

# TASMANIAN RACING APPEAL BOARD

## Appeal No 16 of 2023-24

<b>Panel:</b>	<b>Ms Amber Cohen (Deputy Chair) Mr Rodney Lester (Member) Ms Wendy Kennedy (Member)</b>	<b>Appellant:</b>	<b>Ms Tegan Keys</b>
<b>Appearances:</b>	<b>Ms Charlotte Frankcombe (on behalf of the Stewards) Mr Finlay Davis (on behalf of the Appellant)</b>	<b>Rules:</b>	<b>AR 139(1)(a) a banned substance under AR 136(1) is detected in a sample taken from the rider</b>
<b>Heard at:</b>	<b>Stewards Room Elwick Racecourse 6 Goodwood Road Glenorchy TAS</b>	<b>Penalty:</b>	<b>Four month suspension, with one month wholly suspended for a period of two years pending no further breaches of Prohibited substance rules</b>
<b>Date:</b>	<b>26 February 2024</b>	<b>Result:</b>	<b>Varied – Four month suspension of the Appellant’s right to apply for a licence, with one month wholly suspended for a period of two years pending no further breaches of Prohibited substance rules, backdated to commence 13 December 2023</b>

### REASONS FOR DECISION

1. On 26 February 2024, the Board heard this appeal.

#### The Stewards Decision

2. This appeal concerns a decision of Stewards on 16 January 2024 to impose the penalty of suspension of the Appellant’s licence, for a breach of Australian Rules of Racing 136(1)(g), for four months with one month of this penalty wholly suspended for 2 years pending no further breaches of prohibited substance rules. Importantly, Stewards decision was for the suspension to commence at midnight on 25 January 2024.
3. The charge was:

That on Wednesday 12<sup>th</sup> July 2023 at Elwick Racecourse, Tegan Keys, a licensed Trainer and Trackwork rider who, having been requested by a Stipendiary Steward to supply a sample of her urine which was found, upon analysis, to contain the controlled drug d-methamphetamine, committed a breach of Rule

AR136(1) of the Australian Rules of Racing, and that you are thereby liable to the penalty or penalties which may be imposed upon you pursuant to the provisions of Rule AR283 of the said Rules.

4. The Appellant pleaded guilty to that charge.
5. The penalty was made by Stewards pursuant to Australian Rules of Racing, rule 138 which provides that Stewards may penalise for a breach of rule 139(1)(a) which in turn provides that a rider breaches the rules if a banned substance under rule 136(1) is detected in a sample taken from the rider.
6. The sample in this case was a urine sample taken on 12 July 2023, which returned a positive result for amphetamine on 1 August 2023.
7. At the time of the sample being taken, the appellant, Ms Tegan Keys was the holder of a Trainer licence and a Trackwork Rider licence.
8. Stewards provided a written decision dated 16 January 2024 (“Stewards’ Decision”). This publication was a detailed and comprehensive account of their inquiry and reasons for decision. Given the level of detail contained in the Stewards’ Decision, it is attached to these reasons for decision in full and marked as Annexure “A”.
9. Given the issues before the Board in this Appeal, it is of little use to restate the uncontested facts save that the Board has been provided with a Drug Screening Certificate stating the sample screened was positive for amphetamine (d-methamphetamine) at the level 894 µ g/L.

