

IN THE RACING APPEALS TRIBUNAL

STEPHEN JONES

Appellant

v

RACING NEW SOUTH WALES

Respondent

TRACEY RODGER

Appellant

v

RACING NEW SOUTH WALES

Respondent

REASONS FOR DETERMINATION

Date of hearing	19 December 2024
Date of determination	23 February 2025
For the Appellants	Mr C O'Neill instructed by Esplins Lawyers Mr O Jones instructed by Mr M Cleaver, Racing NSW

ORDERS

In the appeal of Stephen Jones, I make the following orders:

- 1. The appeal is dismissed.**
- 2. The penalties imposed by the Stewards are confirmed.**
- 3. The Appellant is disqualified for a period of 3 years and 6 months, expiring on 22 October 2027.**
- 4. In addition, the Appellant is fined a total of \$7,500.00.**

In the appeal of Tracey Rodger, I make the following orders:

- 1. The appeal is dismissed.**
- 2. The penalties imposed by the Stewards are confirmed.**
- 3. The Appellant is disqualified for a period of 10 months, expiring on 22 August 2024.**

INTRODUCTION

1. Stephen Jones (Jones) has appealed against a determination made by the Appeal Panel (the Panel) of Racing New South Wales (the Respondent) in respect of a series of charges which are set out below.
2. Tracey Rodger (Rodger) has appealed against a determination of the Panel in respect of separate charges brought against her which are again set out below.
3. The appeals were heard together on 19 December 2024. For that purpose I was provided with a Tribunal Book (TB) extending to more than 1,000 pages. I was also provided with a separate bundle of authorities (AB) extending to a further 270 pages. No additional evidence was adduced at the hearing but I had the benefit of oral submissions by counsel for all parties.
4. I will address each appeal separately.

THE APPEAL BROUGHT BY JONES

The relevant provisions of the Australian Racing Rules

5. A total of 21 charges were brought by Stewards against Jones alleging contraventions of one or other of the following provisions of the Australian Rules of Racing (AR):
 - (i) AR 104, which provides that a trainer must record any medication or treatment administered to any horse in the trainer's care by midnight on the day on which it was administered, and which prescribes the information to be included in the record;
 - (ii) AR 249(1)(b), which prohibits a person, without permission of the Stewards, from causing any medication to be administered to a horse at any time on race day prior to the commencement of a race in which the horse is engaged to race;
 - (iii) AR 252(1), which prohibits a person having in his or her possession, or on his or her premises, any medication, substance or preparation which has not been registered, labelled, prescribed, dispensed or

obtained in accordance with applicable Commonwealth and State legislation;

- (iv) AR 252A, which prohibits a person having in his or her possession, or on his or her premises, any injectable product which contains cobalt salts;
- (v) AR254(1)(b)/(c)(i)/(ii), which prohibits a person from causing to be injected, or attempting to inject, a horse to run in any race at any time on the day of the scheduled race and prior to the start of that race, and/or at any time during 1 clear day prior to 12.00 am on the day of the scheduled race, in each case without the permission of the stewards;
- (vi) AR 254A which prohibits the administration of cobalt salts by injection.

6. For the purposes of Jones’ appeal, the focus is upon the penalties imposed for the charges contrary to AR 249 and AR254.

The charges brought against Jones and the penalties imposed by Stewards

7. The charges brought against Jones, and the findings and penalties imposed by Stewards, may be summarised as follows:¹

CHARGE	AR	DATE	PLEA	FINDING	PENALTY
1	249(1)(b)	22/8/2022	Not guilty	Guilty	12 months
2	254(1)(b)(i)	26/8/2022	Not guilty	Guilty	12 months
3	249(1)(b)	12/9/2022	Not guilty	Guilty	12 months
4	254(1)(b)(i)	12/9/2022	Not guilty	Guilty	12 months

¹ TB 1 – 7.

5	249(1)(b)	3/10/2022	Not guilty	Guilty	12 months
6	254(1)(b)(i)	3/10/2022	Not guilty	Guilty	12 months
7	249(1)(b)	14/10/2022	Not guilty	Not guilty	--
8	254(1)(b)(i)	14/10/2022	Not guilty	Not guilty	--
9	249(1)(b)	30/10/2022	Not guilty	Guilty	12 months
10	254(1)(b)(i)	30/10/2022	Not guilty	Guilty	12 months
11	249(1)(b)	29/11/2022	Not guilty	Guilty	12 months
12	254(1)(b)(i)	29/11/2022	Not guilty	Guilty	12 months
13	249(1)(b)	30/9/2022	Not guilty	Guilty	12 months
14	254(1)(b)(i)	30/9/2022	Not guilty	Guilty	12 months
15	249(1)(b)	7/11/2022	Not guilty	Guilty	12 months
16	254(1)(b)(i)	7/11/2022	Not guilty	Guilty	12 months
17	104	12/9/2022 – 7/3/2023	Guilty	Guilty	2 months
18	252(1)	Unspecified	Guilty	Guilty	F \$750.00
19	252A	Unspecified	Guilty	Guilty	F\$750.00
20	254(1)(b)(ii)	20/4/2023	Not guilty	Not guilty	---
21	254A	17/8/2022 – 28/4/23	Guilty	Guilty	F\$10,000.00

8. The charges encompassed the following conduct:

- (i) the administration of *Diurex* to *Inferno Miss* on:
 - (a) 26 August 2022;²
 - (b) 12 September 2022;³
 - (c) 3 October 2022;⁴
 - (d) 30 October 2022;⁵ and
 - (e) 29 November 2022;⁶

- (ii) the administration of *Diurex* to *Oh No Bro* on:
 - (a) 30 September 2022;⁷ and
 - (b) 7 November 2022.⁸

- (iii) the failure to keep records of medication and treatments, specifically *Lasix* and *Diurex*, administered to horses in his care between 12 September 2022 and 7 March 2023;⁹

- (iv) the possession of an unregistered substance, namely *Dr Bells Drops*;¹⁰

- (v) the possession of an injectable product, namely *Hemoplex*, containing cobalt salts;¹¹

- (vi) the injection of the horse *Chiky Chiky Mama* with *Centiofeur* within one clear day of a race in which that horse was to compete;¹²

² Charges 1 and 2.

³ Charges 3 and 4.

⁴ Charges 5 and 6.

⁵ Charges 9 and 10.

⁶ Charges 11 and 12.

⁷ Charges 13 and 14.

⁸ Charges 15 and 16.

⁹ Charge 17.

¹⁰ Charge 18.

¹¹ Charge 19.

¹² Charge 20.

- (vii) the injection of *Hemoplex* to horses in his care on 13 occasions between 17 August 2022 and 28 April 2023.¹³

9. As to the penalties imposed by the Stewards:

- (i) the periods of disqualification imposed in respect of the following charges were ordered to be served concurrently:
 - (a) charges 1 and 2;
 - (b) charges 3 and 4;
 - (c) charges 5 and 6;
 - (d) charges 9 and 10;
 - (e) charges 11 and 12;
 - (f) charges 13 and 14;
 - (g) charges 15 and 16;
- (ii) the penalty imposed in respect of charge 17 was a suspension as opposed to a disqualification and was ordered to be served concurrently with the disqualifications imposed in respect of charges 1 – 6 and 9 – 16;
- (iii) the fines imposed in respect of each of charges 18 and 19 were reduced from \$1,000.00 to \$750.00 on account of Jones' pleas of guilty;
- (iv) the fine imposed in respect of charge 21 was reduced from \$10,000.00 to \$6,000.00 on account of Jones' plea of guilty and what were described as "*other relevant considerations*".

