APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER, KEVIN RANDALL

Appeal Panel:	**Mr R. Beasley SC (Principal Member); Mrs J. Foley; Mr C. Tuck**
Appearances:	**Racing New South Wales: Mr M. Van Gestel, Chairman of Stewards**
	Appellant: Mr J McLeod instructed by Mr G. Hutchinson of Clutch Legal
Date of Hearing:	**30 April 2021**
Date of Reasons:	**28 May 2021**

REASONS FOR DECISION

Mr R Beasley SC (Mrs Foley and Mr Tuck agreeing)

Introduction – Charges and Findings of Breach

1. On 27 August 2020, Racing New South Wales Stewards from the Northern Rivers Racing Association conducted a search of the residence and registered stables of Licensed Trainer, Mr Kevin Randall ("the Appellant"). The Stewards were accompanied by a detection dog, trained in identifying the scent of batteries. During the course of the search the Stewards located an electronic or electric apparatus – a cattle-prod - at the Appellant's stables.

2. The following day the Appellant was charged with a breach of AR231(2)(b) of the Australian Rules of Racing, which is in the following terms:

> "**AR231 Care and Welfare of Horses**
>
> (2) A person must not:

…

(b) have in the person's possession any electric or electronic apparatus or other device capable of affecting the performance of a horse in a race, official trial, jump out or training gallop."

3. As this has been described by the Stewards as "Charge 3" in their report dated 23 February 2021, it is referred to as "Charge 3" in these Reasons. After bringing this charge, the Stewards suspended the Appellant's licence to train under AR23, pending the outcome of the hearing into the charge.

4. After this, and until 23 February 2021, the Stewards conducted a further inquiry into Charge 3, and in relation to allegations that the Appellant had used unlicensed persons for his training business, and into certain allegations of sexual harassment.

5. The Stewards' Inquiry included taking evidence from witnesses, including the Appellant on 4 and 23 February 2021, at which the Appellant was legally represented.

6. On 23 February 2021, the Stewards also charged the Appellant with two breaches of LR82(3) in relation to employing staff members to assist him in connection with his training operation when that staff member was not registered in a capacity to do so. The first charge under LR82(3) (Charge 1) alleged that the staff member was employed by the Appellant between February 2020 and 16 April 2020 when not registered, and the second charge (Charge 2) alleged that the Appellant in March, April, July and August 2020 employed an additional staff member to assist him in connection with his training operation when that person was not registered in a capacity to do so.

7. Also on 23 February 2021 the Appellant was charged with a breach of AR233(c) of the Rules (Charge 4). AR233(c) is in the following terms:

"**AR233 Other Misconduct Offences**

A person must not:

…

(c) engage in sexual harassment of a person employed, engaged in, or participating in the Racing Industry."

8. "Sexual harassment" is defined in the Dictionary of the Rules (AR2) in the following way:

> "Sexual harassment means:
>
> (a) subjecting a person to an unsolicited act of physical intimacy; or
>
> (b) making an unsolicited demand or request (whether directly or by implication) for sexual favours from a person; or
>
> (c) making a remark with sexual connotations relating to a person; or
>
> (d) engaging in any other unwelcome conduct of a sexual nature in relation to a person,
>
> where the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so:
>
> (i) with the intention of offending, humiliating or intimidating the other person; or
>
> (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.
>
> The conduct described in paragraphs (b), (c) and (d) includes, without limitation, conduct involving the internet, social media, a mobile phone, or any other mode of electronic communication.

9. The particulars for Charge 4 were as follows:

> "… you licensed trainer Mr Kevin Randall did engage in the sexual harassment of Ms [R] while she was employed and/or engaged and/or participating in the Racing Industry by subjecting Ms [R] to unsolicited of physical intimacy in that between February 2020 and 16 April 2020 you Mr Kevin Randall did on a number of occasions place your hand on Ms [R's] leg whilst travelling with her between her place of residence and your registered stable premises. Such physical intimacy being unsolicited

> and/or unwelcome and made in circumstances where a reasonable person would have anticipated the possibility that Ms [R] would have been offended and/or humiliated and/or intimidated by the unsolicited act of physical intimacy."

