

# **RACING APPEAL PANEL NEW SOUTH WALES**

## **IN THE MATTER OF THE APPEALS OF MR SAM KAVANAGH, DR TOM BRENNAN AND DR ADAM MATTHEWS**

Appeal Panel: **Mr R. Clugston – Principal Member; Mr R Beasley SC; Mr T. Carlton**

Dates of hearing: **8-11 February 2016; 4 April 2016**

Date of decision: **6 May 2016**

Appearances: **Mr Kavanagh: Mr P. D'Angelo instructed by Mr T Kavanagh  
Dr Brennan: Mr A. Anderson instructed by Mr T Hargreaves.  
Dr Matthews: Mr R. Richter QC and Mr G Casement instructed by Ms N Spicer.  
Racing New South Wales: Mr S. Rushton SC and Mr J McLeod instructed by Mr P Sweney.**

## **REASONS FOR DECISION**

### **PART 1: INTRODUCTION**

#### *Background facts, Stewards' Inquiry and Stewards' Verdicts*

1. On 9 January 2015 Midsummer Sun won the Gosford Cup. It started as the \$3.90 favourite. It was trained by the first named Appellant, Mr Sam Kavanagh, a licenced trainer.

2. A post-race urine sample was taken from Midsummer Sun and returned a high level of caffeine. As a result of this, Stewards of Racing New South Wales ('RNSW') attended Mr Kavanagh's stables on 4 February 2015. During their inspection of the stable premises, the Stewards located a bottle containing a small amount of fluid. The bottle was labelled "*Vitamin Complex – A Complete Vitamin and Mineral Mix to be administered orally*". No label or other marking on the bottle gave any indication as to who the manufacturer was, the date of manufacture, or its ingredients. The only other marking on the bottle was that it was "*for animal use only*".
3. On 5 February 2015, a further post-race urine analysis of Midsummer Sun taken following the running of the Gosford Cup found that the horse had 547 micrograms per litre of cobalt in its urine: Exhibit 33 at the Stewards' Inquiry below. A further analysis showed 550 micrograms per litre (Ex 38 below). As the evidence before the Panel revealed, this is a very high reading, and some 347 micrograms per litre higher than the "exception" level that has now been introduced for prohibited substances under AR178C of the Australian Rules of Racing ('the Rules'). Testing conducted on some of the fluid found in the Vitamin Complex bottle found in Mr Kavanagh's stables revealed that it contained over 20 million micrograms of cobalt per litre: Ex 34 below. It was not in dispute that this concentration of cobalt is about 175 times the concentration of cobalt found in registered veterinary products for horses containing cobalt or vitamin B12.
4. As a result of the above matters, the Stewards conducted interviews, and subsequently an Inquiry. Although there are many other factual matters of relevance (which are discussed and determined below in these reasons for decision), Mr Kavanagh told the Stewards during the course of their investigation that in September 2014 two bottles of Vitamin Complex were supplied to him by Dr Tom Brennan, the second named Appellant. Mr Kavanagh gave evidence, discussed below, that he was given instructions by Dr Brennan as to how to use the Vitamin Complex in an intravenous drip administered to some of the horses he was training, including Midsummer Sun.
5. After initially denying any knowledge of the Vitamin Complex, Dr Brennan eventually admitted during the course of the Stewards' investigation and Inquiry that he had supplied two bottles of the Vitamin Complex to Mr Kavanagh. Dr Brennan

told the Stewards that he originally obtained the bottles of Vitamin Complex from the third named Appellant, Dr Adam Matthews. Dr Matthews was a vet employed by the Veterinary practice Flemington Equine. Dr Brennan was a partner in this practice.

6. Throughout the course of the Stewards' investigation and Inquiry, and in his evidence before this Panel, Dr Matthews has denied any involvement in either the supply of Vitamin Complex to Dr Brennan, or to Mr Kavanagh.
7. During their investigation process, the Stewards gained access to several of the phones of persons who became part of the Inquiry, including the three Appellants. It became apparent during the investigation that on the day of the running of the Gosford Cup on 9 January 2015, a race day drench was administered to Midsummer Sun by a Mr Mitchell Butterfield. The administration of a race day drench without permission from the Stewards is a breach of AR 178E(1). Mr Kavanagh admitted to Stewards that he had made arrangements for Mr Camilleri to facilitate a race day "treatment" to Midsummer Sun on 9 January 2015. Mr Camilleri ultimately pleaded guilty to several charges, including a charge that he was party to a race day administration to Midsummer Sun on 9 January 2015. Mr Butterfield also admitted administering a race day drench and an injection to Midsummer Sun on 9 January 2015.
8. Mr Kavanagh also told the Stewards during the course of their investigation that it was Dr Matthews who put him in contact with Mr Camilleri for the purpose of arranging a race day drench to Midsummer Sun on the day of the running of the Gosford Cup. Dr Matthews denies this.
9. It also became apparent to the Stewards during the course of their investigation that other horses trained by Mr Kavanagh were given race day drenches, in breach of the Rules. Mr Kavanagh has admitted that two of his horses were given race day drenches on 7 January 2015.
10. On 23 August 2015, following the completion of the Stewards' Inquiry, Mr Kavanagh was found guilty by the Stewards of 23 charges under the Rules. The charges generally related to both the administration of Vitamin Complex to his horses, and to

the administration of race day drenches. The total composite penalty imposed on him for the findings of guilt was a disqualification of 9 years and 3 months, and a fine of \$3,000.

11. Also on 23 August 2015, Dr Brennan was found guilty by the same Panel of Stewards of 12 breaches of the Rules, the majority relating to the supply of Vitamin Complex to Mr Kavanagh. He received a total composite penalty of disqualification for a period of 6 years.
12. On 19 November 2015 a differently comprised Panel of Stewards found Dr Matthews guilty of 6 breaches of the Rules relating to what it found was his involvement with the race day treatment of Midsummer Sun on 9 January 2015, and being the original source of Vitamin Complex. The total composite penalty imposed on him was a disqualification of 5 years and 6 months.
13. Mr Kavanagh has appealed to this Panel in relation to the findings of guilt made against him in respect to 11 of the 23 charges. Dr Brennan has challenged 10 of the 12 findings of guilt made in respect of him, and Dr Matthews has appealed all findings of guilt. Each Appellant has also appealed against the penalties imposed by Stewards. These reasons deal only with the appeals in relation to findings of guilt.

#### *The Appeals*

14. The appeals were heard together, and are in the nature of a rehearing where fresh evidence may be given: s43(1) of the *Thoroughbred Racing Act 1996*. Evidence was received over four days between 8 and 11 February 2016. In the course of that hearing, a document was tendered by the RNSW titled: "*RNSW's Summary of Charges*". This document contained a schedule summarising all of the charges brought by the Stewards against each Appellant, each Appellant's initial plea, the Stewards' finding (including the penalty imposed), and the Appellants' position on appeal in relation to their respective charges. For convenience, this document is annexed to these Reasons for Decision and marked "A".
15. As annexure A contains only a summary of the charges brought against each Appellant, also attached to these reasons and marked "B" (Kavanagh), "C" (Brennan)

and “D” (Matthews) are charge sheets for each Appellant where the charges brought against them are fully particularised.

16. After the evidence was completed before the Panel, written submissions were filed and served by all parties. Oral submissions were then made to the Panel on 4 April 2016, at which time the Panel reserved its decision.
17. Each Appellant gave oral evidence to the Panel and was cross-examined. The Panel also heard oral evidence from other witnesses, which is referred to below, including expert witnesses in relation to the amount of cobalt detected in the urine sample of Midsummer Sun following the running of the Gosford Cup. Also tendered at the hearing were various witness statements taken by the Stewards during the course of their investigation, the documents tendered at the Stewards’ Inquiry, together with the transcript of all of the evidence given at that Inquiry.

*Further background matters of fact – Vitamin Complex*

18. While there are a number of critical matters of fact and credit to be resolved, it is convenient in this introductory part of our Reasons for Decision to set out some of the relevant background facts that are either not controversial or not contested.
19. When the Stewards first found a bottle of Vitamin Complex (which became Exhibit 4A in the Stewards Inquiry) at Mr Kavanagh’s stables on 4 February 2015, he told them that he had been sent the bottle as a “free product”. This was not true. During a subsequent inspection of his stables by investigators for the Stewards on 16 February 2015, Mr Kavanagh said that he didn’t know what the Vitamin Complex was. He told a RNSW investigator: “*some guy dropped it off and I thought it was for a trial*”. This was again untruthful. He did, however, admit on this occasion that he used Vitamin Complex on Midsummer Sun at some time prior to that horse running in the Gosford Cup on 9 January 2015.
20. At an interview conducted by Stewards on 25 February 2015 at the RNSW offices, Mr Kavanagh admitted that the Vitamin Complex had been provided to him by Dr Brennan: Ex 2, p87, L348-350. During the course of this interview, Mr Kavanagh admitted administering the Vitamin Complex to the horses Spinning Diamond and

Centre Pivot: Ex 2 p89, L410-425. He said he first used the Vitamin Complex in about September 2014.

21. In relation to Midsummer Sun, Mr Kavanagh's evidence was that he last gave the horse a drip containing 5mls of Vitamin Complex "*probably around Summer Cup time*", but he couldn't be sure of the exact date: Ex 2 p 90, L445-460. The Summer Cup was run on 26 December 2014. He later said that Midsummer Sun had been given a drip containing Vitamin Complex shortly after the running of the Summer Cup: Ex 2 p 99, L900-935.
22. In the same interview, Mr Kavanagh told the Stewards that Dr Brennan told him that the Vitamin Complex contained only vitamins, and was to be tried as a "*pick me up, a tonic*": Ex 2 p 88, L382. He said it was to be used in 5mls amounts orally, and he denied using it in a drip: Ex 2 p 88, L387-393. This evidence was also untruthful to the extent that it suggested oral administration rather than by means of an intravenous drip.
23. In a subsequent interview with Stewards conducted on 13 May 2015, Mr Kavanagh admitted that he had received two bottles of Vitamin Complex from Dr Brennan, and had been charged \$1,000 for each: Ex 2 p 707, L57-76. He admitted that he gave Midsummer Sun at least 10 drips containing 5mls of Vitamin Complex: Ex 2 p 734. He admitted to giving Midsummer Sun a drip prior to the Gosford Cup which was administered on about 6 January 2015, but his evidence was that this drip did not contain 5mls of Vitamin Complex, as the horse had suffered an episode of "shakes" after last using the drip containing Vitamin Complex shortly after the running of the Summer Cup: Ex 2 p 734, L1410-1413. He has always maintained that he did not know that the Vitamin Complex contained cobalt. He told the Stewards that he specifically asked Dr Brennan if the Vitamin Complex contained cobalt and was told it did not: Ex 2 p 734, L1442. Dr Brennan agrees that he told Mr Kavanagh that the Vitamin Complex did not contain cobalt, as his evidence was that this was his own belief based on assurances he says he received from Dr Matthews.
24. On 9 June 2015 (the first day of evidence in the Stewards Inquiry), Dr Brennan denied any knowledge of the Vitamin Complex, or of supplying it to Mr Kavanagh: Ex 1 T5

L207 to T6 L281. This was untruthful. When he later gave evidence to the Stewards during an interview conducted on 20 July 2015, Dr Brennan admitted supplying two bottles of Vitamin Complex to Mr Kavanagh at the cost of \$1,000 each. He agreed that he assured Mr Kavanagh that Vitamin Complex contained no prohibited substance, and agreed that he gave instructions to Mr Kavanagh as to the use of the Vitamin Complex in a drip which was to be administered 7 and 2 days out from races: Ex 2 p 1054, L192 – p 1055, L210.

25. Dr Brennan's evidence was that he obtained the bottles of Vitamin Complex in about September 2014 from Dr Matthews. Dr Brennan asserts that Dr Matthews told him that the bottles contained only Vitamin B, and that they specifically did not contain cobalt. Dr Brennan says that Dr Matthews told him that the bottles were sourced from Canada: Ex 2 p 1054-1056. Dr Matthews denies these matters, which is a matter the Panel has had to resolve below.

*Further background matters of fact – Race Day Administrations*

26. In relation to race day treatments, in his evidence to the Stewards' Inquiry on 13 May 2015, Mr Kavanagh admitted that he made arrangements with Mr Camilleri for Camilleri to provide a race day treatment to Midsummer Sun on the day of the Gosford Cup: Ex 2 p 729, L1159. He said that he was introduced to Camilleri for this purpose by Dr Matthews: Ex 2 p 729, L1160-1168. Mr Kavanagh has given a number of accounts regarding Dr Matthews' involvement, which are dealt with and determined by the Panel below. Dr Matthews denies discussing race day treatments with either Mr Kavanagh or Mr Camilleri.
27. Subsequent to making admissions regarding the race day treatment for Midsummer Sun, Mr Kavanagh also made admissions in relation to race day treatments for the horses Ceda Miss and Palazzo Pubblico on 7 January 2015: Ex 2 p 729, L1190-5.
28. In an interview conducted by the Stewards on 11 June 2015, Mr Mitchell Butterfield admitted to attending Kavanagh's stables on 7 January 2015 with Mr Camilleri for the purpose of drenching a couple of horses. He also admitted giving a drench to Midsummer Sun on 9 January 2015: Ex 2 p 729-936. Mr Butterfield's evidence was

that the race day drenches contained “*beetroot extract, Echinacea powder, 15 Beroccas, 8 aspirins and raw sugar*”: Ex 2 p 936, L456-458.

29. Mr Butterfield also admitted that on 9 January 2015, on the day that he gave the race day drench to Midsummer Sun, he also injected that horse with what he was told was “formaldehyde and Vitamin C”: Ex 2 p 949, L1139 – Ex 2 p 950, L1170. Mr Butterfield says he was provided with the syringe for the injection by a Mr O’Loughlin, a licenced stablehand in Mr Kavanagh’s staff.
30. It is with this general background of facts that the Panel now turns to the resolution of the Appellants’ guilt in relation to the charges layed against them by the Stewards.

## **PART 2: STANDARD OF PROOF**

31. All of the parties to the appeal have reminded the Panel that RNSW bears the onus of establishing the guilt of the Appellants in relation to each of the charges they are contesting. The Panel has also been reminded that the standard of proof, while remaining balance of probabilities, is nevertheless qualified by the principles outlined by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The Panel notes that the charges brought against each Appellant allege very serious misconduct. In many instances, what is alleged involves a deliberate breach of the Rules. A finding of guilt in relation to some of the breaches involves lengthy minimum periods of disqualification which obviously will have a severe impact on both the reputation and lives of each Appellant. The Panel understands that in order to make adverse findings against any of the Appellants, it must be “comfortably satisfied” that guilt has been established by RNSW on the evidence.

## **PART 3: APPEAL OF MR SAM KAVANAGH**

### **Charge 1**

32. Charge 1 against Mr Kavanagh was brought under AR 175(h)(i). The rule (including subrule (h)(ii)) is relevantly in the following terms:



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

.....

