

# TASMANIAN RACING APPEAL BOARD

## Appeal No 21 of 2018/19

<b>Panel:</b>	<b>Kate Cuthbertson (Chair) Suzanne Martin (Member) Wendy Kennedy (Member)</b>	<b>Appellant:</b>	<b>Russell Watts</b>
<b>Appearances:</b>	<b>Anthony Bullock (on behalf of the Appellant) Michael Hoyle (on behalf of the Stewards)</b>	<b>Rules:</b>	<b>GAR 83A(3)</b>
<b>Heard at:</b>	<b>Tasracing Glenorchy Tasmania</b>	<b>Penalty:</b>	<b>Disqualified for 24 months</b>
<b>Date:</b>	<b>18 September 2019</b>	<b>Result:</b>	<b>Varied to 9 months disqualification</b>

### REASONS FOR DECISION

1. The appellant, Mr Russell Watts, was the trainer of a greyhound *Birds Fly High* which was presented to race at the North West Greyhound Racing Club on 5 February 2019 in the SurePick Juvenile Graduation 452. A post-race sample was taken from *Birds Fly High* and found to contain  $\beta$ -androstane-3 $\alpha$ , 17 $\beta$ -diol (the prohibited substance), which is a metabolite of testosterone, in excess of the prescribed concentration of 100 nanograms per millilitre in a sample of urine taken from a male greyhound.
2. As a consequence of the positive swab, a kennel inspection was conducted at the appellant's property on 25 March 2019. The appellant was present and was spoken to by Stewards and an extract from his treatment book was taken. As a consequence of his disclosures to stewards and the information from his treatment book, it was established that the appellant had been administering 2ml of Coforta by injection to his dogs the day or evening before they raced.
3. As a consequence, the appellant was charged with two offences to which he pleaded guilty. The first offence was pursuant to GAR83(2)(a) and related to his presentation of *Birds Fly High* when the dog was not free of a prohibited substance. As a consequence of his plea of guilty, the appellant's licence was disqualified for 12 months.
4. In addition, the appellant was charged pursuant to GAR83A(3) which provides as follows:

*"In addition to sub-rule (1) of this rule, no person without the permission of Stewards may administer or cause to be administered any injectable*

*substance to a greyhound at any time on the day prior to the day of an Event that it is nominated to compete in.*

*Note: For the purposes of this Rule, 'day' means the 24 hour period from 12.01am to 12 midnight on any calendar day."*

5. The particulars of the charge were ultimately as follows:

*"The particulars being that as stated in your own evidence and also listed in your treatment book, a number of greyhounds in your training, and specifically the following greyhounds were all treated with an injection of Coforta on the day prior to an event which they were nominated to compete in. Those particular greyhounds were Drop the Leash, Sacred Way and Spirit Flame, which were injected on the 24<sup>th</sup> March 2019 and subsequently scratched from their engagements on the 25<sup>th</sup> March 2019."*

6. In respect of this charge, the appellant's licence was disqualified for a period of 24 months to be served cumulatively to the penalty of 12 months imposed in respect of the presentation charge.

7. The appellant has appealed against the severity of the penalty imposed in respect of GAR83A(2). No appeal has been brought in respect of the penalty imposed in relation to the presentation charge.

#### **Circumstances of the Offence**

8. During the course of the kennel inspection which occurred on the same day that *Drop the Leash, Sacred Way* and *Spirit Flame* were due to race, the appellant told Stewards that he had injected the dogs with Coforta on the previous evening. He was asked whether he gave Coforta to every runner and he responded that each runner was given 2ml the night before the race. He was then asked the question "So anything's racing tonight?" and responded "*It would have had it last night*". He was further questioned and the following exchange occurred:

*MR QUILL: Just resuming with Mr Watts and it is now 25 past one, Russell just, you mentioned that the dogs get Coforta the day before?*

*MR WATTS: Yeah they do.*

*MR QUILL: So the dogs that are in tonight?*

*MR WATTS: Yep.*

*MR QUILL: They were given Coforta yesterday?*

*MR WATTS: Yep.*

*MR QUILL: Correct?*

*MR WATTS: Yes.*

MR QUILL: *Dogs that are in tomorrow, have they been given anything yet?*

MR WATTS: *Not yet.*

MR QUILL: *Right I was just talking to Mr Hoyle, under the rules you can't treat a greyhound a day prior to it racing.*

