2 July 2024

**DECISION**

**RACING VICTORIA**

**and**

**RODNEY MAHER**

**Dates of hearings:** 29 May 2023, 30 May 2023 and 24 November 2023.

**Date of decision:** 24 June 2024

**Panel:** Judge Kathryn Kings (Deputy Chairperson), Judge Marilyn Harbison (Deputy Chairperson) and Mr Des Gleeson.

**Appearances:** Mr Damian Hannan, instructed by Mr Marwan El-Asmar appeared on behalf of the Stewards.

Mr Zero Partos, instructed by Mr Frank Vinci appeared on behalf of Mr Rodney Maher.

 Ms Stella Stevenson appeared as a witness.

 Dr Robert Corver appeared as a witness.

 Ms Jennifer McIntosh appeared as a witness.

 Dr Barry Smyth appeared as a witness.

 Mr Rodney Maher appeared as a witness.

**Charges and particulars:**

**Brief 1**

**Charge One: AR 231(1)(b)(ii)**

AR 231(1)(b)(ii) reads as follows:

*AR 231 Care and welfare of horses*

*(1) A person must not:*

*…*

*(b) if the person is in charge of a horse - fail at any time:*

*…*

(ii) to take such reasonable steps as are necessary to alleviate any pain inflicted upon or being suffered by the horse;

**Particulars**

1. You are, and were at all relevant times, an Owner registered with Racing Victoria.
2. You were, at all relevant times, the person in charge of a registered thoroughbred known as ‘*Brugia*’ (the Horse).
3. On 2 March 2022, the Horse was examined by a Racing Victoria veterinarian at your property at 1750 Cape Otway Road, Wurdibuloc, where the Horse was found to be distressed and in pain, in poor body condition (1 out of 5), and displaying clinical signs typical of laminitis.
4. Between approximately 24 December 2021 and 2 March 2022, you failed to take such reasonable steps as were necessary to alleviate pain being suffered by the Horse.

**Brief 2**

**Charge One: AR 231(1)(b)(iii)**

AR 231(1)(b)(iii) reads as follows:

*AR 231 Care and welfare of horses*

*(1) A person must not:*

*…*

*(b) if the person is in charge of a horse - fail at any time:*

*(iii) to provide veterinary treatment to the horse where such treatment is necessary for the horse;*

**Particulars**

1. You are, and were at all relevant times, an owner registered with Racing Victoria.
2. You were, at all relevant times, the person in charge of the horse, Sneaky Princess (the Horse).
3. On 30 August 2021, the Horse was examined by a Racing Victoria veterinarian at your property at 1750 Cape Otway Road, Wurdibolic, where the Horse was found to have a chronic granulating wound on its right hind leg which required immediate veterinary treatment.
4. Between 23 August 2021 and 30 August 2021, you failed to provide veterinary treatment to the Horse where such treatment was necessary.

**Charge Two: AR 232(b)**

AR 232(b) reads as follows:

*AR 232 Failure to observe processes and directions of PRAs or Stewards*

*A person must not:*

*…*

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

*…*

**Particulars**

1. You are, and were at all relevant times, an owner registered with Racing Victoria.
2. On 20 September 2021, you were directed by an Equine Welfare Officer at Racing Victoria to provide, by 5:00 pm on 1 October 2021, the following (the First Direction):
	1. Photographs of Apache Cove from when he returned from NSW to Victoria in 2021;
	2. Copies of invoices or receipts for feed purchased (including hard feed and hay) between 1 May 2021 and 30 August 2021;
	3. Copies of invoices or receipts for worming treatments purchased between 1 May 2021 and 30 August 2021; and
	4. Any other documents you believed might be of assistance.
3. On 8 October 2021, you were granted an extension of time to comply with the First Direction, (having on 5 October 2021 only provided Item A – a photograph of Apache Cove) and issued with a further direction to provide, by 5:00 pm on 15 October 2021, the following (the Second Direction):
4. Copies of invoices or receipts for feed purchased (including hard feed and hay) between 1 May 2021 and 30 August 2021;
5. Copies of invoices or receipts for worming treatments purchased between 1 May 2021 and 30 August 2021; and
6. A veterinary report from your veterinarian, Dr James Vanner, concerning the 2014 Delago Deluxe X Betrille Mare.
7. Your conduct, in failing to provide the documents the subject of the Second Direction, was in contravention of AR 232(b).

**Pleas:** Not Guilty to all charges.

**DECISION**

**BRIEF 1 – CHARGE 1**

Mr Rodney Maher pleaded not guilty to one charge under AR 231 (1)(b)(ii). That Rule reads as follows:

1. A person must not:

(b) if the person is in charge of a horse – fail at any time:

(ii) to take reasonable steps as necessary to alleviate any pain being suffered by the horse.

This Charge alleges as follows:

Between approximately 24 December 2022 and 2 March 2023 whilst being the person in charge of *Brugia*, he did fail to take reasonable steps as were necessary to alleviate pain being suffered by the horse (laminitis, pain, and poor body condition).