10. "Ms R" is obviously not the name of the person who made complaints to the Stewards that led to Charge 4. As Ms R was a minor at the time of the alleged breach of the Rules, for the purposes of these reasons she will be referred to as Ms R.

11. During the hearing held on 23 February 2021, the Appellant pleaded guilty to Charges 1 (LR82(3)), Charge 2 (LR82(3)), and Charge 3 (AR231(2)(b)). He pleaded not guilty to Charge 4 (AR233(c)).

12. After giving consideration to the matter, the Stewards Panel (Mr M.A. Holloway (Chairman), Mr R.W. Loughlin and Mr J.T Penfold) found the Appellant guilty of Charge 4.

13. In respect of each of Charges 1 and 2, the Appellant was penalised by way of a fine in the sum of $400. There is no appeal in relation to these fines.

14. In respect to Charge 3, a penalty of a disqualification of 2 years and 3 months was imposed. In respect to Charge 4, a penalty of a 6-month disqualification was imposed. The total penalty imposed on the Appellant was a disqualification of 2 years and 9 months.

15. The Appellant has appealed against the severity of the penalty imposed in relation to Charge 3, and against both the finding of guilt in relation to Charge 4, and the severity of the penalty imposed.

16. At the Appeal hearing, the Stewards were represented by Mr M. Van Gestel, the Chairman of Stewards. With leave, the Appellant was represented by Mr J McLeod of Counsel, instructed by Mr G. Hutchinson of Clutch Legal.

17. Without objection, an Appeal Book was tendered by Mr Van Gestel which contained the transcript from the Stewards' Inquiry, as well as the Exhibits tendered at that

Inquiry. The Appeal Book was marked as Exhibit A on this Appeal, while the Exhibits retained the number that they were allocated at the Stewards' Inquiry. The Appellant was called to give evidence by Mr McLeod, and was cross examined by Mr Van Gestel. At the conclusion of the hearing oral submissions were made, that were subsequently supplemented by written submissions.

Charge 4

Evidence

18. Ms R was employed by the Appellant as a casual stablehand between about February 2020 to about 16 April 2020. Ms R was under 18 years of age at the time, although the Appellant, at first, thought she was older. He did not know Ms R well, having first met her about 6 months before when he saw her riding a horse past his property.

19. Ms R lived with her parents not far from the Appellant's property. During the course of time that she worked for him, other than during the course of about the final 3 weeks, the Appellant frequently drove Ms R to and from his property for her working hours. She worked for him about 3 days a week, for about 2-3 hours a day.

20. On 24 July 2020, Ms R was interviewed by a Racing NSW Investigator during which she made allegations that during the course of the time she worked for the Appellant, he had touched her on several occasions in a manner which was against her consent, and which would fall within the definition of "sexual harassment" in the Rules. In particular, she said the following:

> "J. Rodger: Prior to this recording commencing, you made some allegations about how Mr Randall treated you. Do you want just to outline your allegations?
>
> A.: In the car pretty much – quite regularly he used to pick me up for work in the mornings and then he'd drop me home. In the car pretty much every single time we were in the car – so just maybe three or four times it didn't happen – he used to try and grab my inner leg. That happened quite a lot. He also had some old quarter horses in his back paddock and he used to let me ride them. When I was on the horses at the yard, so at the place, he'd come over and he'd grab me as well and he'd try and like adjust my position in the saddle. He would grab my legs, grab my arm. He would also make some

> comments quite regularly as well about the way I dressed or what I was wearing." (Exhibit 1, p.4.160-.170)

21. When asked about how this conduct made her feel, Ms R said:

> "Like actually crap. My mental health has been through the roof since I quit there." (Exhibit 1, p.4.188-.190)

22. At the Stewards' Inquiry, Ms R repeated these allegations. In relation to her evidence to the Stewards that the Appellant would touch her leg whilst in the car, her evidence was that she would say *"Don't do that, and he'd take it as a joke, me saying 'don't do that'. He'd take 'don't do that' as a joke and it kept going"*: T22.1069-.1070. Ms R's evidence was that the Appellant would grab her leg virtually every time that he drove her to and from his property. She also gave evidence at the Stewards' Inquiry that the Appellant would make comments about the clothes she was wearing and in general how she looked, saying that she "looked good" and "looked beautiful": T28.1390-.1422. She said she was not offended or humiliated by these comments: T30.1455-.1468. She also gave evidence that she accepted that the Appellant's comments about her clothes were probably more related to whether they were the best kind of attire to wear around a stable for the stable hand duties she was performing: T143.222-.230.