*(h) Any person who administers, or causes to be administered, to a horse any substance –*

- (i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing it starting in a race; or*
- (ii) which is detected in any sample taken from such horse prior to or following the running of any race.*

33. Full particulars of the charge are set out in annexure B. In summary it is alleged that Mr Kavanagh administered a prohibited substance (the cobalt in Vitamin Complex) to Midsummer Sun prior to the running of the Gosford Cup for the purpose of affecting that horse's performance in that race.

34. A number of matters have been raised by Mr Kavanagh in defence of this charge. Their resolution will impact upon the defences Mr Kavanagh raises to other charges, and also to part of the defences raised by Dr Brennan and Dr Matthews to charges brought against them that are linked to Mr Kavanagh's conduct. The critical matters raised in defence to this charge are:

- (a) for all charges (including charge 1) brought against him under AR 175(h)(i), Mr Kavanagh contends that it is necessary for RNSW to prove that he knew that Vitamin Complex contained a "prohibited substance" – *"the Mental Element Issue"*;
- (b) Mr Kavanagh denies that Vitamin Complex was administered to Midsummer Sun for *"the purpose of affecting the performance"* of that horse in the Gosford Cup – *"the Purpose Issue"*;
- (c) It is argued that RNSW has not established that the cobalt detected in the urine sample taken from Midsummer Sun following the running of the Gosford Cup on 9 January 2015 came from the bottle of Vitamin Complex (Exhibit 4A below). This defence is raised primarily by Dr Brennan in relation to Charges

1 to 6 brought against him as an alleged “party to” (charges 1 to 3) Mr Kavanagh’s offending, or as someone whose conduct led to or caused (charges 4 to 6) Mr Kavanagh’s offending – “*the Detection Issue*”.

*The Mental Element Issue*

35. Senior Counsel for RNSW, Mr Rushton SC, submitted to the Panel that on a proper construction of AR 175(h)(i), it is not necessary to establish that Mr Kavanagh knew that the Vitamin Complex contained a prohibited substance. He submitted that it is enough that the substance turned out to be prohibited. Leaving aside the issue of purpose, RNSW submits that the rule is to this extent one of absolute liability: RNSW Written Submissions at [66], and [10] in Reply.
36. The text of the rule does not indicate that knowledge that a substance administered is a prohibited substance is a prerequisite to a breach of the rule. That is, of course, not decisive. It is necessary to have regard to the purposes of the Rules (which include the protection of the integrity of horse racing), and to matters of context, which in this case includes that a breach of AR 175(h)(i) incurs a mandatory minimum 3 year disqualification. It is contended by the Appellants that that is a contextual matter that tends against the rule being one of absolute liability.
37. A number of authorities were referred to the Panel, although none specifically addressed AR 175(h)(i).
38. In support of their construction, RNSW relies on *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 78 ACrimR 433. This is a decision of an expanded Full Court of the Western Australian Supreme Court. *Harper* concerned the proper construction of Rule 364 of the Rules of Trotting in Western Australia, which relevantly provided that:

*“Where a ... sample taken from a horse is shown to contain a drug ... and the stewards have not given permission for the administration of the drug ...*

- (a) *The trainer or other person in whose custody or under whose control the horse was at the time shall be deemed guilty of an*

*offence and liable to disqualification for life or any lesser period and/or to a fine in an amount not exceeding \$2,000 ...”*

39. Also of relevance in *Harper* was Rule 364A which provided that:

*“A person referred to in rule 364:*

*“... shall not be guilty of an offence if he shall satisfy the stewards that he took all reasonable and proper precautions to prevent the administration of a drug to the horse therein referred to.”*

40. The Stewards in *Harper* found the Appellant guilty of a breach of Rule 364 partly because he used a product on his horses that was not a registered product, and in relation to which he had received no veterinary advice. They therefore found that he had not satisfied Rule 364A as he had not taken “all reasonable and proper precautions” to prevent administration of a drug. However, the Stewards did not consider whether the Appellant “held an honest and reasonable but mistaken belief” regarding the nature of the supplement he administered. This was the issue the subject of the appeal.
41. Distinguishing the nature of the proceedings against the Appellant from criminal proceedings, the Full Court held that the defence of “honest and reasonable mistake” was not available upon a proper construction of Rule 364. In their consideration of the proper interpretation of the rule, the Court in *Harper* said the following:

*“Counsel for the Applicant made much of the fact that a literal construction of the Rules could conceivably result in a trainer guilty of no wrong conduct being disqualified. He tried to persuade the Court that no such intention should be attributed to the Committee of the Trotting Association which drew up the Rules. We do not see why. It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of Racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls and those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken from them if for any reason, even without actual fault on their part, they present a doped horse for racing.”*

42. It is clear the Full Court of the Western Australian Supreme Court characterised Rule 364 as one of absolute rather than strict liability and ruled out any *Proudman v Dayman*<sup>1</sup> type defence of honest and reasonable mistake.

43. *Harper* was followed by Adamson J in *Day v Harness Racing New South Wales* [2014] NSWSC 1402. In this case, amongst other issues, her Honour had to consider the proper construction of Rule 190 of the *Harness Racing Rules* which relevantly provided:

190. (1) *A horse shall be presented for a race free of prohibited substances.*

(2) *If a horse is presented for a race otherwise than in accordance with subrule (1) the trainer of the horse is guilty of an offence.*

(3) *If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with subrule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*

(4) *An offence under subrule (2) or subrule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*

44. After considering Rule 190 of the *Harness Racing Rules*, and Rule 364 the subject of *Harper*, her Honour held (at [190]) of her judgment):

*“I do not consider there to be any basis for distinguishing the corresponding Rules in the present case from those considered in Harper, notwithstanding their different wording. I accept the defendant’s submissions that the underlying purpose of rule 190 would be frustrated if the defence of honest and reasonable mistake of fact were available, or if it were incumbent on HRNSW, or the Stewards, to prove how the prohibited substance came to be in the horse. Indeed, the wording of rule 190(4) is to the contrary. A purposive construction is to be preferred: rule 309. In all the circumstances, I consider the offence created by rule 190 to be one without a fault element and in respect of which no defence of reasonable mistake of fact is available. In other words, I consider it to be an offence of “absolute liability”. Accordingly, fault and mistake, while relevant to penalty, are not relevant to guilt.”*

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<sup>1</sup> (1941) 67 CLR 536

45. On appeal to the Court of Appeal, the Court upheld her Honour's view that Rule 190 of the Harness Racing Rules was an offence of absolute liability: *Day v Sanders* [2015] NSWCA 324. Basten JA dealt with the construction of Rule 190 at [67]-[85] of the judgment. Having explained that the general approach to the construction of Rule 190 is to "*understand the meaning of the text in its context*", his Honour held that Rule 190 was a rule of absolute liability principally because of the following matters:
- The rule does not add a new offence to the criminal law, weakening any presumption of a *Proudman v Dayman* type defence based on "honest and reasonable belief: [70] of the judgement.
  - subrule (4), which provides that an offence is committed "regardless of the circumstances in which the prohibited substance came to be present in or on the horse", was a clear textual indication that the defence of honest and reasonable belief is not available: [75] of the judgement.
  - There was a public interest in the imposition of absolute liability offences on the human participants of sport, such as harness racing: judgement at [84].
46. Simpson JA agreed with reasoning of Basten JA, and Leeming JA agreed with his conclusions concerning the construction of rule 190. Central to Leeming JA's construction of Rule 190 was both the text of subrule (4), and that the construction of Rule 190 as a rule of absolute liability "*accords with the decision of an enlarged Full Court of the Supreme Court of Western Australia in Harper*": judgement at [127].
47. It was put to the Panel that a distinguishing factor to both *Harper* and *Day* in these appeals is that a breach of AR 175(h)(i) carries with it a three year minimum disqualification penalty. The Panel was referred to a number of cases in support of this submission by Mr Anderson, Counsel for Dr Brennan. An example is *Hursey v Taylor* [1971] Tax SR 212, where Chambers J noted the comments of Lord Pearce in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at 306 that "*the existence of a minimum penalty [is] a strong argument in favour of the offence not being absolute*".

48. The Panel has had regard to the fact that a breach of AR 175(h)(i) involves a lengthy minimum disqualification period. The Panel accepts that it is arguable that this is one contextual indication that the rule may not be one of absolute liability. The Panel also notes that the text of Rules 364 and 364A considered in *Harper*, and Rule 190 considered in *Day*, differ to the language of AR 175(h)(i). The Panel notes however that Adamson J in *Day* at [190] of her judgment, and Leeming JA in *Day* on appeal at [127], both held that there was no clear basis for distinguishing the construction of Rule 190 in that case with Rule 364 considered in *Harper*. The Panel here sees no clear basis for a distinction in approach to AR 175(h)(i).
49. The Panel recognises that to construe AR 175(h)(i) as a rule of absolute liability could in some circumstances mean that a trainer might breach the rule in circumstances where they have acted honestly, and possibly not even negligently. A minimum three year disqualification is a very harsh penalty in such circumstances. Be that as it may, the Panel's construction of AR 175(h)(i) is that it is not necessary to establish knowledge that a substance that was administered was a prohibited substance. That construction is supported by the text of the rule, and the objects of the Rules insofar as they relate to protection of the integrity of horse racing. The Panel is of the view that to take a different approach to the construction of AR 175(h)(i) would involve the Panel setting itself in disagreement with both the Court of Appeal and Justice Adamson in the *Day* cases, and with the Full Court of the Western Australian Supreme Court. That would not be a desirable approach by an administrative appeal panel such as this one.
50. In relation to the "mental element issue" then, the Panel accepts the submission of RNSW that all that need be proved is that the detected substance was a prohibited substance under the Rules.
51. Although on the Panel's construction it is not necessary for us to decide the matter, Mr Kavanagh's state of mind about the contents of the Vitamin Complex bottles will be relevant to penalty. The Vitamin Complex bottle gave no indication of who manufactured it, what its precise ingredients were, or where it came from. That alone

should have raised concerns in Mr Kavanagh's mind, even though he obtained the bottle from a vet that the Panel accepts he trusted.

52. In the end, the Panel indicates that it accepts the evidence of Mr Kavanagh that he did not know that the Vitamin Complex bottle contained cobalt, or at least not in the highly concentrated form that it did.

#### *The Detection Issue*

53. It is convenient to deal with this issue before "the Purpose Issue", as it in part involves the Panel making a finding as to when the Vitamin Complex was last administered to Midsummer Sun before the Gosford Cup, a matter that is in dispute, and the resolution of which has at least some relevance to the "Purpose Issue".
54. Mr Kavanagh's evidence was that he last administered Vitamin Complex to Midsummer Sun in a drip on about 27 or 28 December 2014, following that horse's run in the Summer Cup on 26 December 2014. He said that the horse experienced an episode of shaking after the administration of this drip, and had to be placed on a horse walking machine. Consequently, although he gave Midsummer Sun a drip on 6 January 2015, he says he did not use the usual 5mls of Vitamin Complex on that occasion.
55. Mr Kavanagh's evidence that he did not use any Vitamin Complex in the drip administered to Midsummer Sun on 6 January 2015 (prior to him leaving for the Magic Millions Carnival in Queensland) is partly at odds with a report to Stewards prepared by Nathan Hayward, a Chief Investigator of the Surveillance and Investigation Unit of Racing New South Wales, which he prepared following a stable inspection of Mr Kavanagh's stables on 16 February 2015. Mr Hayward's report formed Exhibit 13 of the Stewards' Inquiry and is found at page 49 of Exhibit 2 before the Panel. In that report, Mr Hayward recorded that Mr Kavanagh told him that on Tuesday, 6 January 2015 he administered a drip to Midsummer Sun which contained the following products:

*"Daroughs Drip (not sure of exact spelling)  
25mls of Ferrocyll*

*25mls of Vam*

*25mls of Vitamin Complex”*

56. Mr Kavanagh has always maintained that he was told by Dr Brennan to only administer 5mls of Vitamin Complex in any drip given to a horse – evidence that is supported by Dr Brennan’s own evidence concerning the instructions he agrees he passed on to Mr Kavanagh. He suggests that Mr Hayward’s report contains an error and that “25mls of Vitamin Complex” should in fact be a reference to “25mls of Vitamin C”. The alternative is that Mr Hayward’s note is correct in referring to Vitamin Complex, but the reference to “25mls” should be a reference to “5mls”.
57. There is some support for Mr Hayward’s note regarding Vitamin Complex from the evidence of Dr Suann (the Chief Veterinarian of RNSW) who, in answer to a question as to what was said at the stable inspection on 16 February 2015, gave the following evidence to the Stewards’ Inquiry on 3 August 2015 (Ex 1 T182 L8995):
- “My recollection of the conversation was that there was an indication that the Vitamin Complex might have been used on the Tuesday prior to the Friday [the day of the Gosford Cup], but in terms of the dose or how it was given, I don’t have any clear recollection of that. I was focused, I guess, looking through the drug cabinet at the time, just looking for potential cobalt containing veterinary preparations that might have been in the cabinet.”*
58. The evidence from Mr Hayward’s report to Stewards and the recollections of Dr Suann are some evidence that contrary to Mr Kavanagh’s assertions, Vitamin Complex was administered in a drip to Midsummer Sun on 6 January 2015. Before resolving this issue, however, it is necessary to consider other evidence and submissions concerning this issue.
59. One submission made by Mr Anderson, Counsel for Dr Brennan, was that it is unlikely that the cobalt detected in Midsummer Sun’s urine sample after the Gosford Cup came from the Vitamin Complex bottle that was Exhibit 4A below because it is unlikely that there was a sufficient quantity of fluid left in it for it to be used in a drip on 6 January 2015. Paragraphs 57 to 60 of Dr Brennan’s written submissions contain a large number of references to the evidence regarding the administration by Mr



Kavanagh of Vitamin Complex to the horses Midsummer Sun, Spinning Diamond and Centre Pivot. These references are used to support a submission that at least 110ml of Vitamin Complex was administered to the horses, and none would have been left in the bottle the Stewards found on 4 February 2015 in Mr Kavanagh's stables, and noting that the second bottle of Vitamin Complex supplied by Dr Brennan to Mr Kavanagh was not opened.

60. The Panel is not persuaded by this submission. Mr Kavanagh's evidence was that he gave ten to twelve administrations of Vitamin Complex to Midsummer Sun, two to Centre Pivot, and four to six to Spinning Diamond: T 91. However, it's clear that the evidence concerning the number of times it was used is only an approximation. Mr Kavanagh kept no records of the administration of Vitamin Complex to his horses. One thing that can be said with certainty about Mr Kavanagh's evidence is that he is not a precise historian. His evidence was in part guess work, and cannot be used in some mathematical way to attempt to arrive at an exact figure as to how much he used. There was enough Vitamin Complex left in the bottle that was Exhibit 4A below for its contents to be tested after the bottle was taken by Stewards, following their stable inspections (7.9ml). The evidence of administrations of Vitamin Complex to Mr Kavanagh's horses is too imprecise for the Panel to draw the conclusion that there was an insufficient amount of it left for 5mls from that bottle to have been used in a drip administered to Midsummer Sun on 6 January 2015. Other evidence must be considered in addition to the evidence referred to by Dr Brennan.