MR WATTS: *I thought you had a day to do it.*

MR QUILL: *No no, you can't, no injectable.*

MR WATTS: *Oh ok.*

MR QUILL: *Any injectable substance, so I'll read and you can come and have a look. So 83A Race Day and Day Prior Treatment, and it says part three of that rule says, in addition to sub rule one, so sub rule one is no person without the permission of the Stewards may administer or cause to be administered any treatment to the greyhound at any time on the day of the meeting until that greyhound is no longer presented. Part two the Stewards may order that any greyhound that has been administered a treatment in contravention of sub rule one of this rule, be withdrawn from an event and part three, in addition to sub rule one of this rule no person without the permission of Stewards may administer or cause to be administered any injectable substance to a greyhound at any time on that day prior to day of any event that it is nominated to compete in. You understand that one?*

MR WATTS: *I I just thought it was, you had the day before you was right, 48 hours.*

MR QUILL: *No well, what I'm saying is you got, what dogs are in tonight?*

MR WATTS: *Drop The Leash, Sacred Way and little brindle bitch up the top, Spirit Flame.*

MR QUILL: *You've got three in tonight, have we got the fields somewhere just so I can. So because you mentioned that and that's why I rang Mr Hoyle because you mentioned it earlier and I just clarified. So if that's the case that they've been treated yesterday, Mr Hoyle has advised that they need to be scratched*

*from tonight's race meeting, and that will be again subject to an inquiry of what is involved, the positive swab notification. So we'll have to scratch those greyhounds because they have been treated.*

*MS LORD: So we have Spirit Flame in race five.*

*MR WATTS: And Drop The Leash, two in the one race.*

*MS LORD: Sorry Yep, Drop The Leash and Sacred Way in race eight, yep so there's three.*

9. During the course of further conversation, the following exchange occurred:

*MR QUILL: One of those things that unfortunately happens and it's probably been, I don't know, the rule hasn't been in place for that long so it's probably a regime that you've been doing for 20 years...*

*MR WATTS: ...that's right...*

*MR QUILL: ...and may have been negligent on your behalf from not updating yourself on the rules but.*

*MR WATTS: The rules change every week, every week you get something on your phone, this is updated this is updated.*

10. During the course of the inquiry the appellant was questioned further regarding his treatment of his dogs the night before a race. He stated that the treatment was *"virtually 24 hours then, well most on 99% of the time its 24 hours, which I thought was the rule, I thought you was allowed to do that. I didn't realise it was 48 hours."* Stewards pointed out to the appellant that the rule had been adopted by Tasracing on 1 January 2019. He explained to Stewards that his practice was to give the dogs that were racing *"a little bit of Coforta"* the night before and sometimes on Monday morning before Tuesday afternoon races. He told Stewards that he had undertaken that practice since he had been back training dogs on his return to the industry from a period of disqualification in 2013. He told Stewards that it was a practice he employed for *"the dogs that are a little hypo that just need a little bit of, it just helps them recover better, it's their welfare more than anything, it's just to help them recover, Coforta is"*.
11. The appellant did not keep individual records of dosing his dogs with injectable Coforta, but stated it was *"whenever a dog raced, it just depends on the dog yeah"*.
12. In his treatment book, the appellant had inscribed in the front cover the following:

*"Race dogs get 2ml Coforta night before race"*.

