APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED JOCKEY MR TOMMY BERRY

APPEAL OF MR ZAID MILLER

Appeal Panel:	**Mr R. Beasley SC, Presiding Member; Mr J. T. Murphy; Mr K. Langby**
Appearances:	**Ms W. Pasterfield, for the Appellants** **Mr O. Jones, of Counsel, and Ms K. Campbell, Legal Counsel for Racing NSW, for Racing NSW Stewards**
Date of Hearing:	1 March 2023
Date of Reasons:	28 March 2023
Rules involved:	AR 115(1)(b) – Accept consideration without consent of Stewards AR 218(4)(b) – Possession of mobile phone in jockeys' room AR 218(4)(c) – Use of mobile phone in jockeys' room AR 228(a) – Conduct prejudicial to the image, interests or integrity of racing

REASONS FOR DECISION

Mr R. Beasley SC, Presiding Member

Berry Appeal: Introduction

1. On 17 January 2023, licensed jockey Mr Tommy Berry (the Appellant) was charged with six breaches of the Australian Rules of Racing (the Rules).

2. Two of the charges allege breach of AR 115(1)(b). That rule provides as follows:

> **AR 115**
>
> (1) A jockey or apprentice jockey must not:
>
> …
>
> (b) other than from his or her nominator, accept or agree to accept any money, gift or other consideration in connection with a horse in a race without the consent of the Stewards and his or her nominator."

3. The particulars of the alleged breaches of AR 115(1)(b) were as follows:

Charge 1:

The details of the charge being that he did accept and/or did agree to accept a consideration in connection with a horse in a race without the consent of the Stewards, by reason of the following particulars:

1. He is a licensed jockey with Racing NSW.

2. On Wednesday 23 March 2022, he rode the horse Waterford in race 3 – TAB Plate conducted at the Warwick Farm Racecourse.

3. Prior to the running of that event, he tipped Waterford to Mr Zaid Miller.

4. Records obtained by Racing NSW established Mr Zaid Miller won $28,790 by placing winning bets with licensed wagering operators on Waterford.

5. As a result of the winning bets on Waterford, Mr Zaid Miller offered to provide a consideration to him in form of payment of a sum of money into the bank account of his mother, Mrs Julie Berry.

6. He accepted that offer of consideration and provided Mr Zaid Miller with details of the bank account of his mother, Mrs Julie Berry, which facilitated the money to be deposited into Mrs Julie Berry's bank account.

7. On 24 March 2022 Mr Zaid Miller deposited $5,000 into Mrs Julie Berry's bank account.

8. The consent of the Stewards was not obtained, nor sought, in respect of the matters detailed in particulars 5-6 above.

9. As a result of the matters detailed in particulars 5-6 above, he agreed to accept the consideration in connection with a horse in a race without the consent of the Stewards.

10. As a result of the matters detailed in particular 7 above, he did accept a consideration in connection with a horse in a race without the consent of the Stewards.

Charge 2

The details of the charge being that he did accept and/or did agree to accept a consideration in connection with a horse in a race without the consent of the Stewards, by reason of the following particulars:

1. He is a licensed jockey with Racing NSW.

2. On Monday 28 March 2022, he rode the horse Character in race 2 – the Tulloch Stakes conducted at the Newcastle Racecourse.

3. Prior to the running of that event, he tipped Character to Mr Zaid Miller.

4. Records obtained by Racing NSW establish Mr Miller won $43,715 by placing winning bets with licensed wagering operators on Character.

5. As a result of the winning bets on Character and another horse that was also tipped by him, Mr Zaid Miller offered to provide a consideration to him, in the form of a payment of a sum of money into the bank account of his mother, Mrs Julie Berry.

6. He accepted that offer of consideration and had previously provided Mr Zaid Miller with the bank account details of his mother, Mrs Julie Berry, which facilitated the money to be deposited into Mrs Julie Berry's bank account.

7. On 29 March 2022 Mr Miller deposited $5,000 into Mrs Julie Berry's bank account. On 30 March 2022, Mr Miller deposited $4,997.34 into Mrs Julie Berry's bank account.

8. The consent of the Stewards was not obtained, nor sought in respect of the matters detailed in particulars 5-6 above.

9. As a result of the matters detailed in particulars 5-6 above, he agreed to accept a consideration in connection with a horse in a race without the consent of the Stewards.

10. As a result of the matters detailed in particular 7 above, he did accept a consideration in connection with a horse in a race without the consent of the Stewards.

