

**RACING APPEALS AND DISCIPLINARY BOARD
(Original Jurisdiction)**

Racing Victoria Stewards

v

*Mr Robert Smerdon, Mr Gregory Nelligan, Mrs Denise Nelligan, Mr Liam Birchley,
Mr Tony Vasil, Mr Stuart Webb, Mr Daniel Garland & Mr Trent Pennuto*

DECISION

Judge Bowman	Chair
Mr B Forrest	Deputy Chair
Mr G Ellis	Member

Appearances

For the stewards

For Mr R Smerdon

For Mr G Nelligan and Mrs
D Nelligan

For Mr L Birchley

For Mr T Vasil

For Mr S Webb

For Mr D Garland

For Mr T Pennuto

Counsel

Mr J Gleeson QC
with Mr D Bennett

Mr M Grant-Taylor QC

Mr P Wheelahan

Solicitors

Minter Ellision

Mr T McHenry

No appearance

Mr T Schultz

Mr T Hannebery

Mr T McHenry

Mr T McHenry

Mr G Croxford

1. Overview

This matter, the Aquanita case, involves probably the biggest scandal and the most widespread investigation in the history of Australian Racing.

- 5 Mr Gleeson QC, who appeared with Mr Bennett of Counsel for the Stewards, invited us to read the 1,000 or so relevant email messages as if reading a book, thus giving a clear overall picture of what occurred. This was a good suggestion.

When that overall picture is examined, one thing is clear. This was a long running systematic conspiracy to try and obtain an unfair advantage in well over a hundred
10 races over seven years. In our opinion, there has been the clearest of breaches of AR

175(a). There has been dishonest, corrupt or fraudulent, improper or dishonourable actions of the highest order.

The extensive investigation which has been carried out was effectively triggered by the *Lovani* affair on Turnbull Stakes Day at Flemington on Saturday 7 October 2017.

15 On that occasion, Gregory Nelligan, a float driver for Aquanita was literally caught red handed inserting a syringe into *Lovani's* mouth. Subsequently, his mobile phone was seized. From it, in excess of 70,000 text messages were downloaded. Approximately 1,000 relevant messages covering seven years were reduced to the spreadsheet which was put in evidence.

20 Those messages leave us in no doubt but that all eight people charged were, to varying degrees, involved in a plan to insert essentially sodium bicarbonate and Tripart paste into horses on race day by way of what were described as "top-ups" so as to gain what was thought to be an unfair advantage.

It is to be noted that raceday administration of alkalising agents (AR 178AA) and medication (AR 178E(1)) to horses on raceday is prohibited by those Rules. Sodium bicarbonate is an alkalising agent and a medication as defined. Tripart paste is also a medication under the Rules.

Applying the *Briginshaw* test, we are certainly comfortably satisfied that all eight persons were part of this conspiracy, at least from time to time, and all eight have
30 breached AR 175(a). The text messages do indeed tell a very sad and disturbing story.

Of those eight people, none has pleaded guilty. Messrs Webb, Garland, Birchley, Vasil and Pennuto specifically pleaded not guilty. Gregory Nelligan and Mrs Nelligan at no stage entered a plea, save for a misguided attempt to plead 'no contest', and were treated as pleading 'not guilty'. Robert Smerdon, whilst represented by Mr Tim
35 McHenry, effectively entered no plea and has been treated as pleading 'not guilty'.

The case ran for a shorter time than might have been anticipated. That was to a considerable extent because, of the eight people charged, only one – Mr Birchley – was actually in attendance during the hearings and gave evidence.

We might add that we are not of the view that the cross-examination of Dr Grace
40 Forbes, General Manager of Veterinary Services for Racing Victoria, had any
appreciable effect on the outcome of the case.

Apart from a charge pursuant to AR 175(a), Mr Smerdon has been additionally
charged with a separate offence, not being part of the “top-ups”. He is charged with
a breach of AR 178E(1) in relation to the application of Vicks to the horse ‘Disco Dan’
45 at Bendigo on 8 October 2010.