In presenting its case, Racing Victoria relied upon the evidence of its Equine Welfare Officer, Ms Jenny McIntosh, and its veterinarian Dr George Smyth. Dr Smyth provided a report dated 25 August 2022, which was also relied upon. Both Ms McIntosh and Dr Smyth gave evidence before the Tribunal as did Mr Maher.

Mr Damian Hannan, Counsel for Racing Victoria, submitted that the Tribunal can be satisfied, to its reasonable satisfaction, that the Charge under AR 231 (1)(b)(ii) is made out.

It was not in dispute that Mr Maher was, at all relevant times, an owner registered with Racing Victoria and that the Rules of Racing apply. What was in dispute was whether Mr Maher was a “person in charge of the horse *Brugia*”, and if so, whether there was a failure to take reasonable steps to alleviate pain.

**Relevant evidence on “person in charge “**

The Stewards relied on the following evidence:

*Brugia* was located on Mr Maher’s registered property at 1750 Cape Otway Road, Wurdiboluc, on 2 March 2022. Mr Maher told the investigators during the inquiry that he had been the owner of *Brugia* since birth.

Mr Maher was the registered owner of *Brugia*. Mr Maher travelled interstate between 2 February 2022 until after *Brugia* was euthanised on 3 March 2022. Mr Maher arranged for his daughter, Talisha, and registered person, Mr Justin Sterley to feed and look after *Brugia* in his absence.

In Mr Maher’s interview with Ms McIntosh of 2 March 2022, he said, referring to the time that he was away, Mr Sterley “was ringing me every night.” On 2 March 2022 Mr Sterley, in an interview with the investigators, said that he was assisting him (Mr Maher) to get a feed regime to improve the condition of some of the horses on the property and Dr James Vanner is his veterinary surgeon. Mr Sterley said Dr Vanner, had a look at her (*Brugia*). Mr Sterley said that he was giving *Brugia* penicillin, Mr Sterley told Ms McIntosh that *Brugia* had been lying down a lot. Ms McIntosh said that the Racing Victoria vet had been out and from his assessment *Brugia* had foundered in the front leg. There were no abscesses and it was likely laminitis. She said that she would contact Mr Maher to discuss the matters raised by the Racing Victoria veterinary surgeon. Mr Sterley said he thought that *Brugia* had been kicked and he had been applying Bute, 10mls, twice daily. He said that he had given her flunixil, 10 mls, for 2 to 3 days, but this did not help. Ms McIntosh asked whether Mr Sterley was the vet as Mr Maher “he had sort of said you were his vet so we were a little bit confused about…” Mr Sterley said “James is his vet. I’ve been in charge, pretty much, put it that way”.

Before the Tribunal, on 24 November 2023, Mr Maher stated, contrary to what he previously said to investigators on 2 March 2022, that while he was away, he was “basically out of contact”. He stated that he received photos on 26 February 2022 of *Brugia* and immediately rang Justin Sterley asking, “What’s going on?” Once he learnt of the condition, he told Justin “With everything that’s going on…if she keeps losing weight or she doesn’t improve, she’ll have to be euthanised…but it’s your call. You’re there, I’m not there. You make the call.”

In evidence before the Tribunal, Mr Maher agreed that he had written a detailed email to Ms McIntosh on his return from interstate (16 March 2022), in which he stated “after a conversation with Justin I decided to put her down as he said she had not improved……” Mr Maher agreed that it was his decision to put the horse down stating “Yeah. Well, anything that Justin did was on my authority. So, you know, I take full responsibility for anything he’s done”.

Mr Maher gave evidence of being surprised to learn that *Brugia* had not in fact been euthanised by reason of Mr Sterley changing his mind after their conversation on 26 February 2022, when Mr Maher told him “If she doesn’t improve, she needs to be put down”. Mr Maher agreed with the accuracy of the earlier email to Racing Victoria on 16 March 2022 where he stated “her condition showed no signs of improving and on speaking with James and Justin I decided to make the decision to put her down”. In evidence, Mr Maher said “yes, in consultation with them I decided. It’s my horse. I decide whether it’s …”

At the hearing, Mr Zero Partos, Counsel for Mr Maher, relied on the following evidence:

1. Particular 2 of the Charge alleges that Mr Maher was in charge of *Brugia* “at all relevant times”. The period was from approximately 24 December 2021 until 2 March 2022.
2. Mr Maher accepts that he was the owner of *Brugia,* but does not accept he was “in charge” of *Brugia* “at all relevant times”. He was away interstate from 2 February 2022, and a registered pre-trainer, Mr Justin Sterley, was looking after *Brugia*, with his daughter, Ms Talisha Maher.
3. Mr Sterley said that he was in charge. Mr Maher was not on the property on 2 March as he was interstate. He cannot dispute the observations of *Brugia* made by Dr Smyth on that day. He does not accept that *Brugia* was in that condition for the entire period alleged in the charge.
4. Mr Maher does not accept, nor does the Charge require him to accept, that *Brugia* had laminitis because:
5. there is no diagnosis of laminitis; and
6. it is not alleged in the charge that she had laminitis.
7. Mr Maher does not accept that *Brugia* was in pain for the period alleged in the charge.
8. Mr Maher does not accept that he failed to take reasonable steps to alleviate *Brugia’s* pain.
* He consulted a veterinarian.
* Medication including anti-inflammatories were administered.
* Additional feed was provided to *Brugia*.
* A registered equine dentist examined *Brugia’s* jaw.
* *Brugia* was moved to a confined area.
* An experienced and registered pre trainer was engaged to care for *Brugia*.
* He understood *Brugia* was to be euthanised on or around 25 February 2022.
* *Brugia* was euthanised around 2/3 March 2022.