4. Charge 3 alleged breach of AR 218(4)(b) which prohibits a jockey from having a mobile telephone in their possession in the jockeys' room without permission of the Stewards. The particulars of that charge were that:

> "Between 14 October 2021 and 21 September 2022 he did have in his possession in the jockeys' room at various locations during race meetings on approximately 70 separate occasions a mobile telephone."

5. Charge 4 alleged a breach of AR 218(4)(c), which prohibits a person from using a mobile phone in the jockeys' room without permission of the Stewards. The particulars of that charge were that:

> "Between 14 October 2021 and 21 September 2022, he did use a mobile telephone in the jockeys' room at various locations on more than 300 occasions."

6. Charges 5 and 6 allege breach of AR 228(a) which provides that:

> A person must not engage in:
>
> (a) conduct prejudicial to the image, interests, integrity or welfare of racing…

7. The particulars for Charge 5 in essence allege that the particulars relating to Charges 1 and 2 represent conduct that is prejudicial to the image, interests, integrity or welfare of racing.

8. Charge 6 alleged that the Appellant engaged in conduct that was prejudicial to the image, interests or integrity of racing by reason of the following particulars:

> 1. He is a licensed jockey with Racing NSW.
>
> 2. He communicated with Mr Zaid Miller, a person he knew to bet on racehorses via Whatsapp message sent between April 2021 and October 2021 inclusive.
>
> 3. He sent the following message to Mr Zaid Miller in October 2021: "You know the worst thing, he told me it would win before I got on him * wanted to call you on the way to the gates * he sent me his other one forward to put on the pace! Didn't think he would do that because James was on BB Roy."
>
> 4. The message in paragraph 3 was in reference to race 4 TAB handicap at Randwick Racecourse 2 October 2021 in which he rode the winner, Wairere Falls.
>
> 5. This message was disseminated on a publicly available website in December 2022 and came to the attention of Racing NSW soon after.
>
> 6. The conduct detailed above is prejudicial to the image, interests or integrity of racing as it conveyed the impression that the integrity of the race had been compromised

9. The Appellant pleaded guilty to breach of the Rules as alleged in Charges 3, 4 and 6. He pleaded not guilty to breach of the rules as alleged in Charges 1, 2 and 5. The Stewards, however, found him guilty of the breaches as alleged.

10. Following the pleas and the findings of guilt, the Stewards imposed the following penalties:

Charge 1: 9 months disqualification (reduced 12 months for good record).

Charge 2: 9 months disqualification (reduced from 12 months for good record).

Charge 3: 2 weeks suspension (reduced from 3 weeks for guilty plea and good record).

Charge 4: 4 weeks suspension (reduced from 6 weeks suspension for guilty plea and good record).

Charge 5: 3 months disqualification (reduced from 4 months for good record).

Charge 6: 10 weeks disqualification (reduced from 4 months for guilty plea and good record).

11. The Stewards determined that the penalties for Charges 1, 2 and 5 be served concurrently, and the penalty of disqualification for Charge 6 be served cumulatively. In total, the Appellant was disqualified for a period of 11 months and 2 weeks, which commenced on 17 January 2023. The suspensions imposed for Charges 3 and 4 were to be served concurrently, with that total 4-week suspension to begin on the expiry of the period of disqualification.

12. On 18 January 2023, I granted a stay on the penalty imposed on the Appellant, but on his request through his legal advisor that stay was dissolved on 27 January 2023.

13. The Appellant has appealed to the Panel challenging the findings of guilt for charges 1, 2 and 5. He also appeals against the severity of the penalty imposed upon him in respect to all findings of breach.

14. At the appeal hearing, the Appellant was represented by his solicitor, Mr Wayne Pasterfield. Racing NSW was represented by Mr O. Jones, of Counsel, and Ms K. Campbell, Legal Counsel for Racing NSW. An Appeal Book containing the transcript and exhibits of the Stewards Inquiry was tendered in evidence. Also tendered was a confidential document raising issues concerning personal difficulties of the Appellant at the time of offending under the Rules, and a medical report concerning his general well-being. No oral evidence was called on the appeal.

15. Mr Pasterfield also represented the Appellant Mr Z Miller in his appeals, which are addressed at [56] to [72] below.

16. By the time of the appeal hearing, there were no disputed facts. In relation to the appeal against the findings of breach relating to Charges 1 and 2, Mr Jones submitted at the commencement of the appeal that the Appellant should be found to have breach AR 115(1)(b) even on the Appellant's version of all relevant events.