10. Having regard to principles of totality, the Stewards imposed a total period of disqualification of 3 years and 6 months, and a total fine of \$7,500.00. The period of disqualification expires on 22 October 2027.

¹³ Charge 21.

The proceedings before the Panel

11. In a determination made on 20 June 2024, the Panel found Jones guilty of charges 1 – 6, 9 – 16 and 19. In a separate determination in respect of penalty made on 2 August 2024, the Panel:

- (i) partially allowed the severity appeal in respect of charges 1 – 6 and 9 – 16;
- (ii) imposed, in respect of those charges, a total disqualification of 20 months to commence on 20 June 2024;
- (iii) dismissed the severity appeal in relation to charges 17, 18, 19 and 21;
- (iv) confirmed the suspension imposed in relation to charge 17 and further confirmed that it was to be served concurrently with the period of disqualification imposed;
- (v) confirmed the fines imposed in respect of charges 18 and 19;
- (vi) confirmed the fine imposed in respect of charge 21.

12. It is noted in respect of (vi) that the Panel's reasons made reference to a fine of \$8,000.00. The fine imposed by Stewards in respect of charge 21 was in fact \$6,000.00, reduced from \$10,000.00.¹⁴ Further, the Stewards imposed a total fine of \$7,500.00 (inferentially, because of totality considerations) to which the Panel did not appear to refer. I am therefore left to assume that the Panel confirmed the total fine of \$7,500.00 and that the reference to a fine of \$8,000.00 is an error.

The ground of appeal

13. Jones' appeal is on the ground of severity only.¹⁵ The Respondent's position is that the appropriate total penalty is that which was imposed by the Stewards at first instance, namely a disqualification of 3½ years and a fine of \$7,500.00.¹⁶ There is

¹⁴ TB 6.

¹⁵ Transcript 2.59

¹⁶ Submissions at [3].

no issue that in proceeding with his appeal, Jones was on notice of the Respondent's position.¹⁷

The facts of Jones' offending

14. Unfortunately, notwithstanding the large amount of material with which I have been provided, there is no document resembling a statement of facts or which otherwise sets out a summary of the offending. I am left to draw the following summary primarily from the reasons of the Panel, supplemented by the written submissions filed by the parties on this appeal. I would again urge parties in matters before the Tribunal to provide a statement of agreed facts whenever the circumstances allow it. Apart from any other consideration, it will obviously reduce the amount of documentary material which is provided (and read) prior to a hearing.

15. Jones is a licenced trainer and previously operated under the name *Stephen Jones Racing*. David Kelly (Kelly) was his stable foreman at the relevant time.¹⁸

16. There was, at the relevant time, a practice in Jones' stables whereby horses with a propensity to bleed were injected with a diuretic.¹⁹ For that purpose two diuretics, *Lasix* and *Diurex*, were kept at the stables.²⁰ The ultimate finding of the Panel²¹ was that there was a practice at Jones's stables, of which Jones knew and approved, and which he directed, that horses prone to bleeding would be injected with *Diurex* before they raced (including on race day itself). The effect of *Diurex* is that it reduces the chance of a horse bleeding after galloping.²²

17. Whenever *Diurex* was administered to a horse, it was done with Jones' knowledge and authority.²³ Jones' evidence was that *Diurex* was not as strong as *Lasix*, and

¹⁷ Submissions at [4].

¹⁸ PLD at [5].

¹⁹ Panel Liability Determination (PLD) at [5].

²⁰ PLD at [6].

²¹ PLD at [57].

²² PLD at [10].

²³ PLD at [6] – [7].

was therefore less likely to be detectable if it were administered. Accordingly, if a horse was to be injected on race day (being a time when the horse could be tested) *Diurex* was the preferred option because it was more difficult to detect.²⁴

The Panel's determination of penalty

18. To begin with, the Panel observed that:

- (i) there were no special circumstances in Jones' case;²⁵
- (ii) where two breaches arise from the same conduct, any periods of disqualification may be served concurrently;²⁶
- (iii) trainers are given the privilege of holding a licence, and such privilege comes with obligations and responsibilities;²⁷
- (iv) knowledge of, and compliance with, the rules are basic components of that privilege, not only for a trainer but for those employed in his or her stables;²⁸
- (v) it is critical that those in senior roles within the racing industry protect its reputation, and that they avoid engaging in conduct which brings the industry into disrepute;²⁹
- (vi) the purpose of imposing penalties is to protect the image and integrity of the industry, not to punish the offender;³⁰ and
- (vii) when determining penalty, it is necessary to have regard to:
 - (a) the objective seriousness of the conduct;
 - (b) the need for general and/or specific deterrence;
 - (c) any plea(s) of guilty;
 - (d) the participant's disciplinary history; and
 - (e) the participant's personal circumstances.³¹

²⁴ PLD at [9].

²⁵ Panel Penalty Determination (PPD) at [15].

²⁶ PPD at [20].

²⁷ PPD at [29].

²⁸ PPD at [29].

²⁹ PPD at [30].

³⁰ PPD at [31].

³¹ PPD at [31].

19. With these principles in mind, in respect of charges 1 – 6 and 9 – 16 the Panel took into account:

- (i) the drastic consequences, for Jones, of disqualification, as well as the consequences for his staff and the owners for whom he trained horses;³²
- (ii) the significant need for general deterrence in respect of this kind of offending, and the necessity to send “*an appropriate message to the industry that such conduct is not acceptable, and is contrary to the interests and reputation of racing in New South Wales*”;³³
- (iii) the fact that Jones was a person of otherwise good character with a good disciplinary history, on both of which he was entitled to rely,³⁴ such that the need for personal deterrence “*did not loom large*” in consideration of penalty;³⁵
- (iv) the fact that Jones gave evidence which was found to be false, and had demonstrated little remorse;³⁶
- (v) the fact that Jones was not using *Diurex* for performance enhancing purposes.³⁷

20. In respect of charge 17, the Panel concluded that although Jones was not the person who made (or who failed to make) the relevant entries, it was his primary responsibility as the licence holder to ensure that his records were accurate and complete.³⁸

21. In respect of charge 18, the Panel concluded that the fine imposed at first instance was appropriate.³⁹

³² PPD at [32].

³³ PPD at [33].

³⁴ PPD at [34].

³⁵ PPD at [34].

³⁶ PPD at [34].

³⁷ PPD at [34].

³⁸ PPD at [39].

³⁹ PPD at [40].

22. In respect of charge 19, the Panel took into account the fact that the pharmaceutical was held by reason of a veterinarian's instruction, and concluded that the fine imposed was appropriate.⁴⁰

23. In respect of charge 21, the Panel concluded that the fine imposed was appropriate (although as previously noted, it appears to have been incorrectly cited as a fine of \$8,000.00).⁴¹

Submissions on behalf of Jones

24. In support of his appeal, Jones filed a Notice of Grounds of Appeal together with an outline of submissions. The essence of the Grounds of Appeal was that the Panel had erred by, in effect, double counting, leading to a penalty which was excessive. The written submissions had, as a primary focus, principles of *autrefois convict* and duplicity which find their place in the criminal law.

