

# TASMANIAN RACING APPEAL BOARD

## Appeal No 07 of 2021/22

<b>Panel:</b>	<b>Ms Kate Cuthbertson (Chair)</b> <b>Dr Suzanne Martin</b> (Member) <b>Ms Wendy Kennedy</b> (Member)	<b>Appellant:</b>	<b>Mr Scott Brunton</b>
<b>Appearances:</b>	<b>Mr Greg Richardson (on behalf of the appellant)</b> <b>Ms Louise Brooks (on behalf of the Stewards)</b>	<b>Rules:</b>	<b>AR 240(2)</b>
<b>Heard at:</b>	<b>Prospect Government Offices</b> <b>171 Westbury Road</b> <b>Prospect TAS</b>	<b>Penalty:</b>	<b>\$3000 fine and 3 months suspension</b>
<b>Date:</b>	<b>2 June 2022</b>	<b>Result:</b>	<b>Appeal against conviction dismissed. Penalty varied to 3 months suspension wholly suspended for a period of 2 years from the 29 July 2022 on condition the appellant does not breach any prohibited substance rules and a \$3000 fine</b>

### REASONS FOR DECISION

1. The appellant, Mr Scott Brunton, is the trainer of a thoroughbred racing horse *Kuroset* which was presented to race at the Tasmanian Racing Club meeting on 13 June 2021 at Elwick Racecourse. A post-race urine sample was taken from the mare following her win in Race 6 on that date. Subsequent analysis by Racing Analytical Services Limited (RASL) detected arsenic in the sample at a level of 0.46mg/L which was above the permitted threshold of 0.30mg/L. Confirmatory testing conducted by the Racing Chemistry Laboratory (RCL) confirmed the sample contained arsenic at a level of 0.45mg/L. An inquiry was conducted in respect of this matter on 21 October 2021 and 23 November 2021. 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.*

2. Part 2 of Schedule 1 is entitled “Substances Prohibited on Race Days, Certain Trials etc”. Division 1 of Part 2 provides that substances capable at any time of causing either directly or indirectly an action and/or an effect on one or more of the following relevant mammalian systems are Prohibited List B substances:
  - (a) The nervous system;
  - (d) the digestive system;
  - (i) the blood system.

Evidence from Dr Adam Richardson, the Office of Racing Integrity’s Regulatory Veterinarian was to the effect that arsenic affects each of the above mammalian systems. Division 3 of Part 2 of Schedule 1 of the rules further provides that arsenic at a mass concentration above 0.30mg per litre in urine is a prohibited substance.

3. The particulars of the charge were as follows:

*The particulars under that charge are that you Mr Brunton as the trainer of Kuroset did present and race Kuroset at the TRC meeting on 13<sup>th</sup> of the 6<sup>th</sup> 2021 and was found to have a prohibited substance in its system, mainly (sic.) arsenic, above the threshold of 0.30mg per litre.*

4. The appellant pleaded guilty to the charge.
5. Following receiving submissions from the appellant as to penalty, Stewards disqualified *Kuroset* from Race 6 in accordance with the requirements of AR240(1). In respect of the charge pursuant to AR240(2), Stewards imposed a suspension of 3 months and a fine of \$3,000. The suspension was ordered to commence on 3 December 2021.
6. The appellant subsequently appealed both conviction and penalty. In his notice of appeal, the appellant stated that the incorrect plea had been entered and that he sought to amend his plea to not guilty. He asserted that procedural fairness had not been afforded to him including that he was not advised of how he could plead in relation to the matter and the effect of his plea. He also argued that the penalty imposed was manifestly excessive. The appellant sought a suspension of penalty pending the outcome of the appeal. Stewards did not oppose a suspension of the penalty. That application was granted by the Chairperson of the Tasmanian Racing Appeals Board (the Board) on 30 November 2021. The penalty imposed by stewards has been the subject of a suspension since that date.

### **Background to the charge**

7. *Kuroset* won Race 6 on 13 June 2021. The race was held at 15:05 on that date. The sample was taken from *Kuroset* at 15:28 that same day. No issues have been raised in relation to the way in which the sample was taken or the analysis. The appellant first received advice that the A sample was positive to arsenic above the permitted threshold by letter dated 20 July 2021. Stewards conducted an inspection of the appellant’s stables on that same day. The appellant arrived shortly after stewards attended the stables and was handed the notification letter. After he read that letter, he was directed to show stewards the yard where *Kuroset* had been stabled leading up to the relevant race. Stewards noted that the yard contained several treated pine posts which, although coated with crib stop, showed evidence of being chewed. Stewards took photographs of the yard and samples of the timber were taken later.

