnes Banks,

**PAUL RONALD JOHN FITZPATRICK,** Professional Horse Trainer, 80 Weelsby Park Drive, Cawdor, and

**BRIAN PAUL HANCOCK,** Professional Horse Trainer, Teeny Lodge, Calderwood Road, Albion Park, all sworn and examined, and

**TONY McGRATH,** President, Australian Harness Racing Council,

**PETER BALDWIN,** Assistant Director Racing, Department of Gaming and Racing,

**TONY MULLINS,** Chief Executive Officer, Harness Racing New South Wales, and

**DENNIS ENGLISH,** Solicitor for Harness Racing New South Wales, on former oath:

**ACTING CHAIRMAN:** Mr Martin, did you receive a summons issued under my hand to attend before this Committee?

**Mr F. R. MARTIN:** I did.

**ACTING CHAIRMAN:** Have we received a submission from you?

**Mr F. R. MARTIN:** No.

**ACTING CHAIRMAN:** Dr Major, did you receive a summons issued under my hand to attend before the Committee?

**Dr MAJOR:** Yes, I did.

**ACTING CHAIRMAN:** Have we received a submission from you?

**Dr MAJOR:** Yes, you have.

**ACTING CHAIRMAN:** Is it your wish that the submission be included as part of your sworn evidence?

**Dr MAJOR:** Yes.

**ACTING CHAIRMAN:** Mr Fitzpatrick, did you receive a summons issued under my hand to attend before the Committee?

**Mr FITZPATRICK:** I did.

**ACTING CHAIRMAN:** Have we received a submission from you?

**Mr FITZPATRICK:** No, you have not.

**ACTING CHAIRMAN:** Mr Hancock, did you receive a summons issued under my hand to attend before the Committee?

**Mr HANCOCK:** Yes, I did.

**ACTING CHAIRMAN:** Have we received a submission from you?

**Mr HANCOCK:** No.

**ACTING CHAIRMAN:** Mr Martin, under the Australian harness racing rules there is an absolute liability rule for trainers where a horse is presented for a race with more than the prescribed level of a prohibited substance. The rule states that an offence is committed regardless of the circumstances in which the prohibited substance came to be present in the horse. Would you tell us what the situation is under the Australian thoroughbred racing rules, please?

**Mr F. R. MARTIN:** Would you care if I got my rule book out?

**ACTING CHAIRMAN:** No, please.

**Mr F. R. MARTIN:** Do you want me to read the rule?

**ACTING CHAIRMAN:** If that would assist, please.

**Mr F. R. MARTIN:** The appropriate rule of racing is rule 178. It is one of a series of rules about prohibited substances, but it is the key one and it states:

> When any horse which has been brought to a racecourse for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have had administered to it any prohibited substance as defined in A.R.1 (i.e. Australian Rule 1), the trainer, and any other person who was in charge of such horse at any relevant time, may be punished, unless he satisfies the Committee of the Club or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance.

**ACTING CHAIRMAN:** So that rule obviously gives a person an opportunity to explain the circumstances, to explain themselves?

**Mr F. R. MARTIN:** Well, not so much to explain themselves, but to prove that they took all proper precautions.

**ACTING CHAIRMAN:** Mr Martin, from your lengthy experience, do you believe the objective of drug free racing is compromised by the right of a person to be absolved from an offence on the ground that he or she had taken all proper precautions, as you just described, to prevent the administration of a prohibited substance?

**Mr F. R. MARTIN:** The problem is that it seems to be a self-evident fact that, if a horse has a substance in it, he must not have taken proper precautions, so it is a bit of a conundrum really and that is one of the problems. I cannot remember any recent cases certainly where a person has had a prohibited substance found in his horse on race day and he has been able to be absolved from any offence by proving that he took proper precautions.

**ACTING CHAIRMAN:** Mr Martin, what sort of consultation preceded the adoption of the Australian thoroughbred racing rules? That is the first part of the question and the second part is: Are they compatible with rules of like countries, other countries?

**Mr F. R. MARTIN:** Yes.

**ACTING CHAIRMAN:** "Yes" to the second question?

**Mr F. R. MARTIN:** I will start with the second one: Yes. The thoroughbred racing industry

has an international body known as the International Federation of Horse Racing Authorities. Every racing nation in the world - South America, South Africa, the whole lot of them - meet once a year in Paris. It is a very serious conference and there is a lot of foregoing preparation for it, naturally.

One of the main results of their conferring is that they have the International Articles on Breeding Racing and they then have the member countries adopt or refuse to adopt these. They become a party to or signatories to these Articles of association, much like the United Nations, so they are pretty well guidelines, and you will find that the Australian Rules of Racing comply with Article 6, which I have supplied to Mr Jefferis, and Article 6 is the one that bears upon the subject matter that we are talking about and it says that a horse should not have a drug in it on race day and all that sort of thing.

**ACTING CHAIRMAN:** Before the adoption of the rules in Australia, what sort of consultation process did you go through?

**Mr F. R. MARTIN:** Well, the Australian Rules of Racing started way back in the time of James II when they first started racing in England, but especially since about 1916 they have grown like topsy and they have been improved. Rules that were not workable have been discarded and new ones have been made. Rule 178 has been through a fair amount of adjustment, I suppose you could call it, over the last ten or fifteen years. They did have a system whereby the trainers would have to say what therapeutic substance they had given their horses in the previous seven or eight days and that would be signed by the club's veterinary surgeon to say, yes, that would be all right, but that did not work at all because if it came up with proof of a substance in it they had to prove that this drug was a prohibited drug, so the veterinary surgeon on duty on the day had to accept the trainer's word that he gave it to the horse, say, three days previously and he would say, well, we will go on what you say, three days ago, it is okay to race, whereas he might have given it the day before or the same morning, so that was one of the problems with that and that arrangement was discarded. It is the same rule, the absolute rule, in harness racing. It looks as though there is an out, but it does not work out that way.

**Mr G. F. MARTIN:** I would like to pursue the processes in thoroughbred racing in relation to the role, say, of chief stewards when a person is charged. What sort of hands on role do they have and what involvement can, for instance, the charged people, whether they be trainers or stable hands, legal representation - can they have that at every stage through the hearing and then if there is an appeal?

**Mr F. R. MARTIN:** First of all, the stewards investigate. Could I explain my background in racing, stewards' processes and things like that?

**ACTING CHAIRMAN:** Yes.

**Mr F. R. MARTIN:** For many years, as a hobby, I worked for the racing stewards as more or less the secretary and reporter and I came to know quite a lot about their procedures and what goes on. First of all, they start an investigation and when they get through the investigation stage, if they believe that there has been apparently a breach of the rules, they confer. There might be seven stewards and they confer and say what are we going to do? Someone would move that he be charged under rule so and so and then they would call the chap back in and charge him. They are very keen on natural justice these days and everyone who has an allegation against them must have a full opportunity to state his case independently, and that is a very dominant factor in all stewards' inquiries. It used not to be until we had this wonderful appeals system that we have now where judges are appointed. That is the process getting up to charging. Then the evidence is led on the stewards' side or, in the case of drugs, vets would give evidence or analysts and vets, and then the stewards confer, having got all the evidence in, and they either find the man guilty or not guilty. There are quite a number found not guilty. I suppose about 15 percent would be not guilty, but mostly the charges are well looked into before they prefer them and quite a lot of pleas of guilty are made. You find a lot of problems with jockeys. We used to have a jockey named Dittman from Queensland and he was the fairest jockey I have seen, he would say: I am guilty. Others are argumentative and they will take it to the full extreme.

**Mr G. F. MARTIN:** The stewards will do the investigation, lay the charge and follow the process through, and they also dispense the justice, I suppose, at the end of it?

**Mr F. R. MARTIN:** Yes, but the point that most people miss: I have always regarded the stewards' inquiry as a preliminary inquiry, because we have such a wonderful appeal system and they can have the matter reheard within a week by either a judge or a person very well placed in racing, so the decision of the stewards is only a preliminary decision because of the organisation of appeals.

**Mr G. F. MARTIN:** The first question was speaking about Rule 178. We were talking about absolute responsibility such as they have in harness racing. The trainer is the person responsible as the registered trainer of the horse I presume?

**Mr F. R. MARTIN:** Yes.

**Mr G. F. MARTIN:** But other people can be charged?

**Mr F. R. MARTIN:** Yes.

**MR G. F. MARTIN:** There has been a high profile case just recently in Melbourne in relation to $TCO_2$ where the trainer had copped a $12,000 fine and I think the stablehand or a strapper or something got a six month suspension. Is that the standard practice, to your knowledge, in all forms of racing, that is that not only the trainer is targeted, it can be other people?

**Mr F. R. MARTIN:** That is quite an unusual case where any other person who was in charge of the horses was also charged. You are referring to the Skalato case in Melbourne, are you?

**Mr G. F. MARTIN:** Previously to the trainer of the horse.

**Mr F. R. MARTIN:** The one that I thought that you were referring to was Skalato, who won the Caulfield Guineas, then about six months after they conducted the inquiry, and that was boldenone or - I forget what the drug was, but he, the trainer Conners, was fined quite considerably, and his son, who was involved in the administration of the drugs, also was fined. He was the assistant trainer they called him.

**Mr G. F. MARTIN:** The case I was referring to was the Freedman case.

**Mr F. R. MARTIN:** The Freedman case, yes.

**Mr G. F. MARTIN:** They were similar circumstances.

**Mr F. R. MARTIN:** Yes.

**Mr TURNER:** Mr Martin, can you advise the Committee whether the Australian Racing Board was formally consulted by Harness Racing New South Wales in connection with the making of the Australian Harness Racing Rules?

**Mr F. R. MARTIN:** That goes back a long way.

**Mr TURNER:** It will test your memory.

**Mr F. R. MARTIN:** I am 82 and I can go back, say, 40 years. I used to do work for the harness racing people, for the stewards, so I know both sides of it, and I know that they have always had, if not official consultation, certainly consultation between committee members and committee members of the harness racing, or between steward to steward.

**Mr TURNER**: Some official consultation, some unofficial consultation?

**Mr F. R. MARTIN**: Yes, mostly unofficial.

**Mr TURNER**: An ongoing process right through?

**Mr F. R. MARTIN**: Yes. Like the Chairman of Stewards will ring up and he will say, "What is your rule on so and so?" Indeed, I have an arrangement with Tony Mullins of Harness Racing in Sydney that I send him all of our rule changes every time they are made and that might be four times a year.

**The Hon. M. I. JONES**: Mr Martin, for the record please, would you say that Rule 178 works sufficiently well to justify its continuation?

**Mr F. R. MARTIN**: I would say so.

**The Hon. M. I. JONES**: And does the thoroughbred racing industry have any pressure on it to adopt any of the rules applicable to New South Wales Harness Racing?

