HRNSW STEWARDS DECISION

Inquiry of Mr Neil Day and Mr Dean McDowell ("the Applicants")

Stewards Panel: R Sanders (Chairman), M Prentice and T Clarke ("the Stewards")

Application from the Applicants

1. The applicants have requested that the Chairman of Stewards disqualify himself from the panel of stewards inquiring into certificates of analysis indicating the presence of Cobalt above the permitted threshold of 200 ug / L in urine in horses presented to race by them. There are a number of limbs to this application which will be addressed in the decision below.

Decision

2. Stewards have determined that the application should not be granted. Detailed reasons are provided below.

Reasons for Decision

Introduction

3. The application has been made in three steps. A preliminary application was made by letter from the applicants' solicitors, Pendlebury Workplace Law, dated 11 December 2014. Stewards then requested a formal application to be made in writing by 18 December 2014. Pendlebury Workplace Law then submitted a letter of that date setting out those reasons. On 22 December 2014, an oral application was made by Mr Rayment of counsel on behalf of each of the applicants. Stewards will treat all three sets of arguments as comprising the application under consideration.

4. It is important to note at the outset that any HRNSW steward's inquiry is conducted in accordance with the Australian Harness Racing Rules, and any HRNSW Local Rules of harness racing (collectively "the rules"), as well as the relevant provisions of the Harness Racing Act 2009. This is not a court of law. Stewards do not sit as judges or judicial officers. It is not an adversarial process, but rather an inquisitorial process. Stewards hold multiple functions, including supervision of harness races; taking of evidence; testing of horses; giving of evidence and, in certain circumstances, investigating and inquiring into matters arising out of the harness industry. In those circumstances stewards are also called upon to make decisions under the rules.

The Application

Defamation Proceedings

5. The first matter is raised in paragraph 6 of the letter dated 11 December 2014. The matter raised is that the applicants then intended to and have commenced proceedings for defamation against HRNSW, including in respect of publications made by the Chairman of Stewards.

6. Stewards do not regard this as a matter which logically leads to a conclusion that the Chairman of Stewards will not have an open mind in respect of the issues to be determined in this inquiry. The argument does not rise any higher than a mere assertion of a potential conflict of interest.

7. The Chairman of Stewards is not a party to the defamation proceedings. Further, any publication alleged to have been made is not said to have been anything other than a notice published in the course of his duties.

8. In the absence of any detailed explanation or submission as to why the mere existence of the defamation proceedings must mean that a fair minded and impartial bystander would find that the Chairman of Stewards has a closed mind to the issues in this inquiry, Stewards must reject this ground.

Alleged Pre-Judgment

9. The letter of 18 December 2014, and the oral submissions made by Mr Rayment on 22 December 2014, both raise an allegation that the Chairman of Stewards has prejudged the applicants' guilt of breaches of "the relevant offence". The evidence relied upon in support of this ground is a letter written by HRNSW's solicitors dated 7 May 2014. This is an allegation which has been made a number of times in the recent Supreme Court proceedings between the parties.

10. The letter of 7 May 2104 was written in response to a letter from the applicants' then solicitors, dated 6 May 2014. It relates solely to arguments made by those solicitors against an interlocutory injunction, on the question of balance of convenience, in relating to a decision by HRNSW Stewards to impose interim suspension of the applicants' licenses pursuant to AHRR 183. The words are not written by the Chairman of Stewards himself.

11. It is said by the applicants that the expression "specific and general deterrence" can only be understood as referring to sentencing, and that therefore the Chairman must have already determined their guilt of the offence.

12. We reject this argument for the following reasons:

    (a) The New South Wales Racing Appeals Tribunal has from time to time used the same expression, while distinguishing its use from that in the criminal justice system. The phrase has been used to describe the policy rationale behind various steps taken by HRNSW to exercise its protective functions and to send a message to trainers licensed in NSW that HRNSW will be taking a hard line against the use of prohibited substances[1]. Those expressions have been used in the industry, without having the same rigid connotations they may have in the criminal law sense.
    (b) Specific and general deterrence can fairly be understood in this context as explaining or justifying the HRNSW policy of invoking AHRR 183 to impose interim suspensions of training licenses upon receipt of one or more certificates of analysis reporting the presence of prohibited substances.