### ***Expert Evidence***

61. In support of his contentions concerning the detection issue, Dr Brennan called Professor D Hibbert to give evidence before the Panel. Professor Hibbert is a Professor Emeritus of Analytical Chemistry at the University of New South Wales. He prepared an expert report dated 7 February 2006 which was tendered by Mr Anderson on Dr Brennan's behalf and became Exhibit 6 before the Panel. In summary form, that report dealt with the mathematical likelihood of Midsummer Sun returning a reading of cobalt of 550 micrograms per litre of cobalt in its urine sample taken on 9 January 2015 following the Gosford Cup, based on a number of differing scenarios. Also tendered through Professor Hibbert was a chart (which became Exhibit 7) concerning the mathematical likelihood of bioaccumulation in various

racehorses, including Midsummer Sun, that had returned positive urine results for cobalt.

62. In reaching the opinions expressed in his report, Professor Hibbert had regard to various studies concerning the administration of cobalt to horses. This included a study by Ho and Ors, entitled "*Controlling the Misuse of Cobalt in Horses*" (Exhibit 9), a study by Knych and Ors, entitled "*Pharmacokinetics and Selected Pharmacodynamics of Cobalt following a single intravenous administration to horses*" ("the Knych Study" – Exhibit 135 in the Stewards Inquiry), and a study in relation to which he was one of the authors – "*Study of Cobalt in Racing Standard Bred Horses*, 20<sup>th</sup> International Conference of Racing Analysts and Veterinarians, 2014.
63. In summary it was Professor Hibbert's opinion that in respect to the cobalt reading in Midsummer Sun's urine sample taken on 9 January 2015:
  - (a) This was not likely to have occurred had 5mls of Vitamin Complex been administered to the horse in a drip on 27 December 2014 – the answer to scenario 1 in his report.
  - (b) It was not likely, had 5mls of Vitamin Complex been administered in a drip to Midsummer Sun on 6 January 2015 – his answer to scenario 3 of his report.
  - (c) It was a possible reading had 25mls of Vitamin Complex been administered in a drip to Midsummer Sun on 6 January 2015 – his answer to scenario 4.
  - (d) It was not likely that 5mls of Vitamin Complex had been administered to Midsummer Sun 4-5 hours before the urine sample was taken on 9 January 2015.
64. Dr Brennan relied on the opinions expressed in Professor Hibbert's report in support of the submission that it was unlikely that cobalt from the Vitamin Complex bottle

(Exhibit 4A below), was the source of the cobalt detected in the urine sample of Midsummer Sun taken on 9 January 2015.

65. There are some difficulties in making good the submission that Professor Hibbert's report can be relied upon as evidence as to either the source of the cobalt in Midsummer Sun's urine sample, or as to the likely date of the last administration of Vitamin Complex to that horse.
66. First, Professor Hibbert was quick to agree in his evidence that he was "not an animal person" and was not able to say "anything about bioaccumulation": T-240, L11637. Bioaccumulation was a reference to the build-up of cobalt in a horse that has been subjected to multiple administrations of that substance – for example, Midsummer Sun, which had been administered cobalt through the Vitamin Complex on between 10 or 12 occasions on Mr Kavanagh's estimate prior to the urine sample being taken from the horse on 9 January 2015. Professor Hibbert also agreed that factors like age, the gender of the horse, and its weight had also not been taken into account in his mathematical models: T 246.
67. Further, the Knych Study, as an example, was a study that dealt with only the single administration of cobalt to horses, to which there had been no prior administrations of that substance. The study group of horses in that report were therefore unlike Midsummer Sun, who had received multiple administrations. Further, in relation to the report that he was an author of, the three horses were only administered 1mg of cobalt. The studies relied upon by Professor Hibbert, as he acknowledged, were therefore very different to what was actually happening with the horse Midsummer Sun, who received many doses of a substance containing a very concentrated form of cobalt.
68. There was also evidence that a urine sample taken from Midsummer Sun on 3 February 2015 (following that horse's death in a training accident) showed that the horse still had 79 micrograms of cobalt per litre in its urine. The evidence was that the "normal" amount of cobalt that could be expected to be detected from a horse would be less than 10 micrograms per litre: T 254. There was no evidence, however,

that any cobalt had been administered to Midsummer Sun at least after 6 January 2015.

69. The issue of the level of cobalt in Midsummer Sun's urine on 3 February 2015 was explored with Dr Suann, the Chief Veterinarian of RNSW, in the course of his evidence before the Panel. Dr Suann's evidence was that a reading of 79 micrograms of cobalt per litre was well in excess of a review of 1,088 horse urine samples that he was aware of, which showed a mean reading *"in the order of 5.5mcgs per litre"*: T 263, L12820. It was Dr Suann's opinion that horses subject to high dose cobalt administrations over a period of time suffered from *"accumulation of cobalt within various tissues of the body"*, from which there was a *"slow rate of decay and elimination of that cobalt from those tissues over a period of time"*: T 262, L12730-12740. This opinion of Dr Suann's was based on his observations made from his management of a cohort of horses who had been subject to administrations of large quantities of cobalt over a period of time. Dr Suann's main observation with those horses was that there was *"a very long and slow decay of cobalt that was in the urine over a period of time"*: see generally Dr Suann's evidence T 261, L12700-12730. While it is meant with no disrespect to Dr Hibbert and the other highly qualified authors of the studies referred to above, the Panel considers the "real life" observations of Dr Suann concerning horses frequently administered large doses of cobalt to be significant, and more compelling evidence than either the results of the limited studies of the effects of cobalt in horses, or any of Exhibits 7, 16 and 17 before the Panel regarding the possibilities or otherwise of bioaccumulation.
70. It was perhaps these observations made from real life scenarios where horses had been subjected to multiple and large dose administrations of cobalt that led Dr Suann to suggest that, in the context of Professor Hibbert's evidence, *"it would be dangerous to use mathematical models when it wasn't taken into account that this particular horse [Midsummer Sun] was exposed to very high doses of cobalt over an extended period of time"*: T-260, L12670-12675.
71. Dr Suann also gave evidence before the Stewards' Inquiry that considering both the amount of cobalt in the Vitamin Complex, and the findings in the Knych Study, the cobalt level in Midsummer Sun's urine sample was consistent with administration of

the Vitamin Complex “*three to four days*” before the day of the Gosford Cup: Exhibit 1, T-182, L8960-8970.

72. The Panel has formed the view that the evidence of Professor Hibbert, including his report that is Exhibit 6, does not support the submission that the cobalt detected in the urine sample from Midsummer Sun taken on 9 January 2015 was not from the Vitamin Complex bottle that was Exhibit 4A below. First, there is no other evidence of cobalt coming from another source. Further, the Panel considers it inherently unlikely that, having administered 5mls of Vitamin Complex to Midsummer Sun on 10 to 12 occasions, up to and including a few days after the running of the Summer Cup on 26 December 2014, Mr Kavanagh would cease administering that substance because the horse may have had a short episode of “shakes” following the administration after the Summer Cup. The Panel is comfortably satisfied that 5mls of Vitamin Complex was administered to Midsummer Sun in a drip on 6 January 2015. This is consistent with Mr Kavanagh’s practice of routinely administering Vitamin Complex in drips to Midsummer Sun, and is also consistent with the evidence referred to above concerning Mr Hayward and Dr Suann, at [55]-[58] above.
73. The Panel is comfortably satisfied that it was the administration of Vitamin Complex in a drip on 6 January 2015 – together with the accumulation of cobalt in the horse caused by prior administration of Vitamin Complex to Midsummer Sun – that resulted in the reading of 550mcg per litre of cobalt in the horse’s urine from the sample taken on 9 January 2015 following the running of the Gosford Cup. The scenario of accumulation of cobalt in the horse is consistent with the evidence of Dr Suann referred to above, concerning the observations he has made with other horses who have been subject to many administrations of high levels of cobalt, and consistent with the relatively high level of cobalt detected in Midsummer Sun’s urine sample taken after its death on 3 February 2015.
74. One further matter that was put to us on behalf of Dr Brennan was the submission that the cobalt detected in the urine sample of Midsummer Sun taken on 9 January 2015 could have come from the race day drench given to that horse by Mr Butterfield on that day, or from the injection that the horse was given that day. The Panel cannot see any proper support for that submission based on the evidence of Professor Hibbert or

Dr Suann. Further, there is no evidence at all that either the race day drench or the injection given to Midsummer Sun on 9 January 2015 contained cobalt. The only evidence as to what was administered to the horse on that day is set out in [28] – [29] above.

75. For all these reasons, the Panel is comfortably satisfied that the cobalt detected in the urine sample of Midsummer Sun taken on 9 January 2015 following the running of the Gosford Cup was the result of an administration of 5mls of Vitamin Complex to that horse in a drip on 6 January 2015 and from the accumulation of cobalt in that horse's system as a result of the multiple administrations of Vitamin Complex Mr Kavanagh has admitted to.

#### *The Purpose Issue*

76. As the Panel is comfortably satisfied that the last administration of Vitamin Complex to Midsummer Sun was in a drip given to the horse on 6 January 2015, this forms part of why we are also satisfied that it was administered for the purposes of affecting – in this case improving – that horse's performance in a race (the Gosford Cup on 9 January 2015).
77. The Panel's finding, however, is not based on this evidence alone. The following evidence of Mr Kavanagh before the Panel, and at the Stewards' Inquiry is relevant:
- The purpose of administering the Vitamin Complex was to have Midsummer Sun *"pull up really well after its gallop, feel well, so that they would bounce back quicker, you know"*: T 79, L3910-3915
  - It was used for the purpose of having Midsummer Sun *"race more regularly"*: T 83, L4120-4128.
  - Evidence at the Stewards Inquiry, 4 August 2015 in Ex 1, T 292 L14460 – T293 L14470, where the following exchange took place:

*Q: It would be fair to say that if a horse recovered well after a hard gallop or a race that would assist in its next performance, wouldn't it?*

*A: Absolutely and I never – I've always maintained that, yes, I thought I was getting some sort of advantage out of it, but I thought that I was getting a legal advantage out of it and I wasn't – I wasn't, you know, harming the horses in any way and I didn't realise I was breaking the rules in any way.*

*Q: I understand the evidence you give. The question goes no further than, if you're giving it two days out, if you gallop Thursday and you're racing Saturday, it's important that the horse recovers as best it can.*

*A. Absolutely.*

78. These admissions are consistent with common sense. One of the purposes of giving the Vitamin Complex might have been to aid recovery of Midsummer Sun. However, that purpose was related to the purpose of assisting the horse in its next race performance. Accordingly, even if this Panel had found that the last time that Midsummer Sun was administered 5mls of Vitamin Complex was on 27 and 28 December 2014 (rather than 6 January 2015) we would still be comfortably satisfied it was given for the purpose of assisting its performance in the Gosford Cup.
79. The Panel has found that it is not necessary for RNSW to establish that Mr Kavanagh knew that Vitamin Complex contained a prohibited substance. The Panel is comfortably satisfied that the Vitamin Complex administered to Midsummer Sun in a drip given to the horse on 6 January 2015 caused the cobalt reading detected in the horse's urine sample taken on 9 January 2015. Even if the last administration of cobalt was in fact given, contrary to our finding, on 27 or 28 December 2014, the Panel would still be comfortably satisfied that the cobalt detected in Midsummer Sun's urine sample on 9 January 2015 was the result of bioaccumulation in the horse's system from the 10 to 12 administrations it had received of Vitamin Complex since about September 2014. The Panel is also comfortably satisfied that Mr Kavanagh administered the Vitamin Complex to Midsummer Sun for the purpose of

affecting the performance of the horse in the Gosford Cup. Accordingly, the Panel is comfortably satisfied that Charge 1 has been proved.

### **Charge 2**

80. Charge 2 is a charge under AR 175(h)(ii) involving the administration by Mr Kavanagh to Midsummer Sun of a prohibited substance which was detected in the urine sample of that horse following the running of the Gosford Cup. The essential ingredients to the charge under 175(h)(ii) are the same as those for the charge under 175(h)(i), save for the fact that the charge under subrule (i) requires proof that the prohibited substance was administered for the purpose of affecting the horse's performance in a race. Although he originally pleaded not guilty to this charge, following the finding of guilt by the Stewards, Mr Kavanagh does not challenge this finding before the Panel.

### **Charge 3**

81. The Stewards found Mr Kavanagh guilty of a breach of AR 178 in that he presented Midsummer Sun to run in the Gosford Cup and a prohibited substance was detected in that horse's urine following the race. Mr Kavanagh pleaded guilty to this charge before the Stewards and maintains that plea of guilt before the Panel.

### **Charges 13 to 15**

82. Charges 13 to 15 were all brought under AR 177B(6). This rule is in the following terms:

*177B (6) Any person who, in the opinion of the Stewards, administers, attempts to administer, causes to be administered or is a party to the administration of, any prohibited substance specified in subrule (2) to a horse being trained by a licensed trainer must be penalised in accordance with AR 196(5).*

83. AR 196(5) provides that the minimum mandatory penalty for such an offence is a 2 year disqualification.



84. Charge 13 relates to the administration of Vitamin Complex to Midsummer Sun in the period September 2014 to January 2015. Charge 14 relates to the administration of Vitamin Complex in the same period to a horse called Centre Pivot. Charge 15 relates to the administration of Vitamin Complex in the same period to a horse called Spinning Diamond. There is no dispute that Mr Kavanagh was the trainer of Centre Pivot and Spinning Diamond in the specified period, and he admits that he administered Vitamin Complex to these horses in a drip in a similar fashion to his multiple administrations to Midsummer Sun.
85. Mr Kavanagh was found guilty by the Stewards of charges 13 to 15 and challenges those findings of guilt before the Panel.
86. It is not entirely clear whether one of Mr Kavanagh's defences is that it must be proven under rule AR 177B(6) that he was aware that he was administering a prohibited substance. If it is, the Panel rejects that submission. The rule can be breached whether or not it was known that what was being administered was a prohibited substance on analogous reasoning to the discussion of the mental element issue to the charges under AR 175(h)(i).
87. Based on the written submission of Mr Kavanagh (see [39]-[55]) the defence to charges 13 to 15 centres on the contention that there was no evidence of "excessive quantities" of cobalt being administered to the horses, and as such, what was administered could not be a prohibited substance within the meaning of AR 177B(2). AR 177B(2) relevantly provides that:

*"The following substances are specified as prohibited substances:*

- (a) *Erythropoiesis – stimulating agents, including but not limited to Erythropoietin (EPO), Epoetin alfa, Epoetin beta, Darbepoetin alfa, and Methoxy polyethylene glycol-epoetin beta (Mircera) ...*
- (l) *Hypoxia inducible factor (HIF) stabilisers ..."*

88. It can be noted that on 1 May 2015, following the events the subject of the charges before the Panel, the words "including but not limited to cobalt" were added to AR 177B(2)(1).