**Mr F. R. MARTIN**: National Harness Racing and New South Wales Harness Racing I guess?

**The Hon. M. I. JONES**: Yes.

**Mr F. R. MARTIN**: No, they have had no pressure. I think it would save a lot of trouble. When I say that, there is an enormous amount of expenditure goes into the detection of drugs and proving that the drugs were in the horse, so you have got highly paid professional men, analysts and top veterinary surgeons. They used to have to prove that it was a performance enhancing drug. Well, that has gone. It used to be if it has a drug in it that is performance enhancing. That has now been got rid of and all the authorities now do is they make a list of all the drugs that they will not have in the horses on race day, and they are drugs that have an effect on what they call the mammalian system. I am not too bright about what that means but it is something to do with the body of the horse. So in those days, the vets and the analysts were present for hours at inquiries proving that it was performance enhancing, and I think the change to saying what drugs we will not have in horses has brought about a great saving to the racing industry, harness racing and greyhound racing too I suppose, and certainly thoroughbred racing. Am I making myself clear?

**The Hon. M. I. JONES**: Yes, you are. I would like to ask your opinion, and I appreciate you are from the Australian Racing Board and not in New South Wales Harness Racing, but in your opinion do you think the cost, as you have just mentioned, of identifying these drugs would be so great as to be an influence in harness racing's adopting the rules that they have adopted?

**Mr F. R. MARTIN**: No, it never has been and never is. They spend millions to set up laboratories and things like that. Nobody ever questions that it is not money well spent. I have never heard it questioned.

**ACTING CHAIRMAN**: Thank you, Mr Martin. We have got no further questions.

**Mr F. R. MARTIN**: Could I make a general statement?

**ACTING CHAIRMAN**: Yes.

**Mr F. R. MARTIN**: The reason why we hear so much about drugs in horses is that it is very important for any racing industry, any of the three codes, to have an integrity of the bet, and that is if

you put your money on, you are not having some horse that you have not backed beating you because it has a drug in it, and we refer to it as the integrity of the bet. I believe in this country we are very very fortunate. Nobody seems to question. You hear stories about the Fine Cottons and all that sort of thing but -

**ACTING CHAIRMAN**: Something with drugs though?

**Mr F. R. MARTIN**: This drug question is of utmost importance to any racing industry, because if people think that horses are being drugged, that they are chemically fit, they are not going to bet, and that is where the lifeblood is, that is how you keep going, that is how you pay for the laboratories, by people betting on the TAB mostly these days. So it is a terribly important function.

I find that the people who control racing, the committees and people like that, are people of high repute. We had a glitch in the greyhound racing in recent times where we had a bent steward who was interfering with the samples for the benefit of some trainers, but generally speaking, I think even a layman would agree that the racing industry goes to a lot of trouble to keep it clean and to make the bet one of integrity.

The other thing I would like to say is that the rules of racing have been compiled over many years, as I say, going right back to James I when he started racing at Newmarket. In Australia we followed the English rules originally and now we have got away from a lot of them because we find that they do not fit in with our country, but they have been compiled with very great thought. For instance, the Australia Racing Board has an Australian Rules Review Advisory Group, and after the stewards or the vets or the racing managers suggest that there should be a change to the rules, it comes to this group, and I am an active member of it, and we test it with our experience in different parts of racing, we look at it and work very hard on seeing it is fair all round, to the participants, to the industry and to the trainers, the jockeys and everyone else. This process is ongoing, and the rules that are there now have been the product of a lot of thought by experienced people.

The racing industry in Australia is run by State governments. It has become an important national industry, and it is said that it is the fourth most important industry in the country. Whether that is right or wrong, it does not matter. It is a prominent national industry. It is run by seven State governments or administered by seven State governments and it is an important Commonwealth industry. It is quite unique. So that if we ever get to the stage where the State Government say, "We are in charge of racing and we are going to make the rules", they will make it in New South Wales and that will give them trouble in Western Australia say. You know how hard it is to get all the State Ministers together to make an agreement. I believe that if State governments decide that they are going to start making the rules of racing, it could have a big effect on the income to the racing industry, the tax that comes into the State governments.

I think that a lot of thought should be given to keeping apart from the rule making. Not that I am saying that the industry is better than the State governments, but to keep apart from that. Indeed, in some of the States I have spoken to Ministers for Racing and they say, "Well, we want to have a body there". For instance, in New South Wales they have a State Thoroughbred Racing Board and they want that to take the backwash from the newspapers and everything else, rather than blaming the Minister.

That is my point. I believe that this is an important national industry run by seven States and it has been run successfully, and I think that the people in it do a pretty good job of making it an industry of integrity.

**ACTING CHAIRMAN**: Thank you, Mr Martin. Dr Major will you come forward please?

**Ms SALIBA**: Dr Major, in your submission you have agreed that the $TCO_2$ threshold issue had an effect on the integrity of the appeals process. You question the viability of the existing arrangement for drug testing in harness racing. Would you like to comment on this? In particular an

issue that has been raised with me is in regard to solutions used in testing. I understand that the bicarb level varies and can give different readings.

**Dr MAJOR:** Yes, I think, answering the last question first, that is the biggest problem. Obviously we are focussing very much on the TCO2 issue in this inquiry at this point. Certainly, I endorse most of what the last witness stated, but there is a big difference between bicarbonates, and I think every other drug tested for. A bicarbonate is not a foreign substance, it is a naturally occurring substance, and that is the crux of why it has become such a complex issue, that we all have a certain level of bicarbonate in our system, otherwise we die. In fact, if we get less than a certain level, we get terribly sick. That is the difficult issue with bicarbonate. And certainly the AEVA fully agrees that there need to be steps in place to control illegitimate manipulation of horses formed by administering bicarbonate, but we do need a system which at the same time is fair and reasonable in detecting this administration.

Certainly my views have changed in the last twelve months from when I first became particularly engaged in this issue. At this point I am certainly very committed that the current rule runs the risk of penalising innocent trainers. I am not here to point blame, but it is my view that between the authorities, which have set a threshold level of 35 millimole of TCO2, and the laboratories, which are in good faith testing the levels, there is a breakdown in fairness and justice in the system.

I am not a lawyer, but in the information sent to me with regard to this Committee there were a couple of items that I came to note, in particular in the regulatory impact statement. 3.9 says that persons deprived of their livelihood can seek independent review and I am not comfortable that they have access to such an independent review of the fairness of the rule. 5.29 states consistency in natural justice for appellants. I am concerned that natural justice may not be served. 7.2(d) requires us to ensure fairness and quality of decision-making and I am not comfortable that on this TCO2 issue these ends have been served by the current rule. Under the Harness Racing (Appeals) Regulations, on my reading - and I am not a lawyer - there is no opportunity to test the validity and fairness of the rule. There is opportunity to question whether the stewards applied the rule correctly and, in fairness to the stewards, that is their job, just as a policeman is there to determine whether a motorist is speeding, but he is not there to decide whether 100 kilometres an hour was too fast on the day. I cannot see any opportunity to question whether the rule was a fair rule.

Over the last twelve months my opinion has actually polarised to some extent. I have had an opportunity to review a lot of the scientific evidence and I am of the opinion that the overwhelming weight of scientific evidence is that the existing rule is flawed. In the case of the two trainers - Mr Martin's private members bill specifically nominated these trainers - I am concerned that, even on the balance of probabilities, it has not been shown that they have offended, in other words administered TCO2 (bicarbonate) to their horses, and that is in a very large part why I am here today in response to this inquiry's request. Nevertheless, the stewards have to apply the law. The law says 35 is the threshold and the laboratories have reported that the threshold has been exceeded. It is an almost mandatory twelve months' suspension for any trainer found with a drug offence in New South Wales and, as I said, these items of natural justice and quality of decisions do not really get a say.

**Ms SALIBA:** With the 35 millimol level, is that standard across all the codes of racing?

**Dr MAJOR:** Harness Racing New South Wales has a level of 35. They have an allowance for the uncertainty of the machine which takes what is called the action level up to 36.2. One State takes it up to 36.4. Thoroughbred administrations throughout Australia have adopted a level of 36, which also makes allowance for an uncertainty factor. Elsewhere in the world there are either no thresholds specified or the threshold of 37 millimol is specified.

**Ms SALIBA:** So that is elsewhere in the world?

**Dr MAJOR:** Elsewhere in the world. I should actually qualify those remarks too by saying

there is no gold standard for TCO2. We know exactly how long a metre rule is; there is one of them in Paris I think which is the standard and every other metre in the rule is compared against that. There is no standard for TCO2 and really every laboratory on every day everywhere in the world will have slightly different methodology and results for measuring the same substance, so we are not really comparing that 35 against a gold standard and there is really quite good evidence that it has varied, that the way the laboratories, in the best of faith, have measured this number has varied over time and across Australia and across the world there are different machines; there are different methodologies and there are different standards.

**Mr G. F. MARTIN:** As a vet, would you say there is any justification for the different levels, say, in thoroughbred to standard bred horses? Is there any particular difference?

**Dr MAJOR:** There are no documented factors which would cause standard bred horses to have different normal levels than thoroughbred horses and the evidence points to the contrary.

**Ms SALIBA:** What is a normal level? Would these levels that you have given be the normal level of an animal before it has had any--

**Dr MAJOR:** The normal level is unknown. This is one of the big difficulties with the issue. We do not have, let's say, 1,000 horses about to go into a race that we can test, measure them all, average them and say: This is the average and this is the range. That is one of the very big difficulties.

Now the best studies that have been conducted are either horses at rest, which might be standard bred or thoroughbred, at rest in a stable, or what is called pre-race testing results. Just to give you an idea, the average is between about 30 and 32, depending on the test and depending on the actual sample taken. Now a difficulty with the pre-race testing is that obviously the reason for testing is to determine whether there are drugged horses, so they will be included in the average, and of course nobody is going to say: Yes, I gave my horse a dose of bicarbonate. The argument against the former test methods was that the horse is at rest and in a stable and there are a lot of factors that we know can vary TCO2 in horses that go to the races that are not considered in a horse at rest and there are also a number of other factors, such as geography, feed, training methods and so on, that can vary a horse's "true" TCO2.

**Dr KERNOHAN:** Dr Major, you have indicated that you are unhappy with the situation, but what changes do you think could be made in harness racing that would benefit the appeals process?