25. The approach taken by counsel for Jones in oral submissions at the hearing was somewhat more nuanced. To begin with, counsel accepted that, strictly speaking, principles of *autrefois convict* had no application to proceedings of this kind.⁴² To the extent that the written submissions advanced a contrary position, counsel essentially eschewed it. However, counsel submitted that principles of totality did have a role to play, and that it was in this context that the structure of the periods of disqualification imposed had resulted in the imposition of a penalty which was excessive.⁴³ In essence, counsel submitted that a number of the instances of offending had been "*charged twice*"⁴⁴ in circumstances where the offending formed one course of conduct.⁴⁵ Counsel accepted that Jones should "*receive a*

⁴⁰ PPD at [41].

⁴¹ PPD at [42].

⁴² Transcript 9.333 – 9.353.

⁴³ Transcript 11.414 – 11.418.

⁴⁴ Transcript 10.388.

⁴⁵ Transcript 10.393.

sentence”⁴⁶ but submitted that the level of accumulation in the penalties imposed had resulted in an excessive penalty when viewed overall.⁴⁷

26. In terms of the offending itself, counsel acknowledged its objective seriousness, but emphasised that this was not a case of any horse being injected with a performance enhancing substance.⁴⁸ He also relied upon Jones’ disciplinary history which he described as exemplary.⁴⁹

Submissions on behalf of the Respondent

27. In written submissions, counsel for the Respondent submitted that criminal law principles of *autrefois convict* had no role to play in matters of this nature.⁵⁰ As I have noted, counsel for the Appellant ultimately conceded that this was correct and so I do not need to address the issue further. In terms of penalty generally, counsel submitted that Jones’ offending was objectively serious, particularly having regard to the following evidence which was unchallenged:

- (i) the offending involved a consistent practice of improperly injecting horses on race day, and then presenting them to race, such conduct being of a kind which had a significantly negative impact on racing;⁵¹
- (ii) Jones had instructed, and regularly reminded, his employees that this practice was to be followed generally;⁵²
- (iii) Jones was aware that the practice contravened the rules;⁵³
- (iv) horses were injected with *Diurex*, a diuretic and a masking agent, to avoid bleeding, conduct which was not only detrimental to the image of racing, but which conferred an unfair advantage;⁵⁴

⁴⁶ Transcript 10.393.

⁴⁷ Transcript 11.400 – 11.417.

⁴⁸ Transcript 11.435 – 11.438.

⁴⁹ Transcript 11.434.

⁵⁰ Submissions at [4] – [27].

⁵¹ Submissions at [32].

⁵² Submissions at [33].

⁵³ Submissions at [34].

⁵⁴ Submissions at [35] – [36].

- (v) Jones took steps to deliberately conceal the practice from Stewards, principally by using *Diurex* on race day which was difficult to detect;⁵⁵
- (vi) Jones did not plead guilty, and had lied in material respects.⁵⁶

28. Taking all of these matters into account, it was submitted that a “*very long*” period of disqualification was warranted, and that the period imposed by Stewards was appropriate.⁵⁷ Counsel sought to make good that submission by extensive references to previous decisions of this Tribunal, as well as others.⁵⁸

29. In oral submissions, counsel expanded on these propositions and submitted that:

- (i) it would be erroneous to think of the charges against Jones in terms of “substantive” charges and “back up” charges, such concepts having their origin in the criminal law but having no place in proceedings of this kind;⁵⁹
- (ii) it nevertheless remained necessary to apply analytical tools and principles drawn from the criminal law, including principles of totality, concurrency, and proportionality;⁶⁰
- (iii) a primary end which was sought to be met by the imposition of a penalty was the protection of the racing industry through general and specific deterrence rather than punishment;⁶¹
- (iv) the objective seriousness of the offending, and Jones’ level of culpability, were both increased due to Jones’ actions in involving his employees who were in a position of vulnerability in the sense of being expected to follow their employer’s directions;⁶²

⁵⁵ Submissions at [37].

⁵⁶ Submissions at [38].

⁵⁷ Submissions at [43].

⁵⁸ Submissions at [47] – [52].

⁵⁹ Transcript 19.753 – 19.764.

⁶⁰ Transcript 19.768 – 19,770.

⁶¹ Transcript 20.783 – 20.785.

⁶² Transcript 20.815 – 21.818.

- (v) Jones knew he was breaching the rules,⁶³ but took deliberate steps in an attempt to conceal his conduct from the Stewards,⁶⁴ and lied about such conduct;⁶⁵
- (vi) although not performance enhancing in a strict sense, injecting horses to stop them from bleeding necessarily conferred an unfair advantage, particularly in light of AR79(4)(b);⁶⁶
- (vii) the conduct of Jones' appeal had proceeded, in effect, as one in respect of penalty, absent any expression of contrition or remorse, any admission of culpability, and any testimonial evidence tendered on his behalf.⁶⁷

CONSIDERATION

30. It is correct to say that AR 249 and AR 254 are, at least at a level of generality, directed to prohibiting the same kind of conduct. However that fact does not, as a matter of discretion, prevent Stewards from taking the course that they did in this case in terms of the charges which were brought. However, if that course is taken, and some or all of the charges are found proved, it is important that Stewards take care to apply the principle of totality when determining penalty. Put simply, that principle requires that the total penalty which is ultimately imposed be just and appropriate. In other words, when imposing a penalty for multiple offences, it is not a matter of doing the arithmetic and imposing a penalty which the arithmetic produces. The ultimate question to be asked is what is the appropriate total penalty for the entirety of the offending, bearing in mind that any penalty should not exceed that which is reasonably necessary and appropriate.⁶⁸

⁶³ Transcript 21.823.

⁶⁴ Transcript 22.857.

⁶⁵ Transcript 22.863.

⁶⁶ Transcript 22.864.

⁶⁷ Transcript 22.866 – 22.893.

⁶⁸ See generally *Principles of Sentencing* (D A Thomas) at 56-7; see also *Mill v The Queen* (1988) 166 CLR 59; *Pearce v The Queen* (1998) 194 CLR 610; [1998] HCA 57.

31. There is no doubt that the principle of totality applies to the penalty regime which operates in matters of the present kind.⁶⁹ There is also no doubt that both the Stewards and the Panel turned their respective minds to that principle when dealing with the matter. Needless to say, I have done the same, in circumstances where the obvious focus of the appeal has been the charges in respect of which periods of disqualification were imposed.
32. In my view, a conclusion that those charges reflect a high degree of objective seriousness is inescapable for a number of reasons.
33. First, the offending was inherently serious. Whilst *Diurex* is not a performance-enhancing agent in the strict sense, the submission by counsel for the Respondent that it nevertheless confers an unfair advantage is a point well made. That is particularly so in light of the provisions of AR 79)(4)(b).⁷⁰
34. Secondly, there was a not inconsiderable degree of premeditation on Jones' part. That is reflected in the fact that *Diurex* was the preferred option for injection on race day because it was more difficult to detect.⁷¹ Jones clearly knew that conduct of this kind was prohibited and his use of *Diurex* was a step taken in an attempt to prevent Stewards from discovering the offending. As the Panel properly pointed out, knowledge of, and compliance with, the rules are basic components of the privilege of holding a licence.⁷² In the present case, Jones clearly knew the rules, and deliberately and consciously breached them.
35. Thirdly, whilst I accept that the offending reflects a course of conduct which is relevant to the application of the principle of totality, it is also important to consider that such course of conduct was not fleeting. It extended over some months, and involved 2 horses being injected on multiple occasions.

⁶⁹ *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450; [2022] HCA 13 at [45].

⁷⁰ PLD at [10] and see [16] above.