13. The instruction previously stated *“Race dogs get 2ml Coforta race day”* but the appellant had scrubbed out *“race day”* and changed it to *“night before race”* as a result of his understanding of certain rule changes. It is not clear from the transcript of the inquiry and it was not clarified during the course of the appeal what rule changes prompted the amendment to his treatment book and practice.
14. The kennel inspection occurred on 25 March 2019. Stewards pointed out to the appellant that given the new rules came into place on 1 January 2019 *“Is it reasonable to assume that a significant number of greyhounds since the 1<sup>st</sup> January 2019, which you have presented to race would have been injected with Coforta the night before race day?”* The appellant responded *“Yeah course there would have been”*.
15. The appellant was then questioned regarding his practice of keeping up to date with the rules of racing. He told Stewards that he was a *“hobby trainer”* but conceded it was a big part of his life. The following exchange then occurred:

*CHAIRMAN: Ok alright, so being that it is a big part of your life you would, in normal circumstances make sure that you are aware of the rules of racing when preparing a dog to race and presenting?*

*MR WATTS: True true, but when you get hammered every week with SS (sic.) messages every week from Tasracing, you just don't even look at half of them that's the problem, I'll admit that.*

*CHAIRMAN: Ok so you didn't update yourself with regard to these rule changes?*

*MR WATTS: No, only on as you can see I've scribbled out for when I started again, I thought it was 24 hours, I thought that's what you had, I thought I was doing the right thing, that's why I wrote it there.*

*CHAIRMAN: Yep but being that you are taking greyhounds for owners, you should be aware of any rule changes that are coming through.*

*MR WATTS: Probably should.*

16. Following his plea of guilty, the appellant provided information to Stewards regarding his personal circumstances. He told them that he was a hobbyist who normally had between 10 and 12 dogs in his kennels and that he had a small 50 acre farm that did not generate sufficient income for anything other than house bills. He told Stewards he worked one day a week in a butcher's shop for half a day and his wife only worked part-time. He told Stewards that disqualification would have a significant impact on his and his family's finances, as 95% of his income derived from training. He had been in the industry for over 40 years. Stewards

indicated during the inquiry that “*this would be a fifth offence under that rule*”. This appeared to be a reference to the presentation offence.

17. At the time of penalty being imposed, the appellant had five greyhounds in his kennel. He trained them on a 50:50 basis, namely that he received half the prize money and otherwise paid all the bills associated with keeping the greyhounds in his kennel.

18. In imposing the penalties for the two offences, Stewards stated as follows:

*In relation to the first charge which is the charge of presentation, taking into account your guilty plea, your personal circumstances, your time in the industry and your record in regard to this rule, and also taking into account the need for this penalty to serve as a personal deterrent to you and as a deterrent to the entire industry, also to uphold the image of the industry and maintain public confidence, the panel have determined today that the appropriate penalty to be a disqualification of your license, and that disqualification to be for a period of 12 months. This penalty will commence immediately. In relation to the second charge, the charge of day prior treatment injections, again taking into account your personal circumstances, your time in the industry and your record, also taking into account the need for this to serve as a personal deterrent and a deterrent to the entire industry, to uphold the image of the industry and to maintain public confidence, the panel has determined that the appropriate for this to be a disqualification of your license for a period of 24 months. This penalty is to be served cumulatively to the previous penalty, this in effect means that your license will be disqualified for a total period of three years and against that decision you have your right of appeal.*

### **Appellant’s Submissions**

19. The appellant submitted that the penalty imposed was too severe taking into account the following circumstances:

- (a) GAR83A had been amended on 1 August 2018 and had come into effect on 1 January 2019;
- (b) no media releases had been distributed in respect of the rule change. The appellant submitted that industry participants receive a great number of text messages from Tasracing with links to various rules. Sometimes there are 10 or 12 rules relating to that link. Industry participants were said to have difficulty keeping up with the numerous rule changes and most do not have the time to do so;
- (c) it was not asserted that Tasracing had failed to send notification with a link to the rules indicating that this particular rule had been amended. It was submitted that it was a case of the appellant not having read about the rule change. His ignorance was not unusual. Many industry participants had failed to understand that the rules had been changed and the effect upon their usual treatment regimes. It was said that many participants were likely to have been offending the rule in the period between its

implementation on 1 January 2019 and the appellant's conviction in respect of his breach of that rule;

