RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTER OF LICENSED TRAINER ROY McCABE
APPEAL ON PENALTY
IN RESPECT OF ALLEGED BREACHES OF AR 233(a), AR231(1)(b)(iii) and LR 114(2)(d) and LR 114(3)

Appeal Panel:	**Mr P F Santucci – Convenor and Acting Principal Member**
	Mrs J Foley
	Mr T O'Callaghan
Appearances:	**Stewards: M Cleaver**
	Appellant: R Reilly – Hammond Nyugen Turnbull Solicitors
Date of Hearing:	**On the papers**
Date of Reasons:	**17 December 2024**

REASONS FOR DECISION

Introduction

1. **THE PANEL:** The Appellant, licenced trainer Roy McCabe was charged with four charges that are set out in full in a Schedule to these reasons.

2. The gist of the charges are as follows.

3. Charge 1 is a breach of AR 233(a) that arises from a breach of RNSW policy on Major Fractures or Other Major Orthopaedic Injuries, on the basis that between 31 October 2023 and 21 November 2023 the Appellant suspected *Aunty Maree* had a stress fracture to the tibia or pelvis that was not reported to the stewards within seven days, and the horse was returned to ¾ pacework without a satisfactory clear nuclear scintigraphy.

4. Charge 2 is a breach of AR 231(1)(b)(iii) as a result of a failure to provide veterinary treatment to *Aunty Maree* between 20 May 2024 and 23 May 2024 after having observed the horse to be significantly lame and displaying noticeable signs of injury.

5. Charge 3 is a breach of LR 114(2)(d) arises from the same failure to provide veterinary treatment to *Aunty Maree* between 20 May 2024 and 23 May 2024.

6. Charge 4 is a breach of LR 114(3) arises from a failure to take reasonable care to prevent a horse from being subject to unnecessary pain, because in the period of 21 – 22 May 2024 the appellant placed *Aunty Maree* on a horse walker for a period of approximately five minutes.

7. In respect of each charge, the Appellant entered a plea of guilty.

8. The Appellant received the following penalty:

    (a) Charge 1: AR233 – $1000 fine reduced to $500 having regard to the plea and mitigating factors.
    (b) Charge 2: AR231(1)(b)(iii) – 9 months disqualification reduced to 7 months having regard to the plea and mitigating factors.
    (c) Charge 3: LR114(2)(d) - 9 months disqualification reduced to 7 months having regard to the plea and mitigating factors (to be served wholly concurrently with charge 2).
    (d) Charge 4: LR114(3) – 4 months disqualification reduced to 3 months having regard to the plea and mitigating factors.

9. The Stewards determined that charge 3 would be served wholly concurrently with charge 2. Leading to a total disqualification of 10 months commencing the 8 August 2024 and concluding the 8 June 2025.

10. This is an appeal only in respect of penalty.

Evidence on appeal

11. This appeal was conducted on the papers.

12. In addition to receiving the appeal book, the Appellant relied on the following materials:

    (a) Expert Report dated 23 October 2024 from Derek Major Consulting;

(b) References from:

i. Danielle Hamlin dated 16 September 2024;

ii. Kerry Parker dated 14 September 2024;

iii. Peter Knight and Robin Tatham dated 16 September 2024;

iv. Colin Hodges dated 27 September 2024; and

v. Terry Rothery dated 26 September 2024

13. We have also received written submissions in chief and in reply from the appellant, and written submissions from the Stewards.

14. The Panel has had regard to those materials.

15. Despite the identification of the Appellant's submissions as "in chief", it is of course the stewards who bear the onus in any appeal before the Panel, and must establish the appropriateness of the penalty imposed de novo.

Charge 1

16. The facts in relation to Charge 1 are not in dispute. It is accepted that in October 2023 Dr Mary Jane Stutsel had examined the horse and "*would be very suspicious that we've got either a tibial stress fracture or a pelvic stress fracture. She [Aunty Maree] needs to be treated as if she is broken until proven otherwise*"

17. It is also clear that the Appellant's treatment records identified his reason for treatment with "bute" (ie Phenylbutazone) was "pelvis" from 30 October to 3 November 2023.

