

# **NEW SOUTH WALES HARNESS RACING APPEAL PANEL**

**APPEAL PANEL MEMBERS**  
**Hon. W Haylen KC**  
**J Murphy**  
**B Judd**

**MONDAY 15 MAY 2023**

**APPELLANT P TURNER**  
**APPEAL AGAINST THE DECISION OF NSW HARNESS**  
**RACING STEWARDS TO DISQUALIFY “AVAIKEN” FROM**  
**RACE 2 AT NEWCASTLE ON 5 MAY 2023**

**RESPONDENT HRNSW**

**AUSTRALIAN HARNESS RACING RULES**  
**66(h)**

## **DECISION**

- 1. Appeal upheld and that the disqualification of AVAIKEN from Race 2 at Newcastle on 5 May 2023 be set aside and the horse returned to the finishing place of Third in the race.**

1. On 5 May 2023, AVAIDEN contested the TAB Regional Championships, Hunter Heat One, at Newcastle. Broadly speaking, progression in the Championships depended on placings in the Heats. Going out of the straight the first time, AVAIDEN was driven inside the pegs due to the erratic racing of a horse in front, and returned to the track between 5 and 8 seconds later. AVAIDEN ultimately finished third in the race with two horses close behind. The Stewards opened a number of inquiries arising from incidents that occurred during the race.
2. The transcript of the Stewards inquiry provided to the Panel related only to the performance of AVAIDEN and the driver, Miss Panella. On the morning of the Panel hearing, the Stewards also provided a copy of the Stewards Report for the Newcastle meeting. That report dealt with a number of issues arising during Race 2, and in particular dealt in some detail with the performance of AVAIDEN.
3. The Transcript of the Stewards interview with Miss Panella and an owner of AVAIDEN focussed on the degree of restraint demonstrated by Miss Panella and the time it took for her to return the horse to the track. Ms Panella stated that she was grabbing hold of the horse and losing speed: the stewards then read the provisions of AHRR 163 (2): "If a driver's horse or sulky shifts inside the line of marker posts, the driver shall restrain the horse and, without interference to another runner, return to a position outside the line of marker posts at the first opportunity." Miss Panella responded by stating that she did not interfere with any runner and pointed out that another runner was hanging at the time. The Stewards interrupted at this point and seemed to have accepted her statement with the response, "all right". There followed a discussion about the horse being "very strong", and "getting on the bit". It was submitted that the driver did a very credible job to get the horse under control and able to return to the track, even though it appeared to hop over a marker on the way back. Further it was argued that the horse did not gain any advantage by being off the track and that it had lost ground by going there. The Stewards then stated that the issue of interference was separate and would be dealt with later.
4. The Stewards then read the provisions of Rule 163 (5): "A driver who, in the opinion of the Stewards, fails to comply with any provision of this rule is guilty of an offence and in relation to sub-rules (1)(c)(i) and (ii) and sub-rule (2), the Stewards may disqualify the horse or give it a lower placing." At this point the Stewards agreed that Miss Panella did not need to lay flat back to be "restraining" the horse, and that degree of effort was "not necessary".
5. After an adjournment, the Stewards reconvened and the following statement was made: "Thank you Miss Panella and Mr Payne. Having considered your submission in respect of this and, of course, a review of the films, Miss Panella, whilst the Stewards accept the reasons for you racing inside the marker pegs are not your own doing, it's a result of an incident wider on the track, the Stewards are not comfortable in accepting that you immediately placed sufficient restraint on your gelding and returned to a position outside the line of the marker pegs at your first available opportunity. And further, when obtaining a position outside of the marker pegs, you interfered with the running of Mr Morris's drive and as a result we believe, in doing so, your runner has gained an unfair advantage. For those reasons, it is the view of this panel of Stewards that AVAIDEN will be disqualified from race number 2 at the Newcastle meeting this evening. Do you understand that?" Mr Payne then asked about the interference that affected AVAIDEN and was told that it was a separate matter. It is to be noted that the rules referred to by the Stewards did not require a driver to exercise "sufficient

restraint" on the horse, but simply "restraint". The transcript contained nothing in relation to Rule 66:" A horse may be disqualified from a race or placed in a lower finishing position in a race if the horse-(h) gains an unfair advantage."