[1] Racing Appeals Tribunal Decision of Thomas 10 October 2012

(c) A fair minded impartial observer would be expected to understand these contextual matters, and take them into account.
(d) Further, we are not convinced that the words used in the letter written by HRNSW solicitors in May 2014 invite the logical conclusion that the Chairman of Stewards has closed his mind to the possibility that the applicants may not be guilty of any particular offence.

Alleged Prejudgment of Absolute Liability

13. The letter of 18 December 2014 at paragraph (b) complains that the Chairman has formed a view that offences pursuant to AHRR are "strict rather than absolute" liability.

14. This argument is misconceived. In fact, Stewards regard the settled approach of the Racing Appeals Tribunal, and superior courts which have dealt with this issue, in that the offence is one of absolute liability (see letter from HRNSW to Pendlebury Law dated 15 December 2014).

15. The fact that Stewards hold an opinion about what the relevant supervisory appeal jurisdiction, and Courts, have decided on a consistent basis, as a prevailing precedent to be applied, is not a matter which can give rise to a reasonable apprehension of bias. The Racing Appeals Tribunal has confirmed that Rule 190 offences are to be treated as absolute liability offences in, for example, the appeal by Dickinson v GRNSW; the appeal of Thomas referred to above; as have Courts in this state, and of other jurisdictions, including Jerrick v Greyhound and Harness Racing Regulatory Authority and Anor [2008] NSWSC 203 at 68 and 69; Green & Ors v Racing Integrity Unit & Anor 2014 NZCA 133 at 49; *Harper v Racing Penalties Appeals Tribunal* (1995) 12 WAR 337).

16. The Stewards will consider any application fairly. The fact that the Chairman, or any other Steward, has a belief or opinion about the settled approach to these type of offences does not mean that any of them will bring a closed mind to considering any alternative argument on the issue.

Pre-Judgment of Penalty

17. Paragraph (c) of the letter of 18 December asserts that Stewards have prejudged the issue of penalty by ruling out one possible penalty option, in their reasons for imposing an interim suspension dated 15 December 2014.

18. This issue needs to be understood in context. The decision made by Stewards on 15 December 2014 was for a different purpose. The applicants' solicitors had urged Stewards not to impose an interim suspension, for reasons including that an appropriate penalty for any breach of AHRR 190 might be to impose no penalty pursuant to Rule 256(6). In the same submissions, the applicants' solicitors indicated that their clients would be "pleading not guilty" to any such charge.

19. The Stewards' reasons of 15 December 2014 in relation to the potential applicability of any penalty pursuant to Rule 256(6) were for the purpose of assessing whether an interim suspension was justified. The conclusion drawn by the Stewards for that limited purpose only, that such a penalty appeared insufficiently likely to justify

avoiding the usual interim suspension cannot be understood to represent a closed mind on the ultimate question of penalty.

20. The HRNSW penalty guidelines, of which any fair minded observer for the purpose of assessing potential bias would be aware, suggests that the starting point for any offence against Rule 190 for a Category 1 substance, is a disqualification of five years for a first offence. Even the lowest category of substance shows that any penalty is a disqualification with a starting point of 12 months.

21. The NSW Racing Appeals Tribunal has consistently held that the minimum starting point for any prohibited substance offence, is one of disqualification. The fair minded impartial observer would also be understood to be so aware.

22. We hearing this matter are well aware of our obligations to have an open mind and that we must base any decision on the evidence after giving the applicants an opportunity to present relevant evidence.

23. Therefore we reject this argument.

Pre-Judgment of Category of Substance

24. Paragraph (d) submits that the Chairman of Stewards has pre-judged the relevant category of the substance Cobalt pursuant to the HRNSW Penalty Guidelines.

