TASMANIAN RACING APPEAL BOARD

Appeal No. 02 of 2020-21

Panel:	**Kate Cuthbertson (Chair) Wendy Kennedy (Member) Suzanne Martin (Member)**	**Appellant:**	**Mark Ganderton**
Appearances:	**Scott Quill (on behalf of the Stewards) Rohan Foon (on behalf of the Appellant)**	**Rules:**	**AR 240 (2)**
Heard at:	**Hobart**	**Penalty:**	**Disqualification for a period of 9 months**
Date:	**20 October 2020**	**Result:**	**Disqualification for a period of 6 months**

REASONS FOR DECISION

1. The appellant, Mr Mark Ganderton, is the trainer of a thoroughbred racing horse *Fighting Phoenix* which was presented to race at the Tasmanian Turf Club meeting on 28 March 2020. A post-race urine sample was taken from the mare following it winning Race 5 on that date. Subsequent analysis by Racing Analytical Services Limited (RASL) detected the prohibited substances phenylbutazone, oxyphenbutazone and gamma-hydroxyphenylbutazone in the sample. Confirmatory testing conducted by Australian Racing Forensic Laboratory (ARFL) confirmed the presence of those substances in the urine sample. Phenylbutazone is a non-steroidal anti-inflammatory commonly used to treat horses experiencing lameness or soft tissue injury. The medication can be administered by way of injection or orally in the form of a paste (commonly referred to as bute paste). Oxyphenbutazone and gamma-hydroxyphenylbutazone are metabolites of phenylbutazone.

2. The inquiry was conducted in respect of this matter on 27 August 2020. During the course of the inquiry, Stewards issued a charge to the appellant pursuant to AR240(2). The rule relevantly provides as follows:

   > *... if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who is in charge of the horse at any relevant time breaches these Australian rules.*

Anti-inflammatory agents are prohibited substances found in Prohibited List B. That list is found in Part 2 of Schedule 1. Part 2 is entitled "Substances Prohibited on Race Days, Certain Trials etc". Part 1 of Schedule 1 which contains Prohibited List A is entitled "Substances Prohibited at all times".

3. The particulars of the charge were as follows:

> *That you as the trainer of Fighting Phoenix presented that runner for the purpose of participating in a race at the Tasmanian Turf Club meeting on 28 March 2020, when a urine sample taken from the mare following it winning Race 5 upon analysis was found to contain phenylbutazone, oxyphenbutazone and gamma-hydroxyphenylbutazone.*

4. The appellant pleaded guilty to the charge.

5. Following receiving submissions from the appellant as to penalty, the Stewards disqualified *Fighting Phoenix* from Race 5 in accordance with the requirements of AR240(1). In respect of the charge pursuant to AR240(2), Stewards imposed a period of 9 months disqualification.

The Appeal

6. The notice of appeal states that the penalty imposed upon the appellant was manifestly excessive. It was further stated in the notice of appeal that numerous precedents were provided at the Stewards' inquiry to show that a fine was adequate.

Circumstances of the offence

7. *Fighting Phoenix* finished first in Race 5 on 28 March 2020. The appellant first received advice that the A sample was positive to phenylbutazone, oxyphenbutazone and gamma-hydroxyphenylbutazone by letter dated 4 May 2020. Stewards conducted an inspection of the appellant's stables on 5 May 2020. Notes from that stable inspection were tendered during the course of the Inquiry. In summary, those notes outlined the following:

   - The appellant was not at home when they first arrived so Stewards waited for him to return;

   - Stewards accompanied the appellant to his stabling complex with Daniel Ganderton who was also present;

   - The appellant walked the Stewards through his feed preparation and advised of his daily feeding routine;

   - The Stewards were then taken to the living area where the appellant keeps his veterinary medications. Upon request he presented a tub of bute paste which he advised he had used to treat *Fighting Phoenix* on 10 March on her return from the Longford Trials and again after the horse had raced at Launceston on 28 March to aid post-race recovery on these days. This information was consistent with treatment records provided by the appellant;

- On return to the feeding area to inspect more thoroughly, Daniel Ganderton advised Stewards that *Fighting Phoenix* had also been treated intravenously on 17 March with Salbute. This was also consistent with the records kept in the treatment books;

- Apart from those treatments as advised and recorded in the treatment book, the appellant was unable to provide any explanation as to why a sample taken from *Fighting Phoenix* would contain a prohibited substance. He did, however, mention a potential case of contamination from either the stable pony or another horse in his stable, *Jurisdiction*. He showed the Stewards the outside yards in which many of his stable are accommodated during the day. He emphasised that *Fighting Phoenix* was sound and did not require constant treatment with bute paste as is consistent with his treatment records.