Similarly, Mr Gregory Nelligan in fact faces a further nine charges, some of which are
alternatives. We shall deal with those subsequently.

We now turn to our findings in relation to each individual charged.

(1) Mr Robert Smerdon

50 Mr Smerdon was a director and shareholder of Aquanita and could rightfully be
described as the most prominent and leading trainer of the group. His involvement
with the “top-ups” scheme goes back to 2010, and continued until the *Lovani* affair in
October 2017. He was a party to the administration of “top-ups” on 115 occasions
over that period.

55 We are comfortably satisfied that he is guilty of the above. He, along with Gregory
Nelligan, could be described as the driving force behind the illegal “top-ups”
conspiracy and he frequently gave instructions concerning it to Nelligan, who was a
float driver and considerably lower down the chain of command.

We do not accept his explanation, when interviewed, that a “top-up” consisted of feed
60 and water. When all the text messages and their timing, particularly on race days, are
examined, this is a palpable nonsense. That applies to others who attempted this
explanation.

In short, we find Mr Smerdon guilty of the breaches of AR 175(a) with which he is
charged. We also find him guilty of a breach of AR 175E(1) concerning the

65 administration of Vicks on 8 October 2010. We would refer to the text messages of that day and the interview of 31 October 2017.

(2) Mr Gregory Nelligan

Mr Gregory Nelligan seems to have been the architect and to some extent the promoter of the “top-ups” scheme. On many occasions he took instructions from Mr Smerdon, 70 but at times he took instructions or requests from others who have been charged. He also appears to have been the chief user of the syringes used to impart the “top-ups” and was, of course, the person apprehended with *Lovani* on 7 October 2017. The many messages found on his mobile phone are the foundation of these prosecutions, save for the *Lovani* episode.

75 We are comfortably satisfied that Gregory Nelligan administered illegal “top-ups” to horses, almost always on race days, on 123 occasions over seven years, and predominately at metropolitan tracks. When interviewed, he took responsibility for the administration to *Lovani*, saying it was his idea and a “one off” occurrence. The material obtained from his mobile phone quickly and clearly proved this to be a lie.

80 In relation to other charges against Gregory Nelligan, charges 2, 3 and 4 are alternatives to charge 1 pursuant to AR 175(a). They fall away. Charges 5, 6 and 7 relate to the laying of horses and to Rule 175 B(2). We find them proven. Charge 8 concerns the administration of Vicks as described in relation to Mr Smerdon. We find it proven. Charge 9 relates to a failure to provide his mobile phone, which failure 85 arose when Gregory Nelligan was interviewed. That has been made out. Charge 10 has also been proved. Gregory Nelligan failed to attend to give evidence at a stewards enquiry on 31 October 2017.

(3) Mrs Denise Nelligan

It was Mrs Denise Nelligan, wife of Gregory Nelligan, who ultimately “blew the 90 whistle” on the whole “top-ups” saga in that it was she, who, when interviewed on 31 October 2017, confessed to and described the contents of the “top-ups”. At all relevant times she was a registered stable hand employed by Aquanita. She also performed

office work. She told stewards that the “top-ups” were not feed and water – a proposition that was never credible – but were “bicarb and tripart”.

95 She attempted to resile from this by letter of 2 November 2017, claiming that she had been under stress, intimidated and wanted to get out of the room. We do not accept this. Her previous answers to the stewards were clear. In addition, she was legally represented at the interview on 31 October 2017.

She did not attend the hearing or provide any other evidence to support the contents
100 of her letter. Further, that the “top-ups” contained illegal substances is entirely consistent with the whole pattern of events and the multitude of messages.

The Stewards allege that her involvement occurred on 13 occasions between 24 February 2011 and 25 February 2017. We are comfortably satisfied that this has been established and that Mrs Nelligan clearly breached AR 175(a). She relayed
105 instructions, made at least some of the “top-ups”, and passed on messages. Her involvement in the whole affair was one of considerable significance.

