**RACING APPEAL PANEL OF NSW**

**IN THE MATTER OF THE APPEAL OF BEN MELHAM**

**PANEL**: Mr D Campbell SC, Convenor; Mr T Carlton, Mr K Langby

**Appearances:** Racing NSW: Mr M Van Gestel, Chairman of Stewards

Mr Melham: Mr P O'Sullivan, Solicitor

**REASONS FOR DECISION**

1. On Friday 31 March 2017 the Panel heard an appeal brought by jockey Ben Melham by a Notice of Appeal dated 26 March 2017 from a decision of the Stewards of 25 March 2017 by which decision the Stewards suspended Mr Melham from riding from Sunday 2 April 2017 until Sunday 16 April 2017. By the decision a $2000 fine was also imposed on Mr Melham.

2. At the hearing the appellant was represented by his solicitor, Mr O'Sullivan. Mr Van Gestel, the steward who chaired the inquiry that resulted in the penalties appealed from, appeared by leave at the hearing on behalf of the Stewards. The Panel upon considering all of the matters placed before us at the hearing determined to dismiss the appeal and advised that reasons would be furnished at a later date. These are those reasons.

3. On Saturday 25 March 2017 the appellant rode the horse Assign in the Daily Telegraph Neville Sellwood Stakes, a Group 3 event over 2000 metres. Assign won the race. Following the race, Stewards raised concerns respecting the manner of the appellant's use of the whip in the race and opened an inquiry. During that inquiry the appellant openly admitted to using his whip on at least 15 occasions between the 400 metre and 100 metre mark. Such an admission was unsurprising given what was plainly able to be seen on the video of the race, which video was exhibited before, and shown to us.

4. As a result of these circumstances, the Stewards determined to lay a charge against the appellant alleging a breach of Australian Rule of Racing AR 137A(5)(a)(ii). So far as is relevant to the matter AR 137A provides:

> *"(3) The Stewards may penalise any rider who in a race…uses his whip in an excessive, unnecessary or improper manner.*
> *(4)…*
> *(5) Subject to the other requirements on this rule:*
> *(a) In a race…prior to the 100 metre mark;*
> *(i) The whip shall not be used in consecutive strides.*
>
> *(ii) The whip shall not be used on more than 5 occasions save and except where there have only been minor infractions and the totality of the whip use over the whole race is less than permitted under AR 137A(5)(a) and (b) and also having regard to the circumstances of the race including distance and context of the race, such as a staying race or rider endeavouring to encourage his mount to improve.*
> *(iii)…*
> *(b) In the final 100 metres of a race…a rider may use his whip at his discretion."*

5. When charging the appellant the Stewards particularised the charge thus:

> *"As the rider of the winner in race number 3, the Neville Sellwood Stakes, that prior to the 100 metres you used the whip on approximately 15 occasions prior to the 100 metres, ten more than what is permitted by the rule."*

5. Upon being so charged the appellant entered a guilty plea. At the hearing before us he adhered to that plea. Accordingly, the matter both before the Stewards and the Panel proceeded in relation to the matter of penalty only. It was rightly pointed out by Mr Van Gestel that the hearing before us was one that was in nature a de novo hearing.

6. The present form of AR 137A(5) was introduced into the rules by amendments made effective from 1 February 2017. Before then "the proviso", being the words after the reference to "5 occasions", was not a part of the rule. That said, nothing was raised by either party that was directed to any of the

additional matters now contained in the provision. It was simply accepted by the appellant that he had in contravention of the rule struck Assign with his whip at least ten times more than he was permitted to. By any characterisation such a situation constituted a serious breach.

8. When introducing the rule for the first time in August of 2009, the then Chairman of the Australian Racing Board, Mr RG Bentley stated:

*" These changes send a clear message that Australian racing is fully attuned to the contemporary community expectations. The need for change is clear and there was no point fiddling around at the edges. There is no point procrastinating where there is industry and public expectations that practices of the past are no longer condoned."*

9. Mr Bentley went on to add that: *"compliance with the new requirements must be supported by a suitable set of deterrents. In this respect the April 2009 meeting of the National Chairman of Stewards has been instructed to examine:*

- *"The development of a national template of penalties for breaches of controls on use of the whip.*
- *The development of a policy of forfeiture of prize money percentages in the case of egregious breaches of the new controls, in addition to other penalties."*

