

# TASMANIAN RACING APPEAL BOARD

## Appeal No 02 of 2022-23

<b>Panel:</b>	<b>Ms Kate Cuthbertson SC (Chair) Mr Patrick O'Halloran (Deputy Chair) Ms Wendy Kennedy (Member)</b>	<b>Appellant:</b>	<b>Mr Mark Reggett</b>
<b>Appearances:</b>	<b>Ms Louise Brooks (on behalf of the Stewards) Mr Anthony O'Connell (on behalf of the Appellant)</b>	<b>Rules:</b>	<b>AR 190(1) A horse shall be presented for a race free of prohibited substances</b>
<b>Heard at:</b>	<b>Tasracing 6 Goodwood Road, Glenorchy TAS 7010</b>	<b>Penalty:</b>	<b>Disqualified for a period of 7 months</b>
<b>Date:</b>	<b>12 September 2022</b>	<b>Result:</b>	<b>Dismissed</b>

### **REASONS FOR DECISION**

1. The appellant was the trainer of BUSTER BYRON which ran in Race 3 at the Tasmanian Trotting Club meeting on Sunday 26 June 2022.
2. Following an inquiry held on 11 August 2022 the Stewards found that the appellant had breached Australian Harness Rules of Racing (AHRR) 190(1) which provides:

*'A horse shall be presented for a race free of prohibited substance'*

3. The particulars of the charge were stated as:

*'That you; Mark Reggett, as the trainer of BUSTER BYRON presented that runner for the purposes of participating in Race 3 at the Tasmanian Trotting Club on Sunday 26<sup>th</sup> June 2022 when a pre-race blood sample taken from the gelding revealed a TCO2 level above the permitted threshold'*

4. The appellant admitted the charge within the inquiry with the Stewards consequentially imposing the following penalties:
  - a. In regard to the appellant Mr Reggett - disqualified for a period of seven months pursuant to the Australian Harness Rules of Racing. That period of disqualification to commence at midnight on Sunday 14 August 2022
  - b. In regard to BUSTER BYRON – disqualified from Race 3, the Great Northern Pace, at the Tasmanian Trotting Club meeting on Sunday 26<sup>th</sup> June 2022, with the placings to be adjusted accordingly, and the prize money to be redistributed to reflect the disqualification of BUSTER BYRON

5. Notably – in the Board’s assessment and considerations for this appeal – Stewards published their reasons for decision of 11 August 2022 (‘Stewards’ Decision’). This publication was a detailed and comprehensive account of their inquiry and reasons for decision.
6. In reference to the level of detail contained within that initial decision and the Appellant’s argued grounds of appeal the ‘Steward’s Decision’ publication is attached to these Reasons for Decision as Annexure ‘A’.
7. In light of the argued ground(s) of appeal the Board does not seek to restate the uncontroversial or uncontested aspects of the stewards’ findings of fact (including but not limited to the chronology of testing and racing) and/or relevant statements of principle that were enlivened in their determination of penalty.

#### **GROUND OF APPEAL**

8. Within his filed ‘Notice and Grounds of Appeal’ (against penalty only) the appellant provided that *‘I am appealing against the severity of my sentence as the penalty did not properly annunciate (sic) what precedents they took into account when deciding penalty nor did they properly take into account the circumstances and my guilty plea which was made at the earliest opportunity’*.
9. Before this Board the appellant – through his representative – submitted that the Stewards had specifically erred in their finding that the appellant had stated that he was unable to explain the reasons as to why BUSTER BYRON returned an adverse result, and that given an explanation had been provided, it was unclear whether the Stewards had used that finding as an aggravating factor when it should have been used as a mitigating factor.
10. This basis of this submission (and error) was said to arise from the appellant stating during the inquiry that *‘No well as I explained on the day, the only reason I can think of is, obviously I’ve told you I was giving it Carboline and that he was shitting a lot that week which could have, you know, made him very dehydrated and, yeah, obviously raised his TC02 level. That’s all I can really put it down to’*.
11. It is to be observed that taking that submission at its highest, the Appellant did not provide a definitive explanation for the irregularity but rather did no more than provide a potential hypothesis.
12. Further - as was noted by the Chair during the Appeal hearing:
  - a. The appellant had not and did not provide any evidence (including by reference to, for example, treatment books) that the levels were linked or in fact explicable due to the explanation provided by the Appellant; and
  - b. there is distinction to be drawn between an explanation being put forward to Stewards and the *acceptance* of that explanation by the Stewards (that is, it should not be assumed that every explanation without further substantiation is automatically accepted by the Stewards merely because it has been enunciated by those appearing).