(4) Mr Liam Birchley

Mr Birchley is a trainer licenced in Queensland, but was registered as a visiting trainer in this state at the time of the alleged conduct which constitutes the breach of AR
110 175(a). He could be described as being Aquanita’s Brisbane trainer for approximately ten years until 2011. The Particulars of the Charge involve three occasions upon which Mr Birchley visited Melbourne in November of 2011, 2012 and 2015. Whilst operating independently of Aquanita after 2011, we are satisfied that he maintained contact with Gregory Nelligan after that year. Again, the text messages tell the story.

115 We are satisfied that Mr Birchley was what could be described as a “non-paying customer” of the services provided in relation to “top-ups”. For example in November 2011 there is reference to Mr Birchley’s horse, *Emmalene*, and to the fact that Moth (Mr Garland) “did it – but didn’t even back it”. Mrs Nelligan enquired of her husband as follows “you do *Emmalene*? Bet on her?” and it is to this that Gregory Nelligan
120 responded that the Moth had done it but had not backed the horse, which won. On 5

November 2012, Mr Smerdon notified Gregory Nelligan “need an extra one for Liam’s”. It is argued that these words are ambiguous, but, when seen in the context of the many other messages, we are comfortably satisfied that this particular message relates to the provision of a “top-up” for one of Mr Birchley’s runners. That this would occur without his knowledge or consent seems to us to be highly unlikely. We do not accept the argument that the reference to “Liam” could be to someone other than Mr Birchley.

Overall, any doubt, however small, that we may have had is effectively removed when the text message exchange of 2 November 2015 is considered. Mr Birchley mentioned in evidence-in-chief that he barely knew Gregory Nelligan. The exchange of text messages reveals a good deal of familiarity. In essence, almost the first thing Mr Birchley did after arriving from Brisbane at Tullamarine airport was to message Gregory Nelligan as follows: “ Can u org a top up for tomorrow pls”. This is followed by a semi - facetious exchange, including Mr Birchley telling Gregory Nelligan that he has “deep pockets” in relation to the number of “top-ups” that may be required. Gregory Nelligan indicated that Mr Smerdon had already ordered five. Incidentally, any suggestion that “top-ups” are feed and water is well and truly laid to rest by the suggestion that Gregory Nelligan could carry them in his pockets. We would add that we consider Mr Birchley’s credit to have been destroyed in cross-examination. We do not accept him as a witness of truth.

Mr Birchley called as a witness Mr Aidan Holt, now a jockey in Northern Queensland, but in 2015 employed as a strapper who came to Melbourne with Mr Birchley’s horse, *Pop ‘n Scotch*. Mr Holt was a witness who did his best, but made a significant error in relation to his careful evidence concerning the timetable followed on 3 November 2015 with *Pop ‘n Scotch*. This error had some impact upon the reliability of Mr Holt’s evidence. Further, Mr Holt agreed that a “top-up” could not sensibly mean feed. All in all, Mr Holt’s evidence did not assist Mr Birchley.

Our conclusion concerning Mr Birchley is this. We are comfortably satisfied that the charge against him has been made out and we find the charge proven.

150 **(5) Mr Tony Vasil**

Mr Tony Vasil also pleaded “not guilty” to the charge pursuant to AR 175(a). Seven Particulars of the Charge are listed and they range from 26 December 2010 to 7 July 2013. Mr Vasil did not give evidence or attend at the hearing. He trained under the Aquanita banner from 2005 to approximately 2012. Thereafter he trained out of
155 Aquanita’s stables under a different financial arrangement.

We are comfortably satisfied that the charge against him has been proved. Some of the relevant text messages are from Mr Pennuto to Gregory Nelligan. At the relevant times, Mr Pennuto was Mr Vasil’s foreman. It seems to us highly unlikely that Mr Pennuto was off on a frolic of his own. There is no evidence to this effect. These
160 communications clearly relate to “top-ups”. There are references to “checking” with Tony, and we accept that this is Mr Vasil. It is to be remembered that no text message to or from Mr Vasil is in evidence. Whether he operated a mobile phone is doubtful and was not admitted by him.