89. It can also be noted at this point of these reasons that AR 178B is in the following terms:

*AR 178B The following substances are declared as prohibited substances:*

- (1) *Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the following mammalian body systems:*

*The nervous system;  
The cardiovascular system;  
The respiratory system;  
The digestive system;  
The musculoskeletal system;  
The endocrine system;  
The urinary system;  
The reproductive system;  
The blood system;  
The immune system.*

Further on 1 January 2015 AR 178C was amended to add this provision:

*AR 178C(1) The following prohibited substances when present at or below the concentrations respectively set out are excepted from the provisions of AR 178B and AR 178H:*

...

- (1) *Cobalt in a mass concentration of 200mcg per litre in urine.*

90. In respect to charges 13 to 15 which are brought under AR 177B(6), it is the Panel's opinion that cobalt has always been a prohibited substance under AR 177B(2) despite only being expressly referred to in subrule 177B(2)(1) since 1 May 2015. This is because the expert evidence before the Panel is:

*“Cobalt, when evidenced by its detection in excessive quantities in a urine sample, would be declared as a “prohibited substance” since it is capable of causing an action and/or an effect principally on the blood system, thereby fulfilling the requirements of AR 178B(1) and would also*

*categorised as a hematopoietic agent, thereby fulfilling the requirements of AR 178B(2).*

*The element cobalt is essential for normal physiological function, but when administered to and present in the body at levels in excess of normal physiological requirements, cobalt is capable of enhancing performance in mammalian species primarily due to stabilisation of hypoxia-inducible factor 1 alfa (HIF-1a). This leads to an increase in production of endogenous erythropoietin (EPO) and subsequent erythropoiesis (red blood cell production).”: Report of Dr Craig Suann dated 25 May 2015, Exhibit 97 before the Stewards Inquiry, Exhibit 2, page 896 (Volume 2 of the Blue folders).*

91. Based on this evidence from Dr Suann, cobalt would be a prohibited substance pursuant to AR 177B(2)(a) and (l) as the Rules stood prior to its amendment to include the words “including but not limited to cobalt”.
92. The defence of Mr Kavanagh seems to be directed towards the submission that cobalt only has the effect as a hypoxia-inducible factor or a hematopoietic agent if it is administered at high levels. The argument is that low levels of cobalt do not have this effect, and therefore cobalt would not be a prohibited in those circumstances, within the meaning of AR 177B(2)(a) or (l). It is suggested that the threshold that has subsequently been introduced by AR 178C of 200mcg per litre, should be used by the Panel as *“the differentiating point where the level of cobalt can be accepted to become a hypoxia-inducible factor stabiliser and a hematopoietic agent”*: See Mr Kavanagh’s written submissions at [46] and generally at [44]-[53].
93. The Panel does not consider this to be a proper construction of the Rules or an accurate analysis of the evidence of Dr Suann. Dr Suann’s evidence is not that cobalt only falls within the definitions in AR 177B(2)(a) and (l) if administered in some kind of undefined “excessive quantities”. His evidence was that cobalt is capable of enhancing performance due to *“stabilisation of the hypoxia-inducible factor – 1 alfa”* when it is present in the body at levels *“in excess of normal physiological requirements”*. That is not evidence in the Panel’s view that only “excessive” levels of cobalt detected in the urine could mean that cobalt has satisfied the definitions set out in AR 177B(2)(a) and (l).

94. In any event, however, Midsummer Sun on any view did have an excessive amount of cobalt detected in its urine when its sample was taken on 9 January 2015 – 550mcg per litre of urine. This is against the evidence that a resting rate of cobalt in a horse’s urine would be expected to be something less than 10mcg per litre in urine. Further, in the Panel’s view, excessive amounts of cobalt were administered not only to Midsummer Sun, but to the horses Centre Pivot and Spinning Diamond. Each of these horses were given drips containing 5mls of the Vitamin Complex. That bottle, upon testing, was found to contain 102.5mg of cobalt for each 5mls. As stated previously, the evidence was that this is some 175 times the amount of cobalt found in registered products.
95. Mr Kavanagh administered a prohibited substance (cobalt in Vitamin Complex) to the horses named in charges 13 to 15. Accordingly, the Panel is comfortably satisfied that charges 13 to 15 have been proved.

#### **Charge 24**

96. This charge under AR 177B(5) relates to possession of a prohibited substance, namely the cobalt in the Vitamin Complex. The Stewards found Mr Kavanagh guilty of this offence but on appeal he has challenged this finding on the basis that the charge is “duplicitous” with the administration charges. In the Panel’s view the charge of possession of a prohibited substance under AR 177B(5) contains different elements to the charges alleging administration. Consequently, the Panel rejects the submission that those charges are duplicitous, and is comfortably satisfied that the elements of this charge have been proved.

#### **Charges 6 to 8**

97. Charge 6 is a charge brought under AR 178E(1) relating to Mr Kavanagh making arrangements for the administration of a race day drench to Midsummer Sun on the day that that horse raced in the Gosford Cup on 9 January 2015. Charges 7 and 8 are brought under the same rule and relate to Mr Kavanagh arranging for race day drenches to be administered to the horses Ceda Miss and Palazzo Pubblico before those horses raced on 7 January 2015.

98. Mr Kavanagh initially pleaded guilty to charge 6 and maintained that guilty plea before the Panel. He initially pleaded not guilty to charges 7 and 8, but having been found guilty by the Stewards, does not challenge those findings of guilt before the Panel.

### **Charge 9**

99. Charge 9 was also brought under AR 178E(1) and related to the administration of the injection given to Midsummer Sun at around 2.00 pm on race day prior to the running of the Gosford Cup on 9 January 2015. Mr Kavanagh was found guilty of this charge by the Stewards but has challenged that finding before the Panel.

100. The relevant factual circumstances are that on about 31 December 2014 Mr Kavanagh alleges he had a conversation with Dr Matthews, in which Dr Matthews suggested that a race day drench could be given to Midsummer Sun prior to its running in the Gosford Cup. Mr Kavanagh says Dr Matthews put him in contact with Mr Camilleri, a bloodstock agent. Dr Matthews denies that he had any discussions with Mr Kavanagh concerning the administration of a race day drench, but agrees that he put Mr Kavanagh in contact with Mr Camilleri primarily for him to have discussions concerning European horses, but also so that Mr Camilleri might assist with the administration of a “recovery saline” to Midsummer Sun after that horse had raced in the Gosford Cup.

101. Mr Kavanagh has admitted that he made arrangements with Mr Camilleri so that Mr Camilleri could have access to his stables prior to the running of the Gosford Cup in order for a race day treatment to be administered to Midsummer Sun.

102. As things transpired, Midsummer Sun was given a race day drench by Mr Butterfield, and also an injection of a substance that Mr Butterfield says he was told contained formaldehyde and vitamin C.

103. Mr Kavanagh defends the charge on the basis that he only authorised the race day drench, and did not authorise any injection: Mr Kavanagh’s submissions at [63].

104. The Panel accepts that Mr Kavanagh did not expressly authorise a race day injection to be given to Midsummer Sun. However, it is not true that he merely authorised a race day drench. RNSW, in its written submissions at [92] points to the evidence of Mr Kavanagh before the Panel at T 159-160, to the effect that he arranged for Mr Camilleri to provide a “treatment” to Midsummer Sun on race day but did not rule out any particular kind of treatment.
105. Further, in his interview before the Stewards on 13 May 2015 (page 729 of Exhibit 2), Mr Kavanagh’s evidence was not that he arranged merely a race day drench for Midsummer Sun but that Mr Camilleri had “*a product that could help the horse*”. In truth, Mr Kavanagh had no idea what Mr Camilleri either was going to treat Midsummer Sun with, or what it was actually treated with: see 13 May 2015 interview at Exhibit 1 T 731, L1260-1265.
106. If Mr Kavanagh had authorised Mr Camilleri to groom Midsummer Sun, and it was given a race day injection, the Panel would not find that he had caused a medication to be administered on a race day in breach of AR 178E(1). What occurred, however, was that he arranged and facilitated Mr Camilleri to provide a race day “treatment” to Midsummer Sun of some kind of “product”. He may not have known precisely what the treatment would be, nor did he expressly authorise an injection, but this does not mean, in the Panel’s view, that he has not, in the circumstances here, caused the injection to be administered to Midsummer Sun on 9 January 2015. He did this by making arrangements with Camilleri for unrestricted access to his stables on a race day, and by placing no restrictions on him as to what race day “treatment” was administered to the horse.
107. Accordingly, the Panel is comfortably satisfied that this charge has been proved.

### **Charges 10 and 11**

108. These charges were both brought under AR 178E(1) and relate to whether Mr Kavanagh administered race day drenches to the horses Invinzabeel and Palazzo Pubblico on 17 January 2015. Mr Kavanagh was found guilty by the Stewards of the charges but challenges those findings before this Panel.

109. Mr Camilleri's evidence was that he delivered drenches to Mr Kavanagh for the horses Invinzabeel and Palazzo Pubblico to be administered on a race day (17 January 2015): T 162 and 163. Mr Kavanagh agrees that Mr Camilleri provided him with drenches that he originally planned to use on 17 January 2015 prior to Invinzabeel and Palazzo Pubblico racing that day. This arrangement is also evidenced by the text messages between Mr Kavanagh and Mr Camilleri in the Timeline (Exhibit 4) at items 782, 783 and 787. Mr Kavanagh's evidence was however that his de facto partner, Kelly Fawcett, discovered the drenches, and threatened to leave with their daughter if he administered them. Consequently, he decided not to use them: T 110-111. He said that Kelly "*basically threw [the drenches] out*": T-111. He was unable to say the exact date that she did this: T 163, L7961.
110. Ms Fawcett gave evidence that she threw out a drench, but it appears that this was a drench delivered by Mr Camilleri on 23 January 2015. This is clear both from her evidence at T 224-225, and Timeline items 974 to 981 which are text messages between Mr Kavanagh and Mr Camilleri regarding the delivery of a drench on 23 January.
111. The Panel considers it is inherently unlikely that Mr Kavanagh would have still been arranging with Mr Camilleri to receive drenches for his horses, not only for 17 January 2015 but also for 23 January 2015, if he had resolved not to use the drenches delivered for 17 January 2015. He was at this time on a concerted path of having horses drenched on a race day in breach of the Rules
112. The Panel accepts that Ms Fawcett threw out the drench delivered on 23 January 2015, and accepts that a disagreement took place between her and Mr Kavanagh about the administration of that drench. This almost certainly occurred after 17 January however. On the totality of the evidence the Panel is comfortably satisfied that Mr Kavanagh administered race day drenches to Invinzabeel and Palazzo Pubblico on 17 January 2015. The Panel is comfortably satisfied that both of these charges have been proved.

## Charge 12

113. This charge was brought under AR178E(1) and relates to an alleged race day administration to the horse Centre Pivot before it raced on 24 January 2015. The Stewards found Mr Kavanagh guilty of this offence, but he challenges that finding before this Panel.
114. The Stewards' contention is that while Ms Fawcett threw out the drench delivered by Mr Camilleri on 23 January 2015, Mr Kavanagh still administered a race day drench to Centre Pivot the following day, prior to its race – this time, a drench he had prepared himself.
115. In support of the finding of guilt to this charge, RNSW submits that it is consistent with Mr Kavanagh's prior conduct in either arranging for race day drenches to be administered to his horses, or administering them himself. It is also said to be consistent with a series of text exchanges between Mr Camilleri and Mr Kavanagh just after 11.00 am on 24 January 2015 concerning the drench delivered by Mr Camilleri the previous day which concludes with Mr Kavanagh texting Mr Camilleri and stating: "*No, just did mine*": Exhibit 4 item 976.
116. Mr Kavanagh denies administering the race day drench to Centre Pivot on 24 January 2015. To the extent that he seems to suggest in his text to Mr Camilleri that he gave the horse one of his own drenches, his evidence seems to be that this was merely done as a means of ingratiating himself with Mr Camilleri, who had told him that he had a lot of clients and could get people interested in sending horses to Mr Kavanagh's stable: see generally his evidence at T110 L5470 to T 111 L5505.
117. As we have already said, the Panel accepts that Ms Fawcett threw out the drench that was delivered on 23 January 2015. The Panel also accepts her evidence that she threatened to leave Mr Kavanagh if he administered a race day treatment to one of his horses, and to take their daughter with her. Clearly then, Centre Pivot was not treated with a drench prepared and delivered by Mr Camilleri. The two alternatives are that Mr Kavanagh made up his own drench and administered it to the horse, as he has



indicated in the text recorded at item 976 of the Timeline, or that he did not do this and merely wanted Mr Camilleri to believe he had administered a drench.

118. After considering all of the evidence in relation to this charge, and Mr Kavanagh's denial, the Panel does not feel an actual persuasion that a race day drench was administered to Centre Pivot on 24 January 2015. Accepting that a threat was made to Mr Kavanagh by Ms Fawcett, the Panel accepts that the text at item 976 of the Timeline was merely 'talk'. Accordingly, the Panel finds Mr Kavanagh not guilty of this charge.

#### **Charge 16**

119. This charge was brought under AR 175A relating to an allegation that Mr Kavanagh conducted himself in a manner prejudicial to racing in buying and receiving drenches from Mr Camilleri for the purpose of race day administrations. He originally pleaded not guilty to this charge before the Stewards, who found this charge proved. He now accepts that finding of guilt.

#### **Charge 4**

120. This charge was brought under AR 175(h)(ii), relating to administration of caffeine to Midsummer Sun. Mr Kavanagh was found not guilty of this charge by the Stewards.

#### **Charge 5**

121. This was a charge brought under AR178, the particulars of which were that Mr Kavanagh brought Midsummer Sun to the Gosford Race Course on 9 January 2015 to run in the Gosford Cup following which a prohibited substance – this time caffeine – was detected in the horses' urine sample. Mr Kavanagh pleaded guilty to this charge before the Stewards, and maintains that plea before the Panel.

#### **Charge 17**

122. This was a charge under AR175(k), the particulars of which were that Mr Kavanagh administered an intra-articular cortico steroid within 8 days of Midsummer Sun running in an official barrier trial at Warwick Farm on 10 October 2014. Mr Kavanagh pleaded guilty to this charge before the Stewards, and maintains that plea before the Panel.