The evidence does not disclose if the samples taken by stewards were analysed and, if so, the results of that analysis.

8. *Kuroset* was no longer housed in the yard that was photographed, so stewards viewed her in her current location. It was noted her new yard also contained several treated pine posts which showed evidence of chewing. These were also photographed. Stewards notified the appellant of this and the appellant ordered the mare be moved to another area. Stewards viewed the area at the stables where medications were stored but did not identify any substance that contained arsenic in the list of ingredients. The feed room was also examined and again no feed was listed with arsenic as part of its composition.
9. During the course of that stable inspection, the appellant indicated that he had been in the process of replacing the treated posts on the property due to previous arsenic contaminations but advised this was an extremely expensive and time-consuming operation.
10. The letter advising the appellant of the results also noted that a subsequent sample had been collected from *Kuroset* on 4 July 2021 which was clear. As a consequence, *Kuroset* was not stood down pending the inquiry.
11. No further information has been provided to the Board in respect of the analysis of samples taken from *Kuroset* apart from the sample the subject of this charge on 13 June 2021 and the subsequent sample taken on 4 July 2021, which was clear.
12. Photos taken of the posts by stewards show some significant chewing damage including one post the base of which appears to be freshly chewed with a large area chewed away.
13. During the course of the inquiry, the appellant was asked by stewards if he was able to provide an explanation as to how arsenic was present in the sample taken from *Kuroset* above the permitted threshold. The appellant stated the following:

*I believe the horse has chewed on treated pine post again, like they have done in the past. I don't usually think it would enhance their arsenic levels but unfortunately it comes from the contaminate from the post, from the treated pine post which is CCA treated which is copper chrome arsenic. That's the dip they put them in, it's legal to do it on rural properties, it's illegal to do it on anywhere residential. It's illegal to do it in their home country of Canada but they're allowed to do it in Australia. So it's a slippery slope but of course, I've got some numbers here and some photos and some things that we've taken just to show you what we've done, what we've, this is something clearly I haven't been able to stop with the measures we've taken in the past. So we've gone to extreme measures to eradicate this problem but all I can tell you is that it's come from the posts, it's proven before and it has again unfortunately and, yeah, all it does is affect my business and it's a real killer.*

14. The appellant went on to explain that he still does not own the property on which he stables and trains his horses and stated that it was a very tough ask to ask someone to spend \$30,000 to \$40,000 on a property they do not own to make it more secure for the horses they want to race with the owners not willing to do so. He told stewards that he had gone to quite lengthy processes to make sure it did not happen again. He also told stewards that he was pushing out dollars to try and, in a business that is struggling, "I'm pushing out a lot of money into fencing again on a property that I

don't own, that I rent and it's still, it's a real struggle". He referred to his massive overheads and having little left over to invest in improving the property. He provided information to the effect that he had spent in excess of \$30,000 on upgrades to the property to counteract the problem.

15. During the course of the inquiry, a statement from Dr Adam Richardson, the Office of Racing Integrity's Regulatory Veterinarian was tendered. As noted above, he explained that arsenic is a prohibited substance in racing animals with its greatest effects in the mammalian body upon the digestive, blood, integumentary and nervous system. He stated that arsenic in various forms has long been used as a general tonic. It specifically stimulates the gastrointestinal tract to improve appetite. It also stimulates the production of red blood cells to improve the oxygen carrying capacity of the blood and has commonly been used in the treatment of anaemia. Arsenic has long been used to improve body condition and the condition of the coat, as well as aid in the recovery from training related stress, debilitation and illness. Dr Richardson indicated that a level of arsenic above the threshold would be considered abnormal and potentially performance altering. Whilst the substance is found in the environment and is used as a preservative for wood, it is also available in therapeutic formulas such as Fowler's solution, and in injectable form in products such as Jurocyl, Ferrocyll and Invigorate. It is noted that there was no evidence that any of these products were found on the appellant's property at the time of the stable inspection.