Subsequently, on 23 February 2012, Mrs Nelligan texted her husband that Tony wants
165 a “top-up”. Mr Vasil’s horse, *Charged and Ready* was racing that day at Werribee.

Further examples are these. On 2 March 2012, there was a text from Mrs Nelligan to Gregory Nelligan to the effect that Tony wanted two “top-ups” and a query as to whether they had enough syringes.

On 7 July 2012, Gregory Nelligan sent a text message to Mr Smerdon which relates to
170 Tony “doing” horses running at Flemington that day, and the arrangements for this. A series of messages of 7 June 2013 refers to Tony “doing” horses in a truck and to interest shown by the stewards. Mr Vasil had four runners at Swan Hill that day.

On the basis of all of the above, we are comfortably satisfied that the charge has been proven and find Mr Vasil guilty.

175 **(6) Mr Stuart Webb**

Mr Webb also pleaded “not guilty” to the charge pursuant to AR 175(a). There are three Particulars of Charge, and they concern events on 15 August 2010, 26 December

2010 and 28 April 2017. Mr Webb trained out of the Aquanita stables and also was responsible for organising transport of Aquanita horses. He did not attend the hearing or give evidence. Despite requests, he did not produce his mobile phone, although the number was obtained.

When interviewed, he maintained that a “top-up” referred to feed. We have already expressed our opinion of that proposition. We are also satisfied that relevant references to “Stuart”, “Stu” or “Stuey” and the like in the text messages are references to Mr Webb.

A text message of 15 August 2010 from Mr Smerdon to Gregory Nelligan concerning three “top ups” refers to “Stuey” being there as well. On 26 December 2010 there is reference to “doing” a horse called *Veewap* and problems associated with doing this at the stables. It then reads “Stu reckons better to just give 2 at races”.

Even clearer are the messages of 28 April 2017 between Mr Webb and Gregory Nelligan. Mr Webb enquired of Gregory Nelligan as to when he was leaving (there were races at Benalla). Gregory Nelligan then replied “just before 9”. Mr Webb responded “top-up please”, to which Gregory Nelligan replied “OK”. This is fairly damning correspondence.

A message from Mr Webb to Gregory Nelligan on 20 March 2016, whilst brief, is also damning. There was a runner *Cheers Thanksalot* at Wodonga on the following day. Mr Webb texted as follows; “I’d like Greg to take *Cheers* to Wodonga and top please”, adding that this message had just been sent from “Robert”.

This is an example of the team effort that is sometimes obvious and Mr Webb was clearly part of it.

Mr Webb was also concerned about stewards and surveillance. On 8 December 2012 an article appeared in the ‘Winning Post’ concerning mobile cameras being installed in on-course horse urinal boxes during the spring carnival. Mr Webb asterisked this and forwarded it to Gregory Nelligan on that day, adding the message “Time to pull our heads in ...”.

On 19 October 2013 Gregory Nelligan forwarded to Mr Smerdon and Mr Webb photographs of stewards' cars. The three were obviously working together and were concerned about stewards and surveillance.

210 In summary, we are comfortably satisfied that the charge has been made out. We find Mr Webb guilty of the relevant offence.

(7) Mr Daniel Garland

215 Mr Garland has pleaded "not guilty" to one charge pursuant to AR 175(a). There are two Particulars of Charge, these relating to events on 3 November 2011 and 25 May 2013. We accept that Mr Garland is referred to by others as "Moth" or "The Moth", a nickname which he has acquired. Mr Garland did not give evidence or attend the hearing. At all relevant times, he was employed by either Mr Smerdon or by Aquanita as a driver. Primarily he received his instructions from Mr Webb, who was the transport organiser. Mr Garland may have possessed a mobile phone, but seems to have seldom used it.

220 On 3 November 2011, there are the messages previously referred to in relation to Mr Birchley's horse *Emmalene* and whether she had been "done". Gregory Nelligan informed his wife that "The Moth did it but even he didn't back it".