17. The Panel agreed that the outcome of the appeal in relation to the findings of breach relating to Charges 1 and 2 turned on the application of now non-controversial facts and the proper construction of the rule, as did Mr Pasterfield. After hearing submissions, the Panel gave short oral reasons dismissing the appeal against the finding of guilt in respect of Charges 1 and 2. Written reasons are set out below.

18. The Panel ordered written submissions to be provided in relation to the challenge to the finding of guilt to Charge 5, and in respect to all penalty appeals. Written submissions dated 14 March 2023 were received from Racing NSW, and from Mr Pasterfield on the Appellant's behalf on 13 March 2023.

Findings of Fact

19. The following facts were not in dispute:

(a) The Appellant tipped the horse Waterford to Mr Zaid Miller as set out in the particulars to Charge 1.

(b) The Appellant tipped the horse Character to Mr Zaid Miller, as well as another horse (Promise of Success) as alleged in the particulars to Charge 2.

(c) Mr Miller placed winning bets on those horses as outlined in the particulars for Charges 1 and 2.

(d) Because of the tips and the winning results, Mr Miller offered to give money to the Appellant's mother: interview with the Appellant on 20/10/2022, T20.955-.977.

(e) Prior to this, the Appellant had previously told Mr Miller of his mother's "struggles" and those of his sister: interview with the Appellant 23/9/2022, T16.780-.785.

(f) The Appellant agreed to Mr Miller providing his mother with money, and gave Mr Miller his mother's bank account details.

(g) Mr Miller made deposits of the sums of money (about $15,000 in total) into the Appellant's mother's bank account as particularised in Charges 1 and 2.

(h) The Appellant's mother lives in a house that is owned by the Appellant. She used at least some of those sums (about $3,000) to make repairs to the guttering of the house: Stewards interview with Julie Berry 23/9/2022, T5.193-.195.

(i) The Stewards did not provide any permission to the Appellant for any of the arrangements he made with Mr Miller.

Charges 1 and 2: AR 115(1)(b): Appeal against finding of breach

20. Against this set of facts, Mr Jones submitted that there had been a clear breach of AR 115(1)(b). Each element of the rule has been satisfied. First, the Appellant had made an agreement to either "accept money" or more particularly "other consideration"

from Mr Miller. Secondly, that agreement had been in relation to "a horse in a race" – in fact, in relation to several horses in several races, which the Appellant had tipped to Mr Miller. Thirdly, this had all been done "without the consent of the Stewards".

21. As to "other consideration", Mr Jones submitted that this was established by the agreement made between the Appellant and Mr Miller for Mr Miller to deposit sums of money in the Appellant's mother's bank account, which were then used in part to effect repairs to a house owned by the Appellant.

22. Mr Pasterfield submitted that in circumstances where money was deposited in Mrs Berry's account, rather than the Appellant's, a finding of breach of AR115(1)(b) should not be made. This argument, however, does not address the words "other consideration" in AR115(1)(b), or the fact that the money deposited by Mr Miller following the tips was used to make repairs to the Appellant's own real property asset. The subsequent argument raised that "nothing new" was done to the house is rejected.

23. As submitted on behalf of Racing NSW, there was a clear and obvious breach of the Rules on the facts particularised for both Charges 1 and 2. The appeals against the finding of breach of AR 115(1)(b) relating to Charges 1 and 2 are dismissed.

Charge 5

24. The Appellant pleaded not guilty to breach of AR228(a) as alleged in Charge 5. The sole issue in dispute was whether the conduct particularised (the same conduct the subject of Charges 1 and 2) was sufficiently in the "public domain" to satisfy that element to establish a breach of the rule.

25. It is not controversial that to establish a breach of AR228(a), the following needs to be proven:

    (a) There must be at least an "element" of public knowledge of the conduct said to be prejudicial to racing.

    (b) The conduct must have a tendency to prejudice the sport of racing rather than the individual involved.

(c) The conduct must be "blameworthy": see *The appeal of Glen Pollott*, Racing Appeals Tribunal, 16 March 2021, following *Waterhouse v Racing Appeals Tribunal* [2002] NSWSC 1143 at [58] per Young J.

26. Racing NSW submits that the public knowledge element need not be established at the date of charge and that the relevant facts are to be determined as at the date of the appeal, given that the appeal is a hearing de novo: see Racing NSW Submissions (**RNSWS**) at [12]-[18].

27. In *The Appeal of Jack Martin* (RAP 14 March 2023), the Panel made a finding that there must be sufficient evidence for the Stewards to at least reasonably consider that the public knowledge element of the alleged breach was in existence at the time of charge: *Appeal of Jack Martin*, RAP, 14 March 2023 at [13]-[15].