23. In his evidence at the Stewards' Inquiry, and in statements he gave to the Stewards, Mr Randall denied ever touching Ms R's leg when driving her to and from his property. In relation to touching her while she was on a horse, his evidence was that he only touched her on the waist and calf for the purposes of giving an instruction as to how to properly seat herself on a horse.

24. At the appeal hearing before this Panel, Ms R was unable to be present to give evidence. The explanation given by the Chairman of Stewards was that she was not sufficiently well to do this. No medical report was supplied, but the Panel accepts what it was told by Mr Van Gestel.

25. The Appellant gave sworn evidence. He again stated that he had only ever touched Ms R on a horse for the purpose of providing a riding instruction to her. He agreed

he had touched her on the lower leg and on the hip. He once again denied ever touching Ms R on the leg whilst driving her to and from the property. His evidence was that this simply did not happen.

Submissions

Stewards

26. Mr Van Gestel readily conceded that the absence of sworn evidence before the Panel by Ms R was not ideal. He did point out, however, that although she had not given sworn evidence before the Stewards, what she had told them during the Inquiry and what she had told the investigator was, first, at all times consistent. Secondly, and rightly, he pointed out that at least in the transcript she did not come across as a vindictive person that was making things up to get back at the Appellant for some unknown reason. As an example, Mr Van Gestel pointed out that Ms R had readily conceded that the Appellant's commentary about her attire on one occasion may simply have been a comment that the clothes she was wearing on that day were not appropriate for the kind of work she was doing. She was also conciliatory to a degree in relation to the manner in which the Appellant had touched her during the course of what he said was giving her riding instructions. In relation to the Appellant touching her on the leg, however, during the times he drove her to and from work, she was unwavering in her evidence that this did happen and that it had, at a minimum, made her feel particularly uncomfortable.

27. In relation to the Appellant's credit, Mr Van Gestel drew the Panel's attention to the evidence that he gave to Stewards when interviewed on 27 August 2020 when he said that during the course of giving her riding instructions or lessons he "definitely didn't touch her leg": Exhibit 4, p.13.610-.618. This is inconsistent with the evidence that the Appellant gave during the Stewards' Inquiry and to the Panel where he conceded that he had touched the Appellant on the leg and around the hip area during the course of giving riding instructions.

28. Mr Van Gestel also emphasised that Ms R has no apparent motive to lie about anything that occurred during the time she worked for the Appellant, and that it was a difficult and brave thing to do for a teenage girl to come forward and report what she had to the Stewards. The Panel unreservedly accepts this submission.

Appellant's submissions

29. Mr McLeod's primary submission was that the Appellant should be accepted as a witness of truth in relation to his denials about placing his hand on Ms R's leg when driving her to and from his property.

30. In relation to the inconsistent evidence concerning whether the Appellant had touched Ms R on the leg during the course of riding instructions, Mr McLeod referred to the fact that prior to this subject matter being addressed in the course of the same interview, the Stewards had immediately before been asking questions of the Appellant as to whether he had touched or squeezed Ms R's leg in the car: Exhibit 4, T12.550-.600. He submitted that the Appellant had got himself into a frame of mind to deny ever touching Ms R. He further pointed out, rightly, that the Appellant had been unhesitating in agreeing that he had at least touched Ms R's legs and hip both at the Stewards' Inquiry and during his evidence before the Panel when giving her riding instructions.

31. Mr McLeod also drew the Panel's attention to certain Facebook posts made by Ms R in which she had not been truthful about her age, or the extent of her work history. The Panel notes these posts, but we do not consider they are of any relevance at all to a determination as to whether Ms R was telling the truth about her claims that the Appellant inappropriately and without consent touched her leg.