### **Appeal against conviction**

16. In the intervening period between the conclusion of the inquiry and the hearing of this appeal, the appellant attended the Elwick Racecourse and Launceston Racecourse to take timber samples from the areas in which he says *Kuroset* was stabled on race days. He sent those samples to Analytical Services Tasmania for analysis. The report of those samples dated 28 January 2022 showed arsenic in both samples. The sample taken from Hobart contained arsenic at less than 2.0mg/kg WMB. The sample from Launceston contained 712mg/kg WMB. No evidence was before the Board to explain the meaning of these results; nevertheless, the sample taken from Hobart had very little arsenic when compared with the Launceston sample.
17. Against that background, the appellant argued that the horse had not arrived at the race track with arsenic in her system at an amount higher than the 0.30mg/L threshold. The appellant accepted that the horse had ingested arsenic at the training centre but that this did not necessarily represent the entirety of what had been ingested. It was suggested, for example, that the horse may have attended the race track with 0.28mg/L of arsenic in her system and topped up by chewing on the timbers in the stabling area. It was argued that all of that was open on the evidence. Although it was noted that the offence is one of strict liability, it was argued that it was not possible to interpret the rule as absolute otherwise it would lead to a "legal nonsense". An extreme example of such "legal nonsense" was said to be where a horse was brought to the race track free of a prohibited substance but was later injected with a prohibited substance by some person unconnected with the horse or the trainer at the race track. In those circumstances, it was suggested, it would be perverse if the rule operated to render a trainer liable for the horse presenting for a race with that substance in their system.
18. When asked what evidence there was that *Kuroset* had ingested any timber at the race track, it was accepted there was no evidence of any damage to the stall that was

able to be provided to the Board. Given the sample taken on 18 January 2022 at Elwick racetrack showed arsenic was present, it was asserted that the Board could not be satisfied that the arsenic present in the horse's system was not at least in part a result of ingesting arsenic via the timbers in the stabling area. The appellant sought to establish that arsenic was present everywhere including in facilities owned and operated by TasRacing.

19. The appellant was granted leave to present the evidence of taking a sample from the stabling areas at both the Hobart and Launceston racecourses together with its analysis. There was no objection taken by stewards to that leave being granted.
20. Stewards however argued that there was little possibility of the arsenic being ingested in the period between the race and the taking of the sample. The narrow window of time was referred to, together with the statement of Mr Cullen who took the sample and referred to accompanying the horse from the race track and being present with it until the sample was taken.
21. Against this background, there was ample material to show that the posts at the appellant's training centre had been chewed.
22. Stewards also provided to the Board a report authored by Assoc Prof Simon Bailey, Assoc Prof Cate Steel, and Prof Ted Whitten from the Faculty of Veterinary and Agricultural Sciences at the University of Melbourne entitled "*Updated Interim Report: Urinary excretion of arsenic from wood ingestion in horses*". That paper describes the study undertaken to determine the amount of CCA-treated wood that horses would need to ingest in order to reach the threshold level of 0.30mg arsenic per litre of urine. The wood used in the study was from a single piece of CCA-treated wood which was a freshly purchased fence post. Sawdust was produced using a circular saw fitted with a sawdust bag. The horses involved in the study were fed the sawdust with their feed. Samples were collected from the horses before the sawdust administration and for 96 hours post administration. Blood samples were also taken. Five horses were involved in the study with the authors noting its limitations given the numbers involved. Nevertheless, the study tended to show that the in-feed administration of 100g of sawdust resulted in a urinary concentration exceeding the threshold with a peak occurring at 25 hours post administration.
23. Ultimately, the study demonstrated it was possible for the urinary threshold set for standardbred and thoroughbred racing to be exceeded by horses consuming CCA-treated wood by the oral route. It was also noted that a minimum amount of wood that would need to be ingested to cause a urinary threshold to be exceeded in *some* horses was approximately 100g. The peak was also noted to have been observed at 24 hours post administration. The study also suggested that the accumulation of arsenic within the gastrointestinal tract may be somewhat limited.
24. This study was relied upon by Stewards to suggest that chewing wood immediately before a race was unlikely to produce the elevated arsenic results in *Kuroset*. It was submitted it was more likely that chewing which occurred in 24-25 hours prior to the race led to the elevated levels. This was particularly the case where horses are attended to prior to the race at the racecourse and tethered within the stalls, reducing the possibility of chewing.