**Dr MAJOR:** It is a very difficult question and the last thing I think the AEVA would want to do is to actually say: Let's not test this at all; it is too hard. There is very good evidence that trainers have attempted to manipulate the system in the past. Early surveys did show that. I do not believe that happens to any great degree now. We need a rule in place, but I think we have to firstly acknowledge that in the current testing, which is a single pre-race plasma TCO2 level, it does not matter what level we set, there is a statistical likelihood of an innocent overage. If we make it further and further away from the mean it becomes smaller and smaller, but there can be a horse who is over and the trainer has not meddled with the horse in any way and there are a number of horses now documented in Australia and around the world which, under good controlled conditions and observed enforced conditions, have gone over the levels which are currently in the rules of racing, so I think that makes the rule unsustainable in terms of natural justice and standards of quality decisions. To actually suspend a trainer for the mandatory twelve months when there is a statistical likelihood that he might be completely innocent I do not think meets those requirements.

There are other possibilities for confirming administration and these involve further testing of the same sample, testing for other substances in the blood and repeated testing - in other words, seeing what happens over time to the sample - because if the horse has just had something dumped in its stomach and you measure it now, it will be a little bit different later on. There are urine tests; there is

what is called fractional excretion of electrolytes. In my view, the way forward is to firstly recognise that the current testing has a statistical likelihood of innocence, and I think the penalty system has to reflect that. It may be that in integrity for the punter we do not want those horses starting in a race. It may be that we have to test them before they race and say "I'm sorry" or even tell the punters that the horse's level is 37 and unfortunately he can't start the race. If the punter considers it that important, perhaps he should know all the horses. If we then say to scratch the horse out of the race and we take him away and perform further testing, I think most scientific experts would consider that it is possible to actually confirm administration. If they can confirm administration, twelve months is fine by me; that is not my issue. The AEVA strongly feels that the current process is flawed.

**Ms SALIBA:** It would still be affecting a trainer's livelihood, in a sense, if you are withdrawing them from a race prior to running or after they have run. It would still affect their livelihood. It would not have a long-term effect, but it would have an immediate impact on the chances of them winning that race.

**Dr MAJOR:** Yes, that is where natural justice comes in. Again, I am not a lawyer, but I think we all recognise levels at which natural justice must come into play and I think most trainers would accept that there is a risk that they will not get their horse to run: The truck might get a flat tyre; the horse might go lame; the vet might for another reason actually advise the steward not to start the horse. I think they will accept a certain risk, trainers are risk-taking people, but I think we need a review process that actually can consider later whether in fact that level of penalty is applicable. It is the same as the football field: If there is a knock-on or a scrum, we cannot have a judge and jury determine whether the referee was correct, but we can, before we affect somebody's livelihood, review the evidence, perhaps video evidence, whatever.

**Dr KERNOHAN:** Dr Major, in your submission you have reservations about the value placed on evidence from professional experts appearing on behalf of industry participants. I gather you feel it is not accorded adequate significance. Would you like to elaborate on that?

**Dr MAJOR:** I have not personally attended an Australian harness racing inquiry or appeal - I have attended a number of Thoroughbred Racing Board appeals - but I have certainly heard the process involved in harness racing, and I am not pointing the finger at anybody but merely reiterating what I said earlier, that the job of the stewards is to enforce the rules of racing, so we can have copious amounts of very good quality scientific evidence presented at the stewards' inquiry and (a) the stewards lack the resources and the ability to adjudge the evidence and (b) in spite of all the evidence - it can be overwhelming - they are there to enforce the rules of racing and they may find that there is remarkably good evidence, but in fact that the trainer still transgressed. When it comes to the appeal stage, once again the appeal judge can only really determine whether the stewards have effectively applied the rules. He again cannot hear the evidence.

One of the difficulties, of course, is the actual structure of the stewards' inquiry and our association is not really very comfortable with the way that the inquiries are structured. There is a chief steward in general who is conducting the inquiry, but it is a little hybrid between an inquiry and a trial in fact. He will ask questions and then he will deliver a verdict. Generally the only people allowed into that inquiry are the trainer and the veterinarian. It is unclear whether the veterinarian is in effect an advocate for the trainer or in fact he is an expert witness. The problem is that there just really is not the opportunity at either the inquiry or the appeal to actually hear and give weight to the scientific evidence.

**Mr G. F. MARTIN:** The views you are reflecting here are basically your association's views, are they not?

**Dr MAJOR:** As the president of the association.

**Mr G. F. MARTIN:** That is the official view of your organisation?

**Dr MAJOR:** It is indeed. I should also point out that I am a member of the Australian Harness Racing Council TCO2 Review Committee. We have met and reviewed evidence in confidence, and I am not in a position to go into that, but I am here on behalf of the Australian Equine Veterinary Association reflecting the members' views.

**ACTING CHAIRMAN:** Throughout this inquiry we keep hearing about the 35 and 36.2 issue. What is the relationship of the figures of 35 and 36.2? What is the margin of error?

**Dr MAJOR:** The uncertainty measurement is a hotly debated issue and it is a very complex one and it is one that is really beyond my scope, but what it relates to is the fact that we can get a sample and put it in the same machine on the same day again and again and again and it will give us a slightly different number every time we do it. That is a fairly standard scientific observation. I think if you sent somebody out to measure something with a ruler and you said to do it ten times or asked ten people to do it, they would get slightly different numbers.

Uncertainty measurement is an attempt to accommodate that, and it is calculated at the moment as 1.2 millimole, so in fact while the rule says 35, the action limit is 36.2. In other words, they will not act until they get to 36.2 because it is only at that level they can really be comfortable that 35 has been exceeded.

**ACTING CHAIRMAN:** Thank you, Dr Major. I would like to ask Mr Hancock to come forward.

**The Hon. D. T. HARWIN:** As a leading trainer, what do you see as the strengths or the weaknesses in the appeals process in harness racing in New South Wales?

**Mr HANCOCK:** I think our appeals programme is pretty good. I am not a guy that does appeal. I have had over 30 years of driving horses and I think I have appealed about twice. If you are guilty, you are guilty. It is like Mr Dittman, if you are in the room and they know you are guilty, and they all say you should never say you are - you are always not guilty, but I just feel the appeals program is pretty good in a lot of ways. You have all sorts you can go to.

**The Hon. D. T. HARWIN:** In evidence that we have had previously from other trainers and other industry participants generally there have been concerns about stewards being both the investigators and adjudicators of offences. How do you feel about that issue?

**Mr HANCOCK:** The stewards have their job to do. We know the rules. We are driving to those rules. Stewards, I think their job is - we have got to have them, as I said. I do not know. Mr Jefferis rang me about it to come in today and it was one lunch time actually, and I said that I would come to this appeal with the TCO thing.

I get quite upset with it in a lot of ways, with the drugs and that in the business. I do not feel they are strong enough, the penalties and all that sort of thing, because I am a horseman, I am an uneducated sort of guy and this has been my business for the last 30 years and it has been a very good business to me. I have worked hard at it. We do 18 hours a day and all that sort of thing, and a lot of these guys come along and all of a sudden they are sitting out three wide beating you. I think I can drive a horse all right, and all of a sudden you find that they are cheating. It hurts you. I am talking on all this sort of thing. I think the harness racing have their own rule book. They are our rules, you sign them. If you do not want to play by them, you are out. If you get caught, you can go to a High Court, you can go anywhere you like, to fight to take someone's livelihood off you, but he has been cheating. I say it is TCO. There could be three or four guys innocent of it. I am not saying that.

I have had horses test - I had a horse at Harold Park one afternoon. He tested up really close, and it was when we first started testing these horses, and they tested him three times and he was right, but the next day I went home and rang the owner and I said, "The horse has got to go." He did come

from a bicarb trainer.

Because what you have got to understand is we had this bicarb on the scene a few years back, it just arrived, and everybody is bicarbing. They are cheating these horses with - some was going 250 grams of bicarb, some was going 500, maybe even go better. People do these things; it is a natural thing. This bicarb coming out, it is just - excuse the French - it just stuffed everything in our business. We had new records, there were horses running new records, all false records, guys winning 200 races and all this sort of thing. All our records went out the book, just went out, and all through this. It was just a common thing. You go to Harold Park and people are giving these horses water and water, and buckets and buckets of water. It is not natural. We have got things in this business that I am - as I said to you, I get upset with it.

I did not want to come today because I am - if you make the TCO2 level 35, if you make it 37, let's make it 38. Why be here all day doing it? Let's make the level 38. These guys will do it. What will you do with a guy that makes it 39, he gets a 39 level? "I did not use it. I had the vet here." The vets are working on a 35 to 36 level.

It is just, with the Olympic Games, we come here, we are the cleanest Olympic Games in the history of the sport. That girl won a gold medal. They took it off her because she cheated, and that is the way I look at it.

We can sit here. We are wasting all your time and our time with this TCO level, and there is no doubt, if you had all the guys here, there might be three or four innocent guys, but the other 90 per cent of the guys they have got up on a charge for getting near the fine line, because people are going to play the fine line, they are going to walk the tightrope. They will say, "It was not me. I did not do that", and all of a sudden these guys that are not doing it, and they detect the drugs, their horses lose legs. I have seen it. They cannot win a race.

I can go back seven years ago, we went through the worst thing in our business. I could not buy a horse for seven years. I had people beating me that I know they cannot train a horse and I could not say to my clientele base, "We will go and buy that horse and go to the races", because the simple reason is I could not beat them.

That affected my business. I have got a clientele base, I have got four people in my yard I have sent accounts to for 30 years. How many businesses do that? 30 years I have people I have sent an account every month to them, and I could not go and buy those people a horse. They are great people, they are great businesses, and that is what happened to our business. I think the sooner this business and our authority, our powers that be, sit down and make rules stand -

There is Lee Freedman just fined $12,000. A bloody kid gets the wrap. The kid got the wrap; he took the six months. Now, whose responsibility is that? Whose responsibility is the horse? He is my horse; I am responsible for him. There is Clarry Connors; he ran a $500,000 race for these people. The owners are suing him for the prize money, because they want that horse presented drug free.

**Ms SALIBA**: I am a little concerned about the fact that with TCO, the bicarb thing, that the animal produces a certain amount on its own.

**Mr HANCOCK**: Yes.

**Ms SALIBA**: I see it a bit like cholesterol problems that humans have. Some people produce more than others and the only thing I am concerned about is not giving a trainer the opportunity to be able to prove that it is not something that has been administered to the horse. In evidence taken previously some of the industry participants have expressed concern about the rules that prohibit a trainer from having legal representation in the inquiry room. What are your views on the issue of having legal representation? Do you think that this matter could be addressed in the same way that it

has been approached in other sporting arenas where representation is allowed? -

**Mr HANCOCK**: I think you can get legal if you want to. You can get legal advice. With the TCO level in a horse, as the doctor would say, you can get a blood count done on a horse and you never heard of this bicarb, ten years ago you never worried about bicarb levels, but now the vet will tell you your horse's bicarb level is 26, 27, 28, 29. Very seldom you do a horse in work at home and his TCO level, his bicarb level, is over 30. You might get some where it might go to 32. A great example is a horse I just raced, it just won two million dollars, and I was in an inquiry or sitting on a committee with one of the leading stewards, our leading steward. I said to him, "What was Our Sir Vancelot's TCO level all the time?" He said, "I can tell you now. He is retired 32. And he raced at 32 all his life", and that horse won $2 million.

