**RACING APPEAL PANEL OF NEW SOUTH WALES**

**APPEAL OF JULIE PRATTEN**
**APPEAL OF SHARON PEPPER**
**APPEAL OF MARK PEPPER**

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| Appeal Panel: | **Mr R. Beasley SC – Principal Member; Mrs J. Foley; Mr J. Nicholson.** |
| Appearances: | **Racing New South Wales: Mr Marc Van Gestel, Chairman of Stewards**<br>**Appellants: Mr P. O'Sullivan, Solicitor** |
| Date of Hearing: | **3 September 2020** |
| Date of Reasons and Orders: | **11 September 2020** |

**REASONS FOR DECISION**

**The Panel**

**Introduction**

1. At a Stewards' Inquiry conducted on 12 August 2020, Licensed Trainer **Julie Pratten** pleaded guilty to a beach of **AR 240(2)** relating to the detection of the prohibited substances trendione and epitrenbolone (both anabolic steroids) in a pre-race urine sample taken from her horse, Rahaan, prior to it racing at the Ballina Races on 17 January 2020.

2. AR 240(2) is in the following terms:

> "… 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."

3. The penalty imposed by the Stewards was a disqualification of Ms Pratten's licence to train for a period of 9 months (they determined that an appropriate base penalty was 12 months, then applied a 25% discount for plea and cooperation).

4. At a separate Stewards' Inquiry also conducted on 12 August, licensed trainer **Sharon Pepper** also pleaded guilty to a breach of AR 240(2). This related to the detection of trendione in a urine sample taken from her horse, Bella Boss, prior to it running at the Lismore Race Meeting on 7 March 2020. Following submissions on penalty, Mrs Pepper was also penalised by a disqualification of her licence to train for 9 months. Mrs Pepper's husband, **Mark Pepper** (her Foreman) pleaded guilty to a breach of **AR 227(a)** for his conduct of administering an injection of a substance to Bella Boss that caused the detection of the prohibited substance in that horse's urine sample. He was disqualified for a period of 4.5 months. Mrs Pepper was also fined $800 under **AR 104** for a failure to keep proper treatment records.

**Appeal**

5. Mr and Mrs Pepper, and Ms Pratten, have all appealed to the Panel against the severity of the penalties imposed upon them (with the exception of the fine imposed on Mrs Pepper for a failure to keep proper records).

6. They were each represented on appeal, with leave, by Mr P. O'Sullivan. The Stewards were represented in each Appeal by Mr Marc Van Gestel, the Chairman of Stewards for Racing New South Wales.

7. As outlined below, there were some similar facts in these Appeals, particularly related to the cause of the presence of the prohibited substances in the two horses' urine samples. As a result, the expert evidence given by Dr T. Koenig (the Chief Veterinarian of Racing New South Wales) and Dr A. Cawley (the Laboratory Manager of the Australian Forensic Racing Laboratory) given in the Pratten Appeal was admitted as evidence in the Appeals of Mr and Mrs Pepper. Appeal Books were tendered in both Appeals as Exhibit A, while the Exhibits from the Stewards' Inquiries were given the same number they had in those Inquiries on the Appeal.

**Similar Facts**

8. The prohibited substances found in the urine sample of Rahaan (Pratten) and Bella Boss (Pepper) are anabolic steroids (trendione and epitrenbolone). They are classified as List A prohibited substance under the Rules

9. The levels of steroids detected in the horses was relatively low. The urine sample of Rahaan was estimated to have 17mcg per litre of trendione, and 1.3mcg per litre of epitrenbolone. Bella Boss was estimated to have 27mcg per litre of trendione in its urine sample.

10. Rather than being medicines or therapeutic substances, anabolic steroids, if used in sufficient quantities for improper means, can be used to build muscle mass in horses, enable them to be worked harder and can shorten the time that a horse might naturally need to recover from injury (see generally the evidence of Dr Koenig). Anabolic steroids have for some years now been banned from use in racehorses.

11. As will be seen, there was no suggestion in either Appeal that the Appellants had any dishonest motives. The evidence is that no Appellant thought that in administering the substance they did to their horses, it might lead to the detection of an anabolic steroid. The expert evidence of Dr Cawley was that at the levels detected here, it was not possible to say that the anabolic steroids had any effect on either horse. This was supported by a peer reviewed journal article tendered by Mr Sullivan: Hodgson et al, *"Effective prolonged use of Altrenogest on behaviour in mares"*, The Veterinary Journal, Vol 169 (2005), 322-325.

12. Both Rahaan and Bella Boss had been treated in the lead up to their races with injectable Altrenogest products. In the case of Rahaan, it was a product called Ovu-Mate. For Bella Boss, it was ReadyServe Altrenogest. Both products were administered by injection, rather than orally. Both products have a proper, therapeutic use in racing. They are prescribed to fillies and mares to have a calming effect when horses are "in season". The evidence is this serves a safety purpose for horses, riders, and handlers.

13. Unfortunately, it appears that both products used by the Appellants were contaminated with the prohibited substances. The risk of contamination of the injectable Altrenogest products was known to racing authorities. As a consequence, warnings were published about the use of such products in the Racing New South Wales Magazine, and on the Racing New South Wales website: see Exhibit 14(a)-(c) in both Appeals.

14. Information concerning this was also provided by Racing New South Wales to Veterinary Associations and the Trainers' Association.

**Other facts relevant to the Pratten Appeal**.

15. Mrs Pratten had seen the warnings given by Racing New South Wales prior to administering the Ovu-Mate Altrenogest product by injection to Rahaan. She usually used the oral form of this product but her Vet, who did not have the oral product, assured her that he had had no problems with the injectable form. However, he told her to give the product 5 clear days from race day. Instead, she injected Rahaan with the product two days out from the race meeting. Her explanation for this was less than satisfactory; but we accept no dishonesty was involved, only some carelessness.

**Submissions in Pratten**

16. Mr O'Sullivan contended that the penalty imposed by the Stewards was manifestly excessive. Of course, there is no need for him to prove this: he need only convince the Panel to impose a lesser penalty. In Mr O'Sullivan's view the starting point of a 12-month disqualification that was imposed by Stewards was well beyond what was appropriate. In particular, Mr O'Sullivan pointed to these matters:

    (a) the lack of any dishonest intent;

    (b) the low level of anabolic steroids detected;

    (c) that the injectable product had been recommended by a Vet; and (perhaps most importantly)

(d) while the detected prohibited substances were List A anabolic steroids, the product actually administered is a therapeutic product used for safety purposes.

17. The thrust of Mr O'Sullivan's submission was that the offending here was closer to a case where a fine should be imposed for the detection of prohibitive substances, not a lengthy disqualification.

18. Mr Van Gestel, as a matter of obviousness, submitted that the offending should be viewed as far more serious. While accepting that no dishonesty was involved, in particular he emphasised the warnings given by Stewards/Racing New South Wales about the potential for contamination of these injectable products. Having warned trainers not to use these products, and that contamination by anabolic steroids was possible, there was a high degree of carelessness, he submitted, in the action of the Appellant.

19. Further, he emphasised that the substances detected here are List A Prohibited Substances. They are anabolic steroids, and it need hardly be said that the image of racing is damaged or potentially damaged any time such substances are found in samples taken from racehorses.

**Determination – Pratten**

20. The matters of most significance in considering penalties to be imposed for breaches of rules of professional associations and sporting industries are well settled. Penalties imposed are not for the purpose of punishment, but are a means of protecting the industry, and to demonstrate to the public that racing officials will take steps to ensure that the reputation of the industry, and its integrity, are protected: *NSW Bar Association v Evatt*[1]; *Day v Sanders; Day v Harness Racing New South Wales*[2]; *The Appeal of Hunter Kilner*[3]; *The Appeal of Noel Callow*[4]. The

[1] (1968) 117 CLR 177 at 183-4

[2] (2015) 90 NSWLR 764 per Leeming JA at [70] and Simpson JA at [131]

[3] RAP, 27/22/17

[4] RAP, 3/4/17

Rules of Racing, breach of which can result in substantial penalties, are in place so that racing authorities can not only control the sport as required, but protect it.

21. Deterrence is another important matter, itself related to both the protection of the sport, and the racing public. Both the racing industry, and the racing and betting public, need to be protected from circumstances where a prohibited substance is detected in a horse's system: *Law Society of New South Wales v Foreman*[5]; *Callow*[6]. The question to be asked is what kind of penalty is required to deter the conduct involved in a particular breach of the rules.

22. The Panel has borne these matters in mind in assessing what penalty is appropriate in this matter, together with the subjective circumstances of the appellant. We do not agree with the submission by Mr O'Sullivan that an appropriate penalty here is closer to a fine, or that the penalty imposed is wildly excessive. That submission might have succeeded if this was a one-off event and the contamination of Ovu-Mate with anabolic steroids had come entirely and unpredictably out of the blue. That is not the case.

23. Sometimes, at first blush it may appear that a penalty like a lengthy disqualification is harsh where no dishonest conduct is involved. A trainer's honesty is only one matter to be considered though. The conduct here has resulted in the presence of anabolic steroids in a pre-race sample of a racehorse. It raced with those substances in its system. These are List A product substances. Detection of such substances in racehorses is very damaging to the image of racing. Further, while dishonesty is not involved here, carelessness is. It is just not as simple as saying that: well, no-one tried to cheat, so it should be a lenient penalty. That is not a proper approach to the Rules of Racing.

24. Amongst the most important matters the Panel has had regard to in this Appeal are the following:

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[5] (1994) 34 NSWLR 408 at page 471 per Giles AJA, and 441 per Mahoney JA

[6] At [41] – [ 43].

(a) The Appellant was not attempting to cheat. Her conduct was not dishonest. She did not intend to administer an anabolic steroid to her horse.

(b) The product she administered was a therapeutic product (albeit a contaminated one).

(c) The prohibited substances were detected at a level where there was no evidence that they would have had any particular effect.

(d) The Appellant received advice from her Veterinarian that he had had no trouble from administering the product in question here as an injectable. However, this was contrary to the warnings given by Racing New South Wales about the risks associated with the injectable version of these products. The warning give was that they could be contaminated with steroids. Trainers were told not to use them. Trainers are expected to keep up to date with these kinds of warnings issued by Racing authorities. It is also expected that they should heed these warnings. If they even contemplate not following such warnings, then either they or their Vet should contact the Stewards to discuss why, and what risks might be involved in not following such warnings.

(e) The Appellant did not follow the instructions given to her by her Veterinarian, and administered the product to her horse far closer to race day than he recommended.

(f) The Appellant has a clean record. Her work as a trainer is important not just to her but to her husband (for which it seems it has a therapeutic role in his life).

(g) The Panel is satisfied that the Appellant will not offend in this way again.

25. Taking all these relevant factors into consideration, we agree with the Stewards that the nature of the penalty to be imposed here must be a disqualification.

26. Where we differ from the Stewards is as to the length of that disqualification. They considered a base penalty should be a 12-month disqualification. That is a longer period than we consider to be appropriate. We are of the view that the starting point for this offending should be an 8 months disqualification.

27. The Appellant pleaded guilty at the Stewards' Inquiry, and has co-operated fully. She should receive a further discount for her plea and co-operation.

28. The Appeal against Severity of Penalty is allowed. The Penalty should remain a disqualification, but the disqualification of 9 months is set aside, and in lieu of that a 6-month disqualification is imposed.

**Facts in the Appeal of Sharon Pepper**

29. Unlike in the Pratten Appeal, Mrs Pepper was unaware of the publications of Racing New South Wales warning against the use of injectable Altrenogest products. As stated above, she should have been.

30. Other than this, the only other factual matter of significance is that the product that Mrs Pepper used on Bella Boss was not prescribed for that horse, and was also out of date.

**Determination of Appeal – Mrs Pepper**

31. The same sentencing principles apply here as applied in the Pratten Appeal. Mrs Pepper is not a cheat. She was careless. That carelessness was in not making sure she was informed of warnings by Racing New South Wales and the Stewards about not using injectable Altrenogest products. Although she faced no charge because of this, and there is no evidence it has had any impact on the level of prohibited substance detected in her horse, it hardly need be said that it is a long way short of good practice to administer out of date medication to a horse for which that medication has not been prescribed.

32. Having considered all the relevant matters, however, the Panel is ultimately of the view that there are insufficient distinguishing factors in this Appeal to warrant a

greater penalty than that in Pratten, although all members of the Panel are concerned about the administration of out of date products or medicines to horses.

33. As with the Pratten Appeal, the base penalty the Panel considers appropriate is an 8 months disqualification. Bearing in mind the Appellant's good record, her plea and her co-operation, that penalty is reduced to a 6-month disqualification.

**Determination of Appeal – Mr Pepper**

34. Mr Pepper was disqualified for 4.5 months (6 months reduced to 4.5 because of his plea). He injected Bella Boss with the Ready-Mate Altrenogest. He pleaded guilty to a breach of AR227(a), which provides that a person may be penalised for engaging in *"conduct or negligence which has led … to a breach of the Rules."* It does not appear as though it was his idea to administer the product. He merely injected the horse because his wife asked him to do so, because she does not like administering injections to horses.

35. Some years ago, Mr Pepper suffered a severe infection. He was unable to continue with his employment as a Registrar of the District Court. He now has a great deal of difficulty reading.

36. Licensed persons have obligations to ensure that if they are given the responsibility of injecting horses with substances, they are not breaking the rules. While the responsibility for keeping up to date with warnings from Racing New South Wales about products is primarily on a Trainer, a Foreman or other licensed person who has responsibility for injecting horses is not absolved from also ensuring that they are aware of warnings not to administer certain products. Given Mr Pepper's disability, however, it may have been that the responsibility fell on Mrs Pepper to some degree to inform him of the warnings of Racing New South Wales.

37. The inability of a licenced person to read warnings issued by Stewards or Racing NSW concerning prohibited substances or contaminated products, or their inability to fully comprehend such publications, is not a defence to a breach of the Rules. Nor can it be taken into account as a significant factor of mitigation. Anyone administering a product or medicine to a horse must know what it is, and ensure a

process is in place where they are aware of any warning published by Racing Authorities concerning products or treatments. The appellant was not, and that involved some degree of carelessness.

38. Taking all matters into account, we agree with the base penalty determined by the Stewards in this appeal. Applying a 25% discount for plea and cooperation, we agree that the appropriate penalty is a 4.5 months disqualification.

**Orders**

**In the Appeal of Julie Pratten**, the following Orders are made:

1. Appeal against severity of penalty allowed.

2. In lieu of a disqualification of 9 months, the appellant's licence to train is disqualified for 6 months. The appellant's disqualification commenced on 12 August 2020, and so she is able to reapply for her licence on 12 February 2021.

3. Appeal deposit to be refunded.

**In the Appeal of Sharon Pepper**, the following Orders are made:

1. Appeal against severity of penalty allowed.

2. In lieu of a disqualification of 9 months, the appellant's licence to train is disqualified for 6 months. The appellant's disqualification commenced on 12 August 2020, and so she is able to reapply for her licence on 12 February 2021.

3. Appeal deposit to be refunded.

**In the Appeal of Mark Pepper**, the following Orders are made:

1. Appeal against severity of penalty dismissed.

2. Penalty of a disqualification of 4.5 months confirmed. The appellant may reapply for his licence on 26 December 2020.

3. Appeal deposit forfeited.