RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTERS OF LICENSED TRAINER STEPHEN JONES AND LICENSED FOREPERSON TRACY RODGER

PENALTY FOR BREACHES OF AR249 (1)(b) AR254(1)(b) AR 254(1)(c)

Appeal Panel:	Mr L V Gyles SC – Convenor and Acting Principal Member Mr J Murphy, Mr C Tuck
Appearances:	Stewards: O Jones, Barrister Appellant Rodger: J Bryant, solicitor Appellant Jones: M Barnes, Barrister
Date of Hearing:	Written Submissions on Penalty
Date of Reasons:	2 August 2024

REASONS FOR DECISION ON PENALTY

1. On 20 June 2024 the panel handed down its Decision in respect of the Appeals of Mr Jones and Ms Rodger against findings by the Stewards of breaches of AR249 and 254, and against the penalties imposed by the Stewards in respect of such breaches ("the Decision").

2. Mr Jones was found guilty of 18 charges primarily related to the administration of medication to horses on race day between August and November 2022, as well as failures to keep proper records and possession of injectable products containing cobalt salts. Mr Jones had pleaded guilty to four of the charges but not guilty to the balance. The panel, for the reasons set out in the Decision, found Mr Jones guilty of those offences for which he had pleaded not guilty, with the result that he was found guilty of all 21 charges.

3. The Stewards imposed sanctions against Mr Jones of a disqualification for 3.5 years and fine of $7500. Mr Jones contends that these sanctions were excessive and that they should be reduced. It is for the panel to now move to the determination of the appropriate penalties in respect of the breaches found against Mr Jones and we do so looking at the matter afresh and are not constrained by the previous sanctions imposed by the Stewards. That is, whilst we will have regard to the penalties imposed by the Stewards and their reasons for that, it is a hearing de novo on the question of penalty.

4. Ms Rodger was Mr Jones' licensed foreperson and was charged in respect of two breaches, the first of injecting or attempting to inject a horse with Diurex on race day and the second of administering a product containing cobalt salts. Ms Rodger pleaded guilty in respect of the second of the alleged breaches and challenged the other. We ultimately determined that the first charge to which she had pleaded not guilty was made out and we therefore move to consideration of penalty on the basis that she was guilty of each of the breaches.

5. The Stewards imposed a fine of $1,000 in respect of the second breach, which was wholly suspended, but in addition imposed a sanction of a 10 month disqualification in respect of the charge concerning the injection of a horse with Diurex. Ms Rodger before the panel contends that the sanctions imposed by the Stewards were excessive.

6. After the Decision was handed down, the parties were invited to provide written submissions on the question of penalty, and have done so. None of the parties sought an oral hearing in respect of penalty and we shall therefore proceed to determine the issue on the basis of the written submissions which have been helpfully provided. We have read and considered each of the submissions of the parties, and the fact that some parts may not have been specifically referred to does not mean that they were not had regard to.

7. In short, Mr Jones of counsel who appears on behalf of the Stewards seeks to maintain the penalties originally imposed by the Stewards in respect of the breaches, which is the disqualification of 3.5 years and fines totalling $7500 in respect of Mr Jones, and a disqualification of 10 months in respect of Ms Rodger.

Mr Bryant, on the other hand, who appears for both Ms Jones and Ms Rodger on the question of penalty, contends that a disqualification is not warranted in respect of the breaches by Mr Jones and that the imposition of a fine is the appropriate outcome, and that any disqualification of Ms Rodger should not go beyond the period of disqualification which she has already served. Which is slightly in excess of seven months.

8. We shall assume that these reasons will be read in conjunction with the Decision and therefore do not propose to repeat those reasons.

9. Mr Jones has been found guilty of a seven offences under AR249(1)(b)(Administration of Medication on Race Day) and seven offences under AR254(1)(b) / (c) (Injections prohibited at Certain Times).

10. In relation to the breaches of AR249(1), the parties agree that the finding carries a minimum penalty of 6 months unless there is a finding of "special circumstances". The Stewards also accept that any period of disqualification in respect of the breaches of AR254(1)(b) & (c) can be served concurrently with the disqualifications in respect of the same conduct under AR249(1)(b).