13. More broadly - in support of the submission that the penalty imposed in the instant matter was outside the range of permissible penalties or was disproportionately more harsh when compared to penalties for similar offending – the Appellant relied on a number of past cases from various jurisdictions<sup>1</sup>.
14. Further submissions were made as to the necessary consideration (or - as was asserted - lack thereof by the Stewards) to be had to the distinction and practical consequence between the imposition of the penalty types of ‘suspensions’ versus ‘disqualification’.
15. In response to the asserted specific error said to have been made by the Stewards in an assessment of the explanation given by the Appellant and whether it (or any other matters) were assessed to have a mitigating effect on penalty, Ms Brooks on behalf of the Stewards submitted with reference to the content of the Stewards’ findings under the heading ‘Factors in Mitigation’ that Stewards had clearly and appropriately identified the mitigating factors they had taken into account.
16. The Board agrees with the submissions from Ms Brooks and finds the asserted specific error is without merit.
17. Ms Brooks, in response to the broader submission that the penalty was ‘outside the range’, sought to distinguish the cases relied upon by the Appellant to the Appellant’s circumstances and further provided a range of cases<sup>2</sup> to support her submission that the penalty was appropriate and ‘within range’.

## **DECISION**

18. In the determination of this appeal the Board observes that the published Stewards’ Decision does not contain any errors of fact or statements of principle relevant to the determination of penalties for charges of this type.
19. Within their reasons under heading ‘Penalty Approach’ the Stewards have carefully and thoughtfully noted that the principles of ‘specific deterrence’, ‘general deterrence’ and denunciation of the charged conduct were all enlivened.
20. Their articulation of the relevant statements of principle(s) under heading ‘Discussion’ were appropriate.

## **USE OF PAST CASES**

21. Whilst trite to do so the Board again observes that the determination (or review) of penalty must be undertaken on a case-by-case basis and that no two ‘cases’ are completely alike.

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<sup>1</sup> Stewards’ Inquiry Decision dated 28.10.21 re Steven O’Brien; Stewards’ Inquiry Decision dated 01.12.21 re Adam Whitford; Stewards’ Inquiry Decision dated 28.10.20 re Craig Van Dongen; Stewards’ Inquiry Decision dated 10.12.21 re Morris Strickland; TRAB Appeal No 16 of 2018/19 re Michael DORNAUF; VCAT decision dated 09.08.22 re Ellen Tormey.

<sup>2</sup> Media Release – Dylan Ford – Almeria; Queensland Racing Integrity Commission Stewards’ Report for Ricky Gordon dated 5 November 2020; Victoria Racing Tribunal Decision dated 22 July 2021 re Rick Holmes; Queensland Racing Integrity Commission Stewards’ Report for Bill Crosby dated 14 September 2020; Media Release Racing and Wagering Western Australia re Michelle Cockell dated 27 July 2022.

22. The Board observes that because of the wide range of conduct that may be involved in charges of this type, and the wide variation in wrongdoing there are limits to the extent to which a meaningful penalty range for charges of this type can be discerned.
23. The Board further observes that even if a penalty range for comparable offending can be established, its use is limited. The existence of a range does not mean that every penalty must fall within it. The Board must make its own evaluation of the gravity of the offence in light of all the circumstances. Where a penalty is outside the range of comparable offending, it is not determinative of the issue, but merely serves to increase the level of scrutiny.
24. Having applied such scrutiny the Board is satisfied that there is no error in the penalty handed down by the Stewards. The level of TCO2 in BUSTER BYRON'S blood sample was in the high range. The appellant has a prior TCO2 conviction. No adequate explanation has been provided to explain the reading. The use of TCO2 gives rise to integrity and animal welfare issues and has no place in the racing industry. Matters of general and specific deterrence were relevant in this case and justified the penalty imposed.
25. In accordance with section 34(1A) and (2)(a) of the *Racing Regulation Act 2004*, fifty percent of the Appellant's prescribed deposit is to be forfeited to the Secretary of the Department. The Appellant is ordered to pay fifty percent of the cost incurred in the preparation of the transcript in accordance with s34(4A) and (4B)(a) of the Act.

