

## **RACING APPEAL PANEL NEW SOUTH WALES**

### **IN THE MATTER OF THE APPEALS OF MR SAM KAVANAGH AND DR TOM BRENNAN**

Appeal Panel: **Mr R. Clugston – Principal Member; Mr R Beasley SC; Mr T. Carlton**

Date of hearing: **19 May 2016**

Date of decision: **17 June 2016**

Appearances **Racing New South Wales: Mr S. Rushton SC and Mr J. McLeod, instructed by Mr P. Sweeney.**  
**Mr Kavanagh: Mr P. D’Angelo, instructed by Mr T. Kavanagh**  
**Dr Brennan: Mr A. Anderson instructed by Mr T. Hargreaves**

### **REASONS FOR DECISION ON PENALTY**

#### **Introduction**

1. These Reasons for Decision regarding penalty should be read in conjunction with the Panel’s Reasons for Decision concerning guilt dated 6 May 2016. Those reasons set out the general background in relation to both of the Appellants’ various breaches of the Australian Rules of Racing (“the Rules”).
2. Following the publication of the Reasons for Decision on guilt, the Panel heard oral submissions concerning penalty on 19 May 2016. The Panel then reserved its decision on penalty.
3. As a general matter, it can be noted that in considering the appropriate penalty for the Appellants’ breaches, the Panel has had regard to:
  - (a) the objective seriousness of each offence and the need for general deterrence;

- (b) the need to protect the integrity of racing;
- (c) the need for specific deterrence in relation to each Appellant; and
- (d) the subjective circumstances of the Appellants and, where relevant, the Appellants' pleas of guilty.

**Sam Kavanagh**

4. At the hearing in relation to penalty on 19 May 2016 Racing New South Wales (RNSW) tendered a table outlining the various charges brought against the Appellants and the Appellant's plea, the findings by the Panel in relation to guilt and the penalty now contended for by RNSW. This table is a convenient means for setting out the various findings of guilt, the penalties originally imposed by the Stewards and those now contended for by RNSW. It is annexed to these reasons and marked "A".
5. As can be seen from annexure "A", the total penalty contended for by RNSW in relation to Mr Kavanagh is a period of disqualification of 8 years and 3 months and a fine of \$3,000.
6. In his submissions on behalf of Mr Kavanagh, Mr D'Angelo asked the Panel to take into account the following matters:
  - (a) the fact that, in his submission, but for taking "technical" legal defences to the cobalt charges, his client could have had the benefit of LR 108 which deals with "special circumstances" (such as co-operation with Stewards) so as to potentially reduce the penalty for charges that otherwise attract a mandatory minimum disqualification period;
  - (b) the principle of totality in sentencing;
  - (c) the admissions and co-operation given to the Stewards by Mr Kavanagh (a submission linked to (a) above);

(d) various personal circumstances relating to Mr Kavanagh, including his prior good character.

7. The Panel has taken a slightly different approach to that pressed by RNSW in relation to the cobalt charges. While the Panel agrees with RNSW that the “in-competition ” and “out of competition” cobalt charges should be grouped separately, we do not agree that the penalty imposed for each group should be entirely cumulative. In reaching this decision we have had regard to the power the Panel has to “otherwise order” in relation to penalties for breaches of the Rules (AR 196(3)), and to the fact that the two groups of offences have elements of commonality (in this regard, see *Pearce v The Queen* (1998) 194 CLR 610; [1998] HC 857, especially at [40]-[42]).
8. In relation to the cobalt charges, we would group them as follows and impose the following penalties:

**Group 1 (in-competition cobalt charges)**

Charge 1 – 3 years disqualification (mandatory minimum).

Charge 2 – 2 years disqualification (which the Panel agrees is the appropriate penalty) .

Charge 3 – 1 year disqualification (which the Panel agrees is the appropriate penalty).

To this Group we would add Charge 5, an in-competition caffeine charge. We agree with RNSW that the appropriate penalty for this breach of the Rules is a 1 year disqualification. We consider that the penalties imposed in relation to Charges 2, 3 and 5 should be served concurrently with the penalty in relation to Charge 1. The total penalty for the Group 1 charges is 3 years disqualification.