28. However, as in *Martin*, Racing NSW relies on an article published in the Sydney Morning Herald on 10 October 2022 in support of the submission that the relevant blameworthy and prejudicial conduct of the Appellant was sufficiently in the public domain prior to the charge under AR228(a) being brought against the Appellant. Although not tendered at the appeal hearing, leave has been granted to Racing NSW to rely on that article which relevantly stated the following:

> "*Group 1 winning jockey Berry has been dragged into an ongoing investigation involving 3 country-based hoops – Kayla Nisbett, Jack Martin and Jordan Mallyon – and whether they have had improper dealings with big gamblers.*
>
> *It prompted investigators to image Berry's phone in September and ask his mother Julie to hand over bank statements as they escalate their probe, which is examining whether jockeys have taken benefits from punters who have profited from their rides.*
>
> *The Australian Rules of Racing forbid any jockey from accepting a gift or cash payment from any person other than the horse's owner, commonly referred to as "a sling". They can only do so from another person with the permission of Stewards.*
>
> *According to sources familiar with the situation, investigators are examining the links between the New South Wales – and Canberra-based riders and professional punter Jacob Hoffman, known as "the Bear".*
> *…*

> *Of particular interest are group exchanges on WhatsApp, which investigators are believed to have accessed as part of their search. Nisbett, Martin and Mallyon had their phones seized last month before investigators later asked Berry to provide his own device to help with their enquiries.*
>
> *There is no suggestion Tommy Berry, Julie Berry, Nisbett, Martin or Mallyon have engaged in any wrongdoing or broken any Australian Racing Rule*."

29. It is clear that the article refers to an investigation into the Appellant's conduct, including whether he, amongst others, had "improper dealings" with "big gamblers". There is a reference to the prohibition in the relevant Rule, to a Mr Hoffman, and to message exchanges on mobile phones. The Stewards submit that this article sufficiently puts the conduct alleged in the charge into the "public domain". They say how it got there is "irrelevant": Stewards' submissions at [19]-[22].

30. In *The Appeal of Martin*, Mr Martin had dealings with a Mr Hoffman. Here, the Appellant's conduct relates to arrangements made with Mr Miller. However, the article also refers to "gamblers" and "punters" in the plural, and in my view sufficiently brought into the public domain the general nature of the conduct complained of against the Appellant the subject of Charges 1 and 2. True it is that a different professional punter or punter was referred to, but the general nature of conduct whereby jockeys taking benefits from punters in possible breach of the Rules was made public.

31. There was no submission made that the Appellant's conduct was not blameworthy or prejudicial to racing. In my view, it clearly was. It can give the impression that licensed persons like jockeys, in breach of the Rules and for reward, favour certain big punters with information ahead of the public. It can also give the impression, as submitted at RNSWS [34], that the jockey may have had an interest in a particular bet in breach of the Rules.

32. The appeal in relation to the finding of breach relating to Charge 5 should be dismissed, and the finding of breach of AR228(a) confirmed.

Penalty Appeals

Charges 1 and 2

Appellant's Submissions

33. The Stewards imposed a 9-month disqualification for each breach, to be served concurrently (reduced from 12-months to reflect the Appellant's "good record"). Mr Pasterfield asked that the following matters be taken into account in support of a submission that the penalty imposed for each breach is "extremely excessive" and should be "vastly reduced":

(a) The Appellant "went out of his way" to not accept anything from Mr Miller.

(b) The Appellant was dealing with very difficult personal issues at the time of offending regarding his marriage, and unresolved issues in relation to the death of his brother some years ago.

(c) The offending was out of character, and is unlikely to be repeated.

(d) There is a disparity between the penalty imposed on the Appellant and the penalty of a one month disqualification imposed on Ms Kayla Nisbett for a breach of AR115(1)(b) in circumstances where she received $1,000 cash from a punter called Mr Hoffman, having told Mr Hoffman that a horse called Smuggler's Bay which had participated in an 800m jump out, had performed well in that jump out. Ms Nisbett pleaded guilty to breaching the rule.

(e) The Appellant was unaware that he was breaching the Rules.

Finally, a submission was made that the total combined penalty imposed for all breaches of the Rules is "soul destroying, cruel, unjust and unreasonable" compared to other penalties involved for similar breaches of the Rules.