8. During the course of the inquiry, the appellant was asked if he was able to provide an explanation as to how the prohibited substances came to appear in the samples taken from *Fighting Phoenix*. The appellant stated that upon reflection he thought there was possible cross-contamination between *Jurisdiction* and *Fighting Phoenix* as they were side by side in the yards. He explained that *Jurisdiction* had been treated with bute paste on several occasions during that week and a few days earlier. The treatment of *Jurisdiction* was not recorded in the treatment books because the appellant had intended to retire that horse. A veterinary report was provided from Longford Equine Clinic confirming that *Jurisdiction* had been recommended to be treated with oral phenylbutazone due to lameness. Radiographs of *Jurisdiction's* feet showed a pedal osteitis in both feet, with the right foot having significant area of loss of bone mineralisation. The veterinarian recommended the treatment with oral bute to settle as much of the pedal osteitis as possible and felt that the horse's prognosis for a return to racing would be poor. The veterinarian's visit occurred on 25 March 2020. The report indicates that the appellant had phoned the veterinarian a few days before that visit and that she had recommended the commencement of oral phenylbutazone during that phone call.

9. The appellant explained that *Jurisdiction* probably got treated with oral phenylbutazone on 24 March and then after the vet came for the next 4-5 days every day. Daniel Ganderton speculated that during the course of treating *Jurisdiction* with bute paste, it was uncertain whether he had spat some or got some on his lips. As a consequence of that speculation, the appellant indicated that they had changed their protocol for administering phenylbutazone. He indicated that they tended to use the injectable form and that it is no longer administered to a horse in their yard or their box.

10. In respect of *Fighting Phoenix's* treatments, Daniel Ganderton explained that he understood that 7 days was the recommended withholding period following the administration of bute paste or Salbute. It was stated that the previous administration of bute had occurred 11 days prior to the race. Daniel Ganderton then referred to "the saga of how that race meeting

unfolded". He explained that the mare was treated the Tuesday, 8 days before the race was expected to take place. When they got to the races, due to COVID and the holes in the track the meeting was called off. Daniel Ganderton explained that they did not make it all the way to Launceston but turned around at Westbury and returned to Devonport. The race ultimately took place 11 days after the treatment.

11. Later, the appellant explained that he treats all of his racehorses with oral bute after they race.

12. During the course of the inquiry, evidence was taken from Paul Zahra who is the scientific manager at RASL. He indicated that a good estimation of the amount of phenylbutazone in the sample was approximately 1400 ng/ml. He indicated that level for this particular drug was probably on the high side. He also stated that he had seen higher levels of this particular drug in samples in the past. He was unable to indicate the timeframe in which the phenylbutazone had been administered. He explained that it is always a difficult question because the amounts can be the result of two different scenarios. On the one hand you can have a large amount given further out from sampling time which gives you a small amount detected or you can have a small amount given closer to race time and you can get the same level. He also indicated that their analysis was unable to ascertain whether the substance was administered orally or intravenously.

13. Evidence was also called from Dr Richardson who is a veterinary surgeon with the Office of Racing Integrity. He explained that phenylbutazone is a non-steroidal anti-inflammatory commonly used within the racing industry. It acts at the tissue level to reduce inflammatory response. He gave evidence that phenylbutazone is detected for a considerable period of time which is why a screening limit of detection of 100 ng/ml was introduced. He indicated that given orally he would commonly recommend a withholding period of 7 days before racing on the basis that if a horse is fed with a particular hay or roughage type substrate, that can delay the absorption of bute and subsequently give a prolonged excretion period. He also stated that if doses were being given on subsequent days, one would probably need to consider a longer withholding period.