9. In relation to what we will call the **Group 2** offences, being the out of competition cobalt charges, we have imposed the following penalties:

Charge 13 – 2 years disqualification (mandatory minimum)

Charge 14 – 2 years disqualification (mandatory minimum)

Charge 15 – 2 years disqualification (mandatory minimum).

To this Group we would add Charge 24 which was an offence of cobalt possession. In lieu of a 12 month disqualification imposed by the Stewards for this offence, we consider the appropriate penalty should be a 6 month disqualification. Further, we consider that the penalties imposed in relation to Charges 14, 15 and 24 should be served concurrently with the penalty for Charge 13 and hence the total period of disqualification for the Group 2 charges is a 2 year disqualification.

10. RNSW contends that the total penalty for Group 1 ( 3 year disqualification) and the total penalty for Group 2 (2 year disqualification) should be served cumulatively. We however consider that 12 months of the disqualification imposed in relation to the Group 2 offences should be served concurrently with the total penalty imposed in relation to the Group 1 offences, and 12 months should be served cumulatively. This reflects the commonality between the two groups of offending, but also imposes some form of additional penalty in relation to the out of competition administration of cobalt to the horses Centre Pivot and Spinning Diamond in addition to the in-competition administration to the horse Midsummer Sun.
11. In relation to the race day drenches, the Panel groups the charges (**Group 3**) as follows and imposes the following penalties:

Charge 6 – 4.5 months disqualification (6 months mandatory minimum but “special circumstances”).

Charge 7 – 6 months disqualification (mandatory minimum).

Charge 8 – 6 months disqualification (mandatory minimum).

Charge 9 – 6 months disqualification (mandatory minimum).

Charge 10 – 6 months disqualification (mandatory minimum).

Charge 11 – 6 months disqualification (mandatory minimum).

Charge 16 (prejudicial conduct) – 3 months disqualification.

12. For all but Charges 6 and 16 a mandatory minimum disqualification applies. The Panel sees no reason to impose a greater penalty than the mandatory minimum for each breach of the Rules, nor is that contended for by RNSW. We accept that special circumstances warrant the reduction contended for by RNSW for Charge 6, and we also accept that a three month disqualification is appropriate for Charge 16. Served cumulatively the total penalty for the Group 3 offences would be a total penalty of 37½ months disqualification. RNSW seeks a total penalty of a 2 year disqualification for this group of offences. This offending however took place over a relatively short period of time. As Mr D'Angelo pointed out in his submissions to the Panel, rather than stopping because Mr Kavanagh was caught by Stewards, he stopped the administration of race day drenches because he was brought to his senses by his partner Ms Fawcett. Bearing in mind all these matters, we would impose a total penalty for the Group 3 offences of 18 months disqualification to be served cumulatively to the penalties imposed in relation to the Group 1 and Group 2 offences.
13. Mr Kavanagh was also charged and pleaded guilty to offences involving an administration of a drench that was an alkalisng agent to the horse The Sharpener. These were Charges 18 and 19. We agree with RNSW that penalties of 3 months disqualification and 2 months disqualification are appropriate for those charges and that those penalties should be served concurrently with each other but cumulatively to the total penalties for the Group 1, 2 and 3 breaches.
14. The Panel takes a slightly different view in relation to the penalty contended for by RNSW in relation to Charge 21 which related to possession of the prohibited substance Xenon Gas. RNSW submits that the penalty for this offence should be a 1 year disqualification. The Panel is of the view that the penalty should be a 6 months disqualification which is consistent with the penalty we have imposed for Charge 24

relating to possession of cobalt. The Panel also considered that the penalty for possession of Xenon Gas should not exceed the penalties imposed for each of the various race day drenches administered by Mr Kavanagh..