11. Therefore in relation to the seven offences in respect of which Mr Jones was found to have breached AR249(1)(b) and AR254(1)(b) & (c) respectively, the issues for consideration are:

(a) Whether, as contended for by Mr Bryant, special circumstances exist which mean that the minimum penalty of six months in respect of the breaches of AR249(1) does not apply;

(b) Subject to (a) above, what the appropriate penalties are in respect of the breaches;

(c) Whether, and to what extent, any periods of disqualification can be served concurrently;

(d) Whether the principle of totality or any other reasons justify a reduction of the sanction otherwise proposed.

Special Circumstances

12. AR249(2) and AR283(6)(i) mandate that a breach of AR249(1) carries with it a period of disqualification of not less than six months unless there is a finding of special circumstances. Mr Bryant in his submissions relies upon LR108(2)(c) which states as follows:

> "*c. In the case of offences under AR249, the medication in the opinion of the Stewards does not contain a prohibited substance, is of an insignificant nature and is for the welfare of the horse;"*

13. Mr Bryant contends that the facts of Mr Jones' case falls within this definition, first because Diurex is not listed under Part 1 – Substances prohibited at all times; Division 1- Prohibited List A; and second because he says that Diurex prevents a horse from suffering from exercise – induced pulmonary haemorrhage (EIPH), which is for the welfare of the horse. He relies upon the Racing Appeal Panel Decision in *Nicholas Dixon* in which it was found that the relevant products did not contain a prohibited substance, was an insignificant nature and was for the welfare of the horse, and therefore *special circumstances* were made out.

14. Mr Jones of counsel for the Stewards contends that this submission is "misconceived" because Diurex is a prohibited substance and relies upon the uncontested evidence before us of Racing NSW Veterinary Doctor Rose Bensley (Court Book pp140-141). He also contends that there is no basis to find that the amount of Diurex administered was of an insignificant nature, and further that it is not an accurate characterisation to say that the Diurex was used for the welfare of the horses because the likely explanation for its use was to seek to prevent the horses from being deemed ineligible to race in future because of a bleed during a race.

15. Having considered the two arguments, we prefer the submission of the Stewards on this issue and find that for the purpose of this determination that Mr Jones has

not made out that special circumstances within the meaning of LR108(2)(c) exist.

16. First, we do not accept the submission that Diurex is not a prohibited substance. No attempt was made to prove this by Mr Jones before the Stewards or before us, despite there being an opportunity to tender expert evidence to do so, and before the Stewards there was no challenge by him to the expert opinion relied upon by the Stewards. Further the cases to which Mr Bryant refers to do not prove otherwise: *Dixon* involved different substances which were tested after sampling and were cleared, and *Balfour* was a Victorian case under different rules and also involving different substances. Prima facie, Diurex it is a diuretic and falls within the definition of Prohibited Substance under the Rules of Racing (see Part 2 p176).

17. In circumstances where there is not a finding that special circumstances exist, we note that there is no discretion on the part of the panel to impose a disqualification of less than the minimum period. Therefore, although Mr Bryant in his submission relies upon matters including that Diurex is not a performance enhancing substance, and that the drug was not injected to mask any illegal or prohibited substance, these are not matters we can take into account in respect of the application of the minimum disqualification, even if we accepted the substance of those submissions. They may however be relevant to the ultimate sentencing, and whether some parts of the disqualification can be served concurrently.

18. There is not a similar constraint upon the panel in respect of the breaches of AR254(1)(b) which is an additional or alternative breach alleged and found in respect of the same conduct the subject of the AR249(1) breaches. The Stewards in Mr Jones' written submissions at paragraph 14 submit that the "starting point" is that the offending in respect of each of the relevant charges is a disqualification of 12 months, but accepts that the period of disqualification referable to the breach of AR249 and AR254 be served concurrently. We shall therefore proceed on the basis that the Stewards accept that where the two breaches arise from the

same conduct, the periods of disqualification can be served concurrently. That was also the position taken by the Stewards in their determination of penalty.