#### ***Determination of conviction appeal***

25. The Board found the arguments presented on behalf of the appellant unpersuasive.

26. It is noted that the timber utilised in the University of Melbourne study contained 2750 mg arsenic per kg wood, a significantly higher level than that present in the timber analysed by Analytical Services Tasmania. The evidence of the sample taken does not establish that the timber at the Elwick racecourse was in fact treated timber given the low levels and that arsenic is present at low levels generally in the environment. There was no evidence that *Kuroset* had in fact chewed or otherwise ingested treated timber products while at the Elwick racecourse on 13 June 2021. By contrast, the timber posts at the appellant's training centre showed evidence of chewing. The appellant has had previous problems with horses returning elevated arsenic levels which he has attributed to chewing on the fence posts at his training centre. In those circumstances, the Board was comfortably satisfied that stewards were correct to find that *Kuroset* was presented to Race 6 with arsenic in its system in excess of the prescribed threshold. The Board is also satisfied that those levels were not the result of the ingestion or otherwise of contaminated timber products at the race track. The appeal against conviction is dismissed.
27. Even in the event of the demonstration of contamination at the race track, the terms of AR240(2) impose strict liability upon the trainer and any other person who is in charge of the horse if it is brought to a racecourse for the purpose of participating in a race and a prohibited substance is detected in a sample taken from either prior to or following its running in any race. AR259(6) provides that if the results stated in a second certificate of analysis confirm that the prohibited substance detected in the reserve portion is the same as the prohibited substance detected in a portion and that the substance is not detected and quantified in any control of the relevant sample, then the second and first certificate of analysis constitute *prima facie* evidence that the relevant sample contains a prohibited substance. It may be that whilst the circumstances in which a horse comes to have an elevated or prohibited substance in its system sounds in penalty, but if the *prima facie* evidence of the presence of the substance in the sample is not otherwise displaced, a trainer or other person in charge of the horse at the relevant period of time is liable under AR240(2). This strict approach is consistent with the high degree of care that is required to be taken by those in charge of horses to ensure they are presented free of any prohibited substance. These rules are designed to uphold the integrity of the industry and must be given full effect.

### **Appeal against penalty**

#### ***Penalty submissions during the inquiry***

28. 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 this was the appellant's 5th arsenic positive case in 6 years and his 6th case of presentation. Stewards stated that they took into account the appellant's personal and professional circumstances as a trainer including that he managed a large stable with over 100 horses and had 21 employees in various capacities. Stewards also took into account the nature of the contamination that can be generated by the use of CCA-treated timber. The appellant's efforts to counter these over time was noted but said to be tempered by the fact that the racing industry as a whole has been on notice regarding the possibilities of contamination for a number of years. Against that background, Stewards stated that the appellant should be aware of the need to prevent horses being able to ingest such products.

29. Finally, Stewards indicated they were mindful of the need for all horses to compete free of prohibited substances for the confidence of participants and other stakeholders in general.
30. During the course of his submissions to stewards, the appellant stated he had been fined very heavily for his last arsenic charge which he believed was unfair compared with other fines for arsenic. He told stewards he did not want to pay a massive fine because he was struggling. He told stewards it was a massive business, that they live month to month with training fees and getting things done so if he was forced to pay a big fine he would have to do so over a period of time. He advised that his wages bill for his staff was \$885,000 per year on top of worker's compensation of \$181,000. He confirmed he had 100 horses in work at the time. His rental for the property is \$120,000 per year.
31. Stewards advised that they did accept contamination was the reason for the positive results.

### *Appellant's submissions on appeal*

32. The appellant advised that he had held a trainer's licence since he was 20 years old, that is, for 19 years in total. In the 6 years leading up to the race on 13 June 2021, he had trained 2,850 runners with 502 winners. In that period of time a lot of swabs have been taken from horses he was involved with, both pre- and post-race and randomly. Previous convictions for presenting horses with prohibited substances needed to be considered against this background. In relation to this positive result, it was noted that the appellant had not been charged with administering the substance and no compounds containing any arsenic were found when his premises were searched. *Kuroset* had been in the appellant's care for 2 or 3 years before the race and had tested negative in 3 subsequent races. It was argued that it was a clear case of environmental ingestion rather than administration. The appellant asked the Board not to depart from that conclusion.
33. The appellant advised that TasRacing had fenced much of the appellant's property when a number of trainers had to move their horses when the Devonport artificial track was being installed. That was some 10 or 11 years ago. Since the appellant had commenced experiencing difficulties with arsenic positives, he had expended money installing new posts. The extent of that expenditure over the last 6 years was not fully explained, however, since September 2021, \$41,000 has been spent on fencing upgrades including labour. It is noted that the appellant indicated he had spent \$30,000 on addressing the issue as at the time of the inquiry. The property consists of 110 paddocks with approximately 30 kilometres of fencing. The appellant stated it would be a massive operation to remove every contaminated post and would make him broke. Nevertheless, he has made efforts to remedy the problem.
34. The appellant referred to the consequences of a 3-month suspension. His overheads per year are at least \$1.2million, not including the cost of feed and treatments. This means \$300,000 needs to be found in a 3-month period to cover overheads. If the appellant is suspended for that period of time, his income will be zero and it may result in his bankruptcy.
35. The appellant argued that he had done what he could to make sure this issue does not arise again. In the circumstances, it was argued that the breach should not attract a suspension at all as the consequences of such a penalty outweighs the seriousness of the offending. Reference was made to previous decisions of this Board including the