32. Finally, Mr McLeod emphasised the significant disadvantage for both his client (and the Panel) of Ms R not being available to give sworn evidence. He noted that at the Stewards' Inquiry, whilst the Appellant's solicitor was allowed to be present, he was not allowed to directly question Ms R as to whether or not the matters she alleged happened had really happened. He pointed to this being a particular disadvantage in circumstances where, on other matters – in relation to comments about how she was dressed, and in relation to the Appellant's intentions when touching her during the course of riding instructions – the Appellant had made a certain amount of concession from the time she gave her statement to the Stewards, to the time of the Stewards' Inquiry.

Resolution – Charge 4

33. An appeal to this Panel is "by way of a new hearing" and fresh evidence may be called: s.43(1) *Thoroughbred Racing Act 1996*.

34. The Panel is left in the position where we have sworn evidence before us from the Appellant denying that he placed his hand on the leg of Ms R on multiple occasions when driving to and from his property. From Ms R, we have statements she gave to the Stewards, and her unsworn evidence at the Stewards' Inquiry. In relation to that matter, Mr McLeod has submitted that the fact that he can't test Ms R's evidence under oath places his client at a significant disadvantage.

35. Although evidence at a Stewards' Inquiry is not given under oath, that is not reason on its own for rejecting either the credibility or reliability of that evidence. It may not be sworn evidence, but it is given by persons in circumstances where if they lie, they can be charged with an offence under the rules of giving false or misleading statements to the Stewards. Further, evidence at a Stewards' Inquiry on many occasions has much of the formality and seriousness that might be found in a court room.

36. Having read carefully the statements given by Ms R to the Stewards and investigators, and having read the transcript of the evidence she gave at the Stewards' Inquiry, we can find no basis upon which it could be said that she should be positively disbelieved, or that the Appellant's evidence should in some way be preferred to hers. The real issue though is whether - in circumstances where Ms R has not given sworn evidence before the Panel, nor had that evidence or the evidence she gave at the Stewards' Inquiry tested by the Appellant's counsel – the Panel is able to be "comfortably satisfied" that the allegations made against the Appellant have been proven. Charge 4 is a very serious charge. The conduct alleged – the Appellant placing his hand, without consent, on Ms R's leg in circumstances that were very upsetting to her – is clearly sexual harassment.

37. The High Court's decision in *Briginshaw v Briginshaw*[1] is often referred to by the Panel without further explanation. Mr McLeod submitted the High Court's reasoning bears close examination, and he reminded the Panel of aspects of both the judgments of Dixon J and Rich J where emphasis is placed on the "careful weighing" of testimony in the process of reaching a state of "comfortable satisfaction" on a finding of fact. He submitted that a difficulty for the Panel here is that it has been forced to weigh unsworn and not fully tested evidence of Ms R, as against the sworn denials of the Appellant. In his judgment, Dixon J (as he then was) talks about the need for a decision-maker to "feel an actual persuasion" as to a finding of fact.

38. The Panel is not unpersuaded by what Ms R told the Stewards. Nor are we able to resolve this matter on the basis of making a positive finding that the Appellant's denials should be accepted. His denials under oath, and as tested by Mr Van Gestel, are noted, but do not alone satisfy us that what Ms R told the Stewards did not occur. However, in circumstances where there has not been sworn evidence by Ms R, and the Appellant's counsel has not had the opportunity to at least put to her an alternative version of what did or did not happen, we are unable to reach the state of "comfortable satisfaction" or "actual persuasion" that we need to for such a serious charge to find the Appellant in breach of the Rule. In those circumstances, and limited to the issue of burden of proof, the appeal in relation to Charge 4 must be allowed, and the finding of breach of AR233(c) set aside.