### **The Appeal**

10. The appellant has appealed against the penalty, and in her notice of appeal raises five matters, which she stated to be both her grounds for appeal and her application for a stay of proceedings. This decision concerns only the appeal against penalty. The five grounds stated are (produced here as closely as possible to the grounds stated in the notice of appeal):
  - 1) Delay of 14 days already by ORI failing to provide a written decision prejudicing appellant;
  - 2) Appellant is suspended from all licensed activities under decision & cannot earn any income;
  - 3) Penalty imposed is manifestly excessive in relation to other relevant decisions (David Keating – entire penalty fully suspended);
  - 4) Stewards failed to place appropriate weight on
    - 8 weeks already served when unable to ride trackwork / handle horses meaning penalty is equivalent to a 6 month penalty
    - Good/excellent record of 18 years, no relevant prior offences
    - Failed to adequately take into account personal circumstances, including cumulative effect of recent penalty from RACING NSW.
  - 5) If this matter cannot be heard in the next 7 working days, a stay of proceedings is requested as the appellant is being unfairly denied participation in the industry at the busiest time of the racing year.
11. During the course of this hearing the Appellant was represented by Mr Finlay Davis. Mr Davis provided some background information by way of written submissions provided at the hearing and further spoke to those submissions at the hearing.
12. That background information confirmed that following the positive result to the urine test taken on 12 July 2023, which was received by Stewards on 1 August 2023, Stewards stood down Ms Keys from track riding on 1 August 2023, pending the Stewards Inquiry, but allowed Ms Keys to continue to hold a trainer’s license. During that stand down period, on 25 September 2023, Ms Keys was disqualified from holding a trainer’s licence and a track

rider's licence by NSW stewards for a period of 4 months. The disqualification was in respect to failing to comply with a direction of NSW Stewards which prohibited the Appellant from riding horses at a property in NSW. The Board understands that charge was made under Australian Rules of Racing 232(b) but does not propose to set out of the detail of the NSW Stewards decision here. Relevantly, that disqualification was to end on 25 January 2024.

13. Mr Davis went on to submit that Ms Keys had been led to believe that any suspension arising from the positive result from the sample taken on 12 July 2023 would be served concurrently with the disqualification by NSW Stewards. However, the decision of Stewards on 16 January 2024 was to suspend the Appellant for four months cumulatively to the NSW disqualification period so that it would commence at midnight on 25 January 2024 and run until 26 April 2024, with the final month to be wholly suspended for two years. Mr Davis submitted that resulted in Ms Keys being effectively suspended from track riding for two months from 1 August 2023 until 25 September 2023, when she was disqualified by NSW Stewards, and then for a further four months from the end of the disqualification on 26 January 2024, making her suspension effectively six months and cumulative to the four months disqualification, which occurred in the interim period. His submission was that in those circumstances, the penalty is manifestly excessive.
14. It is not clear why the Stewards Inquiry into the sample taken in Tasmania on 12 July 2023 was not held until 16 January 2024, however, Stewards indicated that the Inquiry was to be held on 4 January 2024 but the Appellant was not available at that time and so it was rescheduled to 16 January 2024. Mr Davis stated one or more earlier dates in January were scheduled but vacated by Stewards, indicating the delay was caused by both parties.
15. Mr Davis also made submissions along the lines, that
  - a. the delay in holding the Stewards Inquiry resulted in a breach of natural justice for the Appellant;
  - b. insufficient weight or no proper consideration was given to the Appellant's outstanding work ethic and record over the 18 years she has been in the industry;
  - c. the four month disqualification imposed in NSW for failure to comply with a direction of Stewards was the result of inference by Tasmania Stewards and communicated to NSW Stewards that the Appellant was a "druggie" and should be treated as such, before having the matter heard in a Stewards Inquiry in Tasmania. As a result, the Appellant has effectively been penalised twice for the same conduct in the NSW disqualification and the subsequent and cumulative suspension by Tasmanian Stewards, which breaches the principles of natural justice;
  - d. insufficient or no consideration was given to the influence of Scott Brunton, the Appellant's partner and a person whose Trainer's license has been disqualified by Office of Racing Integrity on 8 September 2023, on the Appellant at the relevant time.
16. Stewards were represented by Ms Charlotte Frankcombe at the hearing. Stewards did not object to the factual background outlined by Mr Davis on behalf of the Appellant except to say that during the eight week initial stand down period, the Appellant had been offered a number of opportunities and reminders to provide a "clearance sample" (a sample giving a negative result) but did not do so. Stewards said that it could be inferred that the Appellant was not able to provide a clear sample during that period.
17. Ms Frankcombe explained that the Appellant had provided a further sample on 13 September 2023 but that the result of the testing of that sample had not yet been received, which may be because it had not been paid for. The Appellant advised she had paid for that testing to be completed before the Stewards Inquiry on 16 January 2024, although she was unable to provide the exact date and did not provide evidence to that effect. No explanation was provided to the Board as to why the result of that test had not been received.

