

RACING NSW – STEWARDS REPORT



DETERMINATION OF PENALTY FOR CHARGES ISSUED AGAINST TRAINER MR BENJAMIN SMITH

Tuesday 11 June 2019

**Stewards: M F Van Gestel (Chairman)
P C Dingwall**

Racing NSW Stewards today gave consideration to penalty in respect to charges determined by Stewards on 10 May 2019 against trainer Mr Benjamin Smith.

Evidence and Submissions from Mr Smith

Mr Smith today was assisted by solicitor Mr Paul O'Sullivan. Stewards considered the evidence and submissions made on behalf of Mr Smith, including but not limited to;

1. Medical reports from Dr C L Grace and Dr M Bazaley;
2. Mr Smith's clean record in over 9 years of training;
3. Precedent penalties, including submissions made in respect to other cobalt cases.

General Principals

The Stewards have considered the following principals when considering an appropriate penalty

1. What message is to be given to this individual to not only ensure that in the future this type of conduct is not repeated, but to also ensure that there is an appropriate penalty imposed to indicate the response of the community to integrity and welfare issues.
2. What general message is required to be sent to the community at large to indicate to those who might be likeminded to engage in such conduct, what the likely consequences are, and, secondly, to indicate to the broader community who are not likely to engage in the type of conduct that, should it be detected, they, whether they be wagerers or people just generally interested in the individual code, will know that it is operating at the highest possible standards.
3. The conduct in respect to raceday treatments occurred on a repetitive basis – it was not an isolated act.
4. In considering whether penalties should be served concurrently for the purposes of AR174, there is a commonality in respect of a number of the breaches, such that the appropriate course of action is that there is some degree of concurrency.
5. Some of the charges below contain more than one breach and were grouped together under the same charge for reasons of commonality, either in respect of the relevant conduct or the Rule of Racing that was breached. In this respect, each of the breaches are separate offences (rather than particulars of the same offence) and, as such, attract separate penalties subject to the issues of concurrency and totality of penalty.
6. Pursuant to AR283(6), a mandatory minimum penalty of 6 months disqualification applies to a breach of AR249, unless there is finding that a special circumstance exist, in which case the mandatory minimum penalty of 6 months disqualification may be reduced. The relevant special circumstances are set out in LR108(2). In respect of the breaches of AR249, it was submitted on behalf of Mr Smith that a special

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circumstance did exist and evidence was tendered in support of those submissions. After careful consideration of those submissions and the supporting evidence, the Stewards are not satisfied, to the requisite standard, that a special circumstance under LR108(2)(b) existed at the time of the commission of the relevant offences.

Penalties

1. Charge 1 – AR232(i) False Evidence

Breach 1

During an investigation being conducted by the Stewards at the Newcastle Racecourse, on 11 September 2018 at approximately 9am, in relation to the discovery of a brown bottle in his vehicle located at the Newcastle Racecourse he gave the evidence in the knowledge that such evidence was false.

Plea: Guilty (on basis of one breach)

Finding: Guilty

Reasons: During the investigation on 11 September 2018 and the Stewards inquiries on 13 February and 12 March 2019, Mr Smith admitted the evidence particularised in the charge was false and has pleaded guilty to the breach. The Stewards find that Mr Smith did provide evidence to the Stewards on 11 September 2018, in the knowledge such evidence was false.

Penalty: 12 Months disqualification reduced to 9 months for Mr Smith's guilty plea.

Breach 2

During a Stewards inquiry being conducted by Racing NSW Stewards at the Newcastle Racecourse, on 11 September 2018 in relation to the discovery of a number of unregistered substances in his vehicle located at the Newcastle Racecourse and his residential property he gave evidence in the knowledge that such evidence was false.