- (d) the appellant's ignorance of the rule was clearly reflected in the candid way in which he disclosed his treatment of the dogs to Stewards during the kennel inspection and also reflected in his open reference to the regime in his treatment book;
- (e) but for the appellant's admissions, it was unlikely that the breach would have been detected. The extent of his breach of rule was also not readily apparent from his treatment book, but evident in the content of his disclosures to Stewards;
- (f) previous breaches of analogous rules relating to race day and prior day treatments in other racing codes had been visited with shorter periods of disqualification. Reference was made to the following decisions:
  - the matter of *Barry Campbell* Thoroughbred Racing South Australia Stewards' Decision 14 June 2019. Mr Campbell was a trainer of a race horse which had been injected with substances whilst in the stable premises at the racecourse on the day of the race. He was charged and found guilty of three offences under the Australian Rules of Racing relating to injecting a horse engaged to run in a race at any time on the race day, administering a medication to a horse at any time on race day prior to the commencement of the race in which the horse was engaged to race and engaging in conduct corrupting the outcome of a race or intending to corrupt the outcome of a race. The latter two charges attracted minimum penalties which were not imposed in this case due to the determination of Stewards that special circumstances existed allowing for reduction in the minimum mandatory penalties. What those special circumstances were is not able to be determined from the Stewards' report. In total, the trainer involved received a period of 9 months disqualification for the first charge of injecting a horse on race day, 12 months for the administration of medication on race day prior to the race taking place and 3 year disqualification for the corruption charge. All periods of disqualification were ordered to be served concurrently. The penalty for the race day injection charge said to be analogous to that being considered in this appeal was one of 9 months disqualification;
  - *In the Matter of the Appeal of Licensed Trainer Mr Carl Poidevin against decision of the Stewards given on Tuesday 8 May 2018*, a decision of the Racing Appeal Panel of New South Wales dated 20 July 2018. This decision concerned a trainer of two horses that were found by Stewards to have been injected by the appellant on the day prior to race day. The substance injected into both horses was a mixture of haeomplex, B12 folic, cophos B and pre-ferrin. The fact of the injection was detected as a result of the observation of a haematoma on the jugular vein on one of the horses by a vet and CCTV footage showed the appellant visiting the stables at the

time he is said to have injected the substances. He was charged with two counts of injecting a horse during one clear day before race day and one charge of giving false evidence in respect of his denial. In that case, the trainer accepted that he knew injecting the substances at that time constituted a breach of the rules and that he did so with the purpose of giving the horses an advantage. The Panel affirmed the penalties of disqualification of 9 months and 13 months respectively for the two charges of injecting a horse during one clear day with the penalties to be served concurrently. A further 9 month period of disqualification was imposed in respect of a false evidence charge.

20. Based on the above factors, the appellant submitted the penalty imposed was too long, especially for a brand new rule that the appellant genuinely did not know was in force. Further, it was submitted that the penalty imposed for the day prior treatment offence was disproportionate to the penalty imposed for the presentation charge. Finally, it was submitted that the penalty imposed was far in excess of the penalties imposed in the *Campbell* and *Poidevin* cases referred to above.

#### **Stewards' Submissions**

21. Stewards accepted that the appellant had no actual knowledge of the rule at the time of his breach. It was submitted, however, that complacency and a lack of understanding of trainers' responsibility to keep themselves abreast of the rules ought not be afforded significant weight when considering the length of the penalty to be imposed.
22. Stewards referred to notices that had been published in the Greyhound Form Guides on 13 and 20 December 2018 and 10 and 17 January 2019. Those notices advised participants that six of the National rules had been amended, including GAR 83A, which was described as race day and day prior treatment. No further explanation of the effect of that particular rule change was contained in the notice.
23. Further, the Board was also advised that the Greyhounds Australasia website released a document regarding all of the rule changes. The document was released on 12 July 2018 and related to the changes that were adopted on 1 August 2018 and came into effect in Tasmania on 1 January 2019. The document indicated that the GAR83A – race day and day prior treatment rules will change. A copy of the amendments to each of the rules was attached to the document. It also contained the following relevant information:

***“Why are restrictions on treatment/injections prior to racing being changed?”***

*The current definition of ‘race day treatment’ has been inconsistently applied by controlling bodies and therefore caused confusion with participants. The notice published clarifies how controlling bodies intend to enforce this rule from 1 August 2018.*



*The rule already in place makes it clear that no treatment can be given to a greyhound on the day the greyhound is nominated to compete in an Event. That is, no 'treatment' can be administered on the calendar day of racing, from 12.01 am until the greyhound is removed from the race course after the completion of that Event with the permission of the Stewards pursuant to Rule 42(2), or is scratched with the permission of the Stewards.*

*In addition, the new rule also prohibits the use of any injectable substance on the calendar day prior to (and day of) an Event.*

*This rule is already in place for other racing codes and the rule focuses on what is considered an acceptable practice on race day and the day prior (rather than on the substance itself – which is the ambit of a race day sampling and subsequent analysis).*

...