There is no doubt that bicarb helps some horses and others it does not, and the doctor would say that. Some will run through the wall with it; some it does not make any difference to them. This TCO thing is just hanging around with us and we have inquiry after inquiry and we just waste our prize money. All these inquiries waste our prize money, and that is the thing we are here for. We want to survive and get our prize money at a nice level that owners can be all happy and the trainers and their families can get a living, but this inquiry, this today, we can raise the TCO. As I said, I get upset about it. We can raise it, but when we get some guys who cheat again, are we going to be back in four years time, are we going to raise it again?

**ACTING CHAIRMAN**: This inquiry is not specifically about TCO. It is about rule making and we have a legislative charter.

**Mr HANCOCK**: I am sorry. I will settle down.

**ACTING CHAIRMAN**: That is all right. I just wanted to make it clear. It comes up in the broad course of our inquiry, but this is an inquiry into rule making and fairness and justice.

**Mr HANCOCK**: Yes, well, I would be no good at making rules, because I feel I want to go to work, get an honest day's pay and do the right thing by the public. As the first speaker said, the most important part are the people out there who are putting the money on the TAB and our integrity.

Harness racing, I am proud of it. We went through a thing seven years ago with guys cutting holes and all that. You felt embarrassed. You felt sad for the business; you felt sad for the people in the business. That guy got life. If I had my way, I would have gaoled him. You have got to think of the integrity of the business. It is the integrity of you people in your business. And our harness racing is a great business. I love the business and, as I say, it has been great to me. Harness racing has been great to me. I have travelled the world with it and I have met great people and I am proud of it. I am proud to go down the street and I am proud to go anywhere I like and say my business is harness racing, and the integrity of the whole thing is the most important thing. We just buried a great Australian the other day and the first thing you want to remember is integrity, and that is what we want to be in. These guys, our authorities working at it hard and all that sort of thing. We have all got families. Like, Paul got has two kids now in the game. It has got to be that way.

We have got our rules and we are guided by the vets on this, but our rules - some are old fashioned there, is no doubt. We have got to look at rule changes and all that sort of things, but our business is a great business.

**Mr G. F. MARTIN**: Can you understand also that the integrity of the industry needs to be protected by having its due processes, its rules and the way it is operating seen to be meeting modern standards of fairness, justice and all that. We are looking at that. It is like a two edged thing from that point of view.

**Mr HANCOCK**: I realise that, sir. I know it is a two way thing. We have got to have our

rules; we have got to be strong. We do not want people breaking the rules. If people break the rules, that is what they are going to get, and they know it is in black and white, you break the rules, you are out the door.

**The Hon. M. I. JONES:** Mr Hancock, you were present when Dr Major and Mr Martin passed comment on the rules of the thoroughbred racing industry and the problems of the harness racing industry rules. We appreciate your comments and what you say about working within the rules and the integrity of the industry, but do you feel there could be any benefit to the harness racing industry to adopt similar or the same rules as the thoroughbred racing industry?

**Mr HANCOCK:** I have to say New South Wales is the strongest State in Australia on penalties. We are the toughest in harness racing. You talk to any guys interstate and they shudder when they come here. They know the penalties, that is what it is, and I think our rules are the toughest in Australia in three codes and I feel protected by that. I think you will find that overall our rules in New South Wales are pretty tough. They could be tougher. I got upset earlier, I know that, but--

**ACTING CHAIRMAN:** You were passionate.

**Mr HANCOCK:** Yes. We want the integrity of the business, we want fair play. I do not come through Newtown every Friday night, battle through King Street to go to Harold Park and give it up. We are talking about rules. In this day of suing people and all this sort of thing, it is going to turn, and if I run second, a horse beats me in a $100,000 race, you might get a positive test, but the people might have something on the horse, you know, like with Clarrie Connors. The owners are suing him. It is frightening. The vets are going to be called in. If we do not get a hold of this and fix it, it is going to turn into a terrible thing in the next five years, I can see it.

**The Hon. M. I. JONES:** You just mentioned things being fair. Is the current lack of appeals process fair?

**Mr HANCOCK:** Well, you are talking about something different. As I said, I have appealed twice in my life I think, or three times, in thirty years. I have driven over 2,000 winners. If I interfere with a guy or something like that, I will take the time. I have had my eight weeks, I have had my fortnights, I have had my months, I have had all that. I have been down the road, and you are there and that is what it is, but I feel every time I have been to the forum I have had a fair go, a fair hearing. I have never had a positive swab. I have won over 800 races at Harold Park and have had 800 swabs, so I have not been in the process of going there and I have always said to myself and to everybody: If I ever get a positive swab, I will walk out of the business, because I know I have not done it. I will close shop, and you can take that in writing. I will do that because I think if someone has come in and done it to me, I do not want to mix with those people and I will walk away from it, and I can walk away from it. That is the way I feel about the whole thing. I just don't want to know.

These animals can't talk to us. I am a horse lover. They don't know you are going to put something in their food, they are standing there and you can do anything to them. The doctor has to be a horse lover, he works with them every day, and we all are. These animals are dumb animals. You are putting tubes down them - nobody ever thinks about that. We are working with animals, we are not working with humans, like an athlete who does something to swim faster or dive. We are working with a dumb animal, a lovely animal to work with. Sir Winston Churchill says: An hour spent with a horse a day is an hour wasted. We are working with animals every day. The people love them; they are passionate. You get something wrong, you call the doctor, and the TCO2 level, you have no idea what bicarb does to horses. You put it in a frying pan and clean up pots and pans with it. Just think about this before making decisions on whether you are going to lift it up higher or whatever, please think about it, and the doctors have to think about it.

**Dr KERNOHAN:** Mr Hancock, I appreciate very much your thoughts on integrity and the necessity for integrity and, as a person who has the same thoughts myself, if I am accused of something

that is wrong I like the opportunity to be able to explain. You have said you would walk away from it, but do you think that is really fair if you know in your heart that you are innocent and there is no chance under the current system for you to say anything or prove it?

**Mr HANCOCK:** Madam, the thing is I have a security guard who comes to my place four times a night. I live on a farm. I am paranoid about it; my wife is paranoid about it. We look at everything we do. As I say, a security guard comes to my stables four times a day, seven days a week, every day of the year. I feel sorry for some of these guys, When one case happened I said ring the guy and tell the steward to take the horse and lock it up and test it, and the guy didn't do this. He was always going to get twelve months, they are our rules. He did not do that and that horse might have been quite innocent. Locking the horse up, testing the horse for five or six days down at Camden, the guy would not do that.

**Ms SALIBA:** Is that a way of proving your innocence then; you could actually prove your innocence by doing that?

**Mr HANCOCK:** Well, if a horse has a high bicarb reading and they say you have a bicarb level at the racetrack, take the horse and lock him up. It could go the other way and when he goes back it could back go lower, there are two ways of looking at it.

**Mr G. F. MARTIN:** Generally, given your long experience and high reputation in the industry, would you say that your brother and sister trainers are as aware and as well educated on the drug issue as yourself? Is it generally all the trainers who are aware of what the rules are?

**Mr HANCOCK:** I think you will find 100 percent of the trainers know what the rules are. They know what the rules are, they know what the rule book is and all that. I run my shop and the other trainers run their shop. I think you know the rules when you come in. As I said, the rule books could be changed. We have had some cases over races and inquiries that have cost something like 700,000 out of the authority. That is taken off us, off the fair dinkum trainer who is out there working hard hours and presenting this article so that the Government can turn money over out of it and all that sort of thing, but everyone runs their own shop.

**Mr G. F. MARTIN:** Do you think that there is enough done by the authorities or there could be more done or there would be any advantage in running some sort of drug education program in relation to horses and trainers on an ongoing basis for new people coming in, or do they just have to pick it up as they go? Is there any value in doing that?

**Mr HANCOCK:** Well, we probably do that now. We have our seminars, we have our schools. Some have forty kids at home three times a year. Things have cleaned up in the last five years, I have to say that, and it is full respect to the authority. They took a strong stand and really cleaned it up. It has confidence back in the business, a lot of confidence back in the business, and through that they have done that. I worked my butt off to break the record at Harold Park, 62 races for a season there, and I beat Kevin Newman and Pete Frost, both great horsemen, and my staff and I, we worked our butts off, and I kept it for a while. Two years later a bloke came along and won 100 races in a season.

**Mr G. F. MARTIN:** He might be a genius.

**Mr HANCOCK:** Well, he might have been, but the guy wins one or two races a year now, and so the authority sort of said what's going on and woke up. As I said, in harness racing in New South Wales I honestly do believe we have the toughest laws and we are the toughest drivers in Australia and I hope we never go back the other way. We have to keep the integrity in the business in New South Wales. We are the biggest State and we do it that way.

**ACTING CHAIRMAN:** I would like to call Mr Fitzpatrick, please.

**Dr KERNOHAN:** Mr Fitzpatrick, as someone who is also a leading trainer, what do you see as the strengths or the weaknesses in the appeals process in harness racing in New South Wales.

**Mr FITZPATRICK:** Well, I think most of the trouble with people speaking about having legal representation really only deals with drug charges, if they have a positive test and they require legal representation with them in that respect. I think if they have committed some sort of driving charge or something like that, there is no problem in the appeal system, it is very good. The judge has two people with him to give him advice and the amount of times that I have been through it it has been very good. With drug free racing and drug charges, that is where they have the problems and that is why they want legal representation because the stewards really have a job, as Dr Major said, when you go to an inquiry on drug free racing with a positive test, 99 times out of 100 you will be penalised twelve months or less disqualification. When it then goes to an appeal with a judge, what is he going to do? You cannot present new evidence, so he can only really go along with what the stewards have done and the stewards' job is to enforce the rule, which is if you have a positive test you get penalised, here is your twelve months' disqualification. I don't know how you read it really, but as far as our appeals board, when you go through other charges, there is no problem with it at all, it is only the drug free racing.