18. On behalf of Stewards, Ms Frankcombe said that there was no inference drawn by Stewards that the Appellant was “a druggie”. Stewards said they accepted that this was an error of judgment on her behalf and the penalty reflected that assessment.
19. Both parties acknowledged the result of the urine sample test was a high reading and the Board notes the plea of guilty to the charge. Mr Davis said the Appellant had appropriate supports in place and that a suspension of the penalty would be an appropriate safeguard in this instance.
20. Finally, both Mr Davis and Ms Frankcombe referred the Board to a number of previous Stewards decisions in respect to breaches of the prohibited substances rules, which the Board has had regard to, but for the reasons which follow, does not propose to set out in detail here.

### **The Applicable Rules, Legislation and Case Law**

21. The Rules in Division 5 and Division 6 of Part 7 must be read in conjunction with each other, and Rule 238 separately provides penalties that may be imposed.
22. Rule 136(1) sets out the substances that are banned in riders when detected in a urine sample at a concentration above the respective threshold level and includes the stimulant amphetamine (150 µ g/L).
23. Rule 139 provides that:
  - (1) A rider breaches these Australian Rules if:
    - (a) A banned substance under AR 136(1) is detected in a sample taken from the rider;  
or
    - (b) ...
24. Rule 138 provides:

Without limiting any other rules or powers under these Australian Rules, if a person breaches any rule in this Division 6 the person may be penalised by a PRA or the Stewards.
25. Rule 238 provides, relevantly:
  - (1) Subject to subrule (3), a person or body authorised by the Rules to penalise any person may, unless the contrary is provided, impose:
    - (a) a disqualification;
    - (b) a suspension;
    - (c) a reprimand; or
    - (d) a fine not exceeding \$100,000.
  - ...
  - (4) Unless otherwise ordered by the person or body imposing the penalty, a disqualification or suspension imposed under subrules (1) to (3) is to be served cumulatively to any other suspension or disqualification.
  - ...
26. “Suspension” is defined under the Rules to mean

“the temporary withdrawal (in whole or in part) of any licence, registration, permit, permission, right or privilege granted under the Rules.”
27. The other relevant Rule in this appeal is Rule 278, which provides:
  - (1) Subject to subrule (2), if a licensed person is disqualified, that person’s licence immediately ceases and becomes void, and the person must make application to a PRA to be relicensed in order to be granted a new license.

- (2) For the duration of a period of disqualification, a disqualified person is and remains bound by, and subject to, the Rules.