14. The recommended doses over a period of time were usually to give 2 grams morning and night on the first day, followed by 1 gram morning and night for the following 4 days and then reducing to 1 gram per day. Phenylbutazone in paste form contains 1 gram per 5 ml.

15. Dr Richardson was cross-examined as to the possibility of cross-contamination. The scenario of *Jurisdiction* being administered bute paste every day for the 4 days leading up to it and causing contamination to *Fighting Phoenix* was described by him as "extremely unlikely".

16. Dr Richardson accepted that phenylbutazone is traditionally extensively used in the racing industry. He stated it was very commonly used as a therapeutic agent and was affordable. In response to a suggestion from the

appellant that phenylbutazone could be described as a "training tool…" due to "wear and tear on our horses for want of a better word", Dr Richardson responded that he would call it a therapeutic agent and that he thought that the levels of high intensity exercise that are expected from horses are such that he would expect some degree of inflammatory response which was one of the reasons why bute was extensively used. When asked if he would go so far as to say the use of the substance was a necessity, Dr Richardson replied *"No, absolutely not"*. He explained that he himself trains endurance horses and they have a degree of athletic performance and that he does not treat them with anti-inflammatories but that he will take a lot longer than what is expected in the racing industry to bring a horse up to the level of fitness required for the sport. He noted that, as a Schedule 5 drug, phenylbutazone should be prescribed by a veterinary surgeon for a specific animal.

17. During the course of the inquiry neither Daniel Ganderton nor the appellant stated that they had positively seen *Jurisdiction* spit out bute.

Penalty Submissions during the Inquiry

18. Prior to arriving at penalty, Stewards referred to the appellant's record in relation to prohibited substances and his history of relevant rules being breached. It was noted that the appellant's most recent disqualification was in 2018 which resulted in a total period of 12 months disqualification being imposed. It was also noted that the appellant had only 14 runners between the time he recommenced training horses and the presentation of *Fighting Phoenix* on 28 March 2020. It was noted that when the appellant was relicensed, a condition was imposed reducing the number of horses in work to 10 at any one time.

19. The appellant pointed out that the offence was not of administration but presentation. The appellant asserted that compared to previous prohibited substance charges, this one was the result of a stable muck-up.

20. The appellant presented to Stewards information regarding other penalties imposed for various presentation charges to demonstrate that fines were generally imposed in respect of like offending. The ultimate submission was that as far as therapeutic substances are concerned the trend was to fine irrespective of prior records.

21. The appellant's involvement in the racing industry and particularly being involved in a number of purchases at the sales during the course of the year was stated to be making a positive contribution to the industry. Reference was made to the number of casual staff that he employs to conduct his training. It was noted that he had been in the industry for 40 years and a trainer for 25 of those years. He stated that his family was steeped in racing tradition. It was noted that the appellant also worked outside of the racing industry on the wharf on a casual basis. He stated, however, that training horses was his primary income as it had been for the past 25 years. The difficulties in obtaining employment in the current environment was also referred to by the appellant.

22. When delivering penalty the Stewards stated the following:

> "*In relation to the charge under 240(2) which is obviously the presentation charge we've considered all the evidence that's been put forward. We've considered what you put forward in relation to penalty and particularly considered your guilty plea; your time in the industry, your personal and financial circumstances, the therapeutic nature of the prohibited substance, your record regarding prohibited substances, the timeframe this positive swab now to your previous positive swab which was a short period of time, the high level detected in the sample of the prohibited substance, the negative impact that any positive swab has on the Tasmanian Racing Industry. We've considered also your husbandry practices and any penalty needs to act as a general and specific deterrent. Having regards to the circumstances of the case Stewards were not comfortably satisfied that the cross-contamination was the sole reason for* Fighting Phoenix *being presented with a prohibited substance in its system, and with a case of similar circumstances we feel that a 12 month disqualification be the appropriate penalty, however it is our decision to disqualify your licence for a period of 9 months which will commence immediately and expire at midnight 26 April 2021.*"

Relevant Principles

23. Before considering the appellant's submissions, we record and gratefully adopt the observations and matters of principle set out below by Justice Garde in *Kavanagh v Racing Victoria Limited (No.2)* [2018] VCAT 291 at [15]:

> *Kavanagh and O'Brien rely on the decision of the Racing Appeals Tribunal in McDonough v Harness Racing Victoria, where Judge Williams said:*
>
> > *... from the point of view of penalty the ability of a trainer to demonstrate to a Tribunal, and the onus is on the trainer, that he lacks culpability because he did not administer the substance himself or is not otherwise responsible in any way, that is still of course a significant factor in terms of penalty. But I emphasise the evidentiary onus remains in my view, on the trainer, to avail himself of the benefits of proof of reduced or absent culpability. That conclusion, from a legal point of view, is consistent with the criminal law, in the case of Storey and it is also referred to in a thoroughbred case that I was reading of the New South Wales Authority v Graeme Rogerson ... a case in which His Honour Mr Barry Thorley presided...:*
> >
> > *In the view which this Tribunal takes of the structure of AR178, it is however for the trainer to carry the evidentiary onus of proving facts which serve to reduce the primary inference that would be drawn by the fact of the finding of a prohibited substance in a horse within his charge which has been brought to a race course.*
> >
> > *I endorse that statement of the onus in respect of not only the thoroughbred rules but also the harness racing rules.*
> >
> > *With this background these prohibited substance cases generally, and I emphasise generally, fall into one of three categories. First where through investigation, admission or other direct evidence the Authority, in this case*

Harness Racing Victoria, can establish before the Tribunal a positive culpability on the part of the person responsible, perhaps the trainer.

For example, the trainer administered the drug to the horse either himself or at his direction or had otherwise acted in some way as to be instrumental in the commission of the offence. Within that category the culpability may be in the class of deliberate wrongdoing or it may be through ignorance or carelessness or something similar.

Secondly, where at the conclusion of any evidence and plea the Tribunal is left in the position of having no real idea as to how the prohibited substance came to get into the horse. This may be with the trainer giving some explanation which the Tribunal is not prepared to accept or the trainer may simple (sic.) concede that he has no explanation.

I might say that this second category is perhaps the most commonly experienced scenario. Indeed as again His Honour Mr Barry Thorley ... said:

"The common experience is of course that the Stewards have no idea as to how it is in the case of any racehorse that the prohibited substance came to be in it. They immediately, as is required, opened an inquiry. It is very seldom indeed that that inquiry demonstrates the actual culprit. Why is that? For the obvious reason that the sole knowledge of what transpires is within the stable and its staff and its professional advisors. No doubt one can speculate that there are many ways in which a horse may present with a prohibited substance. One can contemplate the act of some intruder by stealth of night entering the stable and administering some drug. One can contemplate the consumption by the animal accidentally of some substance left lying around negligently or the ingestion of some grasses which produce adverse results. One can contemplate that there was an actual, albeit mistaken administration within the stable of some product which was really intended for the horse in the adjoining stall, but mistakenly administered to the horse in question. One can even imagine that the horse might lick a rail or some place which had previously been contaminated. The number of examples one can contemplate is manifold."

As I say, that is perhaps the most common scenario that the Tribunal is left with.

Thirdly, the trainer (or other person being dealt with) may provide an explanation which the Tribunal accepts and which demonstrates that the trainer has no culpability at all. An obvious example would be if the trainer could satisfy the Tribunal that his horse had been nobbled, and it had been nobbled notwithstanding the presence of reasonable measures to prevent same.

And of course there could be various other factual scenarios where the horse could somehow be the subject of the administration or ingestion of a prohibited substance without any culpability either directly or indirectly on the part of the trainer. This category represents cases where the trainer does establish to the Tribunal's satisfaction, the onus being on him, that he is free of blame, that he himself was not instrumental in the administration of the

prohibited substance and that he has done all he could be expected to do to prevent same.

Generally cases will fall into one of these three categories of case. Obviously the first category where there is positive evidence of culpability to varying degrees, is the worst from the point of view of the trainer or other person concerned and high penalties as are appropriate would be likely to flow.

The second category, the lack of evidence category, may or may not end up being similar to the first category, every case depending on its own individual facts.