Plea: Guilty (on basis of one breach)

Finding: Guilty

Reasons: During the investigation on 11 September 2018 and the Stewards inquiries on 13 February and 12 March 2019, Mr Smith admitted the evidence particularised in the charge was false and has pleaded guilty to the breach. The Stewards find that Mr Smith did provide evidence to the Stewards on 11 September 2018, in the knowledge such evidence was false.

Penalty: 12 Months disqualification reduced to 9 months for Mr Smith's guilty plea.

Stewards ruled that the penalty for breaches 1 and 2 be served cumulatively and accordingly Mr Smith will serve a period of 9 months for both charges.

2. Charge 2 - AR232(h) Refusing to Give Evidence

Refused to give evidence at both a Stewards investigation and a Stewards inquiry conducted at Newcastle racecourse on 11 September 2018, in that he refused to

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provide the name of the person who had supplied unregistered products, when he knew that Mr Neil Costello was the supplier.

Plea: Guilty

Finding: Guilty

Reasons: At the Stewards inquiries conducted on 23 February and 12 March 2019, Mr Smith admitted he did have knowledge on 11 September 2018, that Mr Neil Costello had supplied the unregistered products and has pleaded guilty to refusing to provide his name.

Penalty: 18 Months disqualification reduced to 13 months and two weeks for Mr Smith's guilty plea.

3. Charge 3 – AR245(1)(a) Administering cobalt to Iron Duke

Administered the prohibited substance cobalt to the racehorse Iron Duke prior to the gelding racing in Race 2 – Civil Sydney Maiden Plate conducted at Newcastle 25 August 2018 which resulted in cobalt being detected above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B in a post-race urine sample taken from the gelding following winning Race 2 – Civil Sydney Maiden Plate conducted at Newcastle 25 August 2018.

Plea: Not Guilty

Finding: Guilty

Reasons: As detailed in paragraph 3 of these reasons, Mr Smith admitted to increasing the dosage of supplements to his horses, with Iron Duke being one of the first upon which he used such regime. The evidence of Racing NSW Chief Veterinary Officer Dr Toby Koenig was that dosage of cobalt administered by Mr Smith could be best described as “supraphysiological and excessive”. Given Mr Smith’s evidence and in the absence of any other evidence regarding the administration of cobalt, the Stewards find that Mr Smith did administer cobalt to Iron Duke prior to racing at Newcastle on 25 August 2018 which resulted in cobalt being detected above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B.

Penalty: 18 Months disqualification

4. Charge 4 – AR240(2) Presenting Iron Duke with cobalt

As the trainer of the racehorse Iron Duke brought to Newcastle racecourse on 25 August 2018 for the purpose of participating in Race 2 – Civil Sydney Maiden Plate on that day and the prohibited substance cobalt was detected above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B in the in a post-race urine sample taken from the gelding following winning Race 2 – Civil Sydney Maiden Plate on that day.

Plea: Guilty

Finding: Guilty

Reasons: Trainers have responsibility under AR240(2) to present a horse to race without a prohibited substance in its system. Mr Smith pleaded guilty to the charge and Stewards determine that Mr Smith was the trainer of Iron Duke when presented to race at Newcastle on 25 August 2018 with a level of cobalt above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B of the Australian Rules of Racing being detected in a post-race urine sample.

Penalty: 16 Months disqualification reduced to 12 months for Mr Smith's guilty plea.

5. Charge 5 – AR245(1)(a) Administering cobalt to Elaborate

Administered the prohibited substance cobalt to the racehorse Elaborate prior to the gelding racing in Race 1 – Fresh-R Class 1 Handicap conducted at Wyong 26 August 2018 which resulted in cobalt being detected above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B in a urine sample taken from the gelding following winning Race 1 – Fresh-R Class 1 Handicap conducted at Wyong 26 August 2018.