15. In relation to Charges 17, 22 and 23 (the details and plea history of which are outlined in annexure A), RNSW submits that the penalty for each should be a \$1,000 fine. The Panel agrees and confirms those monetary penalties.
16. The Panel's final orders in relation to Mr Kavanagh are therefore as follows:
  - (1) Appeal against the findings of guilt made by the Stewards in relation to Charges 12 and 20 is upheld.
  - (2) Findings of guilt made by the Stewards and the penalties imposed by Stewards in relation to Charges 12 and 20 are set aside.
  - (3) Appeal against the findings of guilt made by the Stewards in relation to Charges 1, 9, 10, 11, 13, 14, 15, 21 and 24 is dismissed.
  - (4) Findings of guilt made by the Stewards in relation to Charges 1, 9, 10, 11, 13, 14, 15, 21 and 24 are confirmed.
  - (5) Findings of guilt made by the Stewards in relation to Charges 2, 3, 5, 6, 7, 8, 16, 17, 18, 19, 22 and 23 are confirmed.
  - (6) Appeal against the penalties imposed by the Stewards in relation to Charges 21 and 24 is upheld.
  - (7) Penalty of 12 months disqualification imposed by the Stewards in relation to each of Charges 21 and 24 is varied to a disqualification for 6 months for each offence.
  - (8) Appeal against the penalties imposed by the Stewards in relation to Charges 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, and 23 is dismissed.

- (9) Penalties imposed by the Stewards in relation to Charges 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, and 23 are confirmed.
- (10) Appeal against the total penalty of 9 years 3 months disqualification imposed by the Stewards is upheld.
- (11) Total penalty of 9 years 3 months disqualification imposed by the Stewards is varied to a disqualification for 6 years and 3 months, such disqualification to commence on 20 May 2015 and to expire on 19 August 2021.
- (12) Appeal against the total monetary penalty of \$3,000 imposed by Stewards in relation to Charges 17, 22 and 23 is dismissed.
- (13) Total monetary penalty of \$3,000 for each of Charges 17, 22 and 23 is confirmed.
- (14) Appeal deposit forfeited.

**Dr Tom Brennan**

17. Dr Brennan pleaded guilty before the Stewards to a charge of improper practices in connection with racing (Charge 10). The Stewards imposed a penalty of 4 years disqualification and RNSW submits to the Panel that this penalty should be confirmed by the Panel (see annexure A).
18. Dr Brennan also pleaded guilty to a charge of giving false evidence to the Stewards (Charge 12). The Stewards imposed a penalty of 1 year disqualification and submit to the Panel that that penalty should also be confirmed by the Panel.
19. The Panel also found Dr Brennan guilty of what are described as various “in-competition” cobalt charges (Charges 1 to 6). Those charges related to Dr Brennan being a party to a breach by Mr Kavanagh of AR 175(h)(i) (Charge 1) or by his conduct causing such a breach (Charge 4) and, similarly, being a party to Mr Kavanagh’s breach of AR 175(h)(ii) or by his conduct causing such a breach (Charges 2 and 5).
20. Charges 3 and 6 related to Dr Brennan being a party to or by his conduct causing breaches of AR 178 by Mr Kavanagh.
21. The total cumulative result of the penalties imposed by the Stewards in respect of Charges 1 to 6 would be a 12 year disqualification. However, the Stewards imposed a total penalty of 3 years disqualification and submit that the Panel should impose the same penalty.
22. Charge 7, of which Dr Brennan was found guilty by the Stewards and the Panel, related to him being a party to a breach of AR177B(6) by Mr Kavanagh. RNSW submits that the penalty that should be imposed in relation to this breach is a disqualification of 2 years (which is a mandatory minimum) and that this disqualification should be cumulative to the 3 years disqualification contended for by them in relation to Charges 1 to 6. RNSW further contends that the 4 year disqualification for Charge 10 should be concurrent with the penalties imposed for Charges 1 to 6, but the penalty in relation to Charge 12 of 1 year disqualification



should be cumulative to those penalties, with the result that the total period of disqualification contended for by RNSW is 6 years.