⁷¹ See the evidence referred to at [16] above.

⁷² See [18] above.

36. Fourthly, that course of conduct was underpinned by the fact (reflected in the ultimate finding of the Panel which I did not understand to be challenged on this appeal) that there was a practice at Jones's stables, of which Jones knew and approved, and which he directed, that horses prone to bleeding would be injected with *Diurex* before they raced.⁷³
37. All of those factors support the conclusion that Jones' conduct, apart from falling at a high level of objective seriousness, is conduct of a kind which is detrimental to the image of racing, and which has the clear capacity to erode public confidence in the integrity of the racing industry. For that reason, general deterrence is a primary consideration. It is necessary to send a clear message to all industry participants that conduct of this kind is likely to meet with substantial penalties.
38. Jones has advanced little in the way of a subjective case. He chose to defend the charges which, of course, was his right. But the consequence of that is that he cannot avail himself of the discount to which he would have been entitled had he entered pleas of guilty. Moreover, there is no evidence of any remorse, in circumstances where a finding has been made (which, again, is not challenged on this appeal) that some of the evidence he gave in relation to the offending was false. I have taken into account Jones' disciplinary history which is to his credit, and which satisfies me that personal deterrence has little role to play in determining penalty. That is the primary, if not sole, subjective factor in his favour.
39. The written submissions of the Respondent made lengthy references to previous determinations of this Tribunal, and other similar Tribunals, in matters of this general nature. I have read those submissions carefully, and the decisions to which they refer. Great care needs to be taken when engaging in comparative exercises by reference to previous decisions. That is simply because factually, no two cases will ever be the same. It is for that reason that I have previously

⁷³ See [15] above.

observed that when considering previous determinations in the context of assessing penalty, what must be sought to achieved is consistency in the application of principle, not numerical equivalence in the penalty imposed.⁷⁴ Whilst those observations have been made in determining questions of penalty in the Greyhound and Harness Racing industries, they are no less applicable here.

40. However, in deference to the submissions put on behalf of Jones, I should make specific reference to the decision of the Panel in *White and Borg*⁷⁵ upon which counsel placed significant emphasis. In that case, the Appellant White was charged with:

- (i) a breach of AR 254(1)(a)(ii) committed on 9 October 2021 in respect of four separate horses (to which he pleaded guilty);
- (ii) a further breach of the same rule committed on 22 September in respect of 1 horse (to which he pleaded not guilty but was found guilty);
- (iii) a further breach of the same rule committed on 25 September 2021 in respect of 1 horse (to which he pleaded not guilty but was found guilty);
- (iv) a breach of AR 252(1) in respect of a series of substances (to which he pleaded guilty);
- (v) a breach of LR 82(1) in respect of the employment of an unregistered stable hand (to which he pleaded guilty);
- (vi) a breach of LR 51(2) in respect of a failure to report the fact that he had been charged with a criminal offence (to which he pleaded guilty).

41. The Panel imposed a disqualification of 18 months. It is evident, having read the Panel's reasons, that there were two particular matters which had a bearing on

⁷⁴ *Duncan v Greyhound Welfare and Integrity Commission* (17 February 2024) citing *Hili v R*; *Jones v R* [2010] HCA 45; (2010) 242 CLR 520 at [38]-[39]; see also *Ross v Harness Racing New South Wales* (17 February 2024).

⁷⁵ A decision of 6 April 2022 at AB 260 and following.

that determination. The first, was the fact that the Appellant had what was described as a “*good record over 45 years in the industry*”.⁷⁶ The second, was the Panel’s conclusion that it was “*arguable that the conduct [in (i), (ii) and (iii) above] can be seen as closer to one course of conduct over a relatively confined period of time*”.⁷⁷ Bearing in mind the limitations on comparative exercises to which I have already referred, but in light of the emphasis placed on this determination by counsel for Jones, I would simply make the following observations.

42. The first, is that Jones is entitled to have his good record taken into account, and I have done so. However, for the reasons I have pointed out, there is little else in terms of subjective circumstances upon which he can rely. It is also important to bear in mind that the weight to be given to subjective circumstances cannot result in the imposition of a penalty which does not properly reflect what is assessed to be the objective seriousness of the offending. In this case, for the reasons I have stated, the objective seriousness of the offending is high.

43. The second, is that the Appellant in *White* pleaded guilty to at least one of the charges which encompassed injections having been given to a number of horses. It is to be inferred that the Panel took that plea into account.⁷⁸ Jones chose to defend the majority of the charges. Bearing in mind that a plea of guilty necessarily attracts a discount (generally accepted to be 25%), that is an important distinction between the two cases.

44. The third, is that the course of conduct in which the Appellant in *White* engaged, and upon which the Panel obviously placed significant emphasis, extended over 2 weeks, as opposed to several months.

45. The fourth, is that there is no indication in the findings of the Panel in *White* that a system of injecting horses was operating generally within the Appellant’s stables

⁷⁶ At [18].

⁷⁷ At [20].

⁷⁸ At [10](d).

to his knowledge and at his direction. Such a conclusion was reached in the present case. As I have pointed out, the existence of such a system underpinned Jones offending.

46. The fifth, is that whilst the Panel seemingly did not accept the explanation for the offending which was advanced by the Appellant in *White*,⁷⁹ there was no evidence of premeditation of the kind I have identified in Jones' case.

47. Given those factors, I am unable to accept the submission advanced on behalf of Jones that the conduct of the Appellant in *White* “looks objectively much more serious than that of Jones”.⁸⁰ In my view, the converse is the case. Given the number of distinctions between *White* and the present case, the decision in *White* does not constitute any form of yardstick by which the penalty imposed on Jones should be assessed, and it does not support the proposition that the penalty imposed on Jones should be reduced.

48. In my respectful view, there is something of a displacement between the factors cited by the Panel as being relevant to penalty, and the penalty which was ultimately imposed. In my view, that penalty does not reflect the objective seriousness of the offending in charges 1 – 6, and 9 – 16. That is particularly so where the mandatory minimum penalty for those offences is one of 6 months disqualification.

49. For all of these reasons, the penalties imposed by the Stewards are in my view appropriate and should be imposed. This was the Respondent's position on the appeal, of which Jones was on notice. No issue of a denial of procedural fairness arises.⁸¹

50. The formal orders are set out at the conclusion of these reasons.

⁷⁹ At [17].

⁸⁰ Transcript at 13.513.

⁸¹ *Ings v Racing New South Wales* [2022] NSWSC 1127 at [85] – [89] per Basten AJ.

THE APPEAL BROUGHT BY RODGER

The charges and penalties imposed by Stewards

51. The charges against Rodger, and the penalties imposed by Stewards, may be summarised as follows:

CHARGE	AR	DATE	PLEA	FINDING	PENALTY
1	254(1)(c)(1)	14/10/22	Not guilty	Guilty of attempt	10 months
2	254(1)(a)(1)	20/4/23	Not guilty	Not guilty	--
3	254A	31/8/22 – 28/4/23	Guilty	Guilty	F \$750.00 (suspended)

52. The focus of the present appeal is charge 1.

The proceedings before the Panel

53. Before the Panel, Rodger contested the finding of guilt in respect of charge 1, and the penalties imposed for charge 1 and charge 3.⁸² The Panel was satisfied on the whole of the evidence that Rodger was guilty of charge 1.⁸³ The basis on which that conclusion was reached is discussed further below.