Racing NSW Submissions

34. Racing NSW highlights the following matters which they say support the 9-month concurrent disqualification imposed as appropriate:

(a) The fact that the Appellant is a prominent rider is an aggravating factor, or a matter of relevance to general deterrence.

(b) The prohibition in the rule is "central to the protection of the integrity of the sport and the reputation of the industry" given it risked the public thinking that "the jockey in fact had an interest in the bet or the bet had an impact on the jockey's conduct in the race": RNSWS at [34].

(c) The assertion that the Appellant was unaware that he was breaching the Rules should be treated cautiously – it should have been obvious to him that directing a benefit or consideration to a third party like his mother was a breach of the Rules.

(d) A jockey who has an interest in a bet in a race in which they are riding is subject to a 2-year minimum disqualification: AR115(1)(e) and AR283(6)(a). This provides a "reference point" for appropriate penalties for breach of AR115(1)(b).

(e) As to Ms Nisbett, her conduct can be contrasted to that of the Appellant because she:

(i) pleaded guilty;

(ii) told Hoffman that a horse had "run well" rather than tipping it;

(iii) engaged in offending only in relation to one horse in one race;

(iv) received $1,000 and not $15,000;

(v) is not currently as prominent in racing as the Appellant.

Resolution re penalty for Charges 1 and 2

35. The purpose of imposing penalties for breaches of the Rules is well-settled. They are to protect the image and reputation of racing. They do not serve a purpose of punishment.

36. I reject the submission that the penalty imposed by the Stewards is either "cruel", "unjust" or even "excessive". The penalties imposed here for the breaches of AR115(1)(b) are in a range that can properly be described as both rational and appropriate. The question for me is whether they are the most appropriate penalty.

37. I also reject the submission that the Appellant was entirely oblivious to the fact that he might be breaching the Rules. He must have known, in my view, that he was at least flirting with breach. Ultimately, at his direction (by supplying bank account details) money was paid by Mr Miller to the Appellant's mother, who used those funds to arrange for repairs to be made to an asset owned by the Appellant. Whether or not the Appellant took time to construe AR115(1)(b) correctly or not, he must have known he was at least negotiating a means of (in his mind) circumventing the rule. In truth of course, he was negotiating a breach.

38. I understand the submission made by Racing NSW about general deterrence and the prominent position of the Appellant as a leading rider. This is relevant, it should be reflected in penalty, but not excessively so. While I take this into account, I do not consider that there should be a vast differentiation in approach to penalty for breach of this rule between a prominent and a lesser known rider.

39. The mandatory minimum penalty for breach of AR115(1)(e) is of some guidance to the appropriate penalty here. Of course, a rational view could be taken that a 2-year mandatory minimum disqualification for a jockey betting on the horse they are riding in a race is excessive as a starting point. Having said that, the rule is the rule.

40. There is some force in Mr Pasterfield's submission concerning the disparity between the penalty imposed on the Appellant and that of Ms Nisbett. While I agree with the submission of Racing NSW that her offending is less serious, I am not convinced that there will always be a world of difference between a jockey letting a professional punter know that a horse had "run well" in a trial or jump out, and actually tipping it. It might come down to how the information was relayed. If orally, tone might be relevant. It was, however, one-off conduct, and Ms Nisbett pleaded guilty and received less money.

41. While the penalty imposed by the Stewards for the breaches relating to Charges 1 and 2 is not inappropriate, taking all matters into account, it is a slightly longer disqualification than I would impose. In particular, I have had regard to some of the subjective circumstances of the Appellant, including the medical report tendered, and the confidential exhibit. There is also no reason to doubt that the Appellant has been and is a person of good character, who has made a positive contribution to racing but for the offending under the Rules here. I also consider it is highly unlikely that he will breach AR115(1)(b) or any similar rule again.

42. As always, it is appreciated that a lengthy disqualification will have severe financial and other impacts on a licensed person. However, given the mandatory penalties for breach of AR115(1)(e), and all the other matters referred to above, there is no rational scope in my view for not imposing a significant period of disqualification for this offending under AR115(1)(b). While a 9-month disqualification is within the range of appropriate penalties, I would instead impose a 6-month disqualification for each breach, to be served concurrently.

Charges 3 and 4

43. I accept that no integrity issues were involved, and that most of the phone calls made by the Appellant were to his wife. However, offending in relation to possession and use of a mobile phone involves a knowing breach of the Rules. They are also not one-off offences, but extensive. As Racing NSW submits, they set a bad example, even if the calls were in the main made because of urgent and difficult personal circumstances. The offending is, in my view, sufficiently serious that a suspension, and not a fine, is appropriate. The decision of the Panel in *O'Hara* (see RNSWS at [50] and [51]) is a guiding point as to the appropriate penalty.