18. In evidence before the stewards the Appellant accepted that he suspected there was a pelvic fracture. He also agreed that he did not report the fracture to the stewards nor did he arrange for scintigraphy.

19. While it is accepted that the failure to report the suspected fracture and the failure to obtain the scintigraphy, in the expert evidence called by the Appellant from Dr Major it was noted that:

> Whilst nuclear scintigraphy is useful in this area, it is relatively complicated and expensive, and in my hands has only been used on high priced, highly funded, or

> well-performed individuals. It also fails to detect most of the other causes of lameness to which a racehorse is subject.

20. It is not suggested by the Stewards that the breach in respect of this charge led to any further consequences for the horse.

21. The penalty for charge also does not seem to be in dispute.

22. Having reviewed the material we are satisfied that $1000 fine reduced $500 in respect of the guilty plea is an appropriate penalty.

Charge 2 and 3

23. It is accepted by the Stewards that it is the same offending in respect of charges 2 and 3 that amounts to a breach of two rules: one ARR 231(1)(b)(iii), the other LR114(2)(d)

24. The facts in relation to Charges 2 and 3 are that on 6 May 2024 *Aunty Maree* was spelling at a property in Terrabella when an injury occurred through unknown means.

25. According to Mr Rothery who had care of *Aunty Maree* at the time she was in "*absolutely terrific"* form and had fattened up, having only 3 weeks to go on her 6 month spell.

26. Once the injury occurred, we accept the Stewards contention that Appellant did not contact a veterinarian, nor did he attend the property to check on the welfare of the horse. However we consider relevant context for the purposes of penalty (and not an excuse for the failure itself) was the discussion between Mr Rothery and the Appellant [523]-[546] at the time in which the Appellant could not be sure what the problem was, but agreed that a veterinarian should be called.

27. Mr Rotherry's unchallenged evidence was that he had tried to arrange a veterinarian ("*three different vets around Dubbo"*) to attend the property given that the Appellant was in a truck driving to the races. But Mr Rothery was unable to do so.

28. The evidence of Mr Rothery, supported by Dr Major (and agreed by the Stewards in their submissions) was that was a shortage of veterinarians in the area. This is an acknowledged and regrettable situation. While it does not excuse the offending (to which the Appellant has entered a plea of guilty) it is also a significant mitigating factor.

29. It was also in those circumstances that the Appellant then provided some bute for application to the horse with the intention of treating any pain. Dr Major noted that there were circumstances in which animal carers could hold appropriate prescription medications for future use, including bute in circumstances where no vets were available.

30. This was submitted by the Appellant to be a mitigating factor that demonstrated the self-reliance required of country trainers operating in western-New South Wales without the availability of regular veterinary assistance.

31. The Stewards submitted we should not treat it as a mitigating circumstance given it amounted to the Appellant providing a Schedule 4 medication to Mr Rothery without any associated clinical justification, and in the absence of having inspected the horse himself.

32. The Panel is willing to treat the provision of bute as a factor that demonstrates that the Appellant was not intending to mistreat the horse nor to cause it any unnecessary pain. That is relevant in circumstances where there was no other veterinary services available, and accordingly, the administration of bute was likely the only possibility of the horse receiving any pain relief. While it is true as the Stewards point out that in the absence of a veterinary examination it was not possible to identify a precise clinical justification for the application of bute, we consider it was consistent with the Appellant's desire for the horse to be given something to minimise the pain if that were at all possible.

33. Of course it also remains true that another possibility for providing care to the horse would have been to inspect it himself and transport it if possible. The Appellant did eventually do that himself, and transported the horse to Bathurst where it was closer to veterinary care. The Stewards consider that the breach was aggravated because it occurred over a number of days.