### **Determination of the Appeal against Penalty**

28. The Board must decide whether to affirm, vary or quash the penalty imposed by Tasmanian Stewards at the Inquiry on 16 January 2024. The decision was that the Appellant was suspended for four months.
29. For the benefit of any doubt, the Appellant was disqualified at the time of the Stewards decision, which had the effect of ceasing the Appellant's licenses and rendering them void from the time of disqualification, which in this case was from 25 September 2023.
30. The Board has no jurisdiction and is not requested to review the NSW Stewards decision as to conviction or penalty made 25 September 2023.
31. The Board has considered the submissions of each of the parties to this appeal.
32. 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.
33. Within their reasons under heading 'Penalty' the Stewards have carefully and thoughtfully noted that the sentencing principles of punishment which is not disproportionate, specific and general deterrence, denunciation of the charged conduct and the need to rehabilitate the offender were all enlivened.
34. Their articulation of the relevant statements of principle(s) under heading 'Penalty Discussion' were appropriate.
35. As the Board has previously noted, it is trite to observe that the determination (or review) of penalty must be undertaken on a case-by-case basis and that no two 'cases' are completely alike. There is a wide range of conduct, circumstances and wrongdoing that may be involved in charges of this type, which means there are limits to the extent to which a meaningful penalty range for charges of this type can be discerned.
36. The Board must make its own evaluation of the gravity of the offence in light of all the circumstances. Having considered the sentencing principles outlined by Stewards, the Board agrees, as it has in the past, that matters of general and specific deterrence were relevant in this case. The Board was mindful of the four month disqualification imposed by NSW Stewards, which was served in the interim but notes that disqualification was for a separate offence, which is not under review here.
37. The Board is satisfied that the penalty imposed upon the Appellant properly took into account the sentencing principles and the circumstances of this matter, as well as the personal circumstances of the Appellant. The Board does not consider that the penalty of suspension for four months, with one month wholly suspended for a period of two years pending no further breaches of this or a similar rule, is excessive in the circumstances.
38. However, in this case, the Board has had regard to the timing of the Steward's decision and the status of the Appellant's licence. Stewards specified that the penalty would commence at midnight on 25 January 2024. The Appellant's licences had been disqualified at the time the Steward's decision and were, as a result of AR 278(2), void. The Board was advised by Stewards that the practical outcome of the suspension was that that no application for a new license would be processed for the period of the suspension.
39. It follows that it is necessary to consider what may be suspended under Rule 238 by reference to the definition of suspension. Suspension means the temporary withdrawal of not only "any

licence, registration, permit or permission” but also any “right or privilege” granted under the Rules. The meaning of “right” has been the subject of judicial commentary. In RBF, Porter J noted the statement of Lord Oliver in Re KD [1988] 1 AC 806 at 825, which was a case referred to by the primary judge in the first instance, the word “right” can be used in a variety of different senses, both popular and jurisprudential. Porter J went on to say “it may mean a right to do something in respect of which the law will provide an appropriate remedy, it may signify a privilege of doing something without interference, or it may signify not more than a hope or aspiration to a social order.” Given that broad definition, the Board in this case notes the Appellant had a right to apply for a license.

40. As there was no license to suspend, and Stewards intended not to process an application for licence during the suspension period, Stewards should have specified that they were suspending not the Appellant’s licence but her right to apply for a new licence. Taking into account, as Stewards properly did, the 8 weeks the Appellant was stood down upon receipt of the positive test result, before the disqualification of the licence by NSW Stewards, but noting that the Appellant had the opportunity to have that embargo lifted by provision of a clearance sample during the stand down period and did not, and the 8 weeks since the Steward’s decision on 16 January 2024, and notwithstanding that the Appellant may not have been eligible to apply for a new licence as she was disqualified at the time, that the penalty should be backdated to 13 December 2023 so that three months of the penalty has been served to today’s date.
41. As a consequence, the outcome of the appeal is to vary the decision of Stewards to a penalty of four months suspension of the Appellant’s right to apply for a Trackwork Licence or Trainer’s Licence, with one month wholly suspended for a period of two years pending no further offence contrary to the prohibited substance provisions of the Rules. The penalty is backdated to commence on 13 December 2023.
42. As the decision of Stewards has been varied, the Board orders that the appellant forfeit twenty five percent of her prescribed deposit to the Secretary of the Department pursuant to s.34(1A) and (2)(d) of the Racing Regulations Act 2004. Further, the Board orders that the appellant pay twenty five percent of the cost incurred in preparing the transcript of the inquiry pursuant to s.34(4A) and (4B)(c).

**DATED: MARCH 2024**

## STEWARDS DECISION

OFFICE OF RACING INTEGRITY  
and  
Ms Tegan Keys

Date of hearing: 16<sup>th</sup> January 2023

Stewards Panel: Bruce Free (Chair); Tony Harding and Tracy Canham

Present: Ms Tegan Keys

Rule: Australian Rules of Racing AR139(1)(a)

Charge: That on Wednesday 12<sup>th</sup> July 2023 at Elwick Racecourse, Tegan Keys, a licenced Trainer and Trackwork rider who, having been requested by a Stipendiary Steward to supply a sample of her urine which was found, upon analysis, to contain the controlled drug d-methamphetamine, committed a breach of Rule AR136(1) of the Australian Rules of Racing, and that you are thereby liable to the penalty or penalties which may be imposed upon you pursuant to the provisions of Rule AR283 of the said Rules.