Charge 3

39. The Appellant has pleaded guilty to possession of an electronic apparatus – a cattle-prod. The only issue is what the appropriate penalty for this breach of the Rules should be. The Stewards imposed a penalty of a disqualification of two years and three months. This exceeds the mandatory minimum penalty of a two-year disqualification for use of an electronic device (as distinct from possession). Mr McLeod's submission is that this penalty far exceeds an appropriate penalty for a possession offence, and seeks a dramatic reduction of penalty on behalf of his client.

[1] [1938] HCA 34; (1938) 60 CLR 336

Evidence

40. The Appellant's evidence was that he did not purchase or acquire the cattle prod that the Stewards found in his home for the purpose of using on horses. He explained that he had been given the cattle prod by the Department of Primary Industries when employed by that government department for the purposes of his then work. When his work with the Department of Primary Industries ended, he was not asked for the cattle prod back as this particular device is now obsolete as it presented a danger to those using it and a longer device is now used on cattle. The Appellant said he also had his own cattle on his property until about the middle of 2019. There was no challenge to this evidence.

41. The Appellant's evidence also was that he has never used a cattle prod on a horse. The Panel was shown some film of the Appellant riding a racehorse (Ex 10) during which he was said to have roared at the horse (this is difficult to hear but perhaps did happen). The Stewards had some suspicion that the Appellant was using a cattle prod during this track work. That is undoubtedly the Stewards' genuine suspicion, but the film shown to the Panel falls short of allowing us to properly make a finding that the Appellant had used the cattle prod on the horse shown in the film.

Submissions: The Stewards

42. Mr Van Gestel submitted that the Appellant's conduct in being found in possession of an electronic device like a cattle prod as a racehorse trainer is a very serious breach of the Rules. The Panel agrees. True it is that the Appellant has not been charged or found guilty of the use of an electronic device. However, this does not in any way mean that possession of such a device is not serious offending under the Rules. In the Racing Appeals Disciplinary Board of Victoria decision in *Racing Victoria Stewards and Darren Weir* (6 February 2019), Judge Bowman described possession of a device such as a cattle prod as "abhorrent". He went on to point out that although Mr Weir was not charged with the use of jiggers, *"even possessing devices capable of inflicting such cruelty is a very serious offence indeed and it warrants stern punishment"*. In *Weir*, that trainer was charged with the possession of three electronic devices. His licence was disqualified for four years (Judge Bowman, with Mr D Forrest (Deputy Chair) agreeing), although at least part of that penalty was for a breach of then AR175A of "conduct prejudicial to the image of

racing". Mr Josh Bornstein (Deputy Chair), in separate reasons, indicated that he would have imposed a 5-year disqualification, which included two and a half years' disqualification for the possession of the three electronic devices.

43. Mr Van Gestel also referred the Panel to a number of other decisions of the Racing Panel in relation to possession of electronic devices, but for a number of these we agree with his submission that they are so long ago that they are not particularly relevant. For example, the Racing Appeals Tribunal of Queensland decision in *Garnet Taylor* (2 August 2005) and the Victorian Racing Appeals Tribunal decision in *The Appeal of Paul Preusker* (8 March 2007) are sufficiently long ago that they perhaps do not (understandably) take into account what Judge Bowman said in *Weir* is the "emphasis on animal welfare" which is "now even greater than it may have been 12 years ago". Mr Van Gestel did, however, provide us with a copy of the NSW Racing Appeals Tribunal Reasons for Decision in *The Appeal of Lynch* which is a 2014 decision relating to the appellant having possession of electrified spurs. The appellant in that appeal was disqualified for a period of two years and in the course of his reasons for decision, the Tribunal Head, Mr I. D. McRae, said the following with which we respectfully agree:

> "The possession of electric devices awaken all those perceptions of unfairness, advantage and cruelty, coupled with the difficulty of racing authorities throughout the country detecting usage thereof and as such it behoves a tribunal such as this, despite the financial implications of disqualification to a licensed person, to send a clear and concise message that to be found in possession of such items is to be penalised in such manner as to prevent reoffending and deterrence to others in the industry."

Submissions – the Appellant

44. Mr McLeod first stated that the Panel should not make any finding that the Appellant has used the cattle prod on a horse. We accept this. There is no evidence before us upon which we could make such a finding. The charge is a possession charge and the Appellant should be penalised on the basis of that, and not whatever suspicions the Stewards might have.