As to the third category where there is little or no culpability, one would expect any penalty to reflect the absence of culpability or its low level. Within this category of cases there may in appropriate situations be instances where it is deemed not to be appropriate that the sentence express denunciation or general deterrence at all and indeed where it is appropriate to impose no penalty at all.

24. Although the appellant in his written submissions submitted that Stewards ought to have accepted his explanation as to contamination, it was conceded that the matter nevertheless fell within category 2 of *Kavanagh* as there was no affirmative proof as to how or why *Fighting Phoenix* came to present with prohibited substances in its system. So much was conceded by Stewards during the course of the appeal. The Board also views this as a category 2 type case.

The Appellant's Submissions

25. The appellant submitted that an appropriate penalty in the circumstances was a fine. This submission was based on what was said to be a penalty range of "*therapeutic drug offences including bute*". It was submitted that precedents of penalties imposed in other states demonstrated that the penalty range for presenting a race horse with a therapeutic prohibited substance such as bute is a fine and that suspensions for therapeutic substances generally are exceedingly rare. The material provided to the Board in support of this submission included the following:

    (1) Racing Services Tasmania printout of penalties imposed for offences contrary to 240(2) for the period 1 January 2020 to 5 October 2020;

    (2) Racing Services Tasmania printout of penalties imposed for presentation offences between 1 January 2001 to January 2020;

    (3) documents identified as "*Appellant's Additional Precedents*" for jurisdictions including Victoria, New South Wales, Queensland, South Australia, Tasmania and the Northern Territory;

    (4) reasons for decision in the following matters:

    - Tasmanian Racing Appeal Board Appeal No.2 of 2018/10, *Mark Ganderton*, 4 October 2018;

- Racing New South Wales Appeal Panel, *In the Matter of the Appeal of Jarrod Austin*, 20 November 2015;
- Racing Appeals and Disciplinary Board, *Racing Victoria Stewards v Kelvin Bourke*, 18 October 2017;
- Racing Appeals and Disciplinary Board, *Racing Victoria Stewards v Symon Wilde*, 27 April 2017;
- Stewards' Inquiry Decision (Tasmania), *Scott Brunton*, 28 May 2020;
- Racing New South Wales Stewards Report, *Peter & Paul Snowden*, 21 November 2018;
- Racing New South Wales Appeal Panel, *In the Matter of the Appeal of Chris Waller*, 10 February 2017;
- Stewards' Report (Queensland Racing Integrity Commission), *David Vandyke*, 23 July 2020.

26. The documents described as Racing Services Tasmania Precedents and the Appellant's Additional Precedents consist of data extracted from databases held by regulatory authorities. The detail contained in those documents is very limited. Where any information is provided about a participant's prior convictions under relevant rules, that material is in a very summary form. Little is disclosed about the circumstances in which the presentations occurred, or in many cases, the quantity of the substances involved. Some of the entries do not disclose what prohibited substance was involved or the penalty imposed. The additional precedents obtained by the appellants, many of which are not replicated in the information obtained by Racing Services Tasmania, cast some doubt on the extent to which the material accurately reflects all relevant decisions of Stewards and various appellate bodies with respect to breaches of the relevant rules. With those limitations in mind, those precedents do support the appellant's argument that the penalties imposed for breaches of rules prohibiting presentation of a horse with a prohibited substance in its system tend to distinguish between those presented with therapeutic substances as opposed to performance enhancing substances. It also appears to be more common that fines are imposed in respect of such offences.

27. Nevertheless it is apparent that in some cases suspensions, albeit for shorter periods of time, have been imposed for breaches of the presentation rules involving bute or other non-steroidal anti-inflammatory drugs.

28. The matter of *Jarrod Austin* to which the Board was referred was a decision of the Racing New South Wales Appeal Panel. In that decision, the Panel noted that it had:

> "*considered the precedent table of penalties in previous cases of breaches of AR177 and/or AR178* [predecessor to AR240(2)] *involving the substance*

Phenylbutazone. The Panel notes that the table refers to a number of cases covering the period 24 June 1989 to 26 January 2012 and that a wide range of penalties including fines, disqualification and suspension have been imposed. The panel also notes the recent trend has been towards an imposition of fines ranging from $4,000.00 to $15,000.00."