matters of *Poke*, Appeal No. 3 of 2021-22, and *Gaffney*, Appeal No. 6 of 2020-21. In relation to the matter of *Poke*, the Board varied a \$2,500 fine with \$1,500 suspended to a fine of \$2,000 with \$1,000 suspended. In the case of *Gaffney*, a \$2,500 fine was quashed and the appellant was reprimanded.

36. The circumstances in *Gaffney* were unique. Although Ms Gaffney had a previous prohibited substance matter, that was over 20 years old. The evidence in that case suggested that the horse in question had ingested timbers at the TasRacing Spreyton Park Training Centre. Shortly before the arsenic positive, TasRacing had undertaken some fencing at those premises utilising treated timber. This was against a background of the well-known risk that use of such timber posed in the context of race horses. Ms Gaffney assumed that the timber used by TasRacing would not be of a type that would contribute to elevated arsenic levels. The Board accepted that assumption was reasonable in the circumstances but still considered that a reprimand was required. Mr Poke had what was described by the Board as a “*near unblemished record*”.
37. Stewards submitted the same could not be said for the appellant. This presentation was the 5th involving arsenic since 2015 and the appellant’s 6th prohibited substance offence. The history of his previous arsenic positives is as follows:
  - There were 2 positives in 2015 involving two different horses and resulting in no penalties;
  - In 2016 the appellant was fined \$5,000 in respect of the horse *By Order*;
  - In November 2019 the appellant was fined \$7,000 in relation to the horse *Jeremiah*.
38. It was submitted against this background that fines have been insufficient to act as a deterrent for the appellant. It was submitted that given the evidence of damage to the timber posts on the property, the appellant ought to have been on notice of the risk and needed to be especially vigilant. It was submitted that the penalty was not excessive in the circumstances given the need to deter the appellant from committing similar breaches in the future.

### ***Decision***

39. The Board notes that the appellant has taken some steps to modify his property in an attempt to reduce the risk of the further contamination of his horses with arsenic. Nevertheless, it is not clear that sufficient steps had been taken prior to September 2021 to rectify the situation. It is accepted that the appellant is not the owner of the property that he utilises as a training centre. It is not unusual, however, for business owners to be required to invest in properties they lease in order to operate their businesses. Whilst the Board accepts that the appellant has significant overheads, the overall turnover generated by the appellant’s training and racing business was not made clear. As a consequence, the Board is unable to conclude that the appellant has given sufficient priority over the last 6 years to the need to improve the property to prevent the risk of his horses being contaminated with arsenic. Expenditure of \$30,000.00 in the period up to the conduct of the inquiry is extremely modest in the context of the appellant’s other race-related expenditure and likely turnover.
40. Clearly fines have not been a sufficient deterrent in the past. Suspension of a licence was clearly something that was within the range of penalties available to Stewards in



the circumstances. Nevertheless, the Board considers that the actual imposition of a suspension in these circumstances exceeds what is necessary in order to mark out the seriousness of the breach. The appellant should be under no illusions as to the potential problem arising from the horses in his care ingesting treated timber posts. The need to deter the appellant to encourage him to take further steps to improve the property he utilises for training horses is very prominent in this case. In the Board's view, however, an appropriate penalty in the circumstances is a 3 month suspension, the execution of which is wholly suspended on condition that the appellant not commit any breach of any prohibited substance offence for a period of 2 years from the date of this decision. The Board is satisfied that a fine is also appropriate in the circumstances and does not disturb the fine imposed by stewards of \$3,000.

41. The appeal against conviction is dismissed. The appeal against penalty is upheld in part and the penalty imposed varied by wholly suspending the period of suspension for a period of 2 years from the date of this decision, namely 29 July 2022, on condition that the appellant not commit any breach of the prohibited substance rules for a period of 2 years. As the decision the object of the appeal is varied, an amount of not less than 25% of the prescribed deposit is to be forfeited to the Secretary of the Department pursuant to s. 34(2)(d) of the *Racing Regulation Act 2004* (the Act). Further, the appellant is ordered to pay 25% of the cost of preparing the transcript pursuant to section 34(4A) and (4B) of the Act.

**DATED: AUGUST 2022**

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Version 2 – Published 10/09/2022