**DATED: 17 MAY 2023**

# STEWARDS DECISION

## OFFICE OF RACING INTEGRITY

and

**Mr MARK REGGETT**

<b>Date of hearing:</b>	11 <sup>th</sup> August 2022
<b>Stewards Panel:</b>	Ross Neal (Chair); Roger Brown and Carolyn Ellson
<b>Present:</b>	Mr Mark Reggett (Respondent)
<b>Rule:</b>	Australian Rules of Harness Racing (AHRR) 190 (1) <i>`A horse shall be presented for a race free of a prohibited substance`.</i>
<b>Charge:</b>	That you; Mark Reggett, as the trainer of BUSTER BYRON presented that runner for the purposes of participating in Race 3 at the Tasmanian Trotting Club meeting on Sunday 26 <sup>th</sup> June 2022 when a pre-race blood sample taken from the gelding revealed a TC02 level above the permitted threshold.
<b>Plea:</b>	Admitted

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### 1. Background

- (a) The Respondent, Mark Reggett is a Grade A licensed trainer pursuant to the Australian Rules of Harness Racing.
- (b) Mr Reggett has held a trainer's licence since May 2016.
- (c) Mr Reggett is the registered trainer of BUSTER BYRON.

- (d) BUSTER BYRON is a 4YO gelding (Devilish Smile –Chrissy Lee Rose) trained by Mr Reggett and owned by PA Woods; CJ Woods; CP Woods; EK Woods; LA Howorka and SE Howorka.
- (e) BUSTER BYRON was correctly entered for and presented to Race in Race 3, the Great Northern Pace, at the Tasmanian Trotting Club at Elwick Racecourse on Sunday 26<sup>th</sup> June 2022.
- (f) BUSTER BYRON was selected for a pre-race blood test which was undertaken by Office of Racing Integrity Steward Ms E Dunbabin. Mr Mark Yole represented Mr Reggett throughout the sampling process. The sampling process was not contested.
- (g) The collection of the pre-race blood sample was concluded at 5.15pm with the sample being allocated the unique number V607767.
- (h) BUSTER BYRON was driven by Mr Mark Yole and won Race 3, earning a stake of \$5,850.00
- (i) On 28<sup>th</sup> June 2022 Racing Analytical Services Limited (RASL) issued a Certificate of Analysis reporting that TC02 above the permitted threshold had been detected in sample V607767 taken from BUSTER BYRON on 26<sup>th</sup> June 2022. The level reported was 38.8 mmol/L. The control sample was clear.
- (j) RASL also advised that the reserve portion of the sample had been forwarded to the Australian Racing Forensic Laboratory (ARFL) in NSW for referee analysis.
- (k) The outcome of the reserve sample was provided by ARFL on 29<sup>th</sup> June 2022, who reported a TC02 level of 39mmol/L.
- (l) On the 1<sup>st</sup> July 2022, Office of Racing Integrity Stewards called on Mr Reggett at his property at Brighton. Mr Reggett was advised of the irregularity, and an inspection of his property was undertaken. During the inspection Stewards observed tubing paraphernalia in Mr Reggett's gear shed.
- (m) The Stewards also collected a resting blood sample from BUSTER BYRON. This was forwarded to RASL for analysis. The outcome being that the sample collected returned a reading of 30.8mmol/L.

## **2. Submissions of the Respondent**

- 2.1 When asked to explain the irregularity Mr Reggett has stated that he is unable to explain the reasons as to why BUSTER BYRON returned an adverse result.
- 2.2 While Mr Reggett has acknowledged that he does possess drenching paraphernalia (tube and funnel), he nonetheless advises that he uses this equipment within the confines of the rules. Mr Reggett has expanded with respect the drenching equipment by saying that if his horses are racing on Sunday then Thursday is his last day for treating his horses.

### **3. Penalty Approach**

3.1 Turning to the matter of penalty the Stewards are cognisant of the following Sentencing Principles –

- (i) That penalties are designed to punish the offender for his/her wrongdoing. They are not meant to be retributive in the sense that the punishment is disproportionate to the offence, but the offender must be met with a punishment.
- (ii) That in a racing context, it is very important that a penalty has the effect of deterring others from committing similar offences through the consideration of both general and specific deterrence.
- (iii) That penalties imposed upon those offending the prohibited substance rules should reflect the industry's disapproval of drugs being detected in racehorses.

### **4. Respondents Penalty Submissions**

4.1 When addressing the Panel on penalty Mr Reggett referred to the matters of Benson where a fine was imposed, and Ashwood where a 3 month disqualification was imposed. Mr Reggett contending that this approach should be adopted with respect to this matter.

### **5. Penalty Considerations:**

5.1 The Stewards do not view the decisions referred to by Mr Reggett as being of particular relevance as they occurred essentially a decade ago and the industry's approach to TC02 positives has changed in the ensuing period.

5.2 Moreover, in recent times, penalties imposed for breaching the provisions of prohibited substance rules relating to TC02, both in Tasmania and Interstate, have consistently resulted in a period of disqualification for the offender. Such is the industry's concerns with respect to TC02.