19. In circumstances where special circumstances has not been made out, and where the Stewards accept the concurrency of the respective charges as set out above in respect of the same conduct, the questions for the panel are first whether the minimum disqualification period should apply, or something more than that, and second, whether it is appropriate that the minimum periods of disqualification in respect of the seven charges are able to be served concurrently, in whole or in part.

20. The Stewards contend that each of the 7 breaches should carry a 12 month disqualification. That is consistent with them being above an entry level breach for a race day injection of a Prohibited substance. They however reduced the total disqualification for 7 years to 3.5 years, which in substance means that the minimum period would have be served in respect of each of the 7 breaches.

21. Mr Bryant in the submissions made on behalf of Mr Jones points to a number of factors relied upon to seek to reduce the sanction to be imposed on Mr Jones. The matters relied upon are as follows:

    (a) That Diurex has been used for preventing EIPH in thoroughbreds for many years;

    (b) That the horses concerned were both known bleeders;

    (c) That we should be satisfied that the Diurex was not being used as a masking agent to conceal doping;

    (d) That the University of Kentucky in 2019 published an article showing that treatment with Lasix before racing did not provide a performance enhancing effect;

    (e) That Mr Jones has been involved in the Racing Industry for approximately 50 years, initially as a jockey and subsequently as a

trainer where he his trained horses in Malaysia, the Gold Coast, Rosehill, Canterbury and Scone, training approximately 800 winners;

(f) That he has a clean disciplinary record;

(g) That he currently employs 10 staff;

(h) That he contributes to local community and racing industry by way of wages, feed and veterinary fees;

(i) That the disqualification period will have a devastating financial impact on his business and life;

(j) That he is currently 67 years old with health issues; and

(k) That he is a person of good character with strong character references.

22. On behalf of the Stewards, Mr Jones of counsel submits that the offences committed were objectively very serious with a significant negative impact on the image and interests of racing. He says that administration by syringe creates a particularly bad impression and notes that the conduct was not a one-off occurrence and took place over a period of months and in which Mr Jones' employees were implicated. He also submits that the conduct was knowing in the sense that Mr Jones had knowledge of the rules of racing and knew that it was a breach to syringe the horses in this way on race day. The Stewards also submit that the administration of a diuretic to a horse which bleeds is properly characterised as performance enhancing, and relies upon the University of Kentucky's article as well as a decision of the South Australian Racing Appeals Tribunal in the appeal of *Barry Campbell and Tania Coward* in that regard.

23. The Stewards also contend that Mr Jones deliberately concealed the practice from the Stewards by initially not admitting use of Diurex in the stables and by omitting the same from his treatment records. The Stewards also point out that Mr Jones did not plead guilty and then gave false evidence both before the Stewards and before this panel. The relevance and value of the personal

references is also questioned because those providing the references did not know of the findings as to breach.

24. Both Mr Bryant and Mr Jones of counsel refer to and rely upon various other cases in which penalties have been imposed, but with respect we agree with the comments in *Lesley David Kelly v Racing NSW*, 3 May 2024 at [100-101] that reference to other decisions has value when striving for consistency of penalty, but because all cases are different, one must be cautious in taking too much from an individual case.

25. The authorities referred to by Mr Bryant we would find generally involve an objective culpability of less significance than the current case. *Balfour* concerned a single occasion and he pleaded guilty to all charges at the earliest opportunity, but nevertheless was suspended for 6 months.

26. *Cattel* also concerned administration on a single occasion together with a guilty plea and there was a finding that he did not subjectively appreciate that he was in breach of the rules. He was disqualified for a period of 5 months. *Goodwood* was again a single occasion because of mistake by a staff member and where special circumstances were found. It was also under the Victorian Rules. *Payne* was another case which involved a single administration only and was described as a clerical error.

27. We therefore accept the submissions of the Stewards that the authorities relied upon by Mr Bryant in his written submissions are dealing with factual circumstances of a very different character to that of the present case, and are of a less serious nature.