45. Mr McLeod also submitted that we should make a positive finding that the cattle prod was obtained by the Appellant in the circumstances that he said in his evidence – it was given to him by his employer for the purposes of his work. We accept this unchallenged evidence. Mr McLeod also submits that the Panel should find that the cattle prod was only ever used by the Appellant, having ceased his employment with the Department of Primary Industries, on his own cattle. We also accept this evidence, their being none to the contrary.

46. Mr McLeod asked the Panel to note that after his client was charged with a breach of AR231(2)(b) on 28 August 2020, his licence was suspended at that date. Further, on 23 February 2021, when the Appellant pleaded guilty to breach of the rule, his licence was disqualified until there was a stay granted on 9 March 2021. The primary submission by Mr McLeod is that the appropriate penalty for the breach of AR231(2)(b) is a 6 months suspension (but noting time already served): Appellant's submissions at [7(a)]. Alternatively, a 12 months suspension should be imposed, with the second half of that penalty suspended under AR 283(5). As a third alternative, a 6-month disqualification should be imposed, backdated to commence on 28 August 2020, and having expired on 28 February 2021.

47. Unsurprisingly, and pointing to the decisions in *Weir* and *Lynch*, Mr Van Gestel submits that each alternative submitted by the Appellant would be a wholly insufficient penalty for such a serious breach of the Rules. He submitted that the mere fact that a licensed trainer is found in possession of an electronic device is extremely damaging to the image of racing, and for the reasons outlined in both *Weir* and *Lynch* as examples, the penalty imposed by the Stewards is appropriate.

Resolution

48. As has been stated by the Panel on many occasions, disciplinary proceedings such as these are regarded as being "entirely protective". They are designed to protect the image and integrity of racing. Although penalties such as a disqualification may involve "great deprivation" to the person disciplined, and financial hardship, the purpose of such a penalty is directed to protecting the sport rather than punishing a licensed person: see generally *NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-184.

49. As was stated in *The Appeal of Callow* (RAP, 3 April 2017), in "professional disciplinary matters, the principles which apply to determining penalty recognise the importance of deterrence, particularly in regard to the protection of the public". In *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, which concerned disciplinary action against a solicitor, Giles AJA said at [471]:

> "But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct and deterring others that might be tempted to fall short of the high standards required of them."

50. Analogous reasoning applies to deterring a particular horse trainer and other horse trainers from having in their possession electronic devices which as a matter of obviousness are extremely damaging to the image and social standing of the sport of racing.

51. As a matter of principal, we find ourselves in agreement with much of what was submitted by Mr Van Gestel and Mr McLeod. As for Mr Van Gestel, we accept his submissions that the conduct involved here is very serious offending under the Rules, and that what Mr O'McLeod submits is "mere possession" of an electronic device is of itself objectively serious offending that is damaging to racing. Use of such devices is no doubt more serious, but this by no means is a basis for finding possession alone of electronic devices to be anything other than a grave breach of the Rules. As stated, we are also in agreement with Mr Van Gestel that some of the precedent decisions referred to us are now somewhat stale in their reasoning. That is

not a criticism of any of the decisions, but an acknowledgment that times have changed.

52. We are however also in agreement with Mr McLeod that the Appellant is to be penalised for a "possession" not a "use" breach of the Rules. We agree with him that the penalty to be imposed on the Appellant must reflect the fact that there is no basis for finding he has used the cattle prod on a horse, and we have found it was acquired by him through his work which was unrelated to his horse training business. Further, the Appellant is entitled to have his plea and general cooperation taken into account.

53. Mr McLeod submits that a disqualification for a breach of the possession rule of 2 years and 3 months is incongruous with the mandatory minimum penalty of a 2-year disqualification for use of an electronic device: AR231(2)(a) and AR283(6)(e). There is force to this submission. In his written submissions, Mr McLeod also sought to distinguish the penalty imposed in *Weir* (also a possession case), noting 3 jiggers were involved, and the high profile of the trainer concerned. It should be noted also that Mr Weir was charged with a breach of AR175A.