225 On 25 May 2013, there is communication between Gregory Nelligan and his wife to the effect that the stewards have been around and "Moth is a mess". The next communication, only seconds later, states "worried getting caught". Incidentally, on 7 June 2013 Gregory Nelligan informed his wife that "Moth stressing and all of us. Think he half wants to get caught".

Reading these in context, Mr Garland's involvement seems apparent. We are comfortably satisfied that the charge has been made out and find Mr Garland guilty.

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(8) Mr Trent Pennuto

Mr Trent Pennuto has pleaded “not guilty” to one charge pursuant to AR 175(a).
235 There are four Particulars of the Charge. These relate to events on 22 August 2010, 26
December 2010, 15 May 2011 and 9 December 2011. Thus, it can be seen that the
charges relate to occurrences that are in excess of six years old. It is not asserted that
Mr Pennuto has since been engaged in ongoing offending or has been part of the
conspiracy to attempt to obtain an unfair advantage. That does not mean that his
240 alleged behaviour was not reprehensible and a breach of the Rule. Mr Pennuto did
not give evidence or attend the hearing.

At all relevant times, Mr Pennuto, whilst a licenced trainer, was acting as Mr Vasil’s
foreman. Mr Pennuto possessed a mobile phone and has identified its number.

On 22 August 2010, there was an exchange of text messages between Mr Pennuto and
245 Gregory Nelligan. Amongst other things, Mr Pennuto requested that Gregory
Nelligan make a couple of “top-ups”, also stating that “Moth” could give some before
the float took the horses to that day’s races. When Gregory Nelligan responded in the
affirmative, Mr Pennuto replied “Brilliant thanx...I’ll let Robert know”. The races that
day were at Cranbourne. Mr Vasil had two runners.

250 On 26 December 2010, there were races at Caulfield. Mr Vasil had a runner, *Veewap*.
Mr Pennuto sent a message to Gregory Nelligan to the effect that it would be too hard
to do *Veewap* at the stables – “there will be staff everywhere” and that “Stu” (Mr Webb),
reckons it would be better to just give two at the races.

On 15 May 2011, Mr Vasil had a runner, *Last Cash*, at Cranbourne. Mr Smerdon also
255 had runners. Mr Pennuto engaged in an exchange of messages with Gregory Nelligan,
and we will set them out in full, because they are a good illustration of how these
offences were carried out as a team effort:-

Mr Pennuto: “Take top up for him ... he’s had 100 try and get another 120 into
him?? He will be on course early enough to do twice if u have to”.

260 Gregory Nelligan: “I have two tops and are in truck on way”

Mr Pennuto: "One for us and one for Smerdon ... or 2 for us?"

Gregory Nelligan: "Two for us".

Mr Pennuto: "Sweet ... speak to u after".

265 This exchange also demonstrates the complete futility of trying to argue that "top-ups" are feed and water.

The remaining offence involving Mr Pennuto concerns a night meeting at Moonee Valley on 9 December 2011. Mr Vasil had two runners. There was an exchange of messages between Mr Pennuto and Gregory Nelligan. We will not set them out in full, but again they illustrate a type of team approach involving Mr Pennuto, Mr Vasil,
270 Mr Garland and Gregory Nelligan. Again, they make a nonsense of any suggestion that "top-ups" are feed and water.

Mr Pennuto's involvement in this conspiracy is obvious. We are comfortably satisfied the charge has been made out and we find Mr Pennuto guilty.

Conclusion

275 The Aquanita case represents one of the darkest and longest chapters in the history of the Australian turf. There is a litany of brazen attempts to cheat and to obtain an unfair advantage over many years by a well organised team. Whether there were attempts at or the actual carrying out of the illegal provision of substances, we find each of the persons charged guilty. We are comfortably satisfied that each breached
280 AR 175(a) in that each has been guilty of dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing. We also find Gregory Nelligan and Mr Smerdon guilty of the other offences with which they are charged. This brings to an end the first part of this very sad and sorry tale. We will hear pleas in relation to penalties on Thursday next and will endeavour to hand down such
285 penalties on that day.