28. The Stewards also rely upon the matter of *Sam Kavanagh* in which the panel imposed a disqualification of 18 months where the administration had occurred over a shorter period than the present, and the matter of *Benjamin Smith* where the Appeals Panel where the total cumulative period of disqualification was reduced by 36%. That administration concerned a paste rather than an injection and was again in respect of different facts.

Consideration

Charges 1-6; 9-16

29. The starting position is that Trainers are given the privilege of a licence, and that privilege comes with obligations and responsibilities. Having knowledge of and complying with the rules and regulations of racing are a basic part of that, not only themselves but for those in their stable.

30. It is also critical that those in senior and influential roles in the Industry protect the reputation of the Industry and avoid conduct which brings it into disrepute. We echo the comments of the panel in *Michelle Russell* where it is said that it is always a terrible look for racing when a horse is found to have raced with a prohibited substance in its system.

31. The purpose of imposing penalties is to protect the image and integrity of, and participants in, the sport industry of racing. The purpose is not to punish the offender. It is necessary to have regard to the objective seriousness of the conduct, the need for general and specific deterrence, any pleas of guilty, the disciplinary history of the appellant and their personal circumstances.

32. We also refer to, without repeating the principles considered by the Racing Appeals Tribunal of NSW in *Amanda Turnbull v Harness Racing NSW*, 30 September 2022 at [113-114] referring to the decision of the High Court of Australia in *Building and Construction Commissioner v Pattenson* [2022] HCA 13, in which the Racing Appeals Tribunal confirmed it was appropriate to employ analytical tools associated with criminal sentencing such as totality, parity and course of conduct. The panel also appreciates and notes the drastic and serious consequences of disqualification of Mr Jones and the impact upon his livelihood and life generally, as well as the impact upon his staff and the owners for whom he trains horses.

33. Despite those considerations, the need for general deterrence for this type of conduct is very significant. It is necessary 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 NSW.

34. In relation to specific deterrence, we accept that Mr Jones is otherwise a good character and has excellent character references. He also has a good disciplinary record and there should be a benefit for that. We also however need to take into account the fact that he did not plead guilty in respect of these charges and continued to give evidence which has been found to be false, and has shown little remorse. Nevertheless we believe that the findings that have been made and the significant impact upon him and others associated with him, will have a significant individual impact upon him and that the need for specific deterrence does not loom large in terms of our considerations.

35. We note for completeness that we do not need to deal with the question as to whether Diurex was in fact performance enhancing, or capable of being so. We are satisfied that Mr Jones was not using Diurex for that purpose and the Stewards did not put to him this this was his intention. The debate between the parties about the proper interpretation of the Kentucky article does not therefore need to be resolved. Further, we have found that Mr Jones did lie under oath, and any submission that he did not is misconceived. That issue has been determined already. We also on the question of penalty do not rely upon "or seek to further punish" Mr Jones in relation to the vacation of the 10 May 2024 Hearing date. That plays no part in our current considerations and can be ignored.

36. In all of the circumstances we find that it would be appropriate to impose an 8 month disqualification for the 1st breach of AR249, but having regard to the similarity of the subsequent offences (which could arguably be seen as one course of conduct), and to the principles of totality, for 4 months of the mandatory 6 month disqualifications in relation to the remaining 6 breaches to be served concurrently with the disqualification for the 1st breach, meaning that an additional 2 month disqualification be imposed for each of the latter breaches, being a total disqualification period of 20 months. We would impose a penalty of a six months for the 1st offence under AR 254 and 2 months for each subsequent

offence, giving a total of 18 months, which can be served concurrently with the disqualification for the breaches of AR 249.

37. We believe that this sanction is broadly consistent with the previous penalties given by the panel to *Ben Smith* and *Adam Hyeronimus*, the latter involving 2 breaches each with a minimum period of disqualification of 2 years, but the Panel imposing a disqualification of 2 years and 1 month by allowing 23 months of the 2nd charge to be served concurrently. In this respect we note that it is not contended by the Stewards that Mr Jones was attempting to seek to gain an advantage in the races themselves, his long history in the Industry with no prior offences of relevance, and his excellent character references. But for those matters the disqualification period would be longer. Time will run from 20 June 2024 meaning that the disqualification would end on 20 February 2026.