In considering what amounts to “a person in charge”, the Tribunal was referred to the decision in Song v Coddington 2003 NSWSC 1996. Mr Justice James described the essential features of a “person in charge” in relation to the inclusive definition of the term in s 4 of *the Prevention of Cruelty to Animals Act* 1979 (NSW) He said:

”The s. 4 definition particularly refers to the physical relationship in which the person is able to exercise some degree of ultimate responsibility or authority over an animal in its physical environment”.

Justice James said that, in order for a person to be held “a person in charge” of animals, it is not enough that the person perform some ancillary legal function in relation to those animals, but it is necessary that the person, whether on their own or in combination with others, have that authority and responsibility as would enable the person to engage in the physical disposition of the animals. That case involved the transport of animals overseas. The person in charge was a government employee and trained veterinarian.

Throughout the relevant period, Mr Maher was the registered owner of the horse and *Brugia* was on his property. Mr Maher travelled interstate between 2 February 2022 until a date after *Brugia* was euthanised on 3 March 2022. Mr Maher arranged for his daughter, Talisha, and Mr Sterley to feed and look after *Brugia* in his absence. In an interview with an Investigator on 2 March 2022, Mr Maher said that Mr Sterley “was ringing me every night.” That suggests to the Tribunal that Mr Maher was in charge. Further, on 26 February 2022 Mr Sterley sent photos of *Brugia* and as a result Mr Maher immediately rang him in order to find out what was going on. On learning of the condition of *Brugia,* he said to Mr Sterley as follows: “With everything that’s going on I said if she keeps losing weight or she doesn’t improve, she’ll have to be euthanised....but it’s your call. You’re there, I’m not there. You make the call.”

Mr Sterley told investigators that he worked for Mr Maher and was helping him to get together a feed regime to improve the condition of some of the horses on the property. He told investigators that he was “in charge of the place, pretty much, put it that way” while Mr Maher was interstate. That was what Mr Sterley may have thought, but clearly based on his actions he was ringing Mr Maher every night. He sent photos of *Brugia* on 26 February and Mr Maher responded immediately, by telephone, asking what was going on. Clearly Mr Sterley did not consider that he had the authority to euthanise *Brugia*. Furthermore, there was no suggestion that Mr Sterley had consulted with Mr Maher’s veterinarian.

Based on the above evidence, the Tribunal accepts that Mr Maher was the person in charge of *Brugia* between 24 December 2021 and 2 March 2022.

On 24 November 2023, Mr Maher gave evidence before the Tribunal and said that while he was away, he was “basically out of contact. This was different from what he had said previously to investigators on 2 March 2022. The Tribunal does not accept that, during his interstate visit that he was “basically out of contact”. Mr Maher said that he was receiving phone calls from Mr Sterley every night. Mr Maher said that on 26 February 2022 he received photos of *Brugia* and immediately rang Mr Sterley.

Mr Maher gave evidence of being surprised to learn that Brugia had not been euthanised because Mr Sterley changed his mind after the 26 February conversation. Mr Maher agreed with the accuracy of the email to Racing Victoria of 16 March 2022 in which he stated, “her condition showed no signs of improving and on speaking with James and Justin, I decided to make the decision to put her down”. Mr Maher stated in evidence about that decision “yes, in consultation with them, I decided it’s my horse. I decide whether it’s …

The evidence confirms that, although Mr Maher was physically absent from 2 February 2022 and had employed others to feed and care for the horse in his absence, it was he who was required to maintain the “ability and authority to take positive steps to effect the immediate physical circumstances of the animal/horse so that person’s authority might be employed to ensure care, treatment in a humane manner and the welfare of the animal” at all relevant times. It was Mr Maher’s horse. He was the registered owner. On his own evidence he was receiving phone calls daily and photographs of the horse from Mr Sterley. Mr Maher was the person in charge.

The Tribunal is comfortably satisfied that Mr Maher was the person in charge for the entirety of the period between 24 December 2021 and 2 March 2022, including while he was interstate from 2 February 2022.

Accordingly, the Tribunal will now consider the evidence as to whether Mr Maher failed to take reasonable steps to alleviate the horses pain.