25. There have been numerous Stewards Inquiries involving this substance in which Stewards have received veterinary advice that the substance should be deemed as a Class 1 substance under the HRNSW Penalty Guidelines. Not limited to, but due to Cobalt having the effect of an hypoxia inducible factor (HIF)-1 Stabiliser, and is prohibited by AHRR 190A (2) it is referred to in the definitions of a Class 1 category of substance. The Racing Appeals Tribunal has recently endorsed Cobalt as a Class 1 substance.[2]

26. Stewards are not aware of any veterinary evidence, opinion, or argument to the contrary. The applicants did not, in their detailed submissions in relation to the AHRR183 issue, submit that Cobalt should not be regarded as a Class 1 substance. There is no reason that Stewards should have regarded this as a matter which is not controversial as a matter of evidence, opinion, or argument.

27. More importantly, there is no basis to logically conclude that, in the event that the applicants seek to raise this as an issue in dispute at the inquiry, or in any potential penalty phase of the inquiry should that arise, that Stewards will close their minds to any matter which might be argued or tendered.

Conflict of Interest

28. Page two of the letter of 18 December 2014, and the oral submissions by Mr Rayment, make a complaint on several bases, that the Chairman of Stewards has a

[2] Racing Appeals Tribunal decision of Kelly, 16 October 2014.

conflict of interest which would prevent him from sitting on the panel in this Inquiry. The reasons include:

(a) That the Chairman of Stewards made allegedly defamatory publications about the applicants.
(b) That the Chairman of Stewards has an interest in "avoiding any personal culpability" for having misled the applicants through the publishing of notices and a telephone conversation with Mr Day
(c) That he may become (or "is") a witness in the inquiry.
(d) That an aspect of the Chairman of Stewards evidence was not accepted by the Supreme Court of New South Wales;
(e) That the Chairman of Stewards was "responsible for the industry consultation and with publishing notices to the industry about the rule's operation"
(f) That the Chairman of Stewards was "on any view, the person responsible for the introduction of the rule".

29. We will deal with all of these issues together.

30. Firstly we note that there is an absence of reasoning in many of these factors to explain the necessary connection between the matter complained of, and the claim that it will result in the Chairman of Stewards not being in a position to approach the issues to be determined with an open mind. This in itself is fatal to the success of the application.

31. We secondly note that the relevant issues to be determined in respect of a potential offence under Rule 190 are extremely limited. The most apparently relevant provisions are:

> ***190***. *(1) A horse shall be presented for a race free of prohibited substances.*
>
> *(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.*
>
> *(3) If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*
>
> *(4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*

32. The evidentiary provisions under the Rules relating to presentation offences are found in Rule 191. These relevantly include:

> ***191***. *(1) A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at, or approximately at, a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at some time been administered to a horse is prima facie evidence of the matters certified.*
>
> *(2) If another person or drug testing laboratory approved by the controlling body analyses a portion of the sample or specimen referred to in sub rule (1)*

and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance.

(3) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse at a meeting shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the horse was presented for a race not free of prohibited substances.

(4) A certificate furnished under this rule which relates to blood, urine, saliva, or other matter or sample or specimen taken from a horse shall be prima facie evidence if sub rule (1) only applies, and conclusive evidence if both sub rules (1) and (2) apply, that the prohibited substance was present in or on the horse at the time the blood, urine, saliva, or other matter or sample or specimen was taken from the horse.

(5) Sub rules (1) and (2) do not preclude the presence of a prohibited substance in or on a horse, or in blood, urine, saliva, or other matter or sample or specimen, or the fact that a prohibited substance had at some time been administered to a horse, being established in other ways.

(6) Sub rule (3) does not preclude the fact that a horse was presented for a race not free of prohibited substances being established in other ways.

(7) Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.

33. We are therefore of the view that the grounds articulated by the applicants fall well outside the purview of the issues to be decided at the inquiry.

34. Thirdly, we determine that many of the allegations of conflict of interest are not made out as a matter of fact. In the case of the allegation that Mr Sanders was responsible for defamatory publications, the allegation is very poorly particularised. The allegation of defamation does not give rise above an allegation. It is completely untested. The allegation that Mr Sanders has an interest in avoiding personal culpability is entirely unspecified and unwarranted. Mr Sanders will not be personally affected by any decision made in this matter. Further it is noted in any case that employees of HRNSW have a statutory indemnity from liability[3]. The allegation that Mr Sanders was responsible for introducing the Rule is not made out. Only the Board of HRNSW (Controlling Body) can make rules pursuant to the Harness Racing Act and not an individual employee. It is also not clear what evidence or allegations of fact the applicants are relying on in support of these issues.