### **Charge 18**

123. This was a charge under AR 175(a), the particulars of which were that Mr Kavanagh administered a drench to a horse called “The Sharpener” on the day it ran in an official barrier trial on 2 September 2014. Mr Kavanagh pleaded not guilty to this charge before the Stewards who found the charge proved. He now accepts that finding of guilt.

### **Charge 19**

124. This was a charge under AR 178AA, the particulars of which were that Mr Kavanagh administered an alkalising agent to The Sharpener on the day it ran in an official barrier trial at Rosehill Gardens on 2 September 2014. Mr Kavanagh pleaded not guilty to this charge before the Stewards, who found the charge proved. He now accepts that finding of guilt.

### **Charges 20 and 21 – Xenon Gas**

125. Charge 20 is a charge brought under AR 177B(6), the particulars of which are that Mr Kavanagh administered a prohibited substance (Xenon gas) to a horse trained by him at his stables in or around June 2014. Mr Kavanagh pleaded not guilty to this charge before the Stewards, who found the charge proved. He challenges that finding before the Panel.
126. Mr Kavanagh admits possessing Xenon gas. Further, he admits to attempting to administer Xenon gas to a racehorse named “Tiann” in or about June 2014.
127. At [98] of their written submissions, RNSW submits that charge 20 is established on the basis of the following evidence given by Mr Kavanagh on the second day of the hearing before the Panel on 9 February 2016 at T166:

*“Q: Alright, you acquired Xenon gas, did you not?”*

*A: A client acquired Xenon gas.*

*Q: And delivered it to you?*

*A: Yes.*

*Q: And I think you suggested that you had used it on an old horse, or the one that had broken down, called Tiaan?*

A: Yes.”

128. RNSW also refers the Panel to evidence from the Timeline at entries 32 to 76, which are capable of being read as evidence either of experimentation with Xenon gas or administration or attempts to administer Xenon gas.
129. The Panel is comfortably satisfied that Xenon gas is a prohibited substance within the meaning of the Rules. This is based on the evidence of Dr Suann at Exhibit 146 before the Stewards Inquiry, and also the evidence he gave during the course of the Stewards Inquiry on 5 August 2015 at page 515 of Exhibit 1, L25685-25692. His evidence was that Xenon can be considered to be a hypoxia inducible factor stabiliser and is also an erythropoiesis stimulating agent, and thus falls within the definition of AR 177B(2)(a) and (l). The Panel is also of the view that it is not necessary for the Stewards to prove that Mr Kavanagh knew that Xenon gas was a prohibited substance.
130. The Panel does not however consider that the finding of guilt for charge 20 is made out on the basis of the admissions set out above from page 166 of the Transcript or from the Timeline entries. There are other relevant parts of Mr Kavanagh’s evidence that have to be considered.
131. Mr Kavanagh’s evidence is that, while he attempted to administer Xenon gas to Tiaan, he failed. He said this was because the regulator mask broke. His evidence in chief, called through Mr D’Angelo, was that he “*messed the regulator up*”, he “*broke the regulator*” and wasn’t sure if the horse got any gas: T-113 L5589-5592.
132. Further, in cross-examination, shortly after making the admission relied upon by RNSW, Mr Kavanagh’s evidence was that “*we messed up the test*”: T 166 L8110. The Panel considers that when he gave that evidence Mr Kavanagh was attempting to clarify his admission that he used Xenon gas on Tiann, his complete evidence being that it was a failed test and he was not sure whether the horse got any gas, because the regulator mask broke.

133. There are two further pieces of evidence that the Panel must refer to. Mr Kavanagh was first interviewed by Stewards about Xenon gas on 13 May 2015. At pages 713 to 715 of Exhibit 2, when asked about whether he had administered Xenon gas to a horse called Astro Avalanche, or the horse Tiaan, Mr Kavanagh failed to mention that the regulator mask broke. At the Stewards' Inquiry, however, when examined concerning Tiaan and the administration of Xenon gas, Mr Kavanagh did mention having a *"problem with the regulator"* and his evidence was: *"the gas, and I didn't – I basically used it all at once without – and emptied the bottle out straight away and didn't realise"*: T 517 of Exhibit 1 at L25795-25799.
134. The Panel is satisfied that the overall thrust of Mr Kavanagh's evidence when considered as a whole was that he attempted to administer Xenon gas to Tiaan but because of problems with the regulator, he is unsure whether any gas was in fact administered to that horse.
135. As the Panel has been reminded by all parties, in their written submissions and during the course of oral submissions, the Panel has to be comfortably satisfied in relation to all elements of the matters claimed by RNSW to be a breach of the respective rules of racing. In terms of findings of fact, a suspicion is insufficient for the Panel to reach a state of comfortable satisfaction that something that is alleged to have occurred, has occurred.
136. While the Panel has suspicions, it accepts Mr Kavanagh's evidence that, when he attempted to administer the Xenon gas to the racehorse Tiaan, some kind of problem arose with the regulator. It is unclear whether gas was or was not administered to the horse as a consequence of this. As a result, the Panel is not comfortably satisfied that Mr Kavanagh actually managed to administer Xenon gas to a horse. The Panel therefore is not comfortably satisfied that charge 20 has been proved.
137. Charge 21 was brought under AR 175B(5) and relates to possession of Xenon gas. Mr Kavanagh pleaded not guilty to this charge, but has admitted that he did in fact have possession of the prohibited substance, Xenon gas. His argument seems restricted to a claim that charges 20 and 21 are duplicitous, but the Panel assumes this submission is not maintained, given the finding of not guilty in relation to charge 20.

In any event, the Panel would not have found the charge to be duplicitous, as in our view possession is an entirely distinct matter to administration. The Panel finds Mr Kavanagh guilty of charge 21.

### **Charges 22 and 23**

138. Mr Kavanagh pleaded guilty to charge 22, which was brought under AR 178F and relates to his failure to record all treatments and medications administered to his horses during the period 20 January 2014 to 4 February 2015. Mr Kavanagh maintains that plea before the Panel.
139. Mr Kavanagh pleaded not guilty to charge 23, which was brought under AR 80E, and which relates to possessing unregistered and unlabelled substances and preparations in his stables, namely the two bottles of Vitamin Complex. The Stewards found this charge proved, however Mr Kavanagh does not challenge that finding of guilt before the Panel.

#### **PART 4: APPEAL OF DR BRENNAN**

140. Twelve charges were brought against Dr Brennan. Before the Stewards, Dr Brennan pleaded guilty to charge 10, which was a charge brought under AR 175(a) of “engage in improper practices” in connection with the supply of the two bottles of Vitamin Complex to Mr Kavanagh between September 2014 and January 2015. On appeal to this Panel Dr Brennan challenges only the penalty imposed for that breach.
141. Dr Brennan was also charged under AR 175G with giving false evidence to the Stewards on 9 June 2015, in relation to his knowledge and involvement with the bottles of Vitamin Complex. He pleaded guilty to this charge (charge 12) and maintains that plea before this Panel.
142. Dr Brennan was found guilty of the 10 other charges brought by the Stewards. He has challenged those findings of guilt before the Panel.

#### **Charge 1**

143. Charge 1 (see annexure C for the full particulars) involves an allegation of breach of AR 175(l), in which the Stewards found Dr Brennan guilty of “*conniving at or being a party to*” Mr Kavanagh’s breach of AR 175(h)(i), in that he administered cobalt to Midsummer Sun for the purpose of affecting that horse’s performance in the Gosford Cup, run on 9 January 2015.
144. Dr Brennan disputes the finding of guilt in respect of the various charges against him on a number of grounds. What he does not dispute, although he originally denied it in his evidence to Stewards on 9 June 2015, is that he did in fact supply two bottles of Vitamin Complex to Mr Kavanagh in September/October 2014. He made this admission to Stewards during the course of an interview on 20 July 2015.
145. Further, he admits instructing Mr Kavanagh as to how the Vitamin Complex should be used, which involved administering 5mls in an intravenous drip containing various other substances, 7 days and 2 days out from races. Dr Brennan’s evidence is that the bottles of Vitamin Complex were supplied to him by Dr Matthews. His evidence is that Dr Matthews assured him that the Vitamin Complex contained no prohibited

substances and no cobalt. Dr Matthews denies supplying the Vitamin Complex bottles to Dr Brennan. This is a matter that the Panel deals with when discussing the charges against Dr Matthews.

146. In what was labelled "Submission 1" in Dr Brennan's written submissions and by Mr Anderson when he made oral submissions on Dr Brennan's behalf to the Panel, it was contended that the Panel could not be satisfied that the cobalt detected in the urine sample taken from Midsummer Sun came from the open bottle of Vitamin Complex supplied by Dr Brennan to Mr Kavanagh (Exhibit 4A below). The Panel has already found that it is comfortably satisfied that the cobalt detected in Midsummer Sun's urine sample taken following the running of the Gosford Cup did come from the Vitamin Complex supplied by Dr Brennan to Mr Kavanagh.
147. In what was titled "Submission 3", Dr Brennan contends that his liability for charges 1 to 9 is contingent upon Mr Kavanagh's liability for charges 1, 2, 4, 5, 7, 8 and 9 made against him. Dr Brennan submits that Mr Kavanagh could not be found guilty of the charges against him relating to the administration of cobalt unless Mr Kavanagh knew that he was administering a prohibited substance. The Panel has already held that Mr Kavanagh's mental state regarding whether Vitamin Complex was or contained a prohibited substance was not relevant to his liability for a breach of the Rules he was charged under, although they would be generally relevant to penalty.
148. "Submission 2" as described in Dr Brennan's written submissions, was that he was not a "party to" any of the offences committed by Mr Kavanagh. This submission picks up the wording in charge 1 made against Dr Brennan pursuant to rule 175(l) which is relevantly in the following terms:

*"Any person who attempts to commit, or conspires with any other person to commit, or any person who connives at or is a party to another committing any breach of the rules."*

149. The submission that Dr Brennan was not a "party to" the breaches of the rules by Mr Kavanagh relates not only to charge 1 brought against him, but also to charges 2, 3, and 7 to 9.

150. It appears common ground between Mr Anderson and Mr Rushton SC that in construing the words “party to” in AR 175(l) the Panel should have regard to the High Court’s reasoning in *Yorke v Lucas* (1985) 158 CLR 661 concerning accessorial liability in relation to the then s.52 of the *Trade Practices Act*. As submitted on behalf of RNSW, what they must establish in relation to a charge under AR 175(l) is “*actual knowledge on the part of [Dr Brennan] of the essential ingredients of the headline offence*”. According to Dr Brennan, what this means is that for him to be found guilty of charge 1 against him, it must be established that:

- (a) he had actual knowledge of the administration of Vitamin Complex to the horse Midsummer Sun prior to the running of the Gosford Cup; and
- (b) he had actual knowledge that Vitamin Complex was a prohibited substance.

151. In relation to knowledge that the Vitamin Complex was or contained the prohibited substance cobalt, for similar reasoning as discussed in relation to the AR 175(h)(i) charges against Mr Kavanagh, the Panel does not consider it is necessary that it need be established that Dr Brennan knew Vitamin Complex contained a prohibited substance. It is enough that it did. For completeness, although it is not necessary to decide this matter, in the Panel’s view Dr Brennan at least had doubts or suspicions about the contents of the Vitamin Complex. Despite any assurances that Dr Brennan says he was given by Dr Matthews, the bottle had no indication on it as to who manufactured it. There was no indication it was manufactured by or distributed by a recognised or known manufacturer or supplier of horse supplements. There was also no indication on the bottle as to what its ingredients were, other than the fact that it was labelled “Vitamin Complex”.

152. Further, there was an element of secrecy and “cover up” regarding the supply of Vitamin Complex to Mr Kavanagh. The sale of it was not recorded in the books of Flemington Equine. Dr Brennan took steps to destroy postage records. After some positive results to cobalt for his trainers in Melbourne, Dr Brennan disposed of the bottles of Vitamin Complex that were in his possession. It is important to consider however that there may have been some differences in what Dr Brennan suspected



was in Vitamin Complex before the positive urine results, and after them. The Panel is of the view that Dr Brennan had concerns as to whether there was cobalt in the Vitamin Complex, but accepts that he at least was not aware at relevant times that it contained cobalt in the large concentration that was revealed following testing.

153. When the Stewards found Dr Brennan guilty of charge 1 against him, they took the view that to establish guilt it was not necessary to find that Dr Brennan was aware of the identity of the actual horses that Mr Kavanagh administered cobalt to. On appeal to the Panel, RNSW submits that this is more of an “arguable” view: RNSW submissions at [13(d)]. In other words, it is arguable Dr Brennan could still be guilty of being a “party to” Mr Kavanagh’s administration of Vitamin Complex to Midsummer Sun on that basis that he knew it would be administered to one or more of his horses. The Panel agrees that such a construction is arguable, but is not the construction the Panel adopts here.
154. The particulars of charge 1 are that Dr Brennan was a party to the administration of a prohibited substance to “Midsummer Sun” for the requisite purpose. As such, consistent with *Yorke v Lucas*, the Panel is of the view that it must be established to its comfortable satisfaction that Dr Brennan knew that Mr Kavanagh was going to administer or was administering Vitamin Complex to the horse Midsummer Sun for the purpose of affecting that horse’s performance in the Gosford Cup.
155. In relation to “purpose of affecting”, the Panel is comfortably satisfied that Vitamin Complex was supplied by Dr Brennan to Mr Kavanagh for the purpose of positively affecting the performance of all of that trainer’s horses in both recovery from races, but also in future races.
156. In relation to knowledge that Vitamin Complex was administered to Midsummer Sun, this is a matter that Dr Brennan denies.
157. The Panel has considered closely the evidence of Mr Kavanagh on this matter, in terms of what he told Dr Brennan. His evidence was not always precise. The relevant parts are the following:

- Mr Kavanagh and Dr Brennan spoke regularly on the phone concerning the health and well-being of the horses Mr Kavanagh was training: T 117 L5775-5789.
- Dr Brennan regularly looked at the blood results of horses being trained by Mr Kavanagh: T 118 L5825-5842.
- Dr Brennan regularly discussed or advised on treatments for horses being trained by Mr Kavanagh: T 119 L5845-5880.
- Dr Brennan advised Mr Kavanagh as to how the Vitamin Complex was to be administered to horses: T 120 L5925 – T 121 L5945.
- In relation to how horses were responding to the drips containing Vitamin Complex, Mr Kavanagh's evidence on one occasion was that he would be "*guessing*" as to whether he had discussions about this with Dr Brennan: T-121, L5947-5955.
- It was both "*possible*" and "*probable*" that he told Dr Brennan that he was administering Vitamin Complex to Centre Pivot and Spinning Diamond: T-122 L6000-6015.
- It was again both "*possible*" and "*probable*" that he told Dr Brennan what horses he had given Vitamin Complex to: T-123, L6041-6048.
- He did not think it was correct that he had told Dr Brennan that he was getting better results regarding the Vitamin Complex with Midsummer Sun: T 123, L6050-6058.
- He was not sure whether he had a conversation with Dr Brennan concerning Midsummer Sun and Vitamin Complex: T 123 L6059-6078.
- Mr Kavanagh thought it was "*probable*" that he spoke to Dr Brennan concerning the administration of Vitamin Complex to Midsummer Sun: T 125 L 6152.