54. The Panel partially allowed Rodger's appeal in terms of the penalty imposed for the offence contrary to AR 254(1)(c). The Panel ordered that disqualification be immediately lifted, having reached the conclusion that the period which had been served was sufficient.⁸⁴ The appeal against the severity of the penalty imposed for charge 3 was dismissed, with a confirmation that the fine imposed be wholly suspended.⁸⁵

⁸² PLD at [2].

⁸³ PLD at [61].

⁸⁴ PPD at [47]; [49](a).

⁸⁵ PPD at [49](b).

The ground of appeal

55. Rodger asserts, in effect, that the Panel's finding in respect of charge 1 was not supported by the evidence, and that the reasoning of the Panel was "*flawed*".⁸⁶ On that basis, she seeks an order that she be found not guilty of that charge.

56. The approach taken in the written submissions filed on behalf of Rodger, at least to the extent that those submissions assert that the Panel's reasoning was flawed, tends to reflect something of a misunderstanding about the conduct of an appeal before this Tribunal. Rodger's appeal, like that of Jones, proceeds before me *de novo*.⁸⁷ It is not incumbent upon Rodger to establish a flaw in the Panel's reasoning. Rather, it is necessary for me to examine the evidence afresh and make a determination as to whether, in my view, it establishes the commission of the offence.

The facts of Rodger's offending

57. I draw the following summary from the reasons of the Panel and the determination of the Stewards.

58. At the material time, Rodger was employed in Jones' stables.⁸⁸ The case against her was that in circumstances where she and Kelly were the only two persons who were sufficiently experienced to be able to administer diuretics intravenously,⁸⁹ she had attempted to inject *Inferno Miss* with *Diurex* on 14 October 2022.

59. The Panel acknowledged that there was no direct evidence of this conduct having occurred,⁹⁰ and noted that the Stewards had sought to draw an inference that this was the case from the fact that Kelly's partner, Casey Hudson, had seen Rodger with a needle, and then saw the needle disposed of in a bin.⁹¹ The Stewards also

⁸⁶ Submissions at [27].

⁸⁷ *Racing Appeals Tribunal Act 1983* (NSW) s 16(1).

⁸⁸ PLD at [2].

⁸⁹ PLD at [6].

⁹⁰ PLD at [58].

⁹¹ PLD at [58].

relied upon an invoice which included a charge for a bleeding supplement by reference to a date of 14 October 2022.⁹²

60. The Panel noted that Rodger had relied upon “*difficulties and inconsistencies with the evidence of Casey Hudson*”.⁹³ Whilst acknowledging the force of that submission, the Panel was nevertheless satisfied that the offence had been established, and reached that conclusion by reference to various aspects of the evidence before it.⁹⁴

A summary of the evidence

The evidence of Kelly

61. Kelly was interviewed by investigators on 2 January 2023 and said the following:⁹⁵

Hadley *So you’re saying on 14 October 2022 Tracey Rodger injected the horse?*
Kelly *Yeah.*

Hadley *With?*
Kelly *Diurex.*

Hadley *Diurex?*
Kelly *Yeah.*

Hadley *And in the vein you said?*
Kelly *Yeah, in the vein.*

Hadley *And 20ml?*
Kelly *Yeah. 25ml.*

Hadley *25ml, okay.*
Kelly *Yeah.*

62. In an email to Stewards prior to the commencement of their Inquiry, Kelly stated:⁹⁶

I never injected the horse Inferno Miss with Diurex [on 14 October 2022]. I walked into the box to get Inferno Miss but she would not let me catch her. I gave the head collar and lead to Olivia and I then proceeded to head back

⁹² PLD at [58].

⁹³ PLD at [59].

⁹⁴ PLD at [60].

⁹⁵ TB 454.365 – 455.388.

⁹⁶ TB 68.160 – 68.172.

to the entrance to the stables by the horse truck awaiting for Inferno Miss to be loaded. Tracey Rodger and Olivia Fitton had gone to get Inferno Miss from her Stable Box. I cannot comment on whether the horse received an injection whilst in her box on that day prior to being loaded. My partner was at the stables on the specified date and will also be able to confirm that. I myself did not administer any injection of any sort to Inferno Miss prior to her leaving for the races.

63. Kelly told the Inquiry that he had seen Rodger perform injections.⁹⁷ He said that on 14 October 2022, he went in to give *Inferno Miss* an injection, but did not observe Rodger “*actually getting the needle into the horse’s neck and squeezing it in there*”.⁹⁸

The evidence of Rodger

64. Rodger was interviewed on 27 June 2023 by the Respondent’s investigators. She said that she was a foreperson in Jones’ stables⁹⁹ and said that she “*didn’t give anything*” to *Inferno Miss*.¹⁰⁰ She was then specifically questions about the events of 14 October 2022:¹⁰¹

Hadley I will tell you now that we’ve been monitoring and recording the use of Diurex in your stable.

Rodger Yeah

Hadley And it’s evident you have been using that product over a period of time. What can you tell me about this?

Rodger **Well I haven’t administrated it.**

Hadley **Did you administer Diurex to Inferno Miss on 14 October 2022 before it travelled to Taree to take place in race 8 where it placed third on that race day?**

Rodger **I couldn’t tell you. That’s last year.**

Hadley You don’t recall administering Diurex on a race day before it was loaded onto the float?

Rodger Onto the float?

Hadley Yeah.

Rodger No.

⁹⁷ TB 79.685 – 79.690

⁹⁸ TB 91.1220.

⁹⁹ TB 480.36.

¹⁰⁰ TB 487.343 – 487.346.

¹⁰¹ TB 492.555 – 493.646,

Hadley Before it was loaded onto the float in the stable.
Rodger **Ha, ha. Now I know where you're coming from. No, David Kelly did. That's right, yes. He was – yeah I was holding the horse.**

Hadley **So you were holding the horse when David Kelly –**
Rodger **Yes.**

Hadley Did you take the horse to Taree?
Rodger I didn't know what it was, but, yeah, now it makes sense. I don't know if I did go to Taree.

Hadley So you don't know what it was, but you've been ordering the substance?
Rodger David Kelly was there and I – at the end of the day he's our foreman. He was causing – he caused a lot of trouble, so I stayed home for months and I didn't interfere with anything. He tried to ruin our stable. Now I know where we're going with this.

Hadley **So your evidence is that you don't recall that exact date of around 14 October 2022 the horse was engaged to race at Taree, race 8. It placed actually third on that day. Did you administer Diurex to Inferno Miss on that day?**

Rodger **No I didn't, no.**

Hadley **Okay, but your evidence is that you held the horse?**
Rodger **I held the horse. I don't know anything what happened because Dave – Dave did everything.**

Hadley Can you take me through what Dave did? Just explain to me what Dave did.

Rodger On that day?

Hadley Yes.
Rodger **Just asked me to hold the horse.**

Hadley **Yeah, and what did you see him do?**
Rodger **Inject her.**

Hadley And you knew that was Inferno Miss?
Rodger Yes.

Hadley And do you remember if you travelled with that horse to Taree?
Rodger No, I – I don't know if I did because he went to the races too, so I couldn't tell you.

Hadley You can't remember if you turned up at Taree on that day?
Rodger No, I'd have to – no, I don't,

Hadley The horse placed third. You don't recall that?
Rodger Honestly, I don't know if I went because he went. He went to the races too, so I don't – I don't know (emphasis added in each case).