Plea: Not Guilty

Finding: Guilty

Reasons: As detailed in paragraph 3 of these reasons, Mr Smith admitted to increasing the dosage of supplements to his horses, including Elaborate being one of the first upon which he used such regime. The evidence of Racing NSW Chief Veterinary Officer Dr Toby Koenig was that dosage of cobalt administered by Mr Smith could be best described as “supraphysiological and excessive”. Given Mr Smith's evidence and in the absence of any other evidence regarding the administration of cobalt, the Stewards find that Mr Smith did administer cobalt to Elaborate prior to racing at Wyong on 26 August 2018 which resulted in cobalt being detected above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B of the Australian Rules of Racing.

Penalty: 18 Months disqualification

6. Charge 6 – AR240(2) Presenting Elaborate with cobalt

As the trainer of the racehorse Elaborate brought to Wyong racecourse on 26 August 2018 for the purpose of participating in Race 1 – Fresh-R Class 1 Handicap on that day and the prohibited substance cobalt was detected above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B in a post-race urine sample taken from the gelding following winning Race 1 – Fresh-R Class 1 Handicap on that day.

Plea: Guilty

Finding: Guilty

Reasons: Trainers have a responsibility under AR240(2) to present a horse to race without a prohibited substance in its system. Mr Smith pleaded guilty to the charge and Stewards determine that Mr Smith was the trainer of Elaborate when presented to race at Wyong on 26 August 2019 with a level of cobalt above the level of 100ug/l excepted in paragraph 11 of Division 3 of the Prohibited List B of the Australian Rules of Racing being detected in a post-race urine sample.

Penalty: 16 Months disqualification reduced to 12 months for Mr Smith's guilty plea.

7. Charge 7 – AR249(1) Causing medication to be administered on race day

Did cause medication namely, electrolyte paste to be administered on race day to the following horses by the following person prior to such horses running in the following races.

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Breach 1

1. *Dream Charge - Race 7 Thread Effects Class 1 Handicap - Tamworth 5 January 2018 – administered by Ms Emma Bickley*

Plea: Not Guilty

Finding: Guilty

Reasons: Ms Emma Bickley and Mr Daniel Smith both gave evidence at interviews before the Stewards that Mr Benjamin Smith requested that electrolyte paste be administered to runners on race day before running in a race. In respect to Dream Charge on 5 January 2018 both Ms Bickley and Mr Daniel Smith have provided evidence that the horse was administered an electrolyte paste on race morning prior to racing. As a result, Stewards find Mr Smith did cause the administration of such medication in breach of AR249(1).

Penalty: 6 months disqualification (mandatory minimum AR283(6)).

Breach 2

2. *Anecdote – Race 7 Guardian Safety Solutions Provincial Posthaste Benchmark 80 Handicap - Newcastle 9 March 2018 – administered by Ms Emma Bickley*

Plea: Guilty

Finding: Guilty

Reasons: Ms Emma Bickley and Mr Daniel Smith both gave evidence at interviews before the Stewards that Mr Benjamin Smith requested that electrolyte paste be administered to runners on race day before running in a race. In respect to Anecdote on 9 March 2018, Mr Smith has pleaded guilty to the charge and Stewards are satisfied having regard to evidence of communication on that day between Mr Smith and Ms Bickley that Mr Smith did cause the administration of such medication in breach of AR249(1).

Penalty: 6 months disqualification, reduced to 4 months and 2 weeks for Mr Smith's guilty plea (mandatory minimum AR283(6)).

Breach 3

3. *Elaborate – Race 1 Taree League and Sports Club 2yo Maiden Handicap - Taree 20 July 2018 – administered by Ms Emma Bickley*

Plea: Not Guilty

Finding: Guilty

Reasons: Ms Emma Bickley and Mr Daniel Smith both gave evidence at interviews before the Stewards that Mr Benjamin Smith requested that electrolyte paste be administered to runners on race day before running in a race. In respect to Elaborate on 20 July 2018, the communication evidence between Ms Bickley and another stablehand on race day supports that Ms Bickley did administer an electrolyte paste to Elaborate prior to racing. As a result, Stewards find Mr Smith did cause the administration of such medication in breach of AR249(1).