In that case, the panel confirmed the penalty of a $7,000.00 fine that had been imposed by Stewards in respect of the breach.

29. In the matter of *Bourke*, the Racing Appeals & Disciplinary Board in Victoria imposed a fine of $10,000.00 in relation to the presentation of a race horse with bute in its system. The trainer involved had a previous conviction of presentation of a horse in 2013 that was positive to ibuprofen and was disqualified in 2009 for 5 months in respect to the administration of a prohibited substance resulting in an elevated TCO2 reading.

30. In the matter of *Wilde*, the Racing Appeals & Disciplinary Board imposed a fine of $15,000.00 in respect of the presentation of a racehorse that was positive to dexamethasone. The trainer was noted to have three prior convictions in relation to the rule and had been fined previously in respect of bute and ibuprofen positives. Specific deterrence was noted to be relevant in his case and the fine of $15,000.00 was imposed as smaller fines had not produced the desired result. The Board noted that they had decided against the imposition of a period of suspension in that case but did not suggest that such a penalty was not open.

31. The matter of *Brunton*, which is a decision of Stewards in Tasmania, involved the imposition of a $12,000.00 fine for presenting a horse with meloxicam in its system. The therapeutic nature of the substance and the low level detected in the blood sample were noted as relevant to the penalty that was imposed. The report suggests that the presentation was the result of a substance being administered in accordance with the understood withholding period. In that case, the pre-race sample was positive to meloxicam, but the post-race sample was not. Although Mr Brunton had a previous history regarding prohibited substances, the note refers to them being related to environmental contamination.

32. The matter of *Snowden* involved what was found by Stewards to be the inadvertent administration of phenylbutazone due to a stable mix-up. The trainers involved were noted to have good records, albeit that one had a prior offence in 2011 for presentation of a horse that returned a positive result for the same substance. A $7,000.00 fine was imposed in those circumstances.

33. The matter of *Waller* concerned the presentation of a horse with methylamphetamine in its system. Initially Stewards imposed a $30,000.00 fine. On appeal it was noted that the level of the drug detected in the horses' urine was very low and was unlikely to have had any impact on the horses' performance. Although it could not be ascertained what had occurred to result in a positive swab, 17 of Mr Waller's staff (noting he had a staff of about 100), were tested for drugs and 6 of those tested positive to illicit substances. It was noted that Mr Waller had put additional steps in place since the

incident and was noted to already be running a professional stable to high standards. His relevant record was noted to be "*not a bad record in the sense that it does not reveal any instance of a deliberate breach of the rules concerning drugs*". Specific deterrence was regarded as largely irrelevant in this case. The penalty of $30,000.00 was set aside and a $5,000.00 penalty was imposed.

34. In respect of the matter of *Vandyke*, which involved the prohibited substance altrenogest, a $20,000.00 penalty was imposed against a background of having two prior offences in the last year. No information was provided about the nature of those prior matters. It was apparent that Mr Vandyke could not explain the presentation of altrenogest in the horse.

35. The appellant submitted that the Stewards ought to have accepted his explanation as to contamination. It was submitted that this was a class of "*stable muck-up cases*". It was noted that the horse was expected to win and was backed to win by its connections. It was inevitable in those circumstances that it would be tested. It was submitted that the appellant and his associates were surprised at the positive test. Against that background, it was submitted that a 9 month disqualification was outside of the range of penalties for presenting with bute and was therefore manifestly excessive.

36. The appellant further submitted that he ought not to have been disqualified at all. It was noted that disqualification had a financial impact on him, albeit he had alternative work, but that work was irregular due to the impact of COVID-19. It was also asserted that the appellant had changed stable procedures subsequent to the last positive test and relied on veterinarian advice, used reputable products and was more cautious of withholding periods.

Stewards' Submissions

37. The Stewards submitted that each case needed to be judged on its merits. It was noted that Mr Zahra described the quantity of the substance in the horse's system as high. It was noted that the appellant was a repeat offender. Particular emphasis was placed on the fact that the appellant had only had 14 runners since he had recommenced in the racing industry. The first of those 14 runners had raced in October or November 2019. This offending, therefore, occurred within 6 months of him again presenting horses to race.