**Failure to take reasonable steps to alleviate pain.**

Dr Smyth, a regulatory veterinarian employed by Racing Victora, provided a report dated 21 March 2022 and a statement dated 25 August 2022. Dr Smyth gave evidence to the Tribunal. Dr Smyth examined *Brugia* on 2 March 2022. In his report dated 21 March 2022, he said that the clinical signs displayed were typical of a horse with laminitis. He could not make the diagnosis without radiography. He described the obvious distress and poor body condition of about 1/5. The horse’s facial expression indicated that she was in pain.

In his statement of 25 August 2022, Dr Smyth said that the history provided by Mr Maher to the investigators was that *Brugia* was showing signs of pain after her feet were trimmed in December 2021. Before the Tribunal, Dr Smyth connected the loss of weight over time to the pain being suffered and Mr Maher’s comment to the investigators that “one minute she looks all right, the next minute she looks terrible again”.

Dr Smyth said:

“So, it’s not unusual that at some stage the horse may not appear to be in pain but given observations over many days and the fact that this horse was losing weight and continued to lose weight, that tells you that the pain is a thing that is causing this horse concern, and we need really to find out what the primary cause might be”.

In referring to Mr Maher’s observations to the Stewards on 2 March 2022 about *Brugia* being “as fat as mud” before her feet were trimmed by the farrier, Dr Smyth said that the horse had lost four body condition score, or approximately 200 kg, in the 3 to 4 months since having her feet trimmed.

In estimating the time of the onset of pain, Dr Smyth said that a horse that is lame is a horse that has lost its ability to hide its distress. He further said: “So, if you see a horse that’s lame, its sore and it’s been in distress for up to several weeks before you can detect it clinically”.

The evidence as to whether *Brugia* was examined by a veterinarian is as follows:

Mr Maher reported to investigators that his veterinarian, Dr Vanner, was treating two other horses, but that he never actually treated her. Mr Maher said Dr Vanner “saw her”, but never actually physically treated her, because when he visited her, there was actually nothing wrong with the horse. It was just that she was “in discomfort it was only when she foaled and went downhill drastically”.

Mr Maher said that he spoke to Dr Vanner about *Brugia’s* feet whilst she was pregnant and asked whether it was safe to give her “Bute”. Mr Maher’s evidence was that he gave her Bute and penicillin on 17 January 2022.

Mr Maher said before the Tribunal that, for the first time, on 21 January 2022 that whilst Dr Vanner was at the property, he showed Dr Vanner *Brugia*. Mr Maher said that Dr Vanner said “just pump as much feed into her as you can”. Mr Maher stated that the horse was “running around fine”.

There is no evidence before the Tribunal that Dr Vanner ever examined *Brugia* and provided medical advice based on such an examination of *Brugia*. Dr Vanner did not recall ever being asked to examine *Brugia*. In the statement of Dr Smyth, dated 25 August 2022, he had access to the transcripts of evidence of Mr Maher and the investigators. Before the Tribunal, Mr Maher said that when he received the photographs of *Brugia* on 26 February 2022, he was shocked and disappointed to see how much weight *Brugia* had lost.

Dr Smyth reported and gave evidence before the Tribunal. He said that all the signs pointed to laminitis, which is secondary to some other problem. Based on his experience, he rejected the possibility that short trimming of the feet caused laminitis.

Dr Smyth acknowledged that *Brugia* may have been administered antibiotics and NSAID’s (phenylbutazone), but this was done without a prior examination by a veterinarian. He further said that horses with chronic laminitis often suffer from neuropathic pain which responds poorly to NSAIDs and that other therapy may have been more beneficial. Before the Tribunal, Dr Smyth restated what he said in his report, namely that “once you get beyond the initial stages where there’s an inflammatory process going on, the anti-inflammatory drugs probably won’t be effective at all”.

Dr Smyth said that it was critical to evaluate the entire horse and to identify any predisposing factors that require treatment. A radiographic examination is critical for establishing a treatment protocol and prognosis.

In his report of 25 August 2022, Dr Smyth said that veterinarian examination, investigation and treatment were necessary, including when the foot soreness was first identified, when the acute weight loss was apparent despite increased feed availability, when it was suspected the pregnancy had been aborted and throughout the period after the trimming of her feet in December 2021 to determine the cause for the ongoing unresponsive chronic lameness. It was necessary for *Brugia’s* feet to be radiographed in order to guide the treatment. He accepted that he had not seen the horse in the three months before his examination, but said that the state of the horse was such that it had not happened overnight. It was a long-standing problem.

Dr Smyth said that not all reasonable steps had been taken to alleviate the horse’s pain. The Tribunal accepts this for the following reasons:

1. As outlined in the report of Dr Smyth no veterinary examinations were undertaken in relation to the following:

(a) in December 2021 for foot soreness after the farrier treatment, given the farrier was reluctant to trim her feet which suggested to Dr Smyth there might have been a problem before the trimming of the feet. A veterinary practitioner should have examined *Brugia* for foot soreness after the farrier had trimmed her feet, given that the farrier was reluctant to trim *Brugia’s* feet, given that the farrier was reluctant to do this.

(b) to determine the cause of the regression of the mammary glands and acute weight loss despite increased feed being made available.

(c) to determine whether the pregnancy had been aborted or whether the horse was still pregnant.