158. A summary of much of Mr Kavanagh's evidence is set out at [94] and [95] of Dr Brennan's submissions. The Panel has had regard to all of the evidence referred to in those paragraphs. Further, the Panel has noted that there is nothing in the Timeline (Exhibit 4) which indicates definitively that Mr Kavanagh held discussions with Dr Brennan concerning the administration of Vitamin Complex to Midsummer Sun in the lead-up to the Gosford Cup, or at any time to Spinning Diamond or Centre Pivot.
159. The Panel has also had regard to the fact that during the Stewards' Inquiry into Dr Matthews, Mr Kavanagh was far more forthcoming or more positive that he "*would certainly*" have discussed what horses were being given Vitamin Complex: Exhibit 3 T- 158 L7823 - 7834.
160. Further, Mr Kavanagh's evidence was that he did have discussions with Dr Brennan about Midsummer Sun and its improvement on Vitamin Complex: Exhibit 3, T 157 L 7788-7800. We also note that, at some time shortly before the running of the Gosford Cup, Dr Brennan's practice, Flemington Equine, became a shareholder in the horse Midsummer Sun
161. It is clear that there is evidence from which the Panel could infer that Mr Kavanagh did make Dr Brennan aware of the administration of Vitamin Complex to each of Midsummer Sun, Centre Pivot and Spinning Diamond. The Panel's view about his evidence is that there was at least a high probability that he discussed the administration of Vitamin Complex to Midsummer Sun with Dr Brennan, including in the run up to the Gosford Cup.
162. Considering all the evidence, the Panel is comfortably satisfied on the evidence before it to the *Briginshaw* standard that Dr Brennan was made aware of the administration of Vitamin Complex to Midsummer Sun. This horse received at least ten administrations. Mr Kavanagh has given evidence he discussed administering Vitamin Complex to this horse with Dr Brennan. The relationship here of trainer and vet was one where the men had regular discussions about individual horses in training. The Panel is comfortably satisfied that the administrations of Vitamin Complex by Mr Kavanagh to Midsummer Sun were discussed with Dr Brennan.

163. The Panel has found that the cobalt in Midsummer Sun's urine sample came from the Vitamin Complex. It is not necessary to establish that either Dr Brennan or Mr Kavanagh knew Vitamin Complex contained a prohibited substance. The Panel is comfortably satisfied Dr Brennan knew it was being given to Midsummer Sun to affect or improve that horse's performance in races, including the Gosford Cup. Accordingly, the Panel finds Dr Brennan guilty of charge 1 brought under AR 175(l) in that he was a "party to" Mr Kavanagh's offending under AR 175(h)(i) relating to Midsummer Sun.
164. As it affects our findings in relation to charges 8 and 9, the Panel indicates here that it has reached a different conclusion regarding Dr Brennan's knowledge of the administration of Vitamin Complex to the horses Spinning Diamond and Centre Pivot. They were administered far less Vitamin Complex. The "possible" versus "probable" evidence of Mr Kavanagh seems more relevant to these horses than Midsummer Sun. The Panel's consideration of all the evidence leaves it feeling short of an actual persuasion that Dr Brennan was made aware of the administrations to Spinning Diamond and Centre Pivot.

### **Charge 2**

165. This charged under AR 175(l) is related to Mr Kavanagh's breach of AR 175(h)(ii) in relation to Midsummer Sun. As a consequence of the findings outlined above (and including that cobalt is a prohibited substance under AR 177B(2)(a) and (l), and AR 178) the Panel also finds Dr Brennan guilty of charges 2.

### **Charge 3**

166. This charge under AR 175(l) is related to Mr Kavanagh's breach of AR 178 regarding Midsummer Sun. As a result of our findings outlined above, the Panel finds Dr Brennan guilty of charge 3.

### **Charge 7**

167. This is another “party to” breach under AR 177B(6) relating to Midsummer Sun. As a result of our findings above, the Panel finds Dr Brennan guilty of this charge.

### **Charges 8 and 9**

168. These “party to” charges relate to the administration of Vitamin Complex to Centre Pivot and Spinning Diamond. For a finding of guilt in relation to these charges, the Panel has to be satisfied that Dr Brennan was aware of the administration of Vitamin Complex to Centre Pivot and Spinning Diamond. As indicated above in [164], the Panel is not so satisfied and consequently the Panel finds that these charges have not been proved.

### **Charge 4**

169. Charge 4 is brought under AR 175(k). For this charge it must be established that Dr Brennan’s “*conduct or negligence led to or could have led to a breach of the rules*” in this case, Mr Kavanagh’s breach of AR 175(h)(i) relating to the administration of Vitamin Complex to Midsummer Sun for the purpose of affecting its performance in the Gosford Cup.

170. Dr Brennan’s defence to charge 4 is based on his submission 1 discussed above at [146], and submission 3 relating to Mr Kavanagh’s state of mind – see [147] above. For the reasons already given, the Panel is of the view that neither of those defences is made out.

171. Dr Brennan’s conduct in supplying the Vitamin Complex to Mr Kavanagh in circumstances where, as a registered vet, he:

- (a) did not know who made it;
- (b) did not know what its ingredients were;
- (c) took no proper steps to ascertain its ingredients;
- (d) had no means of confirming with any certainty whether Vitamin Complex did or did not contain a prohibited substance,

was, in the Panel’s view, clearly negligent. It is also conduct that can properly be described as conduct that in a direct way “led to” the breaches committed by Mr

Kavanagh. It was clearly given to him for the purpose of him administering Vitamin Complex to his horses. It is not necessary for a charge under 175(k) that Dr Brennan knew what horses the Vitamin Complex would be administered to.

172. Accordingly, the Panel finds Dr Brennan guilty of charge 4.

### **Charges 5 and 6**

173. These charges relate to Dr Brennan's actions being conduct that led to or caused Mr Kavanagh's breaches of AR 175(h)(ii) and 178 relating to the administration of Vitamin Complex to Midsummer Sun. On the basis of the same reasoning for charge 4, the Panel finds Dr Brennan guilty of charges 5 and 6.

### **Charge 11**

174. Charge 11 was brought under AR 175(k). The particulars were that Dr Brennan engaged in conduct that could have led to Mr Kavanagh breaching AR 175(g) by giving false evidence to the Stewards. It was alleged that in concert with Mr Aaron Corby, the Practice Manager of Flemington Equine, Dr Brennan attempted to persuade Mr Kavanagh not to disclose to the Stewards who was the source of the Vitamin Complex bottles that Dr Brennan had sold to Mr Kavanagh. It was alleged that three threats were made by Dr Brennan in the course of this conduct:

- (a) a threat that he would bankrupt Mr Kavanagh because of the debts owed by Mr Kavanagh to Flemington Equine;
- (b) a threat of defamation proceedings by Flemington Equine against Mr Kavanagh; and
- (c) a threat that if Flemington Equine was implicated, it could have a very negative effect on Mr Kavanagh's father, Mr Mark Kavanagh, a trainer in Victoria who had also had a horse return a positive urine sample for cobalt.

175. Dr Brennan was found guilty of this charge by the Stewards, but only in respect to the particular (c) above, and not in relation to particulars (a) or (b). Dr Brennan challenges that finding of guilt before the Panel.

176. At page 709 of Exhibit 2, Mr Hartnell (a solicitor who represented Mr Kavanagh during the course of the Stewards Inquiry) gave evidence of what was said in a phone call to him from Dr Brennan on 25 February 2015, following which Mr Kavanagh and Dr Brennan had a conversation during which the threats alleged in the charge were said to have been made.
177. At the Stewards' Inquiry Dr Brennan denied making the threats: see page 1062-1064 of Exhibit 2.
178. At the Stewards' Inquiry on 9 June 2015, Mr Kavanagh's evidence in relation to threat (c) was that Dr Brennan said: "*[j]ust basically don't name Flemington Equine. That would have a very negative effect on my father's case in Melbourne because he had a cobalt positive as well and basically that I'm sentencing them and everybody*".
179. The evidence is not completely clear as to who first raised the idea that the supply of Vitamin Complex from Dr Brennan to Mr Kavanagh had the potential to impact upon the case of Mark Kavanagh in Victoria. Dr Brennan says it was Mr Hartnell who first raised this. Further, it seems that the evidence is that Mr Kavanagh did not initially tell the Stewards that the Vitamin Complex bottle that was detected in his stables on 4 February 2015 came from Dr Brennan and Flemington Equine, because he was already aware that if they knew this it could negatively impact his father's position in Victoria: see [145] of Dr Brennan's submissions.
180. The Panel is satisfied that there was some discussion between Mr Kavanagh and Dr Brennan, and Dr Brennan and Mr Hartnell, about the issue of whether the supply of Vitamin Complex to Mr Kavanagh's by Dr Brennan might have an impact on Mark Kavanagh's position in Victoria. The Panel is less clear, however, as to whether this was said in some form of threatening manner by Dr Brennan to seek an assurance from Mr Kavanagh that he give false evidence to the Stewards that Dr Brennan had not been the source of the Vitamin Complex bottles. As a consequence, the Panel is not comfortably satisfied that Dr Brennan is guilty of this charge.

## **PART 5: APPEAL OF DR MATTHEWS**

### **Charge 1**

181. Charge 1 against Dr Matthews is brought under AR 175(l) and alleges that he was a “party to” breaches of the Rules by Mr Kavanagh, Mitchell Butterfield and John Camilleri, relating to the race day drench administered to Midsummer Sun on 9 January 2015.
182. Mr Kavanagh has pleaded guilty to a charge brought under AR 178E(1) in relation to the race day drench given to Midsummer Sun. He has also pleaded guilty, under the same rule, to arranging for race day drenches to be given to Ceda Miss and Palazzo Pubblico on 7 January 2015. He has also been found guilty by this Panel of administering race day drenches to two horses on 17 January 2015.
183. Mr Camilleri pleaded guilty to charges brought under AR 175(l) in relation to his role in the race day drench administered to Midsummer Sun on the day of the Gosford Cup. Despite pleading guilty to this charge, his evidence before the Panel was that in his discussions with Dr Matthews, only the administration of a “post-race” drench was discussed.
184. Mr Butterfield pleaded not guilty to the charges brought against him under AR 178E(1) that he administered a race day drench to Midsummer Sun and gave it an intravenous injection on 9 January 2015. His defence however was not that he had not administered a drench, or administered an intravenous injection, but that he did not know that he had done this on a race day. The Stewards did not accept this evidence and Mr Butterfield was found guilty of these charges, amongst others.
185. Dr Matthews denies any knowledge of the administration of a race day drench to Midsummer Sun on 9 January 2015. His evidence before the Panel is that the only kind of drench he discussed with Mr Kavanagh was for a post-race “recovery saline”.



186. There is no controversy that arrangements were made between Mr Kavanagh and Mr Camilleri for Mr Camilleri to attend Mr Kavanagh's stables on 9 January 2015 for the purposes of administering a race day treatment to Midsummer Sun.
187. There is no controversy that Mr Butterfield administered a drench to the horse that day. It is also clear that the horse was given an intravenous injection by Mr Butterfield.
188. The Panel will deal with the evidence of the various witnesses firstly by reference to the matters in the Timeline that is Exhibit 4.
189. On 22 December 2014 (item 167 of the Timeline) Mr Kavanagh sent a text message to Dr Matthews, in the following terms:

*"How did u go mate, I'm desperate for the weekend 3 runners I own and toms horse in the summer cup"*

The reference to "toms horse" was a reference to Midsummer Sun, as by this date Flemington Equine owned a small share of the horse.

190. At about 7.00 am on 31 December 2014 Dr Matthews called Mr Kavanagh and they had a conversation that lasted 11 minutes 48 seconds (item 238 of the Timeline). Mr Kavanagh's evidence is that during the course of this phone call Dr Matthews suggested that he give a race day drench to Midsummer Sun. Mr Kavanagh says that Dr Matthews told him he could put him in touch with someone who could assist with this. Dr Matthews denies this, and says that the conversation centred on putting Mr Kavanagh in touch with Mr Camilleri to discuss European horses, as Mr Camilleri was a bloodstock agent. He says that the only reference to a drench for Midsummer Sun related to a post-race "recovery saline".
191. Almost immediately after this phone conversation, Dr Matthews rang Mr Camilleri and spoke to him for approximately 7 minutes (Timeline item 239).

192. Almost immediately following this call, Mr Camilleri texted Mr Butterfield, and stated: *"I need to speak to you"*: Timeline item 240.

193. Mr Butterfield texted Mr Camilleri back and indicated that he would ring in about an hour. Almost immediately following this, Mr Camilleri sent a text to Mr Butterfield in the following terms: *"You reckon you could come down & drench 1 at Rosehill on Sat week"*: Timeline item 242.

194. The following texts were then exchanged between Mr Butterfield and Mr Camilleri:

Butterfield: *"Yeah, shouldn't be a problem"*.

Camilleri: *"Ok"*.

Camilleri: *"I'll have everything ready, all you'll have to do is walk in and do it"*.

Butterfield: *"Will I need 2 bring a tube or will there be one there?"*

(Timeline items 243-246).

195. At about 7.40 am Dr Matthews then attempted to call Mr Kavanagh back: Timeline 247. Almost immediately after this, Mr Kavanagh rang Dr Matthews and the men spoke for 55 seconds: Timeline item 248.

196. Shortly after this, commencing at 7.46 am, Mr Camilleri and Mr Butterfield exchanged the following texts:

Camilleri: *"You only need to walk in do it, & get out of there."*

Camilleri: *"No-1 can know"*

Butterfield: *"Ok that's fine"*.

(Timeline item 249 to 251).