**Ms SALIBA:** Are there any issues with harness racing that you think unnecessarily generate appeals?

**Mr FITZPATRICK:** Really the TCO2 is the one, unfortunately. I am like Brian, we want drug free racing. I think the main thing that we have difficulty understanding is that the vets cannot come up with the right answer. We have vets on this side saying it should be 37 and we have a vet who represents the AJC saying it should be 35. They are the best vets in the land and they cannot come up with the right answer. All we want is a fair level that protects the innocent, that is all we want, and I don't know whether 35 is that level - Dr Major might know - and I don't really know a lot about it because I am a bit like Brian, I have never been to one, but they say because the TCO2 has been tested in a different way the levels have changed. Surely, I would think, you would know that, if you change the system and the levels, you would have to see change. If they cannot get together and work that out, well, what chance have we got? Whether it is 35 or 37, surely they must be able to come up with the right answer. But I am like Brian: If it goes to 37 there will be people trying to get 36.8 and they are the ones that are going to get caught.

**Ms SALIBA:** Do you have any problems personally complying with the current rules in harness racing?

**Mr FITZPATRICK:** No.

**The Hon. M. I. JONES:** I would like to ask you similar questions to the ones that I asked Mr Hancock. I think you have probably already answered them. You are quite confident in the appeals process being appropriate?

**Mr FITZPATRICK:** Well, as I say, everything other than drug free racing or a drug positive test, I think it is good, but when you go in there - and we will speak about TCO2 or some other positive charge - the stewards nearly automatically will give you twelve months' disqualification or something like that because that is their job. You broke the rules and you are responsible for that. If you can't prove that something has happened, you are going to be found guilty and you will get a disqualification. When you go to the appeals tribunal you really cannot present fresh evidence and there is probably no more evidence to present anyway, so what is the judge going to do? He can't do anything about it.

**The Hon. M. I. JONES:** What would you say about not being able to have your solicitor with you at the time of the inquiry?

**Mr FITZPATRICK:** Well, I mean I think the solicitor is only going to get you out on a technicality, he would not be going to get you out of it whether you are guilty or innocent, it is only going to be a technicality that he is going to get you out on.

**The Hon. M. I. JONES:** With this discrepancy which has been bandied about this morning that it is not an easy thing to calculate and there may be an appeal to the inquiry on the basis of the possibility of measurements not being accurate, those sorts of issues, do you not think that natural justice might be denied by not having a legal representative at the hearing?

**Mr FITZPATRICK:** It is very difficult for me to say because I have not been there, I have not been in that position.

**The Hon. M. I. JONES:** But you are in an industry where you talk to a lot of your colleagues about these sorts of issues, surely?

**Mr FITZPATRICK:** Yes, but they all swear they are innocent, and probably quite a lot of them are, I am not saying they are not. I think this is the problem. Where Dr Major said it's got to protect those innocent people, which when a horse goes to the races and it gets stirred up or it gets a virus or certain aspects like that, the TCO2 level lifts, and although at home when you get a blood done they give you a bicarb level, the level of the amount of bicarb in the horse, that is not the same level as the TCO2, it is a different reading, and it is only just lately that we have been able to take a sample of our horse's blood to the AJC and get that tested. That has only just come of age probably in the last few months, but, as I say, when you take that horse to the races really you have no idea what its TCO2 level is. It could be the first time we have raced the horse and we do not go and get its TCO2 level tested because we don't give him anything to lift his TCO2 level up.

**The Hon. M. I. JONES:** Given that scenario, let's say the horse wins and its level is too high and you are facing loss of livelihood for twelve months. Surely, wouldn't you think it would be appropriate if you are going in front of an inquiry which, by its nature, tends to intimidate people? Don't you think it is reasonable that you should have legal representation there, either to make your case for you or to assist you to make an adequate case, because of these things which may happen to a horse just prior to a race?

**Mr FITZPATRICK:** In that case, and you are talking to me, who does not treat his horse to lift his bicarb levels, I would say no, because there will be a reason that horse's level is high. He would either be a high horse himself, and I would say that would be the main reason, because if they took that horse and took him to the university and kept him there, his TCO2 level would probably be naturally around about 33-34, and then when he went to the races and the float trip and all those other aspects which can lift your TCO2 level, he would be naturally a 35 horse and that would be picked up when he is put under guard. So I do not think the legal representation would help.

**The Hon. M. I. JONES:** For you to explain that to the inquiry, is it not reasonable that you could have a legal representative with you doing that?

**Mr FITZPATRICK:** You have all the evidence from vets and so on that this has happened. I do not really know, but to my thinking, I really think once you get to a stage like that, where you have your solicitor with you and the authority has their solicitor, it becomes a legal battle, it is a technicality that you are getting out on.

**The Hon. M. I. JONES:** Just continuing this example, your livelihood is on the line for twelve months.

**Mr FITZPATRICK:** Right.

**The Hon. M. I. JONES:** You can stand there almost naked in front of the inquiry or you can

have somebody there who is better experienced, to help you withstand this sort of thing. Is that not true?

**Mr FITZPATRICK**: No, because in my case, I would know that there is something wrong.

**The Hon. M. I. JONES:** You know there is something wrong and you want to explain that to the inquiry. If you have never been in an inquiry before, you might be intimidated by it.

**Mr FITZPATRICK**: Possibly, yes.

**The Hon. M. I. JONES:** You might get flustered and so on. What I am saying to you, is it simply not reasonable that you should have some assistance there, somebody who can help you?

**Mr FITZPATRICK**: Some people cannot speak at inquiries.

**The Hon. M. I. JONES:** Yes, that is right. So you would agree there is a good reason?

**Mr FITZPATRICK**: In that case, if some people at an inquiry just cannot say what they want to say, they might have you there and you just cannot present it right, in that case I might need somebody, yes.

**The Hon. M. I. JONES:** Taking it out of your example, because you are doing very well, but as you said, some people simply cannot talk in front of an inquiry.

**Mr FITZPATRICK**: Yes, they get nervous, yes.

**ACTING CHAIRMAN**: Is there anything you would like to say?

**Mr FITZPATRICK**: The only thing I can say is that I really feel sort of pretty strongly about this, because there have been some people innocent, I think, and been found guilty in respect of that, and I know that they are having a discussion on the levels now, but I find it very difficult that the best vets in the land cannot come up with the right level, and that is the only thing I can say. If the vets can get together and work it out, we just want drug free racing, that is all we want, and if they break the rules, they deserve the penalty.

**ACTING CHAIRMAN**: Thank you very much, Mr Fitzpatrick. Would Mr Mullins come forward please? I understand you have a statement.

**Mr MULLINS**: Yes, Madam Chair, I do.

**ACTING CHAIRMAN**: Would you like it to be incorporated into your evidence?

**Mr MULLINS**: Yes, I do, thank you. Would you like me to read it, Madam Chair, or table it?

**ACTING CHAIRMAN**: Would you read the title of it please?

**Mr MULLINS**: Okay. It is addressed to The Hon. Janelle Saffin, MLC, Acting Chair, Regulation Review Committee, dated 27 March 2001.

> I have been asked by Chairman Brian Ross and his fellow Members of the Regulatory Committee of HRNSW to thank you for your invitation to a further public hearing in this Inquiry which will take place on Wednesday, 28.3.01 in room 1250 on Level 12, Parliament House Sydney commencing at 9.00am.
>
> We will be pleased to accept your invitation and I will be accompanied by Mr Tony McGrath, President of the Australian Harness Racing Council and HRNSW Board Member and also Mr Dennis English,

HRNSW Solicitor of Paul A Curtis & Co., of Sydney.

The Chairman has also asked me to sincerely thank you for your advice that you will consider taking further evidence (including the tabling of material) from HRNSW should we wish to address any issues raised during the hearings.

The Regulatory Committee accepts this invitation and has asked me to provide a response on its behalf and with the greatest of respect, for the consideration of the Regulation Review Committee under the following headings.

I have a number of headings there, Madam Chair. It goes into about six pages. Is there time to read them or shall I table them?

**ACTING CHAIRMAN:** It will be incorporated into your evidence.

**Mr MULLINS:** I would like to table that and I have copies for the Committee members.

**ACTING CHAIRMAN:** We would like to ask you some questions.

**Mr MULLINS:** Certainly.

**The Hon. D. T. HARWIN:** Mr Mullins, I apologise if any of these matters are outlined in detail in your written submission but obviously I have just seen it for the first time, so I will fire away. Would you explain to the Committee the policy that underlies the adoption of the absolute liability rule for drug offences in harness racing. This has obviously been put to a couple of witnesses this morning. I am reminded that at least as recently as 1991 the Harness Racing Rules allowed a person a defence of having taken reasonable precautions to prevent a horse being drugged, but now it is an absolute liability situation. What was the policy there?

**Mr MULLINS:** Yes, Mr Harwin, just to reply to your question, there have been a number of changes over a period of time. It really basically began with the then board of the authority, the Harness Racing Authority, in 1994 deciding to conduct a detailed review of all the rules of harness racing in New South Wales.

Now, that particular review began in late 1994 when we established a Rules Review Committee. The first meeting of that Committee was 31 August 1994. The committee was chaired by Dennis English, who is our current solicitor, as you know. Jim Walsh, then board member was on the committee, Brian Judd, the then general manager of the authority, Roger Nebauer, the Chairman of Stewards, and we enlisted the aid of John Withington, the former Deputy Crown Solicitor of New South Wales.

That detailed review was done in consultation with the industry. At that particular time I must point out the current advisory board did not exist but a number of the associations which are currently on the advisory board did exist. We advertised in our Harness Racing Gazette, calling for submissions and letters went out personally to the secretaries of the Non-TAB Clubs Association, TAB clubs, the breeders, the trainers and drivers, Harold Park, the western districts, northwest, southwest and northern associations of the State. A number of submissions were received, and that process took quite a lengthy time until the rules were rewritten in late 1996 and referred to the Minister for Gaming and Racing in 1997, who at that stage was required to approve the rules.

Separately, the Australian Harness Racing Council, which is all States of Australia, had been provided with a copy of our review and they believed it was a good basis to set up a review to set up national rules of harness racing, and that process began in late 1997. The national review was completed in 1999. All members of all States were on that and each individual State asked its participant bodies to contribute to that review. The national rules, for the first time in harness racing, became effective from 1 October 1999.

That is the due process from 1994 onwards.

**The Hon. M. I. JONES:** Mr Mullins, at our last hearing in Parliament House you elected to give some evidence in camera.

**Mr MULLINS:** Yes.

**The Hon. M. I. JONES:** Do you have any further comment, either in camera or in open forum, that you would now like to produce to this Committee following the evidence which you previously gave in camera?

**Mr MULLINS:** Not at this stage, Mr Jones. The matter that I did address the Committee in camera is proceeding. We also have received a written interest from the greyhound authority, very interested in what we are doing in that particular matter. It is progressing, and I would be hopeful that the board, my board of Harness Racing New South Wales, through the regulatory committee would be in a position to adopt that matter as policy before the end of this financial year.