Penalty: 6 months disqualification (mandatory minimum AR283(6)).

8. **Charge 8 – AR227 Attempting to commit breaches of causing medication to be administered on race day**

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Did attempt to commit a breach of AR249(1)(b) by instructing the following persons to administer medication on race day, namely electrolyte paste to the following horses prior to such horses running in the following races.

Breach 1

1. *Ms Emma Bickley - Elaborate - Race 1 Fresh-R Class 1 Handicap - Wyong 26 August 2018.*

Plea: Guilty

Finding: Guilty

Reasons: Ms Emma Bickley gave evidence before the Stewards when interviewed that prior to Elaborate racing at Wyong on 26 August 2018, Mr Smith requested that she administer an electrolyte paste to Elaborate. Whilst Ms Bickley said such administration did not take place, Stewards are satisfied, having regard to Mr Smith's guilty plea that such administration was requested by Mr Smith.

Penalty: 6 months disqualification, reduced to 4 months and 2 weeks for Mr Smith's guilty plea.

Breach 2

2. *Mr Daniel Smith - In Her Time - Race 7 Sydney Stakes - Randwick 14 October 2017*

Plea: Not Guilty

Finding: Guilty

Reasons: At 10:07am on 14 October 2017 Mr Benjamin Smith sent a SMS message to Mr Daniel Smith "U give the paste". Mr Daniel Smith responds in the affirmative with a "thumbs up" symbol. In Her Time was Mr Smith's only runner for this day and having regard to the evidence of Ms Bickley and Mr Daniel Smith in respect to the request for race day medication to be administered, Stewards are satisfied such message was requesting Mr Daniel Smith to administer an electrolyte paste to In Her Time prior to racing in the Sydney Stakes. Mr Daniel Smith has denied the administration took place.

Penalty: 6 months disqualification.

Breach 3

3. *Mr Daniel Smith - Kyoko Race 1 Maiden Handicap, Golly Miss Solly Race 2 Maiden Handicap, Libertine Miss Race 4 Benchmark 55 Handicap, Tabrobane Race 5 benchmark 55 Handicap - Tuncurry 29 October 2017.*

Plea: Not Guilty

Finding: Guilty

Reasons: At 7:31am on 29 October 2017 Mr Benjamin Smith sent a SMS message to Mr Daniel Smith "The runners can all have that race paste". Mr Daniel Smith responds, "Yep got 6 left". Mr Smith had Kyoko Miss, Golly Miss Solly, Libertine Miss and Tabrobane race that day at Tuncurry. The Stewards are satisfied such message to Mr Daniel Smith was to request him to

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administer an electrolyte paste to the 4 horses prior to racing at Tuncurry that day. Mr Daniel Smith denies such administrations took place.

Penalty: 6 months disqualification.

9. Charge 9 – AR252 Possession of unregistered medication or substances

Had in his possession on 11 September 2018 eight medications and/or substances and/or preparations that had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in accordance with the applicable Commonwealth and state legislation namely the Agricultural and Veterinary Chemicals Code Act 1994 (Cth) (Agvet Code), Poisons and Therapeutic Goods Act 1966 (NSW) and the Poisons and Therapeutic Goods Regulation 2008 (NSW).

Plea: Guilty

Finding: Guilty

Reasons: Mr Smith has pleaded guilty to the charge and Stewards are satisfied such substances were in Mr Smith's possession and were not registered and/or labelled and/or prescribed and/or dispensed and/or obtained in accordance with the applicable Commonwealth and State legislation.

Penalty: 6 months disqualification, reduced to 4 months and 2 weeks for Mr Smith's guilty plea.

10. Charge 10 – Improper Conduct administering substance containing formaldehyde

Without taking veterinary advice and with the intention to assist horses with respiratory conditions, administered prior to 11 September 2018 to the racehorses Anecdote, Kristensen and Marksfield, the substance contained in the brown bottle located in his vehicle by Stewards on 11 September 2018, that was found to contain the carcinogenic substance formaldehyde, such substance capable of being detrimental to the welfare of the said horses.