(d) to determine a cause for the discharging wound over the right mandible. The area should have been radiographed to evaluate for the presence of a fracture, a sequestration (dead piece of bone), bone inflammation or tooth infection or a penetrating foreign body.

(e) to determine the cause for the ongoing unresponsive chronic lameness and had her feet and right knee radiographed, which would have provided information about the hooves, the pedal bones and associated joints and any disease in the right knee joints.

2. *Brugia* continued to experienced lameness (pain) and loss of body condition for at least two months.

3. *Brugia* was treated empirically with antibiotics and NSAID’s for more than two months and continued to deteriorate despite the administration of treatment.

4. There was no response to the treatment did not trigger a realisation that the self-diagnosis might not be correct or efficacious, or that a different approach was required.

1. The treatment administered was without the assistance of a veterinary examination and was based on the observations of untrained lay persons, and:
2. The medications dispensed for another horse was not in favour of *Brugia*.

Mr Maher said a registered dentist examined *Brugia’s* teeth. Dr Smyth said the service was provided by Luke Shelbourne from Geelong who has an Equine Dental Association Certificate 1V in equine dental practice and is not a registered veterinary practitioner. The Tribunal does not accept that a registered equine dentist examined *Brugia’s* jaw.

The Tribunal accepts that *Brugia* was moved to a confined area. However, at the time Dr Smyth examined *Brugia* she was unable to access water independently. The day was hot and humid. She required assistance to reach the water provided. She commenced to drink and became less stressed.

This is a case brought by the Stewards under AR 231(1)(b)(ii), being a failure to take such reasonable and necessary steps as to alleviate pain. The Tribunal accepts that there are some limits on the treatments that should have been undertaken to alleviate the pain, due to Mr Maher failing to arrange a veterinarian clinical examination with appropriate diagnostic procedures, such as radiographs and x-rays, in order to determine the appropriate treatment from the beginning. Dr Smyth said that was a failure in the first place and that there was a failure at other times namely, at the time of the farrier trimming, the weight loss, the apparent abortion and the mandible injury. The reasonable and necessary steps relied upon are identified as a failure to ensure a veterinarian clinical examination was undertaken at various times that were identified by Dr Smyth, all of which presented themselves well before Mr Maher travelled interstate. The further steps or treatment which were required to be undertaken to alleviate pain were dependent upon there being a proper examination.

The Tribunal is comfortably satisfied that the charge is made out.

**BRIEF 2 – SNEAKY PRINCESS CHARGES**

Mr Maher is charged with two offences in relation to Sneaky Princess. On 29 May 2023, he pleaded not guilty to both Charges.

**Charge 1** – AR 231(1)(b)(iii) relates to the care and welfare of horses. It is alleged that between 23 August 2021 and 30 August 2021, whilst being the person in charge of Sneaky Princess, Mr Maher failed to provide necessary treatment to the horse (Chronic granulated wound).

**Charge 2** – AR 232 relates to failure to observe processes and directions of PRAs or Stewards by 15 October 2021 (Second Direction).

1. On 20 September 2021 Mr Maher was directed by an Equine Welfare Officer of Racing Victoria to provide the following by 5.00pm on 1 October 2021 (the First Direction):

(a) Photograph of Apache Cove from when he returned from NSW to Victoria in 2021;

(b) Copies of invoices or receipts for feed purchased (including hard feed and hay) between 1 May 2021 and 30 August 2021;

(c) Copies of invoices and receipts for worming treatments purchased between 1 May 2021 and 30 August 2021; and

(d) Any other documents you believed might be of assistance.

1. On 8 October 2021, Mr Maher was granted an extension of time to comply with the First Direction, having on 5 October 2021 only provided Item A (a photograph of Apache Cove). He was issued with a further direction to provide, by 5.00pm on 15 October 2021, the following (Second Direction):
2. Copies of invoices or receipts for feed purchased (including hard feed and hay) between 1 May 2021 and 30 August 2021.
3. Copies of invoices or receipts for worming treatments purchased between 1 May 2021 and 30 August 2021;
4. A veterinary report from Dr James Vanner concerning the Delago DeLuxe X Betrille Mare.

3. His conduct in failing to provide the documents the subject of the Second Direction was in contravention of AR 232(b).

**Charge 1 AR 231 Care and Welfare of Horses**

AR 231(1)(b)(iii) reads as follows:

1. A person must not:

(b) if the person is in charge of a horse – fail at any time:

(iii) to provide veterinary treatment to the horse where such treatment is necessary for the horse.

In respect of Charge 1, Racing Victoria relied upon the evidence of Ms Stella Stevenson, an Equine Officer employed by Racing Victoria, and Dr Robert Corver, a veterinarian, contracted to Racing Victoria. Mr Maher did not give evidence. He relied upon the evidence of his veterinarian, Dr James Vanner.

Ms Stevenson’s evidence was that on 25 August 2021 she received a report through the welfare line regarding horses located at a property on Cape Otway Road that was believed to be owned by registered owner Mr Rodney Maher.