65. Rodger said that she held the horse standing in the “middle”¹⁰² and that she did not think to notify Stewards about what had occurred because she “*did not want to interfere with anything that David did*” as she was “*trying to keep the peace*”.¹⁰³

The following questions were then put to her:¹⁰⁴

Hadley So the evidence that we’ve obtained is that on 14 October 2022 you’re the person that actually injected the horse and the horse was held by another person. What can you tell me about that?

Rodger **Well no, that’s not true. Dave was there.**

Hadley Well David might have been there, but the evidence we’ve obtained is that he didn’t actually inject the horse. He had trouble finding the vein or treating the horse so you actually did it for him.

Rodger **No** (emphasis added).

66. Rodger appeared before the Inquiry, represented by a Solicitor, Mr O’Sullivan.¹⁰⁵

Prior to the commencement of the Inquiry, she had submitted a written document in which she again denied having injected any horse on 14 October 2022.¹⁰⁶

67. In her evidence before the Inquiry, Rodger stated that she could not recall treating any horse with *Diurex*.¹⁰⁷ Contrary to what she had said when interviewed, she then gave the following evidence:¹⁰⁸

Rodger **David didn’t even inject.** He hasn’t done anything to say that.

Chairman **Well, you gave evidence that he injected? When you were interviewed you gave evidence that he has.**

Rodger **Yes, because I was trying to get back at him because I thought he was hurting us again.**

Chairman You gave clear evidence that the only two people who could inject was David Kelly and yourself and you distanced yourself from what happened

¹⁰² TB 494.679.

¹⁰³ TB 495.716 – 495.720.

¹⁰⁴ TB 496.742 – 496.753.

¹⁰⁵ TB 65.

¹⁰⁶ TB 67.133.

¹⁰⁷ TB 106.1903 – 106.1915.

¹⁰⁸ TB 114.2285 – 115.2322.

in the stable there. You said David Kelly did everything. David Kelly did the injections?
 Rodger He did.

Chairman He's told us that. **So that's the truth, is it?**
 Rodger **No.**

Chairman Who did it? Who did the injections?
 Rodger **No-one injected on race day or the day before.**

Chairman Well who did the injections during the week?
 Rodger I would say Dave would have.

Chairman Well, how do you know? If you said that you weren't there, how do you know when he gave the injections?
 Rodger Well, there's no way that he did it on race day.

Chairman How do you know that?
 Rodger Well, if he did, no-one else knew in the stable.

Chairman His evidence is that he was told it had to be done.
 Rodger No, absolutely not (emphasis added).

68. Subsequently, Rodger said:¹⁰⁹

I don't care what Mr Kelly says we don't, as far as we have, our guidelines, we do not inject on race day or the day before.

69. She was then asked:¹¹⁰

Chairman Can we go to 14 October. You gave evidence that you were present that day and you give [sic] evidence that David Kelly injected Inferno Miss with Diurex?
 Rodger **And that was incorrect. I was having –**

Chairman So you retract that evidence now?
 Rodger Absolutely I do.

Chairman Why? Was it a lie?
 Rodger It was. I was trying – He was – **Because I wanted to hurt him** because he was hurting me. He hurt me for months and I don't even know what I did to him for him to –

¹⁰⁹ TB 122.2655.

¹¹⁰ TB 126.2846 – 127.2868; TB 128.2901 – 128.2913.

Chairman **So you told Mr Hadley and untruth to get to David Kelly, is that what you're saying?**

Rodger **Yes because he was trying to get at us and I don't know why. I know we had misunderstandings but I didn't think it would lead to this.**

Chairman So why did you single out 14 October?

Rodger Mr Hadley said 14 October. I didn't.

...

Chairman Right. So we look at the transcript here. You were very adamant, Ms Rodger, that on the 14th David Kelly was the person who injected in your presence, injected *Inferno Miss*.

Rodger Because Mr Hadley said that David said that I did it. So that is why.

Chairman Sorry?

Rodger Mr Hadley said that Dave said that he couldn't get the vein so he gave me the needle. So he was trying to hurt me so I was trying to hurt him. Because he had already hurt me before (emphasis added).

The evidence of Olivia Fitton

70. Olivia Fitton was employed by Jones as a stable hand at the relevant time.¹¹¹ When interviewed by investigators on 27 June 2023,¹¹² she said that Rodger was one of two persons who usually administered injections.¹¹³ She recalled holding horses whilst Rodger injected them,¹¹⁴ and said that the first time she held *Inferno Miss*, Kelly was “*probably*” injecting it.¹¹⁵ However, she then said that on any occasion on which *Inferno Miss* was going to the races, Rodger was responsible for injecting it.¹¹⁶

71. Ms Fitton said that she could not recall the last time Rodger had injected *Inferno Miss* when the horse was racing, but was positive that it was Rodger who had done so.¹¹⁷ She was then asked the following:¹¹⁸

¹¹¹ TB 525.40.

¹¹² Commencing at TB 525.

¹¹³ TB 526.79 – 527.107.

¹¹⁴ TB 527.111.

¹¹⁵ TB 530.257 – 530.264.

¹¹⁶ TB 531.314 – 531.323.

¹¹⁷ TB 532.69 – 533.388.

¹¹⁸ TB 537.590 – 539.684.

Hadley So you said you saw Tracey do it to Inferno. When was that?
Fitton It was one of the times when David was here that Tracey came in and she did it, but I can –

Hadley So that's the allegation on 14 October 2022. Can you tell me what happened? So David was in the box?
Fitton Yeah, he did it in the box and he did it, but we had to get Tracey or someone else to help because she's very stupid to inject.

Hadley So who had the needle in her hand?
Fitton I'm pretty sure it was David, yeah.

Hadley Did he have trouble getting the needle in and then did he pass it to Tracey?
Fitton He got it in eventually, but, not, she's pretty – once he put it in he finished it.

Hadley He finished it?
Fitton Yeah. Tracy did do it one time, but I can't remember which one.

Hadley You can't remember. Was that the same prep?
Fitton Yeah.

Hadley Or was it this year?
Fitton No, same prep last time.

Hadley Last time, okay. Do you know where the horse went when David put it in its neck, where it raced?
Fitton Oh, no.

Hadley No, you can't remember. It's a long [time] ago. I understand that.
Fitton Yeah.

Hadley And so the horse was playing up in the box. Is that right?
Fitton Yeah.

Hadley And you were holding the horse?
Fitton Mm hmm. We had to put other, I think, blinkers on it or just push her neck. We were doing the stall with a stallion chain because she likes the – she was okay in the stall.

Hadley So Tracey knew what was going on? Did you see Tracey? Was Tracey watching the needle go in the neck.
Fitton Yes.

Hadley Was she aware of what was happening?
Fitton Yeah.

72. When giving evidence before the Inquiry, Ms Fitton’s position changed markedly. She maintained that she had lied in answering questions when interviewed, to the point where little or nothing of what she had said on that occasion was true..¹¹⁹

The evidence of Lisa Fitton

73. Lisa Fitton, who worked as a stable hand in Jones’ stables, is Olivia Fitton’s mother, and was interviewed by investigators on 27 June 2023.¹²⁰ Ms Fitton said that she had never seen Rodger inject a horse on race day¹²¹ but had held horses so that Rodger could administer treatments.¹²²

74. Before the Inquiry, Ms Fitton said that she was “*positive*” that she had never held a horse that was injected on race day,¹²³ and said that she had never seen a horse injected on race day.¹²⁴

The evidence of Casey Hudson

75. Casey Hudson is Kelly’s partner and gave evidence before the Inquiry.¹²⁵ She said that she recalled the events of 14 October 2022¹²⁶ before being asked the following:¹²⁷

Chairman ... Could you explain to the Stewards in your own words what occurred in your presence, what you observed if, indeed, you did observe anything?