Plea: Not Guilty

Finding: Guilty

Reasons: The evidence of Racing NSW Chief Veterinary Officer Dr T Koenig was that formaldehyde is a carcinogenic substance that can have detrimental welfare consequences. Mr Smith made no proper inquiry (veterinary or other professional) in respect to the contents of the substance and administered the substance to three racehorses. The Stewards find such administrations were improper having regard to Dr Koenig's evidence.

Penalty: 12 months disqualification.

Penalty Concurrency

The Stewards have considered the total penalty in respect to the decision of the Stewards above and have firstly determined the following penalties should be served concurrently as they have some commonality, which results in a penalty of 7 years disqualification.

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| Charge | Penalty | Concurrent Penalties |
|---|---|--|
| Charge 1 – AR232(i) False Evidence Breach 1 Breach 2 Charge 2 - AR232(h) Refusing to Give Evidence | 9 months Disqualification 9 months Disqualification 13 months & 2 weeks disqualification <i>(Total penalty if served cumulatively – 31 months & 2 weeks)</i> | There is to be partial concurrency in respect of the three penalties resulting in a total combined penalty of 18 months disqualification |
| Charge 3 – AR245(1)(a) Administering cobalt to Iron Duke Charge 4 – AR240(2) Presenting Iron Duke with cobalt | 18 months disqualification 12 months disqualification <i>(Total penalty if served cumulatively – 30 months)</i> | There is to be partial concurrency in respect of the two penalties resulting in a total combined penalty of 18 months disqualification |
| Charge 5 – AR245(1)(a) Administering cobalt to Elaborate Charge 6 – AR240(2) Presenting Elaborate with cobalt | 18 months disqualification 12 months disqualification <i>(Total penalty if served cumulatively – 30 months)</i> | There is to be partial concurrency in respect of the two penalties resulting in a total combined penalty of 18 months disqualification |
| Charge 7 – AR249(1) Causing medication to be administered on race day Breach 1 Breach 2 Breach 3 Charge 8 – AR227 Attempting to commit breaches of causing medication to be administered on race day Breach 1 Breach 2 | 6 months disqualification 4 months & 2 weeks disqualification 6 months disqualification 4 months & 2 weeks disqualification 6 months disqualification | Mandatory Minimum AR283(6) There is to be partial concurrency in respect of the six penalties resulting in a total combined penalty of 18 months disqualification |

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|---|--|--|
| Breach 3 | 6 months disqualification (Total penalty if served cumulatively – 31 months) | |
| Charge 9 – AR252 Possession of unregistered medication or substances | 4 months & 2 weeks disqualification | There is to be partial concurrency in respect of the six penalties resulting in a total combined penalty of 12 months disqualification |
| Charge 10 – Improper Conduct administering substance containing formaldehyde | 12 months disqualification (Total penalty if served cumulatively – 16 months & 2 weeks) | |
| | Total Disqualification | 7 years |

As stated above, having carefully considered the evidence and submissions made by Mr Smith, the Stewards are not satisfied to the requisite standard that a special circumstance under LR108(2)(b) existed at the time of the commission of the relevant breaches of AR249. However, even if the Stewards were satisfied to the requisite standard that such a special circumstance did exist, the Stewards are of the view that it would not have resulted in a significant reduction in the relevant mandatory minimum penalties and would not have resulted in the combined penalty for those breaches being less than the combined penalty above resulting from the orders of concurrency.

Penalty Totality

The penalties set out above represent the penalties that the Stewards consider appropriate for each of the relevant breaches, having taken into account objective considerations and the issue of concurrency. The Stewards have considered Mr Smith's personal and professional circumstances at the time of the offending conduct, including the evidence relied upon in respect of the submissions that there was a special circumstance that existed under LR108(2). Further the Stewards have considered Mr Smith's clean record, the assistance he provided the Stewards with some of the offences, and the effects a significant penalty will have upon him.