197. Later in the day Mr Camilleri sent a text to Dr Matthews in which he stated: *“That job is sweet to do”*: Timeline item 253. He sent a subsequent text to Dr Matthews stating: *“Haven’t heard from Sam”*: Timeline item 254.
198. On 1 January 2015 there were two reasonably lengthy phone conversations between Dr Matthews and Mr Kavanagh. On the first occasion, Dr Matthews called Mr Kavanagh and the men spoke for 13 minutes and 35 seconds (Timeline item 264). They then, following a call from Mr Kavanagh to Dr Matthews, had a subsequent phone conversation of 8 minutes and 9 seconds: Timeline item 265. Shortly following these phone conversations, Mr Kavanagh texted Mr Camilleri and stated: *‘Hay mate, I’m a friend of Adam Matthews, he said to shoot you a msg, give me a call when free, cheers, Sam’*: Timeline item 266.
199. Mr Camilleri responded with *“Gimme 30 min”*: Timeline item 267. Mr Camilleri then rang Mr Kavanagh shortly afterwards on two occasions, for phone conversations that lasted 20 second and 2 minutes 20 seconds: Timeline items 268 and 269. Mr Camilleri then had a 1 minute and 20 second phone conversation with Mr Butterfield: Timeline item 270.
200. Mr Butterfield then sent a text to Mr Camilleri which seems to indicate that, having originally been told that the drench was to be administered on Saturday week, it was now intended that it be done on Friday. Still on 1 January 2015 he sent a text to Mr Camilleri in which he stated: *“No good gettin shitty at me. You said the Saturday. I’m back at work Monday. I said I was sweet 2 do it when you said the Sat”*: Timeline item 271.
201. Shortly after, however, Mr Butterfield sent another text to Mr Camilleri in which he stated: *“I’ve got it sorted just need 2 know times they have 2 be done”*: Timeline item 273.
202. Later that day Mr Butterfield again texted Mr Camilleri and stated: *“I’ll drive down Tuesday arvo, go straight out there Wednesday morning, do it then drive home n go 2 work then Thursday arvo I’ll drive down again and go out first thing Friday morning and do the other one and then drive home 4 work. Sorted”*: Timeline item 274. This

- would appear to be Mr Butterfield indicating that he was able to perform the two race day administrations on Wednesday 7 January 2015, and also administer the drench to Midsummer Sun on Friday, 9 January 2015.
203. Shortly after Mr Camilleri sent a text to Mr Butterfield indicating “*Ok I won’t know times till acceptances Monday*”, to which Mr Butterfield responded: “*Just both wednesday and friday mornings, I’ll have 2 be leaving Rosehill no later then 6 am so I can be at work by 9*”: Timeline items 275 and 276.
204. On 7 January 2015, just before 11.00 am Mr Camilleri texted Mr Kavanagh by simply stating: “*All done*”: Timeline item 337. This would appear to be a reference to the fact that race day drenches had been administered to the horses Ceda Miss and Palazzo Pubblico earlier that day.
205. On 9 January 2015 a series of texts were exchanged between Mr Butterfield, Mr Camilleri, Mr Kavanagh and Mr O’Loughlin regarding difficulties that Mr Butterfield seemed to be having in gaining access to Mr Kavanagh’s stables in order to drench Midsummer Sun: Timelines items 409 to 416. Just after 2.00 pm, however, Mr Camilleri sent a text to Mr Kavanagh stating: “*Jobs done*”: Timeline item 422. The Panel takes this as a reference to the drench having by then been administered to Midsummer Sun at about 2pm. Shortly thereafter, Mr Camilleri texted another person, Kate Attard, indicating that the horse running at Gosford in race 6, number 3 (Midsummer Sun) had been given his “*magic*”: Timeline item 425.
206. At 6 o’clock that day Midsummer Sun won the Gosford Cup.
207. Dealing firstly with the evidence of Mr Kavanagh on this matter, as has been pointed out in Dr Matthews’ written submissions, it is not entirely consistent. Having initially denied the matter, or at least asserted non-recollection, Mr Kavanagh (when presented with evidence regarding phone messages by the Stewards) first made admissions on the race day drench to Midsummer Sun at an interview with the Stewards on 13 May 2015.

208. At page 729 of Exhibit 2, at L1162, Mr Kavanagh's evidence was that Mr Camilleri told him "*he had a product that could help the horse*". At page 731 of Exhibit 2, at L1267, his evidence was: "*They said, "Don't worry. It's all natural and there's other people using them. Don't panic*". The Panel takes the reference to "They" to being a reference to Mr Camilleri.
209. At the Stewards' Inquiry, however, on 3 August 2015, Mr Kavanagh said that it was Dr Matthews, not Mr Camilleri, who said he could send him "*a treatment*": T 233, L1596.
210. At T 326 of Exhibit 1, in evidence given on 4 August 2015, Mr Kavanagh's evidence was that Dr Matthews suggested he contact Mr Camilleri in order to "*have the horse treated in the Gosford Cup*": T 326, L16135.
211. Mr Butterfield's evidence was that he had never spoken to Dr Matthews, and there is no evidence that Dr Matthews was involved with the administration of race day drenches administered to two of Mr Kavanagh's horses on 7 January 2015, other than for the fact that Mr Camilleri had been introduced to Mr Kavanagh through Dr Matthews.
212. Mr Camilleri gave evidence during the course of the Stewards' Inquiry, and also before the Panel. One curious thing about Mr Camilleri's evidence is that it was only in the hearing before the Panel that, for the first time, he says there was a discussion with Dr Matthews on 31 December 2014 about giving a "post-race" drench to Midsummer Sun: T 19, L900-905.
213. The omission of not previously mentioning a post-race drench was also a feature of Dr Matthews' evidence before the Panel. His evidence was that while no race day administration was ever discussed with Mr Camilleri, at the end of a conversation that lasted 7 minutes concerning putting Mr Camilleri in touch with Mr Kavanagh to discuss European horses, he enquired of Mr Camilleri whether he could administer a "*recovery saline*" to Midsummer Sun: T 409 L19908.

214. The Panel does not accept Dr Matthews' version of his conversation with Mr Camilleri. We are comfortably satisfied that Dr Matthews had a discussion with Mr Camilleri about the administration of a race day drench to Midsummer Sun to be given to that horse on 9 January 2015. While having regard to all of the evidence, the Panel's satisfaction is based primarily on the following matters:
- (a) while his evidence was not perfect, Mr Kavanagh was quite clear he discussed a race day treatment with Dr Matthews for Midsummer Sun. He was put in contact with Mr Camilleri by Dr Matthews. Mr Camilleri and Dr Matthews were either friends, or acquaintances of long standing;
  - (b) Mr Camilleri subsequent pleaded guilty to charges relating to his involvement with the administration of race day treatments to, amongst other horses, Midsummer Sun. Further, at the Stewards' Inquiry he ultimately admitted he agreed to facilitate a race day treatment, although he denied he knew what horse. At no point did he inform Stewards that Dr Matthews only involvement had been to discuss a recovery drench: Exhibit 1 T422-424;
  - (c) straight after the telephone conversation between Mr Kavanagh and Dr Matthews on 31 December 2014 referred to above, Dr Matthews was communicating with Mr Camilleri, who then immediately communicated with Mr Butterfield to make arrangements for the administration of a race day treatment to Midsummer Sun;
  - (d) the text that Mr Camilleri sent to Dr Matthews stating "*[t]hat job is sweet to do*" is telling. The Panel is in no doubt that the "job" that was being referred to had nothing to do with European horses, nor was it anything to do with a post-race drench or recovery saline. The "job", in the Panel's view, referred to the race day treatment that was to be given to Midsummer Sun;
  - (e) the inherent unlikelihood that Dr Matthews would recommend Mr Camilleri to Mr Kavanagh as someone who could administer a recovery saline to Midsummer Sun after the running of the Gosford Cup. Why Mr Camilleri?

Mr Camilleri was apparently some kind of bloodstock agent, not a vet or a person experienced in administering treatments to horses.

- (f) Dr Matthews was provided with ample opportunities to inform the Stewards that he had discussed with Mr Camilleri (and Mr Kavanagh) giving Midsummer Sun a “recovery saline”. As RNSW has pointed out in its written submissions, when interviewed on 21 July 2015 Dr Matthews’ evidence was that he had “*never spoken to [Mr Camilleri] about treating horses*”: Ex 2 p 1099-1100. Further, Dr Matthews stated that he never had a discussion with Mr Camilleri about drenching any horse: Ex 2 p 1098 L 974 – 1099 L 1002. That evidence is at odds with the recollection that he now had for the first time in his evidence before the Panel that he did speak to both Mr Kavanagh and Mr Camilleri about making arrangements for a recovery saline treatment to be given to Midsummer Sun. In circumstances where the Stewards were obviously investigating the administration of a race day treatment to Midsummer Sun on the day of the Gosford Cup (a race the horse won and that Dr Matthews had some sort of exotic bet on) the Panel finds it very surprising that Dr Matthews did not previously raise that he had spoken to Camilleri about the administration of a recovery saline when he was answering the Stewards’ questions about his discussions with Mr Kavanagh and Mr Camilleri;
- (g) The Panel has considered whether Mr Kavanagh would lie about his conversation with Dr Matthews concerning a race day drench, or if he is confused or mistaken about what was discussed. Ultimately the Panel considers Mr Kavanagh’s evidence in relation to this matter was truthful and reliable. Further, there is in the Panel’s view no motive for Mr Kavanagh to falsely implicate Dr Matthews in relation to a matter that Mr Kavanagh knows is a clear breach of the Rules.

215. To the extent that there was some form of confusion between either Mr Kavanagh and Mr Camilleri about the date of the race day treatment (a Saturday rather than a Friday), or also some form of confusion between Mr Camilleri and Mr Butterfield, the Panel views that matter as no more than that – a confusion as to whether the Gosford

Cup was to be run on a Friday or a Saturday. In the Panel's view the confusion in relation to dates does not afford any proper basis for Dr Matthews and Mr Camilleri's suggestion that what was originally discussed was a post-race treatment.

216. The Panel has considered the possibility that Mr Kavanagh had a discussion with Dr Matthews concerning a post race drench, and that Mr Kavanagh and Mr Camilleri then made their own arrangements to breach the Rules by planning a race day drench. The Panel however rejects that scenario having regard to the matters referred to above at [214].
217. The Panel has also borne in mind the difficulties Dr Matthews says he was facing at the time he gave his evidence in the Stewards Investigation: see the written submissions of RNSW at [21] and of Dr Matthews also at [21]. The Panel does not consider these matters overcome the overwhelming evidence that Dr Matthews suggested to Mr Kavanagh that Midsummer Sun be given a race day treatment for the Gosford Cup, and put him in touch with Mr Camilleri as someone who could facilitate this. They also do not explain, on the evidence before us concerning the personal issues Dr Matthews was facing, both his and Mr Camilleri's belated memory of a "recovery saline" or post race drench.
218. The Panel is comfortably satisfied (in the sense of feeling an actual and strong persuasion) that the evidence clearly shows that Mr Kavanagh and Dr Matthews had a discussion about the administration of a race day treatment to Midsummer Sun. Dr Matthews then contacted Mr Camilleri about this, put him in contact with Mr Kavanagh, all for the purpose of Mr Camilleri facilitating a race day treatment to Midsummer Sun. The Panel finds that Dr Matthews was a "party to" the underlying offending of Mr Camilleri and Mr Kavanagh in relation to the administration of a race day drench to Midsummer Sun on the day of the Gosford Cup. Accordingly, the Panel is comfortably satisfied that charge 1 has been proved.

#### *Charges 2 to 6*

219. Before dealing with any of the construction issues concerning the Rules which ground the charges layed against Dr Matthews, it is necessary for the Panel to resolve the



central factual dispute: Did Dr Matthews supply to Dr Brennan the bottles of Vitamin Complex that were ultimately supplied to Mr Kavanagh?

220. At [40] of their written submissions, RNSW contends that, if (as we have) the Panel were to find Dr Matthews guilty of charge 1, that is a matter that the Panel can take into account when assessing the veracity of Dr Matthews' denial that he was not the source of the Vitamin Complex.
221. The Panel accepts that it is a matter that it can take into account. However, there are limits to how much reliance the Panel can place on its findings in relation to charge 1, in terms of making any findings regarding the supply of Vitamin Complex. They are entirely separate factual matters.
222. Both Mr Kavanagh and Dr Brennan point to Dr Matthews as being the original source of the Vitamin Complex bottles. The Panel will consider Mr Kavanagh's evidence first.
223. Mr Kavanagh's first evidence concerning Dr Matthews' alleged involvement with Vitamin Complex is less than definitive. On 13 May 2015, in the course of giving answers to questions from the Stewards concerning the administration of Vitamin Complex, Mr Kavanagh was asked where he understood the bottles of Vitamin Complex had come from. There was the following exchange:

*Q: Where did you understand the bottle came from? Did you have a discussion with Adam Matthews at all about it?*

*A: I asked him about the cobalt positives. I said, "Did you" – I said, "Is this a Bova product? What is the story?, and he just said, Oh, no. Don't worry about it. It's not cobalt.*

*Q: Did he say it came from him?*

*A: I was under the impression that it came from him, yes.*

*Q: Did you have a discussion at the sales about the use of this product?*

*A: I don't remember. Well, I had asked him a couple of questions about it, but I don't remember at the sales or where.*

*Q: Do you remember him saying to you, "If you think 5mls is good, 10mls is even better"? Do you remember that?*

*A: He did tell me that when they started horses off on it they were giving 10mls, yes.*

*Q: And you were giving 5mls?*

*A: Yeah.*

*Q: Is that right?*

*A: Correct.*

*Q: And he said to you: "10mls is better". Is that what he indicated to you?*

*A: Yes."*

224. The first observation that can be made concerning this evidence is that when Mr Kavanagh has indicated that he was "under the impression" that the Vitamin Complex bottles came from Dr Matthews, that is evidence that is somewhat less than indicating any form of certainty or direct knowledge. Further, it would seem at least initially that Mr Kavanagh's evidence may not have been perfect as to whether or not there was a discussion with Dr Matthews concerning Vitamin Complex. A week later, in an interview conducted on 20 May 2015, Mr Kavanagh asserted in an answer that he was assured by both Dr Brennan "and by Dr Matthews" that there was no cobalt in the Vitamin Complex bottles: page 809 of Exhibit 2 at L307-311.

225. At the Stewards' Inquiry on 4 August 2015 Mr Kavanagh was cross-examined by Mr Winneke (for Dr Brennan) about what he knew concerning the bottles of Vitamin Complex and its source. At T 310 he gave evidence that Dr Brennan told him that the Vitamin Complex contained a "vitamin B12 supplement" and was not a "prohibited substance": see T-310, L15339-15355.

226. Mr Kavanagh's evidence was that he didn't originally speak to Dr Matthews about the Vitamin Complex but he again came to have the understanding that the bottles originated from Dr Matthews. This at least does not at first appear to be an understanding based on any direct evidence. The following evidence given at the Stewards Inquiry by Mr Kavanagh is relevant, at T 319 and 320:

*"Q: Did you speak to Adam about the Vitamin Complex?*

*A: Not until later.*

Q: *You got the impression, you understood, your current state of mind is that the bottles came from Matthews?*

A: *Yes.*

Q: *You got that impression or you've come to that state of mind because of something you learned from Matthews from speaking to Matthews?*

A: *When all this blew up originally I said to Tom, when everyone was putting me under pressure to not name names, I said to him, "Tom, you need to come clean and just put Adam in", and Tom was too proud to basically put in one of his staff members and I think he was hoping that it would go away.*

Q: *In any event, as far as you're concerned, from discussions that you've had with Tom, with Matthews, you've got no doubt, as far as you're concerned, that the bottle originally came from Matthews?*

A: *I've got no doubt now after – after the investigations have gone on and the more I've heard about it, I've got no doubt.*

Q: *Yes, but I'm talking about from discussions you've had with Matthews?*

A: *Yes, in January, after all the problems had blown up.*

Q: *In addition to that, it was pretty plain to you when you spoke to Matthews at the Magic Millions, he in effect told you what Tom had told you that it was being used by Matthews for his trainers, with good results?*

A: *Yes.*"

227. The interesting aspect about this evidence is that again Mr Kavanagh certainly doesn't state that he had any direct knowledge of Dr Matthews' involvement with Vitamin Complex at least before the Magic Millions sales. It also appears to be Mr Kavanagh's evidence that he never enquired of Dr Matthews about getting a bottle of Vitamin Complex directly from him: T-331, L16381-L1638.