***What if my greyhound needs an injection prior to racing?***

*No injectable substance (whether administered by injection or not) can be given from 12.01am the day prior to racing, until after the greyhound has left the racecourse after the event. i.e. if racing on Thursday, the last injection can be given on Tuesday.*

*Healthy greyhounds are unlikely to need regular administration of injectable substances but where their use is required that can be performed well clear of race day. Treatments close to racing are more likely aimed at affecting performance and do not create a level playing field."*

24. Information relating to the changes to GAR83A noted an essential principle of greyhound racing is that greyhounds are to compete free of prohibited substances to ensure a level playing field for all participants and protect animal welfare. It was noted that *"the change now means that no injectable substance can be administered to a greyhound on a day prior to an Event it is nominated to compete in. As is currently the case, an injectable substance is any substance that is designed to be, or capable of being, administered by injection regardless of whether it is given by injection"*.

25. The note explained:

*This rule change brings the regulations on the treatment of greyhounds close to racing more in line with those in the thoroughbred and harness racing codes and further ensures a level playing field for all participants. It aims to reduce the use of injections in the greyhound racing industry, thereby enhancing animal welfare and reducing the proportion of positive swabs.*

*There is no peer reviewed scientific evidence published that proves the use of supplement injections in the pre-race period leads to improved performance or recovery in greyhounds. However, there are concerns that a trauma caused by injections can have negative welfare implications and*

*may reduce performance, whilst significantly enhancing the risk of returning a positive swab.*

*By heightening restrictions on treatments close to racing it is hoped that those participants who still consider injections and other treatments are necessary for success can move forward and help advance a sustainable industry that puts the greyhound's welfare first and above all other considerations.*

26. Stewards submitted that trainers have an obligation to make themselves aware of the rules that apply to them. It was acknowledged that a lot of information is distributed electronically and that many participants are from a generation where use of such technology is not commonplace. Nevertheless, their ongoing participation in the industry requires that they keep themselves abreast of relevant changes. Stewards also submitted that complacency and lack of understanding of obligations was a cultural issue within the industry that needed to be strongly discouraged. On that basis, Stewards submitted that little weight ought be given to the appellant's ignorance of the relevant rules when assessing the appropriateness of the penalty imposed.
27. In determining penalty, Stewards submitted they took into account the two decisions referred to above. Those cases involved one or two animals only, whereas the case involving the appellant involves significantly more animals. Stewards assess that the appellant had 61 runners in the period between the implementation of the rule and the kennel visit on 25 March 2019. The particulars of the charge referred to three specific greyhounds that the appellant admitted injecting the day before the kennel visit and prior to the race occurring later on 25 March 2019. The particulars also referred to "a number of greyhounds in your training" although that number was not specified during the course of the inquiry. On that basis, Stewards submitted that they were justified in imposing the penalty that they did, that is two years disqualification, as it reflected the greater number of animals involved. The number of dogs involved had to be considered in light of the animal welfare issues motivating the change to the rule and also the potential disruption of the "level playing field".
28. Stewards also relied on the appellant's prior convictions for prohibited substance breaches as justifying the imposition of a significant penalty. In their view, a person with a prior history like that of the appellant ought be more careful and alert to the need to inform themselves of and follow the relevant rules of racing.
29. As noted above, during the course of the inquiry Stewards referred to the appellant's presentation offence being his fifth offence of that type. A perusal of the appellant's records reveals that is not the case. He was previously disqualified in July 2012 in respect of three offences of failing to present greyhounds free of any prohibited substance. The presentation offence with which he was charged in the course of the inquiry the subject of this appeal was in fact his fourth offence of that type.
30. In reply, it was submitted that the other cases relied upon by Stewards and referred to above involved race day treatment. This was certainly the case in respect of the *Campbell* matter. The *Poidevin* decision, however, involved

allegations of day prior treatment. Rules prohibiting treatment on the day of a race were much better known and of longer standing. It was submitted that it was appropriate to take into account the appellant's ignorance and associated honesty when assessing the appropriateness of the penalty.