38. It was noted that fines and disqualification had been imposed upon him in the past, but it had not been sufficient to deter the appellant.

39. In reply, the appellant submitted that having already served 8 weeks as at the date of the hearing, that should serve as an adequate penalty if combined with a fine.

Consideration

40. Whilst it might be the case that a good number of breaches of AR240(2) (and its predecessors) that involve bute and analogous prohibited substances have resulted in the imposition of fines, often quite substantial, that is not universally the case. Further, the Board notes that, for example, disqualifications have been imposed in respect of prohibited substance offending involving bute in the harness racing context and that those disqualifications have in certain cases been quite significant:

- Racing Appeals Tribunal New South Wales, *Alfred Attard*, 31 October 2014 (5 months disqualification);

- Racing Appeals Tribunal New South Wales, *Shaun Gillespie*, 23 June 2015 (12 months disqualification);

- Queensland Civil & Administration Tribunal, *Ken Leslie Rattray*, 14 December 2016 (4 months disqualification);

- Tasmanian Racing Appeal Board, *Dylan Ford*, 1 March 2017 (dexamethasone) (5 months disqualification, including for administration).

41. It is worth noting the comments of the Board in *Ford* as they are extremely relevant to the disposition of this matter. In that appeal, the Board noted the following:

> *"The use of prohibited substances in racing has a deleterious effect on the integrity of the industry and its perception by the public. This is the case even where therapeutic agents are involved. While the use of such substances may not be directly performance enhancing or apt to manipulate the outcome of a race, there are sound reasons for the application of the presentation and administration rules in such circumstances. The use of such agents close to race date enables trainers to work horses harder than otherwise might be the case. There are significant animal welfare issues that flow from this. Such agents may mask a more serious underlying or chronic issue. This may also have consequences for the safety of participants in racing. A horse carrying an injury may break down during the course of a race resulting in the significant risk of an injury being caused to drivers and other horses.*
>
> *It is clear that the penalties imposed by various racing bodies for prohibited substance offences vary greatly between the jurisdictions and according to the substances involved. There is a discernible difference in the treatment of such offences in respect of therapeutic agents as opposed to strictly performance enhancing substances. As a consequence, there is no particular tariff that can be readily ascertained by reference to other cases and other jurisdictions. Each matter must turn on its facts."*

42. These comments are apposite to this case.

43. Here Stewards were faced with the situation of a trainer who, within a short space of being re-licensed to participate in the industry, presented a horse

with a prohibited substance in its system. We have considered the previous appeal decisions in respect of the appellant's presentation offences and note that appellant's stable practices and administration of therapeutic substances are a common theme. Disqualifications, and lengthy ones at that, have previously been imposed upon the appellant. This has not prevented these offences again occurring in the context of his participation in the industry. Specific deterrence is a significant consideration in his case.

44. Although it may be accepted that penalties tend to distinguish between therapeutic substances and performance enhancing substances, this does not inevitably result in the imposition of a penalty falling short of disqualification or suspension. Suspension or disqualification may be warranted, particularly in the face of a participant who does not appear to be able to conduct his activities in the racing industry without falling foul on a repeated basis of these very important rules that are directed to the integrity of the racing industry. As we have observed, specific deterrence is important in this case, but so is general deterrence.

45. Having said that, it appears that the starting point utilised by Stewards, that is one of 12 months disqualification, was too high in the circumstances. In light of the appellant's early plea of guilty, the circumstances of the case, the Board's inability to make any factual findings which would inform our assessment of the appellant's culpability one way or the other, and the appellant's prior matters, we consider that a period of disqualification of 6 months is appropriate.

Conclusion

46. The period of disqualification imposed by Stewards is varied to one of 6 months disqualification. As the decision of Stewards has been varied, the Board orders pursuant to ss.34(1A) and (2)(d) of the *Racing Regulation Act 2004* (the Act) that 25% of the appellant's prescribed deposit be forfeited to the Secretary of the Department. It is also ordered, pursuant to s.34(4A) and (4B)(c) of the Act that the appellant pay 25% of the cost incurred in the preparation of the transcript of the Stewards' inquiry.