Hudson Yes. So we go there to drop David off at the stables. I had our little one with us. So we never stood too close to the boxes in case horses ran out or things like that, but I was close enough eye view to see that Inferno Miss wasn’t having any sort of interest with David going near her with the injection. So he just left out of the box, got Olivia to bring the horse out. He went back down, stood near the horse truck. I waited because I had the little child.. You

¹¹⁹ TB 150.3916; 151.3966; 151.3988; 152.4007; 152.4023; 154.4116. 156.4210; 169.4420.

¹²⁰ Commencing at TB 542.

¹²¹ TB 546.227; TB 547.268.

¹²² TB 547.253.

¹²³ TB 171.4960 – 171.4968.

¹²⁴ TB 174.5096.

¹²⁵ Commencing at TB 183.

¹²⁶ TB 184.225.

¹²⁷ TB 184.227 – 187.367.

know not to go too close to horses. So I waited for them to walk inferno miss past and down and at that stage **that was when Tracey had the needle.**

Chairman
Hudson

Right
And I can't I didn't see whether she gave the needle or not but by the time the horse had got to the truck, the syringe was empty.

Chairman

Can we just wind it back, so when you were there that day basically what you're saying is that you dropped Mr Kelly off and that you remained at the scene. I take it you have experience in the industry?

Hudson

Yes.

Chairman

In respect of your observation of Mr Kelly attempting to treat the horse, what can you say? What did you actually see Mr Kelly do?

Hudson

Well, he went in the box but she was a horse that it didn't matter if it was a multivitamin or whatnot, she just didn't like needles. So when he went there she was rearing up and doing that sort of stuff and she just wasn't having a bar and he didn't want to get himself hurt or the strapper hurt so just went –

Chairman
Hudson

Who was the strapper with the horse?
Olivia

Chairman
Hudson

Olivia Fitton?
Yes, Yep. I think that's her last name.

Chairman

When you saw Mr. Kelly go into the box, how long after you'd arrived did this occur where he's, on your evidence, attempted to inject the horse?

Hudson

Oh, within five minutes of us being at the stables.

Chairman

Was the substance he was endeavouring to inject the horse with drawn up into a syringe?

Hudson

Yes.

Chairman
Hudson

Did you have an understanding of what was occurring?
Yes.

Chairman

What was your understanding of what was occurring, whether it was in breach of the rules?

Hudson

I don't technically know that side of things too much, but I knew that they were doing an injection that was for bleeders. As far as what I knew, I knew what it was used for.

Chairman

How do you know that? Were you told that or did you just know that from your own experience?

Hudson

I just know that from being in the industry.

Chairman *So you've seen situations where horses have been treated with bleeding treatment before they go to the races?*

Hudson *No before the races, no.*

Chairman *You said Olivia was with the horse?*

Hudson *Yeah.*

Chairman ***After Mr. Kelly failed in his attempts to inject the substance into the horse, you say that that needle and syringe was handed to Tracey Rodger?***

Hudson ***Yes.***

Chairman ***How far away would you have been? Was the horse still in the box at that stage?***

Hudson ***Yeah. He gave it to her before the horse went out of the box, but he went back down to the truck and was opening the bay getting the truck ready for the horse. Tracey wasn't in the box, but then she was up near the horse and then her and Olivia were walking next to each other to get the horse on the truck. And I didn't see an injection go in, but by the time had loaded on the truck, the syringe was empty.***

Chairman ***So you say the horse was taken out of the box and what, it's an assumption that you've made that the horse was injected between there and the truck?***

Hudson ***Yes.***

Chairman ***You say that the syringe and needle was handed to Tracey Rodger and your evidence that you did not see her inject the horse, but how did you observe that the syringe was empty?***

Hudson ***Well after the horse had gone on the truck the syringe was thrown in the bin and it was empty.***

Chairman *Where was the bin?*

Hudson *Right next to the, sort of in proximity to where the horse truck pulls up to load horses.*

Chairman ***Did you observe the syringe in the bin or did you just see someone throw it in the bin? How did you observe that it was empty?***

Hudson ***I saw it be thrown in the bin.***

Chairman ***So you didn't actually look at it in the bin?***

Hudson ***No.***

Chairman ***You just saw it being thrown in the bin?***

Hudson ***Yes.***

Chairman **So your evidence is that whilst you didn't see Tracey Rodger inject the horse, you saw the syringe, which you give evidence was empty, discarded into the bin?**

Hudson **Yes.**

Chairman *Then what happened after that?*

Hudson *The horse was loaded on the truck and, well, we left while they were loading the horse on the truck.*

Chairman **In relation to the evidence you've given today, is that in accordance with the fact or have you been discussing this with Mr Kelly?**

Hudson **No we haven't discussed anything. This is facts.**

Chairman **So Mr. Kelly asked you to give evidence of what you saw and observe that day?**

Hudson **Yes** (emphasis added in each case).

76. It was put to Ms Hudson that she was “*making all this up*”, which she denied.¹²⁸ It was also put to her that at no time did Kelly have a needle in his hand that morning, which she also denied, stating that she saw Kelly “*draw up the needle*”.¹²⁹

Documentary evidence

77. On 31 October 2022, an invoice was issued from Jones' stables to Matt and Vicki Lawson in relation to fees for the training of *Inferno Miss*.¹³⁰ Omitting the details of the cost, it contains the following entry:

Procedure – Bleeding supplement (s2 at \$47.77). 14/10/22 – 30/10/22.

Submissions on behalf of Rodger

78. The written submissions filed on behalf of Rodger revolved largely around the evidence of Hudson, and why that evidence should not be accepted.¹³¹ Having cited various aspects of Hudson's evidence, it was submitted that the “*absurdity*” of the Panel's reasoning did not satisfy the applicable standard of proof.¹³²

¹²⁸ TB 190.471; 190.506.

¹²⁹ TB 521.

¹³⁰ TB 575.

¹³¹ Submissions at [25].

¹³² Submissions at [26].

79. In oral submissions, counsel for Rodger accepted that there was evidence which established that there was a practice of giving horses *Diurex* on race day.¹³³ However, it was submitted that the evidence as a whole did not support a conclusion that Rodger was involved in that practice in any way, and that the evidence supported a conclusion that it was Kelly who injected the horse on 14 October.¹³⁴ Counsel submitted that on a proper analysis, the evidence did not rise to the point where I could be satisfied that any injecting took place on a race day.¹³⁵ Counsel submitted that, at its highest, the evidence established that Rodger had administered an injection on one occasion but that such evidence did not establish that the occasion on which she did so was in fact a race day.¹³⁶ Counsel accepted that Rodger may have had the opportunity to administer an injection on race day, but emphasised that this was not the charge brought against her.¹³⁷

80. Counsel further submitted that the invoice did not support the charge against Rodger. He submitted, in particular, that the entry contained no evidence to support an allegation that any substance was administered to *Inferno Miss* on 14 October 2022 and that the only inference that could possibly be drawn from the entry set out above was that a bleeding supplement was administered twice during the period stated, thus leaving open the possibility that the administration could have occurred at any time during such period.¹³⁸

81. Finally, counsel submitted that there was no proper basis on which to conclude that Rodger had been untruthful in her evidence,¹³⁹ nor was there any basis to prefer the evidence of Kelly over that of Rodger.¹⁴⁰ It was submitted that even if Kelly's evidence was preferred, he did not give any positive evidence that the

¹³³ Transcript 3.85.