## Decision

31. It is quite clear that the appellant's breach of the day prior treatment rule was a function of his ignorance. Stewards did not submit otherwise. There is also no question that the appellant's forthright responses to questioning during the course of the kennel inspection, which also reflected his ignorance of the rule, provided the evidence Stewards required to bring the charge against him. There is merit in the Stewards' argument that ignorance is no excuse and ought not be given significant weight in assessing penalty. Nevertheless, the Board heard evidence that the appellant's ignorance was not necessarily isolated. The rule change was relatively recent and not well understood by industry participants as a whole. His honesty in his responses to Stewards distinguishes the circumstances of his offending from those that were dealt with by Stewards in the *Campbell* and *Poidevin* decisions.
32. An additional factor relevant in assessing the appropriateness of the penalty is the total overall penalty that was imposed upon the appellant. The combined effect of the penalties imposed for the presentation offence and the day prior treatment offence was a period of disqualification of three years. It is appropriate for the Board to consider the totality of the penalties imposed in light of the overall conduct of the appellant in assessing the appropriateness of the penalty. If the penalty imposed is too crushing in light of the overall circumstances, the penalty ought be adjusted accordingly.
33. A further problem facing Stewards is the manner in which the charge was put to the appellant. Specific reference was made to three greyhounds together with a general reference to "a number of greyhounds in your training". Although Stewards submitted during the appeal that up to 61 runners were potentially subject to the same treatment regime, that number was neither put to the appellant during the course of the inquiry nor can it be established to the requisite standard on the basis of the evidence that was before Stewards on the date. They had the notation in the treatment book and the appellant's admissions in respect of the three greyhounds together with his acknowledgement of his general treatment regime. The overall effect of the evidence, however, did not permit this Board to conclude that each and every dog that the appellant presented to race in the period between 1 January 2019 and 24 March 2019 had been treated in contravention of rule 83A(3).
34. There is also merit in the appellant's argument that the length of penalty imposed in respect of the day prior treatment offence was disproportionate when compared with the penalty imposed upon the appellant for the prohibited substance presentation offence. That was the fourth offence of the type committed by the appellant. There was no suggestion that the substance the subject of the day prior treatment offence was a prohibited substance. The gravamen of the offending related to the time at which the treatment was given, rather than the treatment itself.

35. In our view, the penalty imposed was manifestly excessive in light of the combined effect of the following:
- a. The totality of the penalties imposed upon the appellant;
  - b. the relative seriousness of the day prior treatment offence compared with the presentation offence for which the appellant was also penalised during the course of the same inquiry;
  - c. the circumstances of the offence including the relatively recent adoption of the rule;
  - d. the inability of the Board to determine with any certainty the number of other dogs involved; and
  - e. that the appellant was in fact charged with one offence contrary to the rule.

In order to properly charge the appellant with offences in respect of a number of dogs and instances of day prior treatment, it is necessary to lay charges separately in respect of each animal and occasion as was the case in *Poidevin*. This ensures that the person so charged has an opportunity to answer the case against them in respect of each alleged incident of day prior treatment.

36. In our view, the appropriate penalty in the circumstances is one of disqualification but for a period of 9 months to be served cumulatively to the penalty imposed in respect of the breach of GAR83(2)(a) relating to *Birds Fly High*.
37. The period of disqualification imposed by Stewards is varied to a period of 9 months. Pursuant to ss.34(1A) and (2)(d) of the *Racing Regulation Act 2004* (the Act), 25% of the appellant's prescribed deposit is to be forfeited to the Secretary of the Department. Further, the appellant is ordered to pay 25% of the cost incurred in the preparation of the transcript pursuant to s.34(4A) of the Act.