**The Hon. M. I. JONES:** Before 30 June?

**Mr MULLINS:** Yes.

**The Hon. D. T. HARWIN:** Just to return perhaps to the liability issue, Mr Mullins, in that respect of course the Harness Racing Rules are not the same as what applies to Australian Thoroughbred Rules and greyhound racing rules, which do not have absolute liability. Did Harness Racing New South Wales consult with the Thoroughbred Racing Board to get an idea of how the rules operate throughout Australia?

**Mr MULLINS:** No, we did not. We would have consulted with them through the regular meetings of the Chairman of Stewards which take place on rules and drug related matters. Can I just have a moment?

**ACTING CHAIRMAN:** Certainly.

**Mr MULLINS:** Mr English has just reminded me that harness racing and greyhound rules are both absolute. The thoroughbred is not. No, we looked after our own national rules, they looked after their own national rules, but following up what Mr Martin said earlier, there are regular meetings of the Chairman of Stewards of the codes on drug related and other items of interest, of which no doubt rules will come up, but we do not confer, no.

**The Hon. D. T. HARWIN:** The Committee obviously is advised that the national rules for greyhound racing are not absolute liability, but maybe the New South Wales rules are.

**Mr MULLINS:** I beg your pardon. If I could just clarify that, with the assistance of Mr English, the New South Wales Greyhound Authority are not part of the national system, they are independent.

**Dr KERNOHAN:** I have a question that is a little bit different. Getting back to the actual limits of TCO2 that are not proscribed under national policy, have the governing bodies at a national level ever suggested, or has it been suggested to them, that a wide research program or a research program be carried out Australia-wide to determine just what is a normal TCO2 level?

**Mr MULLINS:** Yes, Dr Kernohan, to answer your question, firstly the second part if I may, that particular matter is being addressed at a national level by the current committee chaired by Dr Diane Ryan in Melbourne, and I understand that detailed report will be with the president of the council, who is behind me, later this week.

I am not privy to their deliberations, but I do know in press releases that I have seen that they have done a major survey of all feeding regimes upon our horses throughout Australia, and I have no doubt, and I have spoken to Mr McGrath about it this morning, depending on what comes out of that particular inquiry, the Australian Harness Racing Council plans to embark on a national education program.

**Dr KERNOHAN:** As soon as that report is produced, presumably to the Minister and to the Harness Racing Authority, may we have a copy of it please?

**Mr MULLINS:** I would have to check that with the Australian Harness Racing Council. It is not our report. It is a report done by the Australian Harness Racing Council, through the President, who is with me here today. Sorry, did I answer your first question? I might have missed your first question.

**Dr KERNOHAN:** No, it is all right.

**Mr MULLINS:** It is okay. Thank you.

**The Hon. M. I. JONES:** Mr Mullins, we heard evidence earlier from Mr Martin, I think, about the whole process of the thoroughbred racing industry system, which seems to be very widespread and international, and in New South Wales we have New South Wales harness racing and the two systems do not comply. I assume that the two systems do not comply because of the history of harness racing in this State. Looking to the future, are there benefits for harness racing in New South Wales in copying the whole process adopted by the thoroughbred racing industry?

**Mr MULLINS:** We do not believe so, but if I could couch that by saying that any consultation in the new commercial environment we live in between the three codes, particularly on areas of integrity, I think can only do us all the world of good and, as a matter of fact, in view of recommendations arising out of the ICAC report into the greyhound industry, particularly at our level, those matters will be liaised a lot further and I also believe that after New South Wales Racing Limited, which is the company that operates with TAB Limited of which we are a member, the cooperation between the three codes is much higher now than it ever was and it will be more so in the future. We do not particularly agree with the way the gallops have handled it. We believe they apply frankly not strongly enough in this area.

You have heard from our leading icon, Mr Hancock. He is our number one trainer/driver and, quite frankly, he said it all: We regard integrity as our top priority. I am not saying that the other codes do not, but we are the toughest and we intend to remain the toughest and we do not necessarily agree with the rules that the thoroughbreds have, but I also point you back to what Mr Martin said: Technically speaking - and I am not a lawyer - it is so close to being absolute it doesn't matter because they just cannot get out of it in any way at all because the rule is absolute and the rule is absolute too.

Now on the point of penalties, once again we do not agree with the way they handle penalties. We believe a significant fine to a leading trainer is a slap on the wrist and that money will be paid, although for the first time in the history of the racing industry a leading trainer is being sued for quite a lot of money for presenting a horse to a race with a drug in it and his owners were not aware of it. That could have very severe ramifications for all three codes.

**Ms SALIBA:** It might also clean up the industry, those who are currently--

**Mr MULLINS:** Yes, I would say, from my personal point of view and our industry's point of view, we are not totally upset with what is happening.

**ACTING CHAIRMAN:** Mr Mullins, I would like to ask one concluding question and it

arose when you were giving evidence previously. An issue came up about the conflict between the rule and the regulation making, you remember, it was to do with the Act, and you said that you would get advice on that?

**Mr MULLINS:** That was Mr Baldwin, through the department. I think he has something to say on that.

**Mr BALDWIN:** I would certainly like to address that.

**ACTING CHAIRMAN:** Yes, thank you.

**Mr BALDWIN:** Prior to addressing that issue, I have a very brief letter which the Minister for Gaming and Racing has asked that I seek to be allowed to read into evidence. It is actually addressed to the Chairman of the Regulation Review Committee:

> Dear Mr Nagle,
>
> I refer to the letter dated 23rd March 2001 to the Assistant Director Racing, Mr Peter Baldwin, in which the Committee Manager has invited Mr Baldwin to attend a further public hearing on 28th March 2001 of the Inquiry into the Harness Racing New South Wales (Appeals) Regulation 1999.
>
> The above letter also indicates that the Acting Chair has advised that she will consider taking further evidence, including the taking of material from the Office of Racing and Harness Racing New South Wales if either wishes to address any issues raised during the hearings.
>
> The Chief Executive of Harness Racing New South Wales has indicated that he will likely be seeking to respond to some of the evidence provided to the Committee during the first hearing day on 2nd February 2001. I also wish to respond by way of this letter which Mr Baldwin will seek to read into evidence and tender on 28th March 2001.
>
> In particular I wish to focus on the evidence set out on page 30 and pages 58-59 of the transcript from the 2nd February 2001 hearing. First I note the Honourable Don Harwin's statement, 'We do not think it, the staged repeal process, was taken particularly seriously by the Department of Gaming and Racing in this particular instance'. I wish to place on record my concern over this inference that the Department has not taken seriously its relevant obligations under the Subordinate Legislation Act 1999. I confirm Mr Lowenthal's response at the hearing when he provided a guarantee to the Committee members that the staged review of the regulation was taken seriously. I should add that I and my Department are fully mindful of our obligations and responsibilities under the Subordinate Legislation Act.
>
> Second, the Honourable Don Harwin asked those appearing before the Committee during the afternoon session whether they were members of the Harness Racing Association, the New South Wales Trotters Association, the New South Wales Standard Bred Breeders Association or the New South Wales Standard Bred Racing Trainers Association. The Honourable Don Harwin then went on to indicate that he was interested in trying to get 'some feedback as to why the Department goes out and seeks submissions on whether this regulation about appeals is adequate and nothing comes back, yet our Committee was able to find plenty of material pretty quickly. I am just trying to understand what is going on here.' An interested person attending before the Committee, Mr J Walsh, responded after the Honourable Don Harwin pointed out that the regulation was last reviewed in 1999, 'In 1999 I was on the ommittee of the UHRA and I was not aware there was a request'. After some further dialogue between he and Mr Walsh, the Honourable Don Harwin stated 'Then five years later in 1999 under our State's law it has to be reviewed again, yet obviously you guys--'. Another interested person, Mr G Sarina, then offered 'were not informed', to which the Honourable Don Harwin responded, 'There was not any adequate opportunity for input'. Mr Luke Abbott then stated, 'I think there are three areas. In harness racing everybody gets the Trotguide, the gazette or the Australian standard bred. If they were advertised in that I can guarantee you there would have been submissions. The Honourable Don Harwin: 'They say an advertisement was placed in the Trotguide on 28th April 1999.
>
> Attached to this document is a copy of a letter from the Director Racing to the Chairman of the Regulation Review Committee dated 1st September 1999. It confirms details of publications in which advertisements were placed and organisations which were invited to lodge submissions as part of my Department's review process of this regulation in 1999. Specifically, also attached is a copy of the relevant pages in Trotguide of 29th April 1999 and The Daily Telegraph of Saturday, 1st May 1999. I would suggest that, objectively viewed, the list of organisations includes every New South Wales based entity or body which could

possibly be regarded as being representative of harness racing participants or enthusiasts or as having any structured interest in harness racing.

By way of example and contrary to the views expressed by Mr Walsh, attached is a copy of the letter dated 29 April 1999 to the Secretary of the United Harness Racing Association.

In view of the lengths to which the Department went to advertise the review process in keeping with its normal procedures in these matters, it seems difficult to identify the grounds for the conclusion by the Honourable Don Harwin that there was not any adequate opportunity for input.

I trust also that the Committee will take fully into account the contents of my letter to you of 25th January 2001 in which I alluded to the current sensitive state of the TCO2 issue in New South Wales and Australian harness racing.

Yours sincerely,
J Richard Face MP,
Minister for Gaming and Racing.

**ACTING CHAIRMAN:** Thank you, Mr Baldwin, that will be part of the evidence. Could you respond to the question that I was asking earlier, please?

**Mr BALDWIN:** On the issue that was raised previously, as indicated by Mr Lowenthal on 2 February, we instructed the Crown Solicitor in some detail on this issue and also had discussions with parliamentary counsel. The Crown Solicitor particularly indicated the matter was of extreme legal complexity in terms of statutory construction and also the relevant case law. Quite a volume of very high level authority in terms of decisions of superior courts has been provided to us already by the Crown Solicitor and the Crown has indicated that it is looking at finalising the advice at present and we are hopeful of having that final advice in the near future.

**ACTING CHAIRMAN:** Do you have a time frame on that?

**Mr BALDWIN:** Well, again it is difficult to hassle the Crown Solicitor, as it were, on a matter which, as we say, certainly is not straightforward, and the parliamentary counsel has confirmed that, but let's just say that we will use our best endeavours to indicate to the Crown Solicitor that there is a degree of some necessity in having a final opinion as soon as possible.

**ACTING CHAIRMAN:** Would you keep us advised of the progress?

**Mr BALDWIN:** It would be a pleasure.

**ACTING CHAIRMAN:** Dr Major, would you come back please? We have got one last question for you and then we are going to close the inquiry.

**Dr KERNOHAN:** Dr Major, we are going to give a report very soon on the TCO2 problem. What input did you or your organisation have into this review process?

**Dr MAJOR:** I was nominated to be on the review panel, which initially started off with four members and had advice available to it from the Australian Racing Laboratories. I was co-opted as the president of the Australian Equine Veterinary Association at the time.