In addition, the Stewards have considered the general principals detailed above and the principles relating to totality of penalty.

Having considered those matters the Stewards determine that the appropriate total penalty to be issued against Mr Smith for all of the breaches is a period of disqualification of 4 years and 6 months to commence on 18 September 2018, the day Mr Smith's trainers' licence was suspended under the provisions of AR23 and to expire on 18 March 2023 on which day he may re-apply for his licence.

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Relevant Rules

AR 23 Suspension pending the hearing and determination of a charge

Without limiting any other rules or Stewards' powers, if a person has been charged with a breach of the Rules or with the commission of an indictable criminal offence, and if the Stewards are of the opinion that the continued participation of that person in racing might pose an unacceptable risk of prejudicing the image, interests, integrity or welfare of racing, the Stewards may pending the hearing and determination of the charge:

- (a) suspend any licence, registration, right or privilege, granted to that person under these Australian Rules;*
- (b) prevent any horse owned (or part-owned) or leased by that person from participating in any race or official trial;*
- (c) order that any registration of the transfer of ownership and/or training of a horse related to that person be prevented or suspended;*
- (d) make any other direction or order the Stewards think fit in the interests of racing.*

AR 227 Breaches of the Rules

Without limiting any other powers, a PRA or the Stewards may penalise any person who:

- (b) attempts to commit, aids, abets, counsels, procures, connives at, conspires with another person to commit, or is a party to another person who commits, a breach of the Rules.*

AR 228 Conduct detrimental to the interests of racing

A person must not engage in:

- (b) misconduct, improper conduct or unseemly behaviour;*

AR 232 Failure to observe processes and directions of PRAs or Stewards

A person must not:

- (h) refuse or fail to attend or give evidence at an interview, investigation, inquiry, hearing or appeal when directed or requested to do so by a PRA, the Stewards or a person authorised by a PRA or the Stewards.*
- (i) give any evidence at an interview, investigation, inquiry, hearing and/or appeal which is false or misleading.*

AR 240 Prohibited substance in sample taken from horse at race meeting

- (1) Subject to subrule (3), 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 was in charge of the horse at any relevant time breaches these Australian Rules.*
- (4) Subject to subrule (3), 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*

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following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

AR 245 Administration of prohibited substance in sample taken from horse before/after running in race

(5) A person must not:

(a) administer; or

(b) cause to be administered,

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

AR 249 Administration of medication on race day

(1) Notwithstanding the provisions set out in Schedule 1, Part 2, Division 2, a person must not, without the permission of the Stewards:

(a) administer; or

(b) cause to be administered,

any medication to a horse at any time on race day prior to the commencement of a race in which the horse is engaged to race.

AR 252 Possession of medication/substance/preparation in breach of legislation

(1) A person must not have in his or her possession or on his or her premises any medication, substance or preparation which has not been registered, labelled, prescribed, dispensed or obtained in accordance with applicable Commonwealth and State legislation.

LR 108. (1) Unless otherwise ordered, fines or costs imposed by the Board, Appeal Body, Association, Club or Stewards, must be paid within 14 days. If a fine remains outstanding after 14 days of its imposition, such person may be placed on the forfeit list.

(2) For the purposes of AR196(5), special circumstances means where:

(a) the person has pleaded guilty at an early stage and assisted the Stewards or the Board in the investigation or prosecution of a breach of the Rule(s) relating to the subject conduct; or

(b) the person proves on the balance of probabilities that, at the time of the commission of the offence, he:

(i) had impaired mental functioning; or

(ii) was under duress,

that is causally linked to the breach of the Rule(s) and substantially reduces his culpability.

**M F Van Gestel
Chairman of Stewards
General Manager - Integrity**