This standard is reflected in the following decisions:

- a. *Office of Racing Integrity verses Ford (D)* - AHRR 190 (1) - disqualified 18-months. [2018]
- b. *Racing and Wagering WA verses Cockell* - AR 240 -disqualified 6-months. [2022]
- c. *Queensland Racing Integrity Commission verses Warland* – AHRR 190(1) – disqualified 6 months. [2020]
- d. *Queensland Racing Integrity Commission verses Crosby* – AHRR 190(1) – disqualified 6 months. [2020]
- e. *Queensland Racing Integrity Commission verses Gordon* – AHRR 190(1) – disqualified 6 months [2020]

- f. *Harness Racing Victoria verses Holmes* - AHRR 190(1) – suspended 18- months (6 months suspended) [2021]
- 5.3 We note that with respect to *Holmes*, he avoided a disqualification because of his employment being racing related, and the additional hardship which would adversely affect his ability to earn a living should be disqualified.
- 5.4 With respect to this matter the Stewards have determined that a period of disqualification is appropriate, and we have adopted a starting point of 9 months. In assessing this starting point we have recognised the following factors:
- i. The penalties imposed in Tasmania and other Australian jurisdictions. We have taken cognisance of the interstate penalties because they best reflect the contemporary approach to TCO<sub>2</sub> irregularities. We assess this at 6 months.
  - ii. That this is Mr Reggett's second breach of the prohibited substance rules. The previous being in 2018 and relating to an Arsenic overage where Mr Reggett was fined \$3,000
  - iii. We have assessed this second offence of the prohibited substance rules, given Mr Reggett's relatively brief tenure as a trainer should attract an uplift of three months.
  - iv. The elevated level of 38.8 mmol/L is high range.

## 6. Discussion

- 6.1 The Prohibited Substance Rules impose an absolute obligation on trainers to ensure that they presented their runners free of prohibited substances.
- 6.2 In consequence, trainers must take all reasonable steps, and must take proper care, always, to avoid presenting a horse which could give rise to an adverse test result.
- 6.3 Resultantly, where there is a breach of the drug negligence rules trainers must expect substantial penalties, because every time a harness racing horse is presented to race with a prohibitive substance in its metabolism then the integrity of not only harness racing but racing in general is compromised.
- 6.4 In this matter we approach the imposition of penalty on the basis that the cause of the elevated TCO<sub>2</sub> level is not known. The onus under AHRR 190 (1) however, is on the trainer to present a horse free of any prohibited substance. Hence the respondents' admission of the breach.
- 6.5 In fixing penalty, we have regard to the need to uphold the integrity of racing, not only in harness racing, but in all racing, codes have long been at the forefront of disciplinary decision-making. It is wrong to suggest otherwise. Accordingly, the penalty that is imposed upon the respondent must be at a level that protects the public by ensuring appropriate standards of professional behaviour.
- 6.5.1.1



6.6 When considering this matter, the substance detected in the sample taken from BUSTER BYRON on the 26<sup>th</sup> June 2022 was TC02 at the very high level. TC02 being a substance with no legitimate use in harness racing

## **7. Factors in Mitigation**

7.1 In determining the appropriate penalty, the Stewards recognise the following factors in mitigation, and which are relevant to penalty discussions. These being -

- (a) Mr Reggett has been fully cooperative throughout the ORI investigation.
- (b) Mr Reggett's admission of the breach.
- (c) That upon notification of the adverse result Mr Reggett scaled down his operation, and for the past month has been inactive with respect to training and racing horses.

7.2 The Stewards assess that a discount of two months should be applied to reflect the factors in mitigation.

## **8. Outcome**

8.1 Having regards to all circumstances the Stewards make the following orders.

- (a) Mr Reggett is disqualified for a period of seven months pursuant to the Australian Rules of Harness Racing. That period of disqualification to commence at midnight on Sunday 14<sup>th</sup> August 2022 to allow him to make arrangements for his horses. This being to hold Mr Reggett accountable, to encourage in him a sense of responsibility for his actions, and to deter him and others from committing the same or similar offences.

## **9. Disqualification Of Horse**

Pursuant to AHRR 195 BUSTER BYRON is disqualified from Race 3, the Great Northern Pace, at the Tasmanian Trotting Club meeting on Sunday 26<sup>th</sup> June 2022, with the placing to be adjusted accordingly, and the prize money to be redistributed to reflect the disqualification of BUSTER BYRON.

**Decision Date:** 11<sup>th</sup> day of August 2022