As a result of the report, an inspection was conducted on Mr Maher’s property on Monday 30 August 2021 at approximately 11.20am. The inspection was attended by Ms Stevenson, a colleague Ms Samantha Davison, Dr Robert Corver and members of the RSPCA. At the time of the inspection the property was unoccupied.

Ms Stevenson gave evidence that they were able to identify the injured horse using a microchip scanner as the registered thoroughbred, Sneaky Princess. The horse was in the front paddock towards the right perimeter of the property. The property was undulating but there were no steep hills within the property. The horse was in a paddock of between 10 to 15 horses.

Charge 1 is in relation to Mr Maher’s horse, Sneaky Princess (“the horse”).

The report dated 30 August detailing the inspection by Dr Corver was provided to the Tribunal. Dr Corver gave evidence to the Tribunal and was cross examined. He said as a veterinarian in private practice, 80 to 90% of his work was horse work. Currently he is employed by Racing Victoria. He attended the property on 30 August 2021. He described the property as quite large, estimated to be 100 acres, divided into many paddocks. Fencing was mostly post and wire, requiring maintenance attention, particularly towards the back of the property. Approximately 60 horses were counted within the paddocks. Many of the horses barely had a body condition scale (“BCS”) of 2, that being the acceptable minimum, out of a scale from zero to 5. Dr Corver said that the BCS is a well-known scoring process in the industry. There were six horses of concern of which Sneaky Princess was one.

Dr Corver inspected the horse which had an obvious medical condition and required immediate veterinarian attention. She had a BCS of 1.5. She had a chronic granulating wound on her right hind cannon/fetlock area, also affecting paddock soundness (4/5 right hind lame). He described her attitude and behaviour as dull, her and coat was starting to dry. Pasture was inadequate. He said that the horse required immediate veterinary attention with improved management.

Dr Corver reported that given the severity, duration, and extent of the wound on the right hind lower limb of the horse, it would be necessary for a registered veterinarian to administer the treatments that he outlined in his report of 30 August 2021 and to provide any medication required.

In Dr Corver’s report of 11 April 2022, his second report, he concluded that veterinarian consultation and treatment for the horse were required:

1. At the time that the right hind injury was sustained.
2. During the time that the injury was healing.
3. For the right hind lameness evident on the trot; and
4. For the poor body condition.

On 31 August 2021, Ms Stevenson conducted a recorded interview by telephone with Dr Vanner, the veterinarian engaged by Mr Maher. Dr Vanner was at Mr Maher’s property treating the horse. Dr Vanner described the wound as a “fairly nasty” wound, which “looks worse than it is, but certainly needs attention”. He gave the horse a large dose of penicillin. The horse was sedated and all the proud flesh was cut off and debrided. A pressure bandage was applied, which he anticipated would be changed in a week. Given the wound, he expected he would have to debride more proud flesh from the wound at a later time. The process was later repeated by Dr Vanner. He expected that the horse would need to be bandaged for a couple of months. There is no dispute that improvement to the wound, as well as lameness and body score, were made once treatment had commenced. Dr Vanner said that the participant had sent him a photo of the injury “last week” and said “I’ve been that flat stick at the moment, that today was probably the earliest I could get to see her”.

Dr Vanner described the injury “as more than a week old, that’s for sure because that granulation tissue doesn’t happen overnight, but I’d be guessing. It could be anywhere between a couple of weeks to longer”. Dr Corver said that, as of 30 August 2021, “the injury has likely occurred seven to fourteen days previously”. Referring to the horse’s condition, Dr Vanner said “she’s in satisfactory condition but I would like to see – you know, I would like to see some more condition on her”. Following the interview, Dr Vanner said that he would be strongly advising Mr Maher to reduce dramatically the number of horses under his care.

Based on the veterinarian evidence, the Tribunal accepts that the horse’s injury required veterinary treatment when it was sustained and earlier than 30 August 2021.

On 31 August 2021, Ms Stevenson explained the veterinary findings of Dr Corver of the Horse to the participant, by phone. The participant declined to participate in a recorded interview. The following is a summary of the conversation that Ms Stevenson had with Mr Maher – see Paragraph 14 of her statement dated 13 September 2022

1. The horse was in paddock 5 along with 20 other mares.
2. She was brought up to the front of the property four days ago (27 August) because of the injury.
3. The paddock was where she was kept and was fed twice a day. On Sunday, 22 August Mr Maher realised the horse was injured.
4. When questioned, Mr Maher advised that the horse had not come up to be fed on the previous four days, as she would not walk across the canal. When the horse didn’t come down after four days, he realised that she had dropped in body condition and that she had a wire injury to the off-hind leg.
5. She had been in this condition for the last two weeks.
6. It took four days to get the mare out of the paddock.
7. She is a young mare. After not eating for four days her body condition had declined.
8. It was a new injury from that which resulted from being caught in the fence.
9. He messaged a photo of the leg to Dr James Vanner, his veterinarian, last week and was waiting for him to attend to the horse.
10. The horse was treated by Dr Vanner on morning of 31 August 2021. He cut back the proud flesh and bandaged her leg. He suggested that the horse be kept in a yard.