38. We shall deal with the balance of the charges below.

Charge 17

39. This Charge concerned the failure of Mr Jones to keep proper treatment records, and to which he pleaded guilty. In our view, although Mr Jones was not the person actually making (or not making) the entries into the treatment book, as the licence holder it remained his primary responsibility at all times to ensure that the entries were accurate and complete. We also note that he would have known of and given advice and direction to his staff about dose rates, which should have been recorded. In any event, and having regard to the guilty plea, we do not disagree with the two month suspension imposed by the Stewards and find that this can be served concurrently with the disqualifications imposed above.

Charge 18

40. This charge concerned there being three vials of Dr Bell's drops within Mr Jones' stable. Having regard to the guilty plea in respect of this charge we would not disagree with the fine of $750 imposed by the Stewards in relation to this breach.

Charge 19

41. This was a charge in respect of possession of a substance containing a small amount of cobalt. Having regard to the guilty plea and the fact that the pharmaceutical was held by reason of a veterinarian's instruction, and having regard to other decisions, we would agree with the fine of $750 imposed in respect of this breach.

Charge 21

42. This was a charge concerning administration of cobalt slats by injection on 13 occasions by injection. We do not disagree with the Stewards imposition of a fine of $8000 in respect of these breaches, which were systemic.

Final Orders Mr Jones

43. The Final Orders we make in relation to Mr Jones Appeal are as follows:
    (a) We partially allow the severity appeal in relation to charges 1-6 and 9-16 incl. and impose a 20 Month Disqualification period, to run from 20 June 2024;
    (b) We dismiss the severity appeal in relation to Charges 17, 18, 19 and 21 and;
        (i) confirm that the 2 month suspension in relation to Charge 17 can be served concurrently with the disqualification above;
        (ii) confirm the fines of $750 in respect of Charges 18 and 19; and
        (iii) confirm the fine of $8000 in respect of Charge 21.
    (c) Appeal deposit is forfeited.

Ms Rodger

44. Ms Rodger has been found guilty of one offence under AR254(1)(c) of attempting to inject Inferno Miss on race day. The Stewards do not contend that there is a minimum disqualification in respect of this charge, however Mr Jones on their behalf submits that a 10 month disqualification would be appropriate. The

Stewards say that the attempted injection is an objectively serious matter which is damaging to the image and interests of racing and further rely upon a lack of remorse or acknowledgement of the wrongdoing from Ms Rodger.

45. Mr Bryant on the other hand refers to other authorities including two where a trainer was disqualified for six months. Mr Bryant submits that the breaches are at the lowest end of objective seriousness because first the Diurex was not in fact administered to the horse on that day, was not performance enhancing nor used to mask illegal or prohibited substances, and that there would be less responsibility for Ms Rodger as a stable hand and not a licensed trainer.

46. Mr Bryant also relies upon the fact that Ms Rodger has been involved in the racing industry for over 45 years in various roles such as stable hand, fore-point person and track work rider and has a strong disciplinary record and is of good character.

47. In the circumstances, and having regard to the considerations above, we find that where Ms Rodger has already been stood down from 30 June 2023 until 22 December 2023, and from 20 June 2024 to date, a period in excess of 7 months, that there should be no further period of disqualification for her. The time served is sufficient in our view.

48. In relation to the cobalt salts injection charges against Ms Rodger we do not disagree with a fine of $750 being suspended.

Final Orders Ms Rodger

49. In relation to the Appeal by Ms Rodger:

(a) We partially allow the severity Appeal in relation to breach of AR 254(1)(c) and order that the disqualification imposed by the Stewards be immediately lifted;

(b) We dismiss the severity appeal in relation to the breach of AR 254 and confirm that the fine of $750 be wholly suspended;

(c) Appeal deposit is forfeited.