54. The Panel expresses no disagreement with the penalty imposed in *Weir*. We respectfully accept and adopt the observations made by Judge Bowman about the very serious nature of an offence of possession of an electronic device, and the need for "stern punishment" for such a breach of the rules. However, on the facts found in this appeal, it is not appropriate to impose a penalty on the Appellant for a possession offence that is longer than the mandatory minimum penalty for an offence of using an electronic device. Based on our factual findings, and given this is the Appellant's first breach of this rule, we consider it would be an error of principal to impose a penalty for a possession offence under AR231(2)(b) which is greater than the mandated minimum of a breach of AR231(2)(a) involving use of an electronic device.

55. While we consider that the penalty should be less than the mandatory minimum two year disqualification for a breach of the "use" rule relating to electronic devices, we do not consider that a breach of AR231(2)(b) is much less objectively serious than a breach of AR231(2)(a). To use an electronic apparatus on a horse is disgraceful

conduct (reflected in the mandatory minimum penalty), and it is objectively more serious than being found to be in possession of such a device with no evidence of use. However, any trainer found in possession of electronic apparatus, such as here, commits a very serious breach of the rules. There is nothing trivial about a licenced trainer being found in possession of a device that can transmit an electric shock to a horse. Mr McLeod is probably correct to describe the Appellant's offending as being at least down the lower end of objective seriousness for a breach of AR231(2)(b), but the lower end is still a grave breach of the rules. We are therefore unable to accept the submissions of Mr McLeod that the penalty to be imposed on the Appellant should be reduced to a 6 months suspension, or a 6 months disqualification. In our view, even accepting that the Appellant had not acquired this electronic device for the purposes of using it on horses, and accepting there is no evidence of actual use, we consider the base penalty for a breach of AR231(2)(b) is an 18-month disqualification. To this penalty, it is appropriate to make a reduction for the Appellant's plea, and for the general level of cooperation he gave to the Stewards on this matter.

56. In relation to that level of cooperation, there was some suggestion that when the Stewards were searching his home the Appellant deliberately did not find the cattle prod while conducting his own search. There is insufficient evidence for the Panel to make such a finding. We therefore consider that given the Appellant told the Stewards that he did have possession of a cattle prod but could not remember where he kept it, and subsequently pleaded guilty when charged with possession, he should get a full discount for his plea and cooperation of 25%. This reduces his disqualification from 18 months down to 13 months and 2 weeks.

57. On 28 August 2020, acting under AR23, the Stewards suspended the appellant's licence to train after he was charged with a breach of AR232(2)(b), but before his guilt was determined by them on 23 February 2021. While not a disqualification, this meant that the appellant was unable to start a horse in any race or trial, or work them, from 28 August 2020 until a stay on the disqualification imposed upon him on 23 February 2021 was granted on 9 March 2021. We are of the view that this period of 6 months and 9 days should be considered to be part of the 13-month 2-week disqualification we have imposed. By our reckoning, a 13-month and 2-week

disqualification imposed today would expire on 12 July 2022. Factoring in the 6 months and 9 days we consider should be taken to have been already served, the Appellant will be entitled to reapply for his licence on 3 January 2022. We give leave to the parties for 7 days to contact the Principal Member in relation to a differently date if they consider an error has been made.

58. The orders the Panel makes are as follows:

(1) Appeal against finding of breach of AR233(c) allowed.

(2) Finding of breach of AR233(c) set aside.

(3) Disqualification of 6 months for breach of AR233(c) set aside.

(4) Appeal in relation to the severity of penalty imposed for breach of AR231(2)(b) allowed.

(5) In lieu of a disqualification of 2 years and 3 months for breach of AR231(2)(b), the Appellant is disqualified for a period of 13 months and 2 weeks. Noting that the Appellant has served a period of suspension of his licence from 28 August 2020 until 23 February 2021, and a period of disqualification from 23 February 2021 until a stay was granted on 9 March 2021, the Appellant is able to reapply for his licence on 3 January 2022.

(6) Appeal deposit to be refunded.