¹³⁴ Transcript 4.138.

¹³⁵ Transcript 4.150.

¹³⁶ Transcript 4.154 – 4.160

¹³⁷ Transcript 5.185.

¹³⁸ Transcript 6.215 – 6.229.

¹³⁹ Transcript 6.230 - 6.239.

¹⁴⁰ Transcript 6.240

injection in question had occurred.¹⁴¹ Counsel also relied on the evidence of Ms Olivia Fitton that she had observed Kelly give the injection.¹⁴²

Submissions on behalf of the Respondent

82. Counsel for the Respondent pointed to a number of objective facts which, he submitted, supported a conclusion that the charge against Rodger was made out.

83. In oral submissions, counsel emphasised that there were a number of factual findings made by the Panel which were not challenged on this appeal.¹⁴³ I have set out those findings below. Accepting such findings, counsel submitted that there were a series of shortcomings and inconsistencies in Rodger's evidence, in addition to which there was the evidence of Ms Hudson that she had seen Rodger in possession of a needle.¹⁴⁴ Counsel accepted that the evidence of Olivia Fitton was lacking in quality¹⁴⁵ but submitted that on the whole, the evidence was sufficient to establish the charge.

CONSIDERATION

84. Before addressing the evidence, it is appropriate to make three preliminary observations.

85. The first, is that there is obviously no direct evidence of Rodger injecting or attempting to inject *Inferno Miss* on 14 October 2022. The Respondent relies on a combination of circumstances to establish the case against Rodger. Those circumstances must be assessed as a whole. To approach such an assessment in a piecemeal way would be entirely artificial.

86. The second, is that I have not taken into account the evidence of Olivia Fitton. For obvious reasons it is entirely unreliable.

¹⁴¹ Transcript 7.266.

¹⁴² Transcript 7.267.

¹⁴³ Transcript 14.535 and following.

¹⁴⁴ Transcript 16.615 – 16.646.

¹⁴⁵ Transcript 16.666.

87. The third, is that the evidence of Lisa Fitton is general in its terms. For that reason, its probative value is limited.

88. In assessing the evidence, it is convenient to begin by emphasising that Rodger bears no onus whatsoever. She most certainly does not bear any onus to prove that she did not commit the offence. That said, it is open to me to take into account her evidence in determining whether, on the entirety of the evidence, I am satisfied that the charge is made out.

89. Rodger's evidence is redolent with inconsistencies and admitted untruths. When first spoken to by Investigator Hadley she said, in terms, that she had not administered *Diurex*. When the specific allegation was put that she had administered *Diurex* to *Inferno Miss*, she said, in effect, that she had no recollection of doing so. When further questioned, she positively asserted that it was Kelly who administered *Diurex* to *Inferno Miss* and that she was holding the horse. She then confirmed that she did not administer *Diurex* to *Inferno Miss* on 14 October 2022 because Kelly did everything. The inconsistencies in these answers will be self-evident.

90. Subsequently, when giving evidence before the Inquiry, Rodger said that Kelly did **not** inject *Inferno Miss*. She went on to say that **nobody** injected the horse. That was, obviously, diametrically opposed to what she had said previously. Rodger later agreed that she had told untruths to "get to" Kelly, because "*he was trying to hurt [her] so [she] was trying to hurt him*". I am left to conclude, based on her own admissions, that Rodger was prepared to tell untruths to suit her own purposes. For that reason, I regard her evidence as generally unreliable.

91. Kelly's evidence was, in effect, that *Inferno Miss* resisted the needle and that he left Rodger and Olivia Fitton with the horse in her stable box. That is supported by the evidence of Ms Hudson that *Inferno Miss* "*wasn't having any sort of interest with [Kelly] going near her with the injection*". Ms Hudson said that she saw Kelly "draw up" the needle, saw the needle handed to Rodger, and then saw the empty

syringe thrown into the bin. I, of course, have not had the advantage of seeing Ms Hudson give evidence. The mere fact that she is Kelly's partner is not, in my view, a proper basis to simply discard what she has said.

92. In my view, the entirety of the evidence (including the unchallenged findings made by the Panel) is capable of supporting the following facts:

- (i) there was a practice at Jones' stables where horses with a propensity to bleed were injected with a diuretic;
- (ii) that practice extended to injecting horses on race days;
- (iii) two diuretics were kept at the stables, *Lasix* and *Diurex*;
- (iv) the diuretic used on race days was *Diurex* because it was harder to detect;
- (v) only two persons, Rodger and Kelly, were sufficiently experienced, and thus able, to administer those diuretics by injection;
- (vi) accepting that Kelly did not inject *Inferno Miss*, the only other person capable of doing so in terms of experience was Rodger;
- (vii) *Inferno Miss* raced on 14 October 2022 and 30 November 2022 and did not race between those dates;
- (viii) the relevant entry in the invoice was a reference to *Diurex* with a commencement date of 14 October 2022, that being the date on which Rodger allegedly injected, or attempted to inject, *Inferno Miss*;
- (ix) Kelly "drew up" a needle and syringe on 14 October 2022;
- (x) Kelly attempt to inject the horse with the needle;
- (xi) Kelly failed in those attempts and handed to needle and syringe to Rodger;
- (xii) Rodger was seen in possession of a needle in the presence of *Inferno Miss*;
- (xiii) an empty syringe was then seen by Ms Hudson to be thrown into a bin.

93. On the basis of a combination of those facts, I am satisfied that the offence is made out. That conclusion necessarily involves an acceptance of the evidence of Kelly and Ms Hudson over that of Rodger. In this regard, I am not able to accept the submission advanced by counsel for Rodger that there was no basis on which to conclude that that Rodger had been untruthful. Rodger admitted, in

specific terms, that some of what she had said were lies, told in an attempt to hurt Kelly. Indeed, she specifically admitted that she had told investigators an untruth to “*get at*” Kelly.

PENALTY

94. A disqualification of 10 months was imposed by Stewards. The Panel noted that Rodger had been stood down from 30 June 2023 to 22 December 2023, and from 20 June 2024 to 2 August 2024 and considered that the disqualification she had served was sufficient.¹⁴⁶ On 26 June 2024, I refused an application for a stay made by Rodger, which means that the periods of disqualification imposed by both the Stewards and the Panel have, in effect, have expired.
95. Rodger’s offending was objectively serious, there was no plea of guilty, she told untruths before the Inquiry and there is little or no evidence of remorse. I have taken into account her positive disciplinary history, but the objective seriousness of the offending, and the need for general deterrence, leads me to the view that the penalty of a 10 month disqualification imposed by the Stewards is appropriate.

ORDERS

96. In the appeal of Stephen Jones, I make the following orders:
1. The appeal is dismissed.
 2. The penalties imposed by the Stewards are confirmed.
 3. The Appellant is disqualified for a period of 3 years and 6 months, expiring on 22 October 2027.
 4. In addition, the Appellant is fined a total of \$7,500.00.
97. In the appeal of Tracey Rodger, I make the following orders:
1. The appeal is dismissed.
 2. The penalties imposed by the Stewards are confirmed.

¹⁴⁶ PPD at [47].

3. The Appellant is disqualified for a period of 10 months, expiring on 22 August 2024.

THE HONOURABLE G J BELLEW SC

24 February 2025