44. In my view, the penalties imposed by the Stewards (2 weeks and 4 weeks suspensions respectively) are appropriate penalties, and I would dismiss the appeal against severity. These suspensions should be served concurrently, but after the period of disqualification for offending under the Rules the subject of Charges 1 and 2 has been served.

Charges 5 and 6

45. Both charges relate to a breach of AR228(a). Both involve objectively serious breaches of the Rules. To that extent, I disagree with the submission put forward by the Appellant that Charge 5 involves a "minor" breach. Further, as to Charge 6, I note the Appellant's acceptance that his conduct was damaging to racing: see RNSWS at [60].

46. I agree with the submission made by Racing NSW at [55] that the nature of the conduct caught by this rule can vary so much that comparing one penalty with another can be close to meaningless unless the facts (the conduct) closely aligns. Whether the Appellant's conduct here in breach of AR228(a) is more or less serious than that involved in *The Appeal of Loy* (2 months' suspension for offensive social media posts about the then Premier), *Sarah/McCullogh* (suspensions of 9 months and 3 months for breach of COVID-19 protocols), or *Whitfield* (2 months' disqualification for a fight at a racecourse) involve complex considerations, and reasonable minds might differ.

47. The Appellant pleaded not guilty to breach of Charge 5, but I consider this related to a technical matter. It relied on an aspect of the charge not being made out. The charge was only made out belatedly by the Stewards through the late tender of the SMH article. As to Charge 6, a plea was immediately entered, and full cooperation given.

48. Taking into account all of the circumstances, including the subjective circumstances referred to above, I consider that a 2-month disqualification for both breaches to be appropriate.

49. The Stewards determined that the disqualification they imposed for Charge 5 should be concurrent with the penalties imposed for Charges 1 and 2, but the penalty imposed for Charge 6 should be cumulative to those disqualifications.

50. I agree that a reasonable case can be made that the penalty to be imposed for Charge 6 (which involves different conduct to that relating to Charges 1, 2 and 5) should be entirely cumulative to the other penalties. However, it does involve conduct with the same punter (Mr Miller) generally in relation to the performance of horses. In my

view, half of the period of disqualification for Charge 6 should be concurrent to the periods of disqualification imposed for Charges 1, 2 and 5, and half cumulative.

Conclusion

51. The appeal in relation to the finding of breach of AR115(1)(b) the subject of Charges 1 and 2 is dismissed. The finding of breach of the Rules is confirmed. The appeal in relation to the penalty imposed for those breaches should be allowed, with a penalty of a 6-month disqualification imposed for each breach in lieu of a penalty of a 9-month disqualification. The 6-month periods of disqualification should be served concurrently.

52. The appeals against the penalty imposed for the findings of breach of AR218(4)(b) and 218(4)(c) relating to Charges 3 and 4 should be dismissed. I agree with the Stewards that the penalties of a 2 week and 4-week suspension imposed respectively should be concurrent, and should be served after any period of disqualification has expired.

53. The appeal in relation to a finding of breach of AR228(a) the subject of Charge 5 should be dismissed. The finding of breach of AR228(a) should be confirmed. The appeal in relation to penalty should be allowed, with a penalty of a 2-month disqualification to be imposed in lieu of a 3-month disqualification.

54. The appeal in relation to the severity of the penalty imposed for Charge 6 should be allowed. In lieu of a 10-week disqualification, a disqualification of 2 months should be imposed.

55. The total period of disqualification for charges 1, 2 and 5 should be 6 months. The disqualification imposed in relation to Charge 6 is 2 months. One month of that disqualification should be served concurrently with the disqualification imposed for Charges 1, 2 and 5, meaning that the total period of disqualification should be 7 months. The total period of suspension in relation to charges 3 and 4 is 4 weeks, which should be served at the expiry of the 7-month period of disqualification.

Appeal of Zaid Miller

56. Two charges were brought against Mr. Miller under AR227(b) (Charges 1 and 2), asserting that he was a party to the breaches of AR115(1)(b) that were the Charges 1 and 2 brought against the Appellant Mr. Berry.

57. Charge 3 brought against Mr. Miller alleged he had engaged in conduct prejudicial to racing in breach of AR228(a), relating to the same conduct alleged in Charges 1 and 2.

58. A separate charge was brought against Mr. Miller (Charge 4) under AR228(c) alleging improper conduct towards a Steward. The particulars of that charge were:

(a) At all relevant times he was a punter and an owner of a racehorse and, both separately and collectively, was bound by and required to comply with the Rules of Racing.

(b) At 3.05pm on 6 December 2022, her returned a missed call to the Racing NSW Chairman of Stewards, Mr. Steve Railton. In that phone call he was informed that charges were to be issued against him at which time he made a particular comment to Mr. Railton before terminating the phone call.

(c) The behaviour detailed above was improper as it was perceived as a threat to the Chairman of Stewards and was in relation to his functions, powers, or duties as Chairman of Stewards.

59. The “particular comment” to Mr. Railton was “how do you sleep at night”, or words to that effect.

60. Mr. Miller pleaded guilty to breach of Charge 4. The Stewards determined a base penalty of a 4-month disqualification was appropriate, reduced to 3 months because of the guilty plea.

61. Mr. Miller pleaded not guilty to each of charges 1 to 3, but was found to have breached the relevant rules by the Stewards. A 12-month disqualification was

imposed for both Charges 1 and 2, and a 4-month disqualification for Charge 3. The Stewards determined those penalties should be served concurrently, with the 3-month disqualification in relation to Charge 4 to be served cumulatively, meaning a total disqualification of 15 months.

62. At the commencement of the Appeal hearing, Mr. Pasterfield indicated there was no appeal in relation to Charge 4. As to the other Charges, the appeal was in respect to both the findings of breach, and the severity of penalty imposed.

Charges 1 and 2

63. For the reasons expressed above at [20] to [23], Mr. Berry was found guilty of breaching AR115(1)(b). Mr. Miller's not guilty plea to Charges 1 and 2 against him was tied to Mr. Berry's not guilty pleas. As Mr. Berry has been found to have breached AR115(1)(b), it follows Mr. Miller should be found to have breached AR227(b). The appeals in relation to the findings of breach of AR227(b) relating to Charges 1 and 2 should be dismissed.

Charge 3

64. As with Charge 5 against Mr. Berry, the only issue was whether the conduct said to be prejudicial and blameworthy had become public knowledge. In my view, the conduct alleged in Charge 3 must have been public knowledge at the date of charge (6 December 2022), not at some later date. That raises the issue again as to whether the matters described in the SMH article of 10 October 2022 sufficiently put Mr. Miller's conduct into the public domain.

65. Mr. Miller is not named in the article. In fact, the name of another punter was published. However, the article refers to "professional punters" and "big gamblers" in the plural, and otherwise raises in general terms the kind of conduct that Racing NSW contends is the prejudicial and blameworthy conduct. In my view, the article sufficiently puts into the public domain the conduct that Mr. Miller was engaging in with Mr. Berry. The "public domain" test is satisfied. No submission was made the conduct was not prejudicial or blameworthy in the manner required to demonstrate breach of AR228(a). The appeal in relation to the finding of breach of AR228(a) the subject of Charge 3 should be dismissed.

Penalty Appeals

Charges 1 and 2

66. The main argument made for a reduction in the penalty imposed for Charges 1 and 2 against Mr. Miller was the comparison Mr. Pasterfield has asked the Panel to consider with the penalty imposed on Mr. Hoffman for his breach of AR227(b) concerning his interactions with Kayla Nisbet referred to at [33(d)] above. Unlike Mr. Miller, Mr. Hoffman pleaded guilty to breach of AR227(b). The Stewards determined a base penalty of a 3-month disqualification, reduced to 9 weeks because of plea. Mr. Pasterfield contends there is in effect an inconsistency in the penalty imposed on Mr. Hoffman, and those imposed on Mr. Miller.

67. Racing NSW contends that the 12-month disqualifications imposed are appropriate for reasons that can be summarized as follows:

(a) Mr. Miller is a big punter: RNSWS at [65].

(b) Mr. Miller courts jockeys to advertise his meat products: RNSWS at [66].

(c) Mr. Miller encouraged Berry's offending conduct, and instigated the payments: RNSWS at [67]-[68].

(d) There is an absence of good character or reputational evidence: RNSWS at [69].

(e) In light of his known betting activity, a longer disqualification would be a benefit to Mr. Miller: RNSWS at [70].

68. Some of these submissions have more force than others. Ultimately I consider that some guidance can be had from comparing the penalty imposed on Mr. Hoffman to those imposed on Mr. Miller, and also by reaching consistency with the penalties imposed on Mr. Berry.

69. There is a wide range between a 9-week disqualification on the one hand (Hoffman), and a 12month disqualification. However, Mr. Hoffman pleaded guilty, and the underlying offending conduct of Ms. Nisbet was less serious than that of Mr. Berry. Mr. Berry has been penalised with a 6-month disqualification for each breach of

AR115(1)(b). Given the apparent prominence of Mr. Miller as a punter, there is no reason why he should receive a lesser penalty than Mr. Berry, and no submission was made in support of that. Further, the Panel knows little else about Mr. Miller, and while he is a first offender under the Rules, no other material was put before us as to good character or subjective considerations that might warrant a discount of penalty.

70. In the end, while I consider the 12-month disqualifications imposed is in the range of appropriate penalties, I consider the most appropriate penalty is a 9-month disqualification for each breach of AR227(b), to be served concurrently.

Charge 3

71. Absent any material in mitigation, I consider the penalty of a 4-month disqualification imposed by the Stewards to be appropriate. That penalty though is to be served concurrently with the penalties for Charges 1 and 2.

Charge 4 and conclusion

72. There is no appeal against the 3-month disqualification imposed, which must be served cumulatively. The total period of disqualification I would impose then is 12 months.

Mr. J T Murphy and Mr. K Langby

73. We have read the reasons for decision of the Presiding Member, and agree with the orders he proposes in both appeals, for the reasons he gives.

The Panel's order in the Appeal of Tommy Berry are as follows:

1. Appeals against findings of breach of AR115(1)(b) relating to Charges 1 and 2 are dismissed.
2. Findings of breach of AR115(1)(b) relating to Charges 1 and 2 confirmed.
3. Appeal against finding of breach of AR228(a) relating to Charge 5 dismissed.
4. Finding of breach of AR228(a) relating to Charge 5 confirmed.
5. Appeals in relation to penalty imposed in relation to Charges 1 and 2 allowed.
6. In lieu of a 9-month disqualification for the breach of AR115(1)(b) relating to Charges 1 and 2, the appellant is disqualified for 6 months for each breach, to be served concurrently.

7. The appeals against the severity of penalty for the breaches of AR 218(4)(b) and AR 218(4)(c) relating to Charges 3 and 4 are dismissed.
8. The penalty of a 2-week suspension of the Appellant's license to ride in races for breach of AR218(4)(b) is confirmed, to be served concurrently with the penalty for breach of AR218(4)(c).
9. The penalty of a 4-week suspension of the Appellant's license to ride in races for breach of AR218(4)(c) is confirmed.
10. Appeals in relation to the severity of penalty imposed for breaches of AR228(a) the subject of Charges 5 and 6 are allowed.
11. In lieu of a 3-month disqualification for breach of AR228(a) relating to Charge 5, a 2-month disqualification is imposed.
12. In lieu of a 10-week disqualification for breach of AR228(a) relating to Charge 6, a 2-month disqualification is imposed. One month of this disqualification is to be served concurrently with the disqualifications imposed for the breaches of the Rules relating to Charges 1, 2 and 5.
13. The total period of disqualification imposed is 7 months. The 4-week suspension of the Appellant's license to ride in races commences on the expiration of the disqualification. It should be noted that the Appellant was granted a stay on 18 January 2023, but that stay was lifted at his request on 27 January 2023, and so the Appellant has already served part of his disqualification period by the date of these reasons. We leave it to the parties to agree the date the disqualification ends based on our orders, and the date the suspension begins and ends.
14. Appeal deposit forfeited.

The Panel's orders in relation to the appeal of Zaid Miller are as follows:

1. Appeals in relation to finding of breach of AR227(b) relating to Charges 1 and 2 dismissed.
2. Findings of breach of AR227(b) confirmed.
3. Appeal in relation to finding of breach of AR228(a) relating to Charge 3 dismissed.
4. Finding of breach of AR228(a) confirmed.
5. Appeals in relation to severity of penalty for breach of AR227(b) allowed.
6. In lieu of disqualifications of 12 months, the Appellant is disqualified for 9 months for each breach of AR227(b), to be served concurrently.
7. Appeal in relation to severity of penalty for breach of AR 228(a) relating to Charge 3 dismissed.

8. Penalty of a 4-month disqualification for breach of AR228(a) confirmed, to be served concurrently with the disqualifications relating to Charges 1 and 2.
9. The penalty imposed for breach of AR228(c) (not appealed) is a 3-month disqualification. This penalty is cumulative to the other disqualifications.
10. The total period of disqualification is 12 months. That penalty commenced on 17 January 2023, and expires on 17 January 2024.
11. Appeal deposit forfeited.