23. Mr Anderson, Counsel for Dr Brennan, described the total penalty contended for by RNSW as a “crushing” one. He further submitted that the Panel should have regard to *Pearce* and related authorities and to the strong character references provided on behalf of Dr Brennan and to his previous good character. The Panel has taken those submissions into account.
24. The Panel accepts RNSW’s submission that the appropriate penalties for the following charges should be:

Charge 1 – 3 years disqualification

Charge 2 - 2 years disqualification

Charge 3 – 1 year disqualification

Charge 4 - 3 years disqualification

Charge 5 – 2 years disqualification

Charge 6 - 1 year disqualification

Charge 7 – 2 years disqualification

However, the Panel accepts Mr Anderson’s submission that the conduct specified in the particulars to Charge 10 are almost identical to the particulars specified in Charges 1 to 7 inclusive. Accordingly, the Panel considers that the appropriate penalty in relation to Charge 10 is 3 years disqualification.

25. Further, the Panel considers it appropriate to treat the conduct involved in Charges 1 to 7 as one group of offending and imposes a concurrent penalty of a 3 year disqualification. That 3 year disqualification period is to be served concurrently with the 3 year disqualification imposed for Charge 10.
26. In relation to Charge 12, the Panel agrees with RNSW that giving false evidence at the Stewards’ Inquiry was clearly a separate matter to Dr Brennan’s other offending. The Panel considers that a penalty of 12 months disqualification is appropriate which

should be cumulative to the concurrent 3 year disqualification imposed in respect of his other breaches.

27. Accordingly, the Panel imposes a total disqualification period of 4 years in lieu of the 6 year disqualification imposed by the Stewards.
28. The Panel's orders in relation to Dr Brennan are as follows:
  - (1) Appeal against the findings of guilt made by the Stewards in relation to Charges 8, 9 and 11 is upheld.
  - (2) Findings of guilt made by the Stewards and the penalties imposed by the Stewards in relation to Charges 8, 9 and 11 are set aside.
  - (3) Appeal against the findings of guilt made by the Stewards in relation to Charges 1, 2, 3, 4, 5, 6 and 7 is dismissed.
  - (4) Findings of guilt made by the Stewards in relation to Charges 1, 2, 3, 4, 5, 6 and 7 are confirmed.
  - (5) Findings of guilt made by the Stewards in relation to Charges 10 and 12 are confirmed.
  - (6) Appeal against penalty imposed by Stewards in relation to Charge 10 is upheld.
  - (7) Penalty of 4 years disqualification imposed by Stewards in relation to Charge 10 is varied to disqualification for 3 years.
  - (8) Appeal against the penalties imposed by Stewards in relation to Charges 1, 2, 3, 4, 5, 6, 7 and 12 is dismissed.
  - (9) Penalties imposed by Stewards in relation to Charges 1, 2, 3, 4, 5, 6, 7 and 12 are confirmed.

- (10) Appeal against the total penalty of 6 years disqualification imposed by Stewards is upheld.
- (11) Total penalty of 6 years disqualification imposed by the Stewards is varied to a disqualification for 4 years, such disqualification to commence on 1 August 2015 and to expire on 31 July 2019.
- (12) Appeal deposit forfeited.

Sam Kavanagh, Tom Brennan, and Adam Mathews v RNSW – Racing Appeal Panel –  
 RNSW's Summary of Charges, Results of Racing Appeal Panel Hearing, and Penalties Contended for by RNSW<sup>1</sup>  
 (in connection with penalty hearing scheduled for 19 May 2016)

Charge number and overall nature	Short summary of charge	Initial plea	Finding at 1 <sup>st</sup> instance	Appellant's position on appeal (as to plea and substance of defence raised)	Finding by the Racing Appeal Panel	Penalty contended for by RNSW before the Racing Appeal Panel
Sam Kavanagh (SK) <sup>2</sup>						
1. Cobalt – in competition	AR 175(h)(i) – administer prohibited substance (PS) for the purpose of affecting performance – cobalt – Midsummer Sun (GB) (MS Sun) - re Gosford Gold Cup - 9 January 2015	Not guilty	Guilty – