RACING APPEAL PANEL OF NEW SOUTH WALES

APPEAL OF TIMOTHY NOLAN

Appeal Panel:	**Mr R. Beasley SC (Principal Member); Mrs J. Foley; Mr J. Murphy**
Appearances:	**Mr M. Van Gestel for Racing NSW**
	Mr I. Pike SC for the Appellant
Date of Hearing:	**12 February 2021**
Date of Decision:	**23 February 2021**

REASONS FOR DECISION

A. Introduction

1. This appeal raises the issue of what should be the appropriate penalty imposed on Mr Tim Nolan, a registered breeder, for admitted breaches of LR114(4) and LR114(5)(e). These rules prohibit an owner, trainer or other person in control of a horse from having that horse euthanized or destroyed except in certain circumstances, and prohibit horses from being sent to abattoirs and knackeries. In addition, there is an appeal against the penalty imposed by the Stewards for an admitted breach of AR232(i) for giving false evidence to Stewards during the course of an investigation or interview.

2. LR114(4) is in the following terms:

> "A registered owner, trainer or any person that is in charge or has in his or her possession, control or custody of any horses (Eligible Horses, Unnamed Horses and Named Horses) is not to euthanize or destroy a horse (or permit a horse to be euthanized or destroyed) unless a registered veterinary surgeon has certified in writing that it is

necessary on welfare or safety grounds or for reasons approved in writing by Racing NSW or unless under extreme circumstances where it is necessary for a horse to be euthanized immediately and the decision is subsequently confirmed by a veterinary surgeon."

3. The particulars of the breach of this rule are as follows:

> "[The Appellant] did permit the thoroughbred mare Pending Decision to be destroyed by authorising Pending Decision to be destroyed at the Kankool knackery on or around May or June 2020 without having certification from a veterinary surgeon that such destruction was necessary on welfare or safety grounds or for reasons approved by Racing NSW."

4. LR114(5)(e) is in the following terms:

> "Further to AR64JA(1), where a decision has been made to retire a horse, or not to commence racing an eligible horse, and that horse has been domiciled in New South Wales for the majority of its life:
>
> …
>
> (e) the horse is not to be, directly or indirectly, sent to an abattoir, knackery or similarly disposed of."

5. The particulars of the breach of LR114(5)(e) are as follows:

> "[The Appellant] did send an eligible horse, namely 2018 Colt Dissident x Absolutelyanything to the Kankool knackery on or about May or June 2020 when he made a decision not to commence racing such eligible horse."

6. AR232(i) is in the following terms:

> "A person must not:
>
> …
>
> (i) give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading."

7. The particulars of the charge brought under AR232(1) were that during a phone call the Appellant had with the Deputy Chairman of Stewards, Mr Wade Birch, on 26

October 2020, he told Mr Birch that Pending Decision had died of colic about four months before, knowing that statement to be false. He also repeated this statement during the course of a phone conversation with Mr Van Gestel on 28 October 2020.

8. The Appellant entered a plea of guilty to each charge. Having received written submissions from the Appellant's solicitors (Ex 8), on 18 December 2020 the Stewards imposed the following penalties:

> Breach of LR114(5) – 2 years' disqualification.
> Breach of LR114(5)(e) – 18 months' disqualification.
> Breach of AR232(i) – 4 months' disqualification.

9. After considering the totality of the offending against the Rules, the Stewards imposed a penalty of two years' disqualification.

10. On the day that the disqualification was imposed, Racing NSW, through its Chief Executive Officer Mr P. V'Landys AM, lessened the impact of the disqualification imposed on the Appellant by making a determination that the prohibition outlined in AR263(l) (prohibiting a disqualified person from conducting or assisting with thoroughbred breeding in Australia) and AR 263(n) (prohibiting a disqualified person from permitting or authorising any other person to conduct any activity associated with racing, sales or breeding on the disqualified person's behalf) would not apply to the Appellant. He was also granted permission to participate in thoroughbred horse sales and related events (263(n)), but not to attend sales.

11. The Appellant has appealed to the Panel against the penalties imposed upon him for each of the rules, and in relation to the total penalty imposed on him. At the appeal hearing he was represented, with leave, by Mr I. Pike SC, instructed by Allen & Overy Solicitors (Mr D. Walter). Mr Van Gestel, the Chairman of Stewards and Head of Integrity for Racing NSW, appeared for it.

12. The core facts in this appeal are not in dispute, and so it was considered to be unnecessary by the parties to call any oral evidence. Instead, an Appeal Book containing the transcript of the Stewards' Inquiry, records of interview, and exhibits

from the inquiry were tendered as evidence. As discussed below, while the parties are a long way apart as to what they submit is the appropriate penalty which should be imposed, there was limited disagreement as to the principles to be applied in determining penalty.

B. Evidence and Findings of Fact

13. The Appellant is the owner and manager of Murrulla Horse Stud, situated in the Hunter Valley of New South Wales. He has owned that stud for over a decade, and has a long family history involving horse breeding. He has not been found to be in breach of the Rules of Racing at any prior time, and there is evidence of his good character in the Appeal Book.

Pending Decision – LR114(4)

14. The Appellant was the breeder and part-owner of the 7-year-old mare Pending Decision. He admits that in about May or June 2020 he sent Pending Decision to the Kankool Knackery for the horse to be destroyed, and that there was no veterinary certification or other permission as required by LR114(4) for the horse to be euthanized or destroyed.

15. Pending Decision had a hoof injury "associated with laminitis in the right hind limb": report of Dr P. Carrigan dated 11 November 2020. The horse had suffered from this problem for approximately 4 years: T5.220. Although the Appellant's veterinarian, Dr Carrigan, had not examined Pending Decision for this injury, the problem had been managed by Mr G. Hall, an accredited farrier who works for the Appellant. He described the horse as being lame, and "quite uncomfortable at times" due to her injury: Appeal Book page 65.610-615.

16. Pending Decision lost a foal in about late April 2020, and it was the Appellant's opinion that this occurred because of the pain the horse was experiencing due to her foot injury: T6.240. The Appellant decided that "it was best for her to be destroyed" because of the pain associated with the injury: T9.375-80.

17. Clearly, this decision was not based on the expert judgment of a veterinarian. However, the Appellant has long experience with horses, which guided his decision: T9.400. He felt she "didn't have any quality of life due to her lameness": T9.382. The decision was therefore made to end her life by sending her to the knackery.

18. The Appellant's conduct in not seeking certification from a veterinarian for approval in writing from Racing NSW, and then sending the horse to a knackery, was an obvious breach of LR114(4), a rule the Appellant said he was unaware of (a matter he says applies to the whole of LR114).

19. Had certification from a vet been sought to euthanize Pending Decision, it is unclear whether this would have been given. It might depend on the vet in question. There is, however, insufficient evidence for the Panel to sensibly form a view about this. What we are satisfied about, however, is that this horse had a chronic foot injury that caused her pain. We also accept that the Appellant was genuine in his belief that having the horse euthanized was in the best interests of the horse, and one made on welfare grounds, and no other.

Dissident Colt

20. The Appellant was the part-owner and breeder of a colt by Dissident, which was due to turn 2 years of age on 1 August 2020. This horse was also sent by the Appellant to be destroyed at the Kankool Knackery, in breach of LR114(5)(e).

21. The Dissident colt suffered from a "severe deep foot infection" of the right hind foot: report of Dr Carrigan dated 11 November 2020. The horse was X-rayed on 19 March 2020, and the infection was then managed with farrier care, antibiotics, and the application of a hoof cast. The horse was again X-rayed on 6 April 2020, and its foot infection had not improved. Dr Carrigan further explained the treatment given to the horse during the Stewards' Inquiry: Ex 10, pp.4.193-5.208. He stated that the horse's condition had "deteriorated" by 6 April 2020. He thought at that stage the horse's prognosis was "pretty poor": Ex 10, p.6.263. While he at no point recommended euthanizing the horse, it was something he thought might be "the next step" without improvement in the horse's condition: Ex 10, p.9.402-410.

22. Dr T. Koenig, the Chief Veterinarian for Racing NSW, agreed that euthanizing the horse was an option that "would need to be taken into consideration and balanced against the significant invasive procedures that would be required" to treat the horse: Ex 10, p.9.410-415.

23. The Appellant's opinion was that the Dissident colt "had no quality of life" even "to be paddock sound": T13.590.

24. While the Panel is again not in a position to reach a concluded view that a vet would have certified that the Dissident colt should be euthanized on welfare grounds, there is evidence that this was a real possibility in the event that the horse's foot injury did not reasonably quickly improve from 6 April 2020, or if it worsened. Again, we are comfortably satisfied that the Appellant's decision to send the horse to a knackery, although an obvious breach of the rule, was made solely on welfare grounds, and had no aspect of a commercial decision (or other similarly aggravating factor).

False Evidence Charge

25. In a phone conversation he had with Mr W. Birch (the Deputy Chairman of Stewards) on 26 October 2020, the Appellant said that "Pending Decision had died of colic in a paddock around four months earlier": Ex 1 at [4]. This was false, to the Appellant's knowledge. On 28 October 2020, this time during a telephone conversation with Mr Van Gestel, the Appellant denied sending Pending Decision to a knackery and repeated that "she died of colic": Ex 2 [6]. This again was false.

26. It has been submitted on behalf of the Appellant that he was "confused and panicked" when called by Mr Birch and subsequently Mr Van Gestel: Appellant's submissions at [4.10(c)]. Whether that was the case or not, the false statements were retracted within a few days, and the Appellant has fully cooperated with the Stewards from that point.

C. Submissions, and principles relating to penalty

27. At the appeal hearing, there was no dispute about the following fundamental matters:

(a) The charges brought against the Appellant are objectively serious.

(b) The purpose of imposing penalties for breach of the Rules of Racing is not punishment. It is for the protection of the sport and the industry: *Appeal of Noel Callow*, RAP, 9 May 2017 at [38].

(c) The Appellant is entitled to a discount for his early plea, and his cooperation.

28. Some reliance was placed by Mr Pike on the fact that the Appellant was unaware of LR114. He referred to the judgment of Fagan J in *Kavanagh v Racing NSW* [2019] NSWSC 40, where his Honour remarked that specific deterrence, for example, was of no relevance to the penalty to be imposed on a trainer who had administered a prohibited substance to a horse thinking instead that he was administering a vitamin complex. We are not certain that there is a direct analogy of this reasoning to the circumstances of this appeal. A trainer giving a substance to a horse that he believes is a vitamin complex but turns out to be cobalt is one thing. A breeder not knowing an important welfare rule that was introduced over 3 years ago is another.

D. Resolution

29. The Panel agrees with the submission made by Mr Pike that the breaches of LR114(4) and 114(5)(e) involved here are towards the lower end of the scale. It is primarily for that reason, based on the matters outlined below, that we have reached the view that it is appropriate to reduce the penalty imposed on the Appellant by the Stewards.

30. Before setting out our reasons, the Panel wishes to make one matter very clear. We understand the importance of LR114. Its stated objective is "to ensure the welfare of thoroughbred horses from birth, during their racing careers and on retirement": LR114(1). It is a rule that goes to the heart of serious welfare concerns relating to the racing industry. A breach of either LR114(4) or 114(5)(e) has the potential to cause a great deal of damage to the image and integrity of racing. Mr Van Gestel submitted, correctly, that breaches of these rules can have a seriously negative impact on what he described as racing's "social licence". The Panel accepts that.

We also understand that the purpose of imposing a penalty for breach of these rules is the protection of the image and integrity of the sport, and to send a message to the racing public and the public in general that racing will not tolerate conduct of the kind caught by these rules. However, the Panel has an obligation to reach what it considers to be a just decision based on all of the relevant facts relating to the breaches of LR114 here.

31. There is no doubt, as Mr Van Gestel submitted, that it is damaging to racing for horses to be sent to a knackery as the Appellant did here. The Panel of course takes that into account (there would be no breach of LR114(5)(e) had this not happened). However, the other matters that the Panel is bound to take into account are these:

(a) Both horses had serious health issues. The extent of Pending Decision's hoof problem from the point of view of whether or not a vet would have certified that she should be euthanized is unclear, but we accept that she lived in pain and discomfort and had for some time. The Dissident colt had an unresponsive and serious infection of a hind hoof. This clearly must have been both painful and debilitating. The veterinary evidence leads us to the view that euthanasia on welfare grounds was a real possibility for this horse.