10. Contained in the material exhibited before the Panel was a publication entitled *"Rider Penalty Guidelines for Whip Rule Breaches".* We infer it is a version of the national template of penalties for breaches of controls on the use of the whip about which Mr Bentley spoke. Some observations ought at this juncture be made about the document. First, as it expressly states, the document is to be used as a guide only with all circumstances of the breach needing to be considered at an individualised level. Second, the document was obviously drafted prior to the 2017 revision of AR 137A(5)(a)(ii). The changes so effected were plainly an attempt to overcome some examples of perceived harshness that had arisen under the previous version of the rule. Third, there are parts of the guideline that at best, could be termed as being ambiguous, and possibly as confusing. There was considerable discussion as to this at the hearing.

11. The Stewards, in reaching the two week suspension penalty they ultimately imposed were undoubtedly influenced by their interpretation of the document stating *"that penalty template says for any rider that breaches the rule for his first offence with more than six strikes this template says it's a starting point of four weeks…and we offset that by the fact that it's carnival time."* It is, however not necessary for us to determine whether in so doing they erred as this hearing is one that is de novo. We would however wish to point out our concerns in relation to the form of the document and the potential confusion and resultant unfairness it could generate. It is also questionable what role it should now have given the introduction of the proviso in the 2017 amendment to the rule.

12. The true question for us on the hearing of this appeal is whether properly assessed, in light of all the circumstances, both objectively as regards the appellant's use of the whip, and as regards those matters that relate subjectively to the appellant, the penalties imposed are, as is claimed by the appellant, excessive.

13. The objective characterisation of the matter can as we have already said, only be described as serious. The Stewards by not seizing the appellant's share of the prize money have not sought to characterise the breach as egregious. Its impact should not however be understated. The infractions occurred over a distance of 300 metres, in the straight, and were clearly visible to racegoers in attendance, and the very many number of persons who watched the event on television. It was during a group 3 event conducted over the carnival. The horse, having been so struck went on to win the race. Fortunately, it was not concluded that came about because of the appellant's excessive whipping of it. This was not a case of miscalculation or misjudgement. The actions were numerous and deliberate. Conduct of this kind, to use Mr Bentley's words *"cannot be condoned in the industry."* It must be characterised as what it is and must be deterred by the imposing of serious sanctions.

14. The appellant sought to mitigate his actions by pointing out the impacts with the horse were not severe, and so would not have compromised the wellbeing of the animal. Whilst that may be so it does not in our view serve to mitigate what he did.

Had he struck the horse forcefully that would have operated to aggravate what he did, and may even have led to a finding of egregiousness.

15. What it is that is objectively aggravating in this case is the number of times over the permitted number that the whip was used. Ten is three times that allowed. It is significantly more than the seven that occurred in the matter of Brodie Loy decided by a Panel convened by Mr Clugston on 13 June 2014. That Panel regarded seven such strikes as an aggravating feature of that case. We have no hesitation in finding likewise in relation to ten. There a suspension of three weeks had been imposed by the Stewards and remained undisturbed by the Panel.

16. Before turning to consider the subjective features of the matter mention ought to be made of one aspect of the evidence of the appellant. He sought to explain (in part) his conduct as coming about due to him being unwell, and having arrived late, and as having occurred with him disregarding riding instructions, which involved him being told the horse resented the whip and so he should not use it. This he said resulted from a form of brain snap on his part that he could not really explain. We do not believe these are matters of a nature that could assist the appellant. The video plainly shows what he did. The ride was very professional apart from the excessive whipping. The appellant's skill and judgment was a large factor in the success of the horse. We are not disposed to the view the appellant's brain was malfunctioning in the way he was suggesting to us in his evidence. When asked by Mr Van Gestel at the Stewards inquiry whether he had any explanation for his conduct, no such matters were put forward by him in exculpation of the brain fade he said had occurred.

17. The appellant is an experienced and highly sought after rider. No doubt younger riders look up to him and aspire to the successes he had has. He has known of the existence and purpose of AR 137A since its inception in 2009. He has had ample time to adjust his style of riding to conform to the rule, yet regrettably even over the last twelve months has had in excess of twenty breaches recorded on his record. In his evidence the appellant pointed out that he had never before breached the rule by the extent he had here, the majority of his past indiscretions being probably one to

three over. We have no way of testing that evidence, and it having been given on oath ought to accept it as being essentially correct.