The question what input the members had, the input has been quite restricted by confidentiality and privacy, and that is an issue that I feel uncomfortable with. I believe that this sort of matter really should be determined in open forum. I can understand that there are some very sensitive issues in there, but I think there are trainers' livelihoods at stake, and I would prefer very open discussion of these issues.

**Dr KERNOHAN:** I was just trying to find out how much input from the general equine veterinary profession went into this review, that was all.

# APPENDIX SEVEN

**Dr MAJOR:** I have had a good deal of general input from my members.

**Dr KERNOHAN:** Were you able to transfer that -

**Dr MAJOR:** Obviously, within the membership there will be some differences of opinion, but I believe that the views that I express here today are overall those of the great majority of the membership. Specifically, my members have not been able to address the submissions and so on that were raised by the sub-committee.

**Dr KERNOHAN:** Was there any experimentation done as part of the general review process? Can you answer that without -

**Dr MAJOR:** No experimentation. There was certainly a review of all the available information and in fact a survey, as was mentioned earlier, a survey of feeding practices of standard breed trainers was commissioned.

**ACTING CHAIRMAN:** I would like to make some concluding remarks. This inquiry has generated information relevant to the whole structure of harness racing in New South Wales. We have had detailed presentations from the Department of Gaming and Racing, Harness Racing New South Wales and from the President of the Australian Harness Racing Counsel. On behalf of the Committee I thank the Minister and his senior officials for their time and co-operation.

The Committee is also grateful to all witnesses who offered their useful testimony and to those persons who sent in written submissions. I would like to thank the witnesses today, Mr Martin, who I think has left, Mr Fitzpatrick, Mr Hancock, Dr Major, Mr Mullins and Mr Baldwin.

The submissions and evidence already provided are receiving ongoing examination by the Regulation Review Committee. I think it would be appropriate to mention that the written submissions relevant to TCO2 have been made available, with the consent of the authors, to the Australian Harness Racing Council for the purpose of their national TCO2 review. This material was released so that it could be taken into account in that review prior to the subcommittee finalising its deliberations.

The Regulation Review Committee will in due course report to the New South Wales Parliament on the inquiry which it has conducted, and I would like to thank you all for your attendance today and to assure every witness that we respect the integrity of the profession and all the people who have appeared before us. I sincerely thank you.

I would also like to thank Hansard, and the Committee as well, for the effort that they have put into the Committee's work.

I would be grateful now if members of the public could leave the inquiry room so that our Committee can conclude its deliberations.

**(The Committee adjourned at 11 a.m.)**

# AUSTRALIAN HARNESS RACING COUNCIL Inc.

390 ST. KILDA ROAD MELBOURNE VICTORIA AUSTRALIA
Telephone (03) 9867 8033 Fax (03) 9866 8356
Email: ahrc@harness.org.au

ABN 19 877 460 923


Ref:saffin-tc022-3

RECEIVED 23/3/01

March 22, 2001.

Hon J Saffin MLC
Acting Chairman
Regulation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Saffin,

Your letter dated 8 March 2001 is acknowledged in respect of your Inquiry into the Harness Racing New South Wales (Appeals) Regulation 1999. I have now had the opportunity to discuss it with Dr Diane Ryan Chairperson of the Review Sub-Committee.

Thank you for your suggestion that group meetings or information sessions with industry participants occur so that an exchange of views is possible in understanding the practical and financial difficulties they face in meeting the complexities of $TCO_2$. A deliberate decision on the methodology to be employed in the Review was made not to conduct open meetings as you are doing.

As you can appreciate Council's Review is being conducted within its Terms of Reference and the reporting as such will occur in these terms:-

*That a Sub-Committee be created, to be chaired by Dr Diane Ryan to conduct an evaluation of the existing material available to Council on $TCO_2$, and to have the power to co-opt the necessary expert advice and opinions in order to arrive at a recommendation to the AHRC of the:*

1. *Level of laboratory uncertainty factor in the testing process;*
2. *Integrity of the testing process*
3. *The mean $TCO_2$ level of the harness racing population*
4. *The mean $TCO_2$ level of untreated harness racing population.*
5. *Has the mean level increased and reasons why?*

*Report to the Executive with a Summary and Recommendations within 12 weeks, then the Executive to consider, prior to referral to Council Members.*

Council's methodology in the Review has been to undertake a range of activities, which have been summarised in the attached Press Release for your information. You may not be aware that Dr Diane Ryan conducted a major information session during the 1999 World Trotting Conference Harold Park on the Industry Day. It was very successful with an attendance of over

300 Industry Participants on the day. It included Dr Craig Suann and Dr John Vine from their respective Racing Laboratories and others. This information has been significantly published and circularised. A copy is available on our National website (www.harness.org.au, Australian Breeding, Industry Publications, World Trotting Conference Papers). It is included in the same area of Council's Paper $TCO_2$ – Questions and Answers. The website receives some 4 million hits per month.

In addition, it should be noted that Harness Racing Victoria recently conducted a program on this area across their State with Stewards, nutrition specialists etc. Unfortunately numbers in attendance was poor; significantly below expectations.

More importantly, Council received a number of submissions from industry participants, quite apart from the professional veterinarians and academics, affected by the area of the Review. It even extended its Call for Submissions to enable others to provide papers. These were read by the Sub-Committee. Unfortunately, some of the persons who have appeared in your Inquiry did not avail themselves of this opportunity.

The Terms of Reference of the Review are the areas, which the Sub-Committee is considering and will report on. The consultative approach you suggest by organisations and individuals through bodies such as the NSW Industry Advisory Board as an example is already frequently availed of. Your Committee's perception is not agreed with as each State Controlling Body operates within its own unique State environment and tailors their industry action specifically to meet the needs of its own State's industry participants. This is the organisational linkage for all of our local industry participants to Harness Racing New South Wales whether through a relevant industry body or directly to the Authority.

Yours faithfully,

Rod Pollock
Chief Executive.

Copy: Dr Diane Ryan,
Chairperson
$TCO_2$ Review Sub-Committee.

Mr A.J. McGrath
President, AHRC

Attachment: Press Release January 2001.

# AHRC TC02 Review - Progress Report

The President of the Australian Harness Racing Council, Mr Tony McGrath has called for a report of the progress of the $TCO_2$ Review, which was instigated by the Council in October 2000. The original objective was that a report from the Sub-Committee was to have been received by the Executive in December 2000.

It is now indicated by the Chairperson of the Sub-Committee, Dr Diane Ryan that the Report and Recommendations will not be completed until mid-March 2001, given the extent and wider scope of the methodology and analysis that the Sub-Committee has adopted. The Executive of Council has agreed and supported this full analysis as the matter has serious implications for harness racing and the effect of any policy arising from Council's deliberation of the recommendations presented to it.

An interim review of the progress towards these recommendations will be now conducted by the Executive in the last week of February and a final study of the full report will be considered in mid March 2001. The Executive's recommendations will be made at the Council's full meeting on Monday 30th April 2001.

Dr. Diane Ryan has advised the Executive that the following significant action has been undertaken in the Sub-Committee's Review to date:

- A call for submissions of Papers was made to the Industry. These were received and distributed to the Sub-Committee participants on a confidential basis. In all, some thirty (30) submissions were received.

- Council has identified, compiled and directly input disparate computer and manual data obtained from State Controlling Bodies and Accredited Racing Laboratories. It should be noted that the manual and computer data collected from these sources required considerable work to be capable of inputting into a computer software form to be worked on by the biometricians engaged.

- Engaged independent biometricians to organise and develop the dataset to ensure its integrity for analysis and to produce relevant reports for the Review Sub-Committee. The intellectual property ownership of the data resides with the Racing Laboratories. The last data received from the States was obtained in December 2000. Since that time, Council's staff has reorganised the data into a useable format for the consultant biometricians. The dataset is significant as it arises from many thousands of tested samples.

- The latest advice is that this large dataset and its analysis and evaluation will be completed by late February 2001. The completed reports will then be forwarded to the Review Sub-Committee for consideration and discussion of the Biometricians' Reports provided prior to making recommendations to the AHRC Executive.

- It is accurate to state that the Council at the time of establishing the Review and its timeframe was unaware of the difficulties of the actual collection and processing time involved in the data collection phase of the Review.

- The Review Sub-Committee requested and Council commissioned the Standardbred Diet Survey's development and design by Consultants then organised the printing and distribution nationally to each of harness racing's 5400 trainers. The receipt date of 1st January 2001 was extended by one week to 8th January 2001 after numerous telephone enquiries. Nearly 10% returns have been received to date, which is a good result. The information is being processed currently. It will then be forwarded in computer completed format to our Consultant for analysis and reporting to the Review Sub-Committee.

The Executive has been advised by Dr Diane Ryan that the actual data gathering of this Review Project is essential to the integrity of the Project together with the commissioning of the above action to ensure that this independent Review within the Terms agreed by Council is carried out effectively and thoroughly. In doing so, more time and resources than earlier envisaged has been required. This has been put into the actual data gathering phase of the Project and will be used in the subsequent analysis and evaluation of the dataset. This is fundamental to the Review Sub-Committee's consideration prior to making its Recommendations to the Executive of the Australian Harness Racing Council. The Executive have agreed to this extension in view of the importance of this significant national issue.

The determination of a fair and reasonable decision for a policy on this matter, meeting the needs of integrity for Harness Racing's national image and the welfare of the participants engaged in training, is the prime objective of this current process.

Rod Pollock
Chief Executive

Link to Australian Harness Racing Council Home Page: www.harness.org.au/ahrc

16/01/2001

# APPENDIX EIGHT

# Summary of evidence presented to the Regulation Review Committee on $TCO_2$

## 1. Can $TCO_2$ be considered an absolute measurement?

Dr. B.J. Stewart, in his evidence to the inquiry, stated that "$TCO_2$ is a dependent variable, not tightly controlled."[1] The Australian Equine Veterinary Association, in their submission to the inquiry, add that, in their opinion, there is no absolute standard against which the measurement instruments are calibrated, hence it is not possible to confirm whether a result is "right" or "wrong".[2]x

Dr. Snow adds that, "Prior to the introduction of the 'Verichem' quality control sample at end of 1977, apparently no common quality control samples were used in the various testing laboratories. Therefore there is no information on whether the analyses used to determine initial population means was giving identical results nor if analytical results were similar to those presently obtained. Statements that the mean pre-race $TCO_2$ concentrations were higher in the early nineties than now as justification for their being no change in analysis is erroneous as at that time extensive use with often high doses of alkalising agents was being administered whilst at the present time especially with the large number of 'positive' findings it must be highly questionable if trainers are resorting to widespread use of alkalising agents. Definite proof that there has not been a change in analytical measurement is vital as a number of trainers in NSW have been disqualified for lengthy periods with concentrations of only 0.2 mmol/L above the threshold."[3]

According to Dr. Snow, "Towards the end of 1998. . .the laboratories changed from using CASCO standards (the internationally used standards) to an Australian standard (the ASE standard). . .It has been forcibly argued at inquires in various states that this variation [between batches] has resulted in a change in measurement with values being higher (as attested to by higher values for the control sample [Verichem]). Even Dr. John Vine, chief analyst from the Racing Analytical Services (in Victoria) has agreed on the different values but claims the levels now obtained are the correct ones. . .[however] the scientific argument is nebulous as the Verichem quality controls were not in use in the first 5-6 years for plasma $TCO_2$...The Australian Racing Forensic Laboratory (NSW) has refused despite repeated requests at various inquiries to provide their data to examine if similar changes have occurred with the change in standards."