Plea: Admitted

### 1. Background.

- (a) On Wednesday 12<sup>th</sup> July 2023 Office of Racing Integrity Stewards conducted workplace drug testing at Elwick Racecourse.
- (b) Ms Keys was one of the persons selected to be tested.
- (c) Ms Keys was required to provide a sample of her urine. The sampling being conducted by Office of Racing Integrity Stewards.
- (d) That sample was given the unique number 301579.
- (e) On Tuesday 1<sup>st</sup> August 2023 Racing Analytical Services Limited (RASL) confirmed the presence of d-methamphetamine in sample number 301579, being the urine sample provided by Ms Keys.
- (f) Ms Keys subsequently provided a clear sample.

### 2. Respondents Penalty Submissions

For her part Ms Keys readily accepts she made a regrettable choice in consuming an illicit substance, namely d-methamphetamine.

Ms Keys informed the Panel that it was a one-off incident brought on by stress, and that she is not a regular user of any illicit substances.

Ms Keys submitted that as a consequence being stood down from training and riding, she has lost her income and is relying on income support.

Ms Keys expressed her desire to participate in the industry in some way as soon as possible for her mental health and to assist her family financially.

Ms Keys offered to undergo regular drug testing if she were to be able to commence riding at the completion of the current disqualification she is serving, which expires on the 25<sup>th</sup> January 2024.

### 3. Penalty

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 those persons actively involved in the care and training of racehorses.
- (iv) The need to rehabilitate the offender should also be factored into the outcome.

### 4. Contributory Factors

Ms Keys's has been co-operative with the Stewards throughout the process. She has admitted her wrongdoing and accepted full responsibility for her actions. Ms Keys's record demonstrates no previous breaches of the prohibited substances rules in the previous 18 years she has been licenced. Importantly, we acknowledge Ms Keys's personal circumstances which we find are relevant with respect to penalty.

### 5. Penalty Discussion:

When promulgating a starting point, the panel has had regard to not only the sentencing principles detailed above, but also the seriousness of the offending; industry expectations; and the need to protect the industry from unnecessary risk. Balanced against this is that the substance involved (d-methamphetamine) is a Class A drug and as such the penalty imposed must reflect the industry's concern with respect to the presence of this drug in licenced racing industry participants.

Given all factors we determine that the starting point in this matter should be a suspension of Ms Keys's licence for a period of four months.

In consideration of penalty the Stewards recognise that Ms Keys was stood down from riding for a period of eight weeks, between the time the Office of Racing Integrity was advised of the result of sample 301579 and her four month disqualification handed down from NSW Stewards on the 25<sup>th</sup> September 2023.

### 6. Outcome

Ms Keys is suspended for a period of four months, with one month of this penalty being wholly suspended for two years pending no further breaches of this, or similar rules. The effective dates of the suspension being midnight 25th January 2024 until midnight 24th April 2024.



The suspended component of the penalty holding Ms Keys accountable, and to encourage in her a sense of responsibility for her actions, and to deter her, and others from committing the same or similar offences.

In determining penalty, the Panel has had regard to the following:

- Ms Keys's plea of guilty to the charge at the earliest available opportunity and cooperation throughout the inquiry.
- Ms Keys's disciplinary history, noting no prior breaches of a similar rule.
- the nature of the prohibited substance, being methamphetamine.
- the need to maintain the integrity of thoroughbred racing and to ensure a level playing field for all participants.
- The time served by Ms Keys when stood down prior to her NSW disqualification.
- Ms Keys's personal circumstances.
- Previous offences under this rule have in some instances disqualifications imposed.

Decision Date: 16<sup>th</sup> January 2024