18. These assertions do however identify a deficiency in the way matters of this kind are presently recorded on a rider's record. At the moment there does not even appear to be a facility for characterising breaches as 6 plus strikes additional or some lesser amount. If it is intended that resort is to be had to the penalty guidelines (or a revised version of them) then riders' records ought to be updated so that additional information, including the number of strikes proven, in relation to past breaches is known and can properly be considered on the question of penalty by both the Stewards, and if appropriate the Panel or other similar types of bodies.

19. Even if we act on what the appellant has said, and treat him as a first time offender with respect to matters involving 6 plus strikes, we are still driven to the conclusion that for this type of offence his history, especially that over the last twelve months, evinces a contumelious disregard for the rule. To have breaches in such a period in the order of twenty times is shocking. Thus the appellant is disentitled to any leniency on account of his record. He needs to take positive steps to redress this habit or he will find himself receiving ever-increasing penalties. We hope that the circumstances of this matter have brought this home to him.

20. It is also a matter of concern that before the race out of which this offence occurred, Stewards warned the appellant about excessive use of the whip and urged compliance by him. Notwithstanding that the appellant went out and conducted himself in the way he did excessively striking his mount in a very serious way. This also is to our way of thinking an aggravating feature of the matter.

21. On the other hand the appellant openly admitted his breach and pleaded guilty immediately upon being charged. He adhered to that plea before us. He gave evidence that acknowledged the seriousness of his breach. Through his solicitor he informed us he intends to seek assistance with his riding style in an effort to redress his actions.

22. Additionally, the appellant points to the harshness to him of a penalty that involves a suspension from riding during the period of the autumn carnival where he

would ordinarily be competing in events worth a great deal of prizemoney. His livelihood would be seriously affected by the penalties imposed upon him.

23. It is always difficult to have to impose penalties on riders when to do so will have the result of affecting their livelihood. However, compliance with provisions such as that presently under consideration is required. Breaches, especially those as serious as are involved in the present case cannot be condoned, and must be met with penalties having a deterrent effect.

23. The question of penalty is provided for by AR 196. To the extent that it is relevant that rule provides:

> *"(1)Subject to sub-rule (2) of this Rule any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so by disqualification, suspension, reprimand, or fine not exceeding $100,000. Provided that a disqualification or suspension may be supplemented by a fine.*
> *(2) In respect of a breach of AR 137A the Stewards may in addition to the penalty options conferred on them under subrule (1) of this Rule order the forfeiture of the rider's riding fee and/or forfeiture of all or part of the rider's percentage of prizemoney notwithstanding that the amount exceeds $100,000.*
> *(3) Unless otherwise ordered by the person or body imposing the penalty, a penalty of disqualification or suspension imposed in pursuance of subrules (1) and (2) of this Rule shall be served cumulatively to any other penalty of suspension or disqualification.*
> *(4) Any person or body authorised by the Rules to penalise any person may in respect of any penalty imposed on a person in relation to the conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding two years upon such terms and conditions as they see fit."*

24. An examination of AR 196 reveals the seriousness with which the governing body regards breaches of AR 137A, allowing the forfeiture of prizemoney even if it exceeds $100,000, and also by allowing for a fine of up to $100,000 in addition to any disqualification or suspension that might be imposed.

25. Whilst AR 196(4) authorises a suspending of any penalty either in whole or in part on whatever terms and conditions may appear appropriate and notwithstanding there having been considerable discussion at the hearing as to possibly so doing in this case we have come to the view that it is not open to us to take such a course given all of the circumstances.

26. In the end result, we have come to the view, having considered all of the various options and all of the evidence and submissions placed before us that the penalties imposed by the Stewards have not been shown to be too severe, are appropriate, and must be given effect to.

27. Accordingly, as was announced on 31 March 2017 at the conclusion of the hearing:

(a) The appeal is dismissed.

(b) The appellant's licence to ride in races is suspended for a period of two weeks commencing on Sunday 2 April 2017 and expiring on Sunday 16 April 2017 on which day he may ride.

(c) The appellant is fined $2,000

(d) The appeal deposit of $200 is forfeited.