(b) The Appellant acted as he did on both occasions out of welfare concerns for the horses. He considered ending their lives was the proper thing to do. It was not a commercial decision. It was not made, for example, because a particular horse was "slow", or "difficult" to manage, or because he could no longer be bothered feeding or homing them.

32. To those considerations must be added the Appellant's good record, the evidence of his good character, and a discount applied for his plea and cooperation.

33. Finally, we have considered some of the relevant reasons for decision and penalties imposed for previous breaches of the Rules that have been drawn to our attention by Mr Pike and Mr Van Gestel. While there is a limit to what can be taken from any of these decisions or determinations of penalty by Stewards referred to us, to some degree the Panel's decision in *The Appeal of Daniel Riley* (RAP, 16/1/20) and the

penalty imposed by Stewards on licensed trainer Ian Symons (15/1/20), are an indication of a more lenient approach to penalty for breaches of LR114 than appears to have been taken in this matter. We were also referred to the penalties imposed for breaches of LR114(5)(e) on Mr D. Brown, and licensed trainer Mr T. Sutherland (under appeal to the Panel), but they involve very different factual circumstances to here.

34. The Appellant has submitted that the appropriate penalty for his breaches of the Rules should be a reprimand, or a fine of up to $10,000. We do not consider that such a penalty would properly reflect the seriousness of his conduct. It would not in any adequate way protect the image and integrity of racing. However, the two-year disqualification imposed on the Appellant is considerably longer than we feel is appropriate based on the facts.

35. In our view, the penalty that should be imposed on the Appellant for the breach of AR114(4), and the breach of LR114(5)(e), is a 12-month disqualification for each offence. We have reached that view on the basis that the matters set out in Mr V'Landys' letter to the Appellant of 18 December 2020 regarding AR263 continue to apply.

36. To the 12-month disqualification periods, a 25% discount for plea and cooperation should be applied. We are therefore of the view that the appropriate penalty for the breach of LR114(4) is a 9-month disqualification, and the same penalty should be imposed for the breach of LR114(5)(e). The offending here is very similar – both horses had serious injuries, and both were sent at about the same time to Kankool. Both decisions were made on welfare grounds. We consider it sufficiently close to the same course of conduct such that even though two horses are involved, and there are separate breaches of a different subclause of LR114, the penalties should be served concurrently.

37. The appeal in relation to the penalty imposed for breach of AR232(i) is dismissed. We consider that the Appellant may have been taken by surprise by the calls from Mr Birch and Mr Van Gestel, but not that he was "confused". He knew what had happened to the horses, and was not (at first) honest with Stewards. Giving false

evidence to Stewards in the course of an inquiry is always a serious matter. Further, the investigation here was about the serious subject matter of a possible breach of LR114. Taking into account the Appellant soon recanted, and then fully cooperated with Stewards, and bearing in mind his plea, we are of the view that the four month disqualification imposed by the Stewards for the breach of AR232(i) is appropriate, and consistent with a number of prior penalties imposed on persons who have given false evidence to Stewards: *Appeal of Tim Martin* (RAP, 16/10/19); *Appeal of Dean Boal* (RAP, 16/10/20); *Appeal of Clint Lundholm* (RAP, 7/8/20).

38. The offending under AR232(i) arises out of the same general subject matter of the breaches of LR114, but is of a different kind. While two months of this disqualification should be served concurrently with the penalties imposed for the breaches of AR114, we are of the view that two months should be cumulative to the 9-month disqualification. This makes the total penalty imposed on the Appellant to be an 11-month disqualification.

39. The Panel makes the following orders:

(1) Appeal against severity of penalty allowed.

(2) Penalty of a two-year disqualification set aside.

(3) In lieu of the two-year disqualification, the Appellant is disqualified (subject to the conditions outlined in the letter to him from Racing NSW of 18 December 2020) for a total period of 11 months on the basis of the following:

(a) for the breach of LR114(4) – 9-month disqualification;

(b) for the breach of LR114(5)(e) – 9-month disqualification to be served concurrently with the period outlined in (a) above;

(c) for the breach of AR232(i) – 4-month disqualification, two months of which is to be served cumulatively to the 9-month disqualification referred to above.

(4) The 11-month disqualification imposed on the Appellant is to commence immediately, or on such other day as allowed by the Rules.

(5) Appeal deposit to be refunded.