On 7 September 2021, Mr Maher restated that the water within the paddock made it difficult for him to get a look at the horse and that, four days after noticing the injury, he ended up cutting the fence and sending a photo to Dr Vanner.

On 8 September 2021, Ms Stevenson issued an official direction to the participant to participate in a recorded interview, which due to Mr Maher’s personal reasons, was conducted on 20 September 2021.

Based on what Mr Maher had told Ms Stevenson, he had been aware of the injury for 14 days before the horse received any veterinary treatment. The injury probably had been sustained even before that period, based on the evidence of Dr Vanner and Dr Corver. At the interview on 20 September 2021, Mr Maher reiterated that the paddock was under water; “I’ve got photos that show it. It was clearly under water there’s what you’d call a water easement that’s about eight foot long and about three foot deep which was full of water, and she was on the other side of that, and she never came up. So, I went down to have a look at her, couldn’t get close to her, but I could see she’d cut her leg fairly badly”.

Four days after noticing the injury, Mr Maher cut the fence and sent the photo of the horse to Dr Vanner. He hoped that Dr Vanner would attend that day or shortly thereafter. There is no evidence, after sending the photo to Dr Vanner, Mr Maher made any attempt to follow up with Dr Vanner in order to find out when he would attend upon the horse. The evidence is that Dr Vanner attended on 31 August 2021. Racing Victoria suggested that there were other veterinary surgeon’s in the area, including Southwest Equine and Barwon Equine Hospital. A veterinary surgeon could have attended earlier than 31 August 2021. There was no evidence before the Tribunal of when they could attend.

At the interview on 31 August 2021, Dr Vanner described the need for the participant to “seriously reduce his number of horses.” The evidence established that there were 59 live horses on the property.

The Tribunal accepts that a participant cannot be required to monitor every horse in their care continuously. However, there must be sufficient supervision of the horses to enable veterinary treatment to be provided in a reasonable and timely manner. This is consistent with the intended promotion of animal welfare to which the Rule is directed. The Tribunal accepts that the injury to the horse might be described as an accident.

Whether it be by reason of overstocking the property or by too many horses being placed in flood prone paddocks, the injury required veterinary attention as soon as it was sustained or within a reasonably contemporaneous time. This was the evidence of both experts. It did not occur. AR 231(1)(b)(iii) requires the person in charge to provide the necessary treatment “at any time”.

The Tribunal does not accept that a participant can rely upon a lack of knowledge of the injury, or upon an added delay caused by having to cut a fence to capture the horse. Nor can Mr Maher rely on the fact that the paddock in which the horse was housed had a water easement that was known by him to be eight feet long and about three feet deep and of which he said, “it was too deep for me to even walk through”. This added to the delay. The horse should not have been placed in a paddock that contained an easement or, if placed in such a paddock, should have been placed in a more suitable paddock once it began to rain. Furthermore, once rain commenced, Mr Maher should have been checking the horses regularly in order to ensure that they were properly fed and checking for possible injury, particularly when he was aware that there was a paddock which was likely to become flood affected. Once the horse was seen to be injured, the horse should have been attended to promptly.

The Tribunal accepts that the obligation to provide necessary veterinary treatment is strict. The Tribunal rejects the submission of Mr Maher that Racing Victoria cannot rely upon the decision in Greyhound Racing Victora Stewards v Anderton [2018] VSC 64. The relevant Rules apply to a statutory offence. Adopting what Zammit J said in that case, one must consider the text of the Rules themselves as follows – “In short, unless rebutted by the relevant statutory instrument, strict liability will be the default position.”

It does not matter that Justice Zammit was considering another Rule under another set of regulations. The meaning of the text of AR 231(1)(b) is that the drafters intended to create an offence of strict liability. Adopting what Zammit J said:

“In the present case, there is no sufficient reason for treating the presumption as rebutted. The text does not rebut it. The identified purpose does not rebut it. The text of the statutory provision is the paramount consideration, whose clear meaning cannot be displaced”.

The Tribunal accepts that the liability for failing to do so must also be strict. The Tribunal accepts the evidence of both experts that the wound should have been treated at the time that it was sustained. Both experts agreed that the injury was sustained at least seven days before 30 August 2021. Dr Vanner stated as follows: “…it’s more than a week old because granulation doesn’t happen overnight – it could be anywhere between a couple of weeks to longer”. Dr Corver estimated that “as at 30 August 2021 the injury has likely occurred seven to fourteen days plus”.

Based on the medical evidence, the wound occurred between 16 and 20 August 2021 and should have been treated at the time that the injury was sustained. The evidence is that the wound was treated on 31 August 2021.

The Tribunal is satisfied to its reasonable satisfaction that the charge under AR 231(1)(b)(iii) is made out.