34. For that reason the Stewards suggested that the starting point for the penalty should be 9 months.

35. The Panel considers that consistent with *Foran* the appropriate starting point is 6 months subject to consideration of the circumstances of the case that might give rise to either mitigation or aggravation. We do not consider that a starting point of 9 months is warranted and given the circumstances of the absence of veterinary care in the area we are not prepared

to treat the number of days over which the offending took place as a particularly aggravating factor that would justify such a starting point in this case.

Charge 4

36. Charge 4 arises from the fact that the Appellant caused *Aunty Maree* unnecessary pain by placing her on walker.

37. The facts surrounding Charge 4 arise in the course of the same circumstances giving rise to Charges 2 and 3.

38. On 20 May 2024, the Appellant collected the horse from Mr Rotherby in Terrabella and took it back to his Bathurst stables. When it was there the Appellant observed the filly to be lame at a walk and to be in pain.
39. Nevertheless the Appellant placed the filly on the walker on approximately 21 May 2024.
40. On 24 May 2024 the Appellant contacted Orange Veterinary Hospital about the horse's condition, and Dr Ryan Lane attended the stables and euthanised her. Dr Ryan Lane provided a written report.
41. When asked for his explanation of why he put the horse on the walker the Appellant explained [1528]:

> Just to get it out of the box, let her walk around for five minutes, she did have bute in her. You know, she was like, Ashleigh said she was still herself, she was happy, she was eating, she was drinking. She wasn't dragging her back leg, that's for sure.

42. The evidence given was that the walker was at a "turtle pace", for about five minutes.
43. The conduct of the Appellant was obviously wrong (and he has pleaded guilty), and misguided. But it was not calculated to cause the horse additional pain.
44. We agree with the Stewards that the expert evidence called by Dr Major to the effect that walking is sometimes used as a form of rehabilitation does not take matters much further on the facts of this particular case. But we accept it gives some context for why the Appellant may have thought (obviously wrongly) that very light work on the walker may have been beneficial for the horse.
45. It seems to the Panel that the most likely explanation was that the Appellant was ill informed and had not properly turned his mind to the gravity of the potential injury and the appropriate treatment.

46. That is consistent with the following frank exchange before the stewards:

> CHAIRMAN: If she is not suffering from pain because of medication, she might look better on a walker than she would realistically be?
>
> R. McCABE: No.
>
> CHAIRMAN: Is that something you turned your mind to?
>
> R. McCABE: No.

47. In those circumstances we think it is appropriate to approach the starting point for Charge 4 on the basis of the same starting point taken by the stewards being four months.

Consideration

48. It is necessary to take account of all the circumstances of the case, the subjective factors of the Appellant, the fact he has entered a plea of guilty, and the need for general and specific deterrence.
49. The Stewards conceded the following subjective factors weighed in favour of the Appellant:
    (a) The references speak highly of the Appellant's character and his genuine care for horses
    (b) The Appellant has a long career in the racing industry without having ever been charged with similar types of matters,
    (c) The Appellant was forthright and assisted Stewards throughout the entire process,
    (d) The Appellant made full and frank admissions to his failures,
    (e) The Appellant entered a plead guilty at earliest opportunity
50. Moreover, the Stewards further accepted that subjective factors presented before the Appeal Panel are "*considerably more impressive than that provided to the Stewards. Noting, in particular, the steps he has gone to educate himself and the extensive character references*": RS[48].

51. Weighing in favour of a strong penalty however is the need for general deterrence and the need to remain vigilant about the welfare of horse in the care of a licenced person.

52. It is clear in this case that the Appellant's conduct fell well short of what was expected but this was not a case in which there was deliberate cruelty. Rather, the circumstances are best

characterised as carelessness compounded by the need for self-reliance in the absence of ready veterinary assistance. Those circumstances wrongly led the Appellant to a position where he considered he was adequately managing the health and recovery of the horse.

53. Taking all those matters together we have concluded that the appropriate penalty to be served for Charges 2 and 3 is 5 months (being a starting point of 6 months reduced by one month). While the guilty plea deserves recognition and discount as does the unavailability of veterinary care. However, it is true that the failure to obtain veterinary assistance did continue over some days, so no greater discount is warranted. But as will be seen later the subjective factors in the Appellant's case are relevant to the total penalty imposed considered slightly later in these reasons.