35. Fourthly, we regard the balance of matters as ignoring the context in which this inquiry is being conducted. Some of the issues raised by the applicants as set out above may well constitute grounds for a judge in an adversarial court proceeding to be disqualified. However, any assessment of bias in a statutory or domestic tribunal must take into account the rules and statutory context within which they operate. They must also take into account the multiple functions of Stewards, and the manner

[3] *Harness Racing Act 2009*

in which those roles will interact which cannot take place in a judicial context. Many cases support the proposition that Steward's Inquiries are a unique species of domestic tribunal, in which otherwise typical or expected processes will not be required, or even allowed (Coad v Lee Steere (1936) 40 WALR 70; Marlin v Durban Turf Club (1942) S Afr LR 112; Evan v Winterbottom (1945) 47 WALR 79; Russell v Duke of Norfolk [1949] 1 All ER 109; R v Brewer; ex parte Renzella [1973] VR 375; Hall v New South Wales Trotting Club Ltd (1976) 1 NSWLR 323). In particular, Steward's Inquiries not infrequently require Stewards to perform multiple roles, including giving of evidence; laying a charge; questioning witnesses; and sitting as the decision maker. The fact that one of the applicants may give a different version of a conversation he alleges he had with Mr Sanders does not of itself mean that he will have closed his mind to the important issues to be decided in the inquiry. Stewards are also mindful that the subject of that evidence is not relevant to the primary issues to be determined in respect of any Rule 190 offence. It could only conceivably relate to evidence in mitigation of penalty (if that were to arise). We may be prepared to entertain a further, limited, application in respect of potential apprehended bias at the commencement of any penalty phase of the inquiry (if one is in fact required). It is also noted that the question of whether either of the applicants relied on certain statements by the Chairman of Stewards has also been raised as an issue in the Supreme Court proceedings between the parties (see paragraph 93 of the applicants' Points of Claim). That issue has been argued, without success, which makes it even more remote to the interest of this inquiry, particularly in its present phase.

Supplementary Matters

36. Prior to seeking legal representation at the inquiry of 22 December 2014, Mr Day made three points which, for caution, we will treat these as forming part of the application.

37. The first of those was an asserted opinion: ""*Well I think you're very - your decision would be very biased sir*". This can be rejected. The opinion of an interested party is not relevant to the objective assessment of apprehended bias to be applied.

38. The second is the argument that "*Well you made the rule to start with*". That argument was advanced by Mr Rayment and has already been dealt with in this decision.

39. The third objection was "*You want to be a policeman judge and juror*". Much of this argument is addressed above in the analysis of the multiple roles of Stewards.

40. A fair minded impartial observer would of course be aware of this unique aspect of Steward's Inquiries. Indeed, Mr Day fairly conceded that he himself was aware of this aspect of such inquiries, and that he had been involved in thousands of such inquiries where the same aspect attached.

41. Finally it was put by Mr Rayment, that Messrs Prentice and Clarke may be influenced by Mr Sanders given he is the Manager Integrity & Chairman of Stewards in forming any view on this application. That submission is based on a presumption that Mr Sanders has already formed a concluded view in respect of the issues to be determined. Stewards do not find that he has, or that a fair minded bystander would so conclude. It would not necessarily be grounds for disqualification of a decision maker in an investigative or inquisitorial process, to have formed certain views or suspicions. That is the nature of the process. However, the fact that Mr Sanders has

played certain roles (provided and indeed required by the Rules) preliminary to the inquiry does not, and cannot prevent him from sitting in the Inquiry.

42. The submission also ignores the fact that each Steward is entitled to one vote, and only if the matter is deadlocked, would a Chairman be entitled to a casting vote. The Stewards have voted unanimously that this Application be rejected.

Conclusion

43. The Stewards Panel reject the application. The Stewards Panel will remain as previously constituted.

44. The applicants are directed to appear at the resumption of the Inquiry on **Tuesday 27 January 2015** commencing at 11am for Mr Day and 2pm for Mr McDowell.

R Sanders (Chairman), M Prentice and T Clarke