Dr. Snow has written that "To counteract the argument that ASE standards resulted in higher values, as indicated by statistical analysis of data from NSW and other states, Dr, Shawn Stanley presented a statistical report prepared by Unisearch (University of NSW) from data submitted by Dr. Stanley. . .Two of the four studies used in the statistical evaluation to compare to the 1998 study were inappropriate. The study by Lloyd and others (1992) utilised a different method of measuring

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[1] Dr. B.J. Stewart, evidence to the inquiry

[2] Australian Equine Veterinary Association, submission to inquiry

[3] Dr. David Snow, submission to inquiry

plasma $TCO_2$ resulting in differing values (a fact confirmed by Dr. Suann). The study by Reilly and others (1996) used pre-race values obtained by the various Australian laboratories. This would result in higher mean levels than stabled horses (a fact agreed to by racing analysts a various inquiries)."

Dr. Snow also states that, "Normal laboratory practice to ascertain that a change in methodology (change in standards used) does not influence the levels being measured entails running both methods in parallel. Unfortunately this was not done at RASL or ARFL. Therefore to ascertain that there was no change in population mean with the new standards, a study of stabled thoroughbreds was carried out throughout Australia. This study had a number of problems when related to harness racing. Firstly a different breed of horses was used and differing feeding practices, training programs, etc, could result in different levels between the two different breeds. Secondly the reported population was significantly higher by about 0.6 mmol/L than an earlier study in standardbreds. . .A change in standards that results in higher readings means that there has been a de facto lowering of the plasma $TCO_2$ threshold. In the case of the ASE standards this is to about 34.5 mmol/L. This would lead to more trainers being found to be marginally in excess of the 35 mmol/L threshold."[4]

## 2. 35 mmol/L or 37 mmol/L as threshold

In the USA, France and Sweden the threshold level, for the presence of $TCO_2$ in standardbred horses, is 37 mmol/L. This was also the original threshold limit in Australia.

The Australian Equine Veterinary Association point out that the former president of the Australian Harness Racing Council (Dr. Ern Manea), in his farewell address to the council in August 2000) expressed his personal conviction that the AHRC ought to follow the threshold set by racing authorities overseas (in the USA the threshold tends to be 37 mmol/L but without a tolerance for uncertainty).[5]

Dr. David Lloyd has argued in his PhD thesis that, when setting a cut-off point for $TCO_2$ concentrations, it should be recognised that there are *not* two distinctly different populations of horses: comprising horses that have received sodium bicarbonate and those that have not. There is an *overlap* between the $TCO_2$ concentrations derived from both groups of horses. It is *not* possible to distinguish horses that are at the higher end of the "normal" range of $TCO_2$ concentrations and those horses with low $TCO_2$ concentrations (that may have received a small dose of sodium bicarbonate, or other alkalising agent, and are still within the "normal" range).

Dr. Lloyd has further argued that the threshold (or cut-off point) consequently needs to be determined so that it is above the "normal" range of $TCO_2$ concentrations that would be expected in untreated horses. This is best achieved by implementing a

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[4] ibid

[5] Australian Equine Veterinary Association, submission to inquiry

cut-off point at which there is an extremely low possibility of an untreated horse exceeding it.[6]

The Australian Equine Veterinary Association, in their submission to the inquiry, add that, before Dr. David Lloyd completed his PhD thesis on the effects of sodium bicarbonate in racehorses, he and Professor Reuben Rose (of the faculty of veterinary science at the University of Sydney) prepared a confidential report for the NSW Harness Racing Council on the issue of $TCO_2$ measurement in racehorses. Subsequent to the receipt of that report, the council established a threshold of 37 mmol/L. Horses recording a level of 37 mmol/L were "deemed" to have been administered a prohibited substance.[7]

## 3. Variations of $TCO_2$ levels in equine populations

According to a submission from Dr. David Snow, of Macquarie Pathology, "There is information to indicate that the mean plasma $TCO_2$ prior to racing is significantly higher than the stabled population. The explanation given by analysts and stewards is that many trainers are using alkalising agents. This is pure conjecture. In the Steward Hunter inquiry, on the date of analysis at the Australian Racing Forensic Laboratory, amongst 36 horses tested, there was a very high mean plasma $TCO_2$ level recorded, with analysis being carried out from 2 separate meetings, a distance apart and held on separate days (mean values of 34.4 mmol/L and 35.5 mmol/L). Of the 36 horses only 1 had a value less than 32 mmol/L. Rather than considering this to be an analytical problem, both analysts and stewards supported the proposition that the trainers were using alkalising agents – despite the enormous coincidence this would have involved. . .The finding that horses placed under surveillance prior to major races have a higher plasma $TCO_2$ concentration than the stabled population mean supports the possibility of a physiological increase at the racetrack.[8]

(Dr. David Lloyd has written in his PhD thesis that "Unannounced surveys were conducted to determine the venous blood $TCO_2$ concentrations in horses prior to racing. The first survey was carried out at Harold Park Paceway on 27 July 1991. Venous blood samples were collected from 79 standardbred horses. There was a wide distribution of venous blood concentrations found in the pre-race samples from horses tested at Harold Park. . .The values ranged from 32.4 mmol/L to 52.6 mmol/L. The average concentration for the 79 horses tested was 39 mmol/L plus/minus 5.0 mmol/L. A large of number of horses had values between 40 and 45 mmol/L. 48 horses (or 61%) had $TCO_2$ values above and were considered to have been given an alkalising agent. There were 9 horses with $TCO_2$ concentrations between 35.0 mmol/L and 35.9 mmol/L and there were 22 horses with values below 35 mmol/L: giving a total of 31 horses (or 39%) within the normal range.)[9]

Dr. Pender Pedler, lecturer in mathematics at Edith Cowan University, examined pre-race $TCO_2$ test results from 195 meetings (conducted in New South Wales between

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[6] David Lloyd, *The Effects of Sodium Bicarbonate in Racehorses* (PhD Thesis, University of Sydney, 1993), pp.127-128

[7] Australian Equine Veterinary Association, submission to inquiry

[8] Dr. David Snow, submission to the inquiry

[9] David Lloyd, *The Effects of Sodium Bicarbonate in Racehorses*, pp.111,115

1997 and 1999). He concluded that the NSW pre-race $TCO_2$ data showed (1) significant change in the average $TCO_2$ values over the time of the testing period and (2) periodic variation over the calender year, with the average $TCO_2$ value higher in the winter months than in the summer months.

He found, in his examination of the data from the 195 meetings, that the range of monthly averages was 1.26 mmol/L: the average of the July data being 31.97 mmol/L and the average of the December data being 30.71, giving a difference of 1.26 mmol/L. He notes that the used of any fixed value for an upper permissible $TCO_2$ level assumes that the distribution of the $TCO_2$ values remains essentially constant over time. However the evidence from the data, as he has analysed it, demonstrates that the distribution of NSW $TCO_2$ values are not stable. [10]

Mr. Garry Anderson, a Biometrician in faculty of veterinary sciences at the Melbourne, presented similar evidence in his submission to the inquiry. He wrote that, in a survey of 8, 149 samples taken in Victoria from May 1998 to September 2000, an estimate of the standard deviation for pre-race $TCO_2$ was 1.6 mmol/L.[11]

Dr. David Snow, in his submission, has forwarded a letter from Alistair MacLean, a equine surgeon working at the University of Melbourne (dated October 2000). McLean's letter was to Rod Pollock, CEO of the Australian Harness Racing Council, and he pointed out that "Recently I received permission to analyse a blood sample from a client's horse. I took an identical sample, collected at the same time, and forwarded it (in identical manner) to a human laboratory (Royal Melbourne Hospital) to have an independent analysis on bicarbonate performed (using similar Beckman machine). The racing laboratory result: 33.5 mmol/L; the human laboratory result: 31.8 mmol/L. . .In [another] recent case, I was party to delivering duplicate samples to Racing Analytical Services (without their knowledge). In one case, there was a difference of 0.7 mmol/L $TCO_2$ between identical samples. While they say this is acceptable laboratory variation, I cannot accept this as being accurate enough. If for instance, one sample resulted in 36.1 and the second duplicate sample 36.8 – the result of the inquiry would be the difference between being found innocent and against being found guilty and probably losing one's livelihood for 6-12 months."[12]

Dr. Snow also forwarded a study of dispersion frequencies, of WATA $TCO_2$ data, produced by Equitech. The essence of the Equitech analysis of the data is that "Since the introduction of the ASE standards on 12 December 1998 there has been a significant shift in the mean and normal distribution of pre-race $TCO_2$ concentrations at the WATA (97/98 mean and standard deviation 31.4, 1.53 mmol/L, 98/99 mean and standard deviation 31.9, 1.59 mmol/L). In effect there has been an increment in the 'upper naturally occurring' $TCO_2$ level of about 0.6."[13]

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[10] Pender Pedler, *Problems with $TCO_2$ Testing*, submission to the Regulation Review Committee of the NSW Parliament, Inquiry into Regulatory Controls Governing Appeals to Harness Racing NSW and the Harness Racing Appeals Tribunal (Sydney, 2 February 2001)

[11] Garry Anderson, submission to the inquiry

[12] Dr. David Snow, submission to the inquiry, attachment 5

[13] ibid., attachment 7b

## 4. Stewards' comprehension of scientific data

Dr. Nicholas Kanniegieter, specialist equine surgeon, in his submission to the inquiry, comments that, in his opinion, "I have been in stewards hearings where some members of the stewards panel have dosed off to sleep during presentation of scientific evidence. Despite presenting vast amounts of scientific evidence, none of this is examined by stewards when attempting to make a decision. This occurs because of the complexity of the scientific argument which is presented to the stewards who, while they may be very good and well-trained as stewards, have received no scientific or legal training."[14]

[14] Dr. Nicholas Kanniegieter, submission to the inquiry