54. The appropriate penalty in respect of Charge 4 is 4 months reduced to 3 months disqualification in light of the guilty plea.

55. Having considered each of the charges individually, it remains important for the Panel to consider the "totality" of the penalty imposed to ensure that the imposition of a cumulative sentence is not incommensurate with the gravity of the whole of the offending, and remains consistent with the protective purpose of imposing the penalty

56. In the present case the offending occurred concurrently, with the use of the walker causing pain (Charge 4) occurring at the same time as there was a failure to obtain veterinary assistance (Charge 2 and 3) that had it been obtained may have avoided the circumstances that led to Charge 4. In those circumstances the offending is from a closely related course of conduct, not entirely separate incidents.

57. Moreover the subjective factors in light of the Appellant's favour are strong particularly his willingness to better inform himself of proper treatment, his early guilty plea, and his assistance and frankness before the stewards.

58. For those reasons we consider it appropriate that in respect of Charge 4, part of that penalty should be served concurrently with Charge 2 and 3 as well. We think it appropriate that 2 of the 3 months penalty for be served concurrently. Said another way, the Appellant will only effectively serve an additional 1 month disqualification arising from the penalty for Charge 4.

59. Accordingly, the total penalty is **6 month disqualification and $500 fine.**

60. We have not received any submissions about the date on which the penalty should commence or finish.

61. Accordingly we make the following orders:

    1. Set aside the orders of the Stewards in respect of penalty an in its place impose the following penalty for all 4 charges:

        a. $500 fine;

        b. 6 month disqualification;

    2. Direct the parties to attempt to agree the date on which the disqualification takes effect. If there remains any dispute about it the parties have leave to file short (1 page submission) on the appropriate date, if it is to be any other date than the date of these reasons;

    3. Appeal deposit is to be returned.

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Schedule of Charges

Charge 1: AR233

Mr Roy McCabe you are hereby charged with breach of AR233(a).

AR 233 Other Misconduct Offences

A person must not:

(a) breach a policy, regulation or code of practice published by Racing Australia or a PRA;

The details of the charge being that you, licensed trainer Mr Roy McCabe did breach a policy published by Racing NSW, to wit, 'RNSW Policy on Major Fractures or Other Major Orthopaedic Injuries' by reason of the following particulars:

1. You are a licensed trainer with Racing NSW.

2. At all relevant times, you were a registered trainer and/or person in charge of the thoroughbred horse *Aunty Maree.*

3. Between the 31 October 2023 and the 21 November 2023, you suspected *Aunty Maree* had a stress fracture to the tibia or pelvis which you failed to report to the Stewards within seven days.

4. Approximately two weeks after 31 October 2023, you returned *Aunty Maree* to training at ¾ pace on Bathurst racecourse. Prior to returning her to training, you failed to have her undergo a satisfactory nuclear scintigraphy.

5. The above breaches the 'RNSW Policy on Major Fractures or Other Major Orthopaedic Injuries' which states

RNSW Policy on Major Fractures or Other Major Orthopaedic Injuries

Any horse that has sustained a major fracture or undergone a major orthopaedic surgery must be reported to the Stewards **within seven days.** The Code of Practice explains what constitutes a major fracture. However, if further advice is required, trainers should discuss this with their treating veterinary surgeon or Racing NSW Chief Veterinary Officer Dr Peter Curl. Please note *stress fractures of long bones and the pelvis* includes both diagnosed and suspected fractures.

Any horse with a stress fracture, diagnosed or suspected, considered suitable to return to training in less than four months from the time of diagnosis must undergo a satisfactory **nuclear scintigraphy** examination of the affected region - with additional imaging as indicated.

Charge 2: AR231(1)(b)(iii)

Mr Roy McCabe you are hereby charged with breach of AR231(1)(b)(iii).