**Charge 2 AR 232 Failure to comply with a direction from Stewards**

A person must not:

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

The relevant particulars are as follows:

1. On 20 September 2021, you were directed by an Equine Welfare Officer at Racing Victoria to provide, by 5:00pm on 1 October 2021, the following (the First Direction):
	1. Photographs of Apache Cove from when he returned from NSW to Victoria in 2021;
	2. Copies of invoices or receipts for feed purchased (including hard feed and hay) between 1 May 2021 and 30 August 2021;
	3. Copies of invoices or receipts for worming treatments purchased between 1 May 2021 and 30 August 2021; and
	4. Any other documents you believed might be of assistance.
2. On 8 October 2021, you were granted an extension of time to comply with the First Direction, (having on 5 October 2021 only provided Item A – a photograph of Apache Cove) and issued with a further direction to provide, by 5:00pm on 15 October 2021, the following (the Second Direction):
3. Copies of invoices or receipts for feed purchased (including hard feed and hay) between 1 May 2021 and 30 August 2021;
4. Copies of invoices or receipts for worming treatments purchased between 1 May 2021 and 30 August 2021; and
5. A veterinary report from your veterinarian, Dr James Vanner, concerning the 2014 Delago Deluxe X Betrille Mare.

Counsel for Racing Victoria must establish that a valid direction has been made and that there was a failure to comply. Counsel for Racing Victoria submitted that the Tribunal can be reasonably satisfied that the charge under AR 232(b) is made out in relation to the failure to provide copies of invoices or receipts for feed purchased and treatments by 1 October 2021 (particulars 3(a) & (b) above. Racing Victoria did not pursue the charge in relation to the provision of a veterinary report of Dr Vanner (particular 3 (c)).

On 7 and 8 October 2021, an extension of time until 15 October 2021 was granted to Mr Maher in order to allow him to comply with the relevant direction. However, no copies of invoices or receipts were provided to the Stewards at all.

The Tribunal accepts that the requests for copies of invoices, receipts and statements were reasonable and lawful requests, given the concerns of the Stewards about the physical health of a number of the horses who were described as barely having a BCS of 2 and specifically six horses identified by Dr Corver.

The Tribunal accepts that Mr Maher understood the request and stated that “I can get invoices for them” and “I can certainly prove all that”.

The Tribunal rejects the submission of Mr Maher that, given that the Stewards are not pursing particular 3 (c), the entire charge must fail as a matter of law. He submits that the Tribunal should find the charge not proven and that the charge should be dismissed. Particulars are provided in the Charge to in order to inform him of the case he must meet. The basis of the Charge under AR 232 is that there must be a valid direction made and a failure to comply. Particulars are not the elements of the Charge.

The Tribunal accepts that Particular (3) lists the documents sought under the second direction of 8 October 2021 and Particular 4 alleges a “failure to provide the documents the subject of the Second Direction”.

There is no dispute but that Mr Maher did not provide the documents sought.

The Stewards did not pursue the charge in relation to particular (c) relating to the provision of a veterinary report. By not pursuing the charge in relation to the veterinary report, the scope of the charge was confined to the documents in paragraphs (a) and (b). There is no requirement to amend particulars in a proceeding before the Tribunal, particularly when the issues between the parties are known.

The Tribunal rejects the submission of Mr Maher that Charge 3 must fail because of the effective withdrawal of (c). Mr Maher submitted that, on a technical reading of the particulars provided, the Stewards could only succeed if there was a failure to provide “all” the documents. It is illogical, that the non-pursuit of part of the case necessarily makes it unprovable. It is even more illogical given the evidence is that Mr Maher in fact actually failed to provide “all” of the documents, despite asserting to the Stewards that he could provide then. The Stewards acted responsibly. No unfairness was caused to Mr Maher.

A further and alternative submission was made that, if the Tribunal was against him on this point, the charge should be found not proven. Mr Maher said that he did not have invoices or receipts in his possession. He said that he could arrange for a statement from suppliers, which suggestion was accepted by the investigator. As things transpired, Mr Maher was unable to provide a statement in lieu of the invoices or receipts. He was unable to get from his daughter invoices for worming, despite his initial hope that he would be able to do so.

On the basis of the evidence, Mr Maher said that he did not have the invoices or receipts. The Tribunal accepts that evidence. While the Tribunal accepts that Racing Victoria accepted it would accept a statement, neither the Second Direction nor the Charge refers to any statement. The Tribunal accepts that, even if the Second Direction or charge did require the provision of a statement, AR 232(b) cannot reasonably be construed as compelling someone to produce a document not then in existence.

AR 232(b) is broad, but the power in AR 232(b) cannot be unlimited. It has to be read in conjunction with, and within the limitations of the powers in, AR 22.

There is no power in AR 22 for a Steward or Investigator to compel a person to create a document that does not then exist. AR 22(1)(d) gives an investigator power “to require production and take possession of” certain documents, but it does not give any power to require a person to have a third party create documents.

Accordingly, the Tribunal cannot be reasonably satisfied that the charge under AR 232(b) is made out in relation to the failure to provide copies of invoices or receipts for feed purchased and treatments by 1 October 2021 (particulars 3 (a) and (b).

Mark Howard

Registrar, Victorian Racing Tribunal