228. In his evidence before this Panel, Mr Kavanagh says he was first told about the Vitamin Complex by Dr Brennan in about September 2014. There was no mention of Dr Matthews' involvement: T-79, L3910-3919. Further, when he finally named his supplier on 25 February 2015, he only named Dr Brennan. There was no mention of Dr Matthews being the original source.

229. In relation to the first discussion that Mr Kavanagh said he had with Dr Matthews concerning the use of Vitamin Complex, his evidence was that he wasn't sure whether it was at the Magic Millions Carnival in January 2015 or "before": T 145 L7100-7110. He says that, despite the difficulties with his memory, he raised the issue of Midsummer Sun getting the "shakes" after its last administration of Vitamin Complex (a matter that Mr Kavanagh had said he'd previously called Dr Brennan about) and that Dr Matthews said that he could "*double the dose and use 10ml instead of 5*": T 145 L7111-7120.
230. The Panel pauses here to make the observation that it would seem unlikely that Mr Kavanagh would inform Dr Matthews (a vet) that a horse had had an adverse reaction to a particular substance, for that vet to recommend that the dose of that substance be doubled. Absent expert evidence however, the Panel does not put undue weight on this evidence.
231. Mr Kavanagh's memory as to when he spoke to Dr Matthews concerning Vitamin Complex was further explored by Mr Rushton SC. While his evidence is that he had a conversation with Dr Matthews concerning Midsummer Sun getting the "shakes" after its last administration of Vitamin Complex, his memory as to whether that was immediately after the Summer Cup, before the Gosford Cup or face to face at the Gold Coast, is most unclear: T 146 L7135-7150.
232. Mr Kavanagh also gave evidence concerning what he said was a conversation that he thought he had with Dr Matthews concerning Vitamin Complex in New Zealand: T 146 L7151-7180.
233. The impression the Panel has gained from this evidence is that it was given without a clear memory and without great conviction or confidence. Mr Kavanagh did, however, send Dr Matthews a text (Timeline item 583) following a positive result for the trainer Peter Moody to cobalt on 13 January 2015, with the text stating "*Drips Moody gone cobalt*", which was a follow up from a previous text at Timeline 581, which was "*Are u sure we are okay?*" Dr Matthews responded with a text containing three question marks. Mr Kavanagh's evidence was that he shortly thereafter had a telephone conversation with Dr Matthews (see Timeline 585) in which he discussed

the drips, or in his words “*I would have asked him about the drips*”: T-151, L7400. The texts sent by Mr Kavanagh are capable of being taken as evidence that he thought Dr Matthews knew about Vitamin Complex. Dr Matthew’s response could be taken as evidence he did not, or that he had no knowledge of the positive cobalt results in Victoria, and hence didn’t know why Mr Kavanagh was asking if he was okay.

234. The Panel’s impressions concerning Mr Kavanagh’s evidence were to a degree reinforced when Mr Kavanagh was cross-examined by Mr Richter QC where he once again stated that “*The whole way through I was under the impression [Dr Matthews] supplied it*”: T 200, L9722-9728.

235. Again, the fact that Mr Kavanagh was “under the impression” that Dr Matthews was the source of the Vitamin Complex is not compelling evidence that Dr Matthews was in fact the source of the Vitamin Complex to Mr Kavanagh’s knowledge. It is true that in cross-examination Mr Kavanagh was certain that he had spoken to Dr Matthews “*about using the product*”, and asserts (with certainty this time) that it was “*at the Magic Millions*”: T 200, L9745-9751. The certainty of this answer can be contrasted with the uncertainty of Mr Kavanagh’s memory when asked about the Magic Millions sales in evidence in chief.

236. In relation to Mr Kavanagh’s evidence concerning Dr Matthews’ involvement with the bottles of Vitamin Complex, the main criticism made by Dr Matthews in his written submissions is that it was “unacceptably vague”: Matthews’ Written Submissions at [43.1]. As the Panel has indicated in its discussion of Mr Kavanagh’s evidence on this matter above, we consider that there was a lack of precision or certainty about Mr Kavanagh’s evidence. It lacked confidence, and certainly his memory is less than perfect. This of course does not mean that he is lying. A general observation that can be made about Mr Kavanagh’s evidence is that from the time he informed the Stewards of the supplier of the bottles of Vitamin Complex, and from the time that he was confronted with text messages from his phone records, he has made many admissions against his own interest.

237. Dr Brennan’s evidence was that Dr Matthews had not only been the source of the Vitamin Complex bottles, but that he had assured him that it did not contain

prohibited substances. As the provenance of the Vitamin Complex bottles was unknown, Dr Brennan said that he had specifically asked Dr Matthews if it contained cobalt and was assured it did not. Such were his concerns, however, that he spoke to a Mr Bova about arranging testing of the Vitamin Complex contents, but the cost was prohibitive. His evidence was that he found the \$1,000 price tag on each bottle to be “odd” but he was prepared to rely on the opinion of a “fellow professional”. Nevertheless, he told Victorian trainers he supplied it to and Mr Kavanagh that he could not give them a guarantee concerning its contents: see Dr Brennan’s evidence generally at T289 - 296. Dr Brennan also gave evidence as to the instructions Dr Matthews gave to him about how Vitamin Complex was to be used: T 298, L14529-14535.

238. Dr Brennan also gave evidence about a text that Dr Matthews sent to him on 18 November 2014, in which he said: “*Have those bottles Thursday if suits*”: see Timeline entry 137A. Dr Brennan’s evidence is that this text was in relation to the supply of Vitamin Complex bottles by Dr Matthews to him. Dr Matthews denied this and said that the text was in relation to the supply of a different product (Toradol) that he sourced from an aunt: see his evidence at T 437 before the Panel.
239. The evidence that Dr Brennan gave to the Panel is generally consistent with the evidence that he gave to Stewards in an interview conducted on 20 July 2015, which was when he first admitted being the source of the Vitamin Complex bottles supplied to Mr Kavanagh. During the course of that interview, his evidence was that Dr Matthews had supplied him with the Vitamin Complex bottles, he was concerned about their contents and rang Mr Bova, and that he was also assured by Dr Matthews that it did not contain cobalt. He said that Dr Matthews told him that the bottles were sourced from Canada: see generally Dr Brennan’s evidence at page 1052-1056 of Exhibit 2. In that interview he also told the Stewards that Dr Matthews had instructed him on how to use Vitamin Complex in drips, that Dr Matthew had told him that the Vitamin Complex contained only Vitamin B12, that they had specific discussions concerning whether cobalt was in it and that Dr Matthews had assured him it was not: see pages 1066-1075 of Exhibit 2.

240. The Panel on one view is faced with a stark choice between the evidence of Dr Brennan and Dr Matthews. The shortened form of Dr Brennan's evidence in relation to Vitamin Complex is that it was Dr Matthews who was the original source. Dr Matthews denies this. This cannot be a matter of mistaken recollections or differing observations. Time is not a factor. One or other of Dr Brennan and Dr Matthews is telling the truth, and one of them is lying.
241. Unsurprisingly, the written submissions served on behalf of Dr Matthews assert that it is Dr Brennan who is lying. In support of this, those written submissions contain a long list of instances of where Dr Brennan gave untruthful evidence in the course of the Inquiries of both the Victorian Racing Authorities and the NSW Stewards in relation to the use of Vitamin Complex. Those instances are set out at [27]-[33] of Dr Matthews' written submissions. There are then submissions made as to what motive Dr Brennan might have for lying concerning Dr Matthews, including the desire to "shift responsibility" and to "deflect legal responsibility" amongst other possible motives: see [34] of Dr Matthews' submission.
242. Equally unsurprisingly, the position of RNSW is that, at least in relation to who was the original source of Vitamin Complex, it is Dr Matthews that is lying. Amongst other things, RNSW relies on the evidence of Dr Brennan and Mr Kavanagh, including evidence from the Timeline, such as Mr Kavanagh's text at Timeline 581. They also rely on the text message at Timeline 137A, which Dr Brennan said was in relation to Vitamin Complex and which Dr Matthews said was in relation to Toradol. There are also a series of phone calls between Dr Brennan and Dr Matthews on 14 January 2015, which Dr Brennan says related to Vitamin Complex.
243. Further, RNSW submits that Dr Brennan has little motive for lying about who was the original source of Vitamin Complex, and while the submission was made more in relation to the evidence concerning the administration of a race day drench to Midsummer Sun on 9 January 2015, RNSW submits that Dr Matthews was not a reliable witness and that he was at times both evasive and argumentative.
244. The Panel agrees that at times Dr Matthews was evasive and argumentative. We have not accepted his evidence concerning the alleged "recovery saline" to be given to

Midsummer Sun and we have found him guilty of charge 1 concerning the race day drench given to Midsummer Sun. It is not lost on the Panel that we are comfortably satisfied that Dr Matthews was a knowing party to a serious breach of the Rules by Mr Kavanagh and Mr Camilleri.

245. Contrary to its submission concerning Dr Matthews, RNSW submits that Dr Brennan was a *“credible witness and his evidence should be preferred to that given by Dr Matthews”*: RNSW submissions at [36].
246. In the Panel’s view Dr Matthews was not the only witness who was at times both evasive and argumentative. The “debate” that Dr Brennan had with Mr Rushton SC concerning the proposition that Vitamin Complex was administered to horses to give them “an edge” was one example of where the Panel did not consider that Dr Brennan was being fully frank: see generally T 297-298 of the Transcript before the Panel. According to Dr Brennan, Dr Matthews had told him that harness racing horses who had used the Vitamin Complex had subsequently won. Dr Brennan suggested that the only relevance of giving this evidence was that it meant no positive swabs had occurred following those horses winning. He was also at pains to suggest that the only use to be made of Vitamin Complex was for recovery purposes. That may have been part of the reason for using Vitamin Complex, but ultimately there is no doubt in the Panel’s mind that the use of Vitamin Complex was ultimately aimed at improving horses’ performances in races.
247. The fact that Dr Brennan told a number of lies before 20 July 2015 concerning his own involvement with Vitamin Complex, does not mean that he has lied since admitting supplying the Vitamin Complex to Mr Kavanagh concerning Dr Matthews being the original source of Vitamin Complex. Dr Brennan chose to lie at first to the Victorian Racing Authorities and to the New South Wales Stewards concerning his own knowledge of Vitamin Complex. He told a series of other lies, but they can be seen to be linked to that original lie that he knew nothing about it. No doubt there are a number of motivations for Dr Brennan being untruthful at first, which include protecting the clients of Flemington Equine and also protecting his own interests. Nevertheless, the fact that Dr Brennan was originally untruthful is a matter that the Panel must take into account in making the assessment as to whether or not it is



comfortably satisfied that Dr Matthews was the original source of Vitamin Complex. The Panel also has to take into account the lack of conviction, or perhaps the lack of confidence in the evidence of Mr Kavanagh as to whether Dr Matthews was the original source of Vitamin Complex, and the circumstances in which he says he had discussions with Dr Matthews about it. Further, the Panel does not accept Dr Brennan's assertion that he knew nothing about the administration of Vitamin Complex to Midsummer Sun.

248. Charges 2 to 6 brought against Dr Matthews are very serious charges. The standard of proof before the Panel is the balance of probabilities. *Briginshaw* does not change the standard of proof, and it does not require proof of something to be at the standard of beyond reasonable doubt in criminal proceedings. However, as the Panel has emphasised before, that standard is as informed by the High Court's reasoning in *Briginshaw* and other cases that discuss the principles outlined in that case. Those principles require a standard of satisfaction. The Panel must feel an "actual persuasion" in relation to the findings it makes, and its state of "reasonable satisfaction" that something has occurred should not be based, to quote Dixon J in *Briginshaw*, on "*inexact proofs, indefinite testimony, or indirect inferences*".
249. The Panel has considered all of the evidence in relation to the claim that Dr Matthews was the original source of Vitamin Complex. This includes the indirect evidence above, but also the direct testimony of both Dr Brennan and Mr Kavanagh. In the end, the Panel is simply not comfortably satisfied that Dr Matthews was the original source of Vitamin Complex. The Panel's failure to be comfortably satisfied concerning Dr Matthews' involvement as the original source of the Vitamin Complex should not be considered to be a finding that either Dr Brennan or Mr Kavanagh are lying in relation to their evidence concerning Dr Mathews and Vitamin Complex. Their evidence on this matter, however (together with the other evidence we have been referred to) simply does not leave us with a feeling of actual persuasion that Dr Matthews was involved as the original source of the Vitamin Complex. The evidence of both Dr Brennan and Mr Kavanagh in relation to this matter needs to be treated with caution. They have previously given untruth evidence to the Stewards in the course of their investigation and inquiry, and we have noted the general vagueness of Mr Kavanagh's evidence on this issue. Further, for the Panel to find that Dr

Matthews is guilty of charges 2 to 6, it has to be comfortably satisfied that he is lying concerning the issue of whether he is the original source of Vitamin Complex. On the totality of the evidence, the Panel is not comfortably satisfied of this.

250. Given this factual finding, it follows that charges 2 to 6 brought against Dr Matthews have not been proved.

#### **PART 6 - SUMMARY**

251. The Panel will draft formal orders in due course, but in summary in relation to Mr Kavanagh:

- (a) The findings of guilt in relation to charges 1, 9,10, 11, 13, 14, 15, 21 and 24 are confirmed;
- (b) A finding of not guilty is made in respect to charges 12 and 20;
- (c) The Panel notes that Mr Kavanagh either pleaded guilty to or has accepted the finding of guilt in relation to charges 2, 3, 5, 16, 17, 18, 19, 22 and 23.

252. In relation to Dr Brennan:

- (a) The Panel confirms the findings of guilt in relation to charges 1 to 7;
- (b) The panel finds Dr Brennan not guilty of charges 8, 9 and 11; and
- (c) The Panel notes that Dr Brennan has pleaded guilty to charges 10 and 12.

253. In relation to Dr Matthews:

- (a) The Panel confirms the finding of guilt in relation to charge 1; and
- (b) The Panel finds Dr Matthews not guilty of charges 2 to 6.

**ROSS CLUGSTON, PRINCIPAL MEMBER**

**RICHARD BEASLEY SC**

**TOM CARLTON**

**6 May 2016**