AR231(1)(b)(iii)

(1) A person must not:

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

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

The details of the charge being that you, licensed trainer Mr Roy McCabe did fail to provide veterinary treatment to a thoroughbred horse where such treatment was necessary, by reason of one or any combination of two or more of the following particulars:

1. You are a licensed trainer with Racing NSW.

2. At all relevant times, you were a registered trainer and/or person in charge of the thoroughbred horse *Aunty Maree.*

3. On 6 May 2024, *Aunty Maree* was spelling at a property being 276 Yeronga Road, Terrabella. At this time, *Aunty Maree* was injured through unknown means. You were made aware of the injury shortly after it occurred.

4. On 20 May 2024, you attended 276 Yeronga Road, Terrabella where you observed *Aunty Maree* to be significantly lame. You drove her to your Bathurst stables. At the time of arrival at Bathurst, *Aunty Maree* continued to show signs of being significantly lame and displaying noticeable signs of injury.

5. Between the 20 May 2024 and the 23 May 2024, you failed to provide any veterinary treatment for *Aunty Maree* despite her continued lameness and obvious signs of injury.

6. *Aunty Maree's* injuries were such that treatment was necessary throughout that period.

Charge 3: LR114(2)(d)

Mr Roy McCabe you are hereby charged with breach of LR114(2)(d).

LR114(2)(d)

(2) *A registered owner, trainer or any person that is in charge of or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named Horses) must ensure that any such horses are provided at all times with:*

(d) veterinary treatment where such treatment is necessary or directed by Racing NSW.

The details of the charge being that you, licensed trainer Mr Roy McCabe did fail to provide veterinary treatment to a thoroughbred horse where such treatment was necessary, by reason of one or any combination of two or more of the following particulars:

1. You are a licensed trainer with Racing NSW.

2. At all relevant times, you were a registered trainer and/or person in charge of the thoroughbred horse *Aunty Maree.*

3. On 6 May 2024, *Aunty Maree* was spelling at a property being 276 Yeronga Road, Terrabella. At this time, *Aunty Maree* was injured through unknown means. You were made aware of the injury shortly after it occurred.

4. On 20 May 2024, you attended 276 Yeronga Road, Terrabella where you observed *Aunty Maree* to be significantly lame. You drove her to your Bathurst stables. At the time of arrival at Bathurst, *Aunty Maree* continued to show signs of being significantly lame and displaying noticeable signs of injury.

5. Between the 20 May 2024 and the 23 May 2024, you failed to provide any veterinary treatment for *Aunty Maree* despite her continued lameness and obvious signs of injury.

6. *Aunty Maree's* injuries were such that treatment was necessary throughout that period.

Charge 3: LR114(2)(d)

Mr Roy McCabe you are hereby charged with breach of LR114(2)(d).

LR114(3)

(3) A registered owner, trainer or any person that is in charge of or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named Horses) must exercise reasonable care, control and supervision as may be necessary to prevent any such horse from being subject to cruelty or unnecessary pain or suffering.

The details of the charge being that you, licensed trainer Mr Roy McCabe did fail to exercise reasonable care and control as was necessary to prevent a thoroughbred horse from being subject to unnecessary pain or suffering, by reason of one or any combination of two or more of the following particulars:

1. You are a licensed trainer with Racing NSW.

2. At all relevant times, you were a registered trainer and/or person in charge of the thoroughbred horse *Aunty Maree.*

3. Between the 20 May 2024 and the 23 May 2024, *Aunty Maree* was at your Bathurst Stables. During this period, she was significantly lame and displaying obvious signs of injury.

4. Between the 20 May 2024 and the 23 May 2024, you failed to provide any veterinary treatment for *Aunty Maree* despite her continued lameness and obvious signs of injury. The degree of the injury was such that treatment with phenylbutazone did not sufficiently resolve the lameness.

5. Despite the above, between the 21 and 22 May 2024, you placed *Aunty Maree* on a horse walker for a period of approximately five minutes.

6. The above, in light of the condition of *Aunty Maree*, subjected her to unnecessary pain and/or suffering which you failed to avoid.