6. The Stewards Report sheet for that night raised new issues. After recording the incident leading to AVAIDEN crossing the markers, the report states: "After considering submissions from Miss Panella and Mr Payne, Stewards in accordance with AHRR 66(h) established that AVAIDEN had gained an unfair advantage as a result of racing inside marker pegs from the first turn until entry to the back straight and was therefore disqualified from the event and the placings were amended...In deciding that AVAIDEN had gained an unfair advantage, Stewards were mindful of the distance the gelding had raced inside marker pegs rounding the turn, the provisions of AHR 163(2) which requires the Driver of a horse racing inside marker pegs to immediately restrain the horse and return to a position outside the marker post at the first opportunity to do so and the interference caused to Jasper Styles when AVAIDEN returned to a position outside the marker pegs upon entry to the back straight."
7. The matters referred to in this report reflect little if anything of the matters dealt with in the Transcript. In that hearing, there is no reference made to the provisions of R66(h) with the entire focus being on Rule 163. Indeed, at no time during that hearing was a charge laid under R66(h). Miss Panella and Mr Payne were not afforded an opportunity to deal with R66(h) matters or to seek an adjournment to consider those matters. At the Appeal before this Panel the representative for Mr Turner sought leave to add a further ground of appeal, namely a claim that there was a denial of natural justice or procedural fairness at the hearing before the Stewards. This addition to the grounds was not opposed by Stewards. That ground of appeal is clearly made out in relation to the Stewards Report that relies heavily on R66(h).
8. It seems clear to the Panel that on the night of the race, the Stewards inquiry was centred on R163 (2) and (5). They concluded that Miss Panella did not immediately place sufficient restraint on the horse, although the rule does not require or use that language. They also concluded that she had not returned the horse inside the markers at the first available opportunity, but did not identify where that opportunity was in a period of 5 to 8 seconds. They found that in returning to the track she interfered with the running of Mr. Morris's drive. Yet Miss Panella was not charged with interference under R163 (1)(a)(iii).
9. The Panel has considered the inter-play between R163 (2) and (5). It appears from questions raised with the Stewards at the Appeal, that there is unlikely to be any guidance provided by consideration of these provisions made by Appeal Tribunals operating in the States. The Stewards found that Miss Panella had caused interference (R163(2)), and by operation of R 163 (5) a driver who fails to comply with any provisions of the rule, is guilty of an offence. When those matters are engaged, the Stewards may disqualify the horse. These requirements are expressly combined to work together. It follows that as Miss Panella was not found guilty of the offence of interference, that the Stewards had no power under this rule to disqualify the horse. As already stated earlier in this decision, the Stewards had not proceeded under R66(h).
10. In summary, the Stewards hearing on the night was conducted solely on the provisions of R163, as described above. Miss Panella was not charged or found guilty of interference in the run out of the straight for the first time and it was not open to the Stewards to disqualify the horse under R163. Miss Panella was never charged under R66(h) or given the opportunity to contest any allegation made under that rule. Miss

Panella was thereby not accorded procedural fairness and the decision purportedly made under R66(h) cannot stand. It should also be noted that in answer to questions from the Panel, Mr Bentley who appeared for HRNSW, broadly agreed that R66 was concerned with horses and R163 was concerned with drivers.

11. During the hearing, the Panel drew attention to the provisions of R162 and R163 and the various descriptions used to define conduct that would attract a penalty, being, "interference or jostling", "shifting ground" (R162 (1)(u) and (www); "interference," not to impede the forward progress of another horse, and crossing and compelling another runner to shorten stride, or causing another horse to pull out of its stride (R163 (1)(b), and (6). R163(2) does not refer to jostling, forward progress or shortening stride but simply refers to "interference". It may be that all of these descriptions can, in certain circumstances, constitute "interference". It may assist future enforcement of "interference" cases for the rules to specify what action by a horse or driver falls within that category.
12. Having regard to the above matters, the Panel declares that the Appeal be upheld and that the disqualification of AVAIDEN from Race 2 at Newcastle on 5 May 2023 be set aside and the horse returned to the finishing place of Third in the race.

Hon. Wayne Haylen KC – Principal Member

Mr J Murphy – Panel Member

Mr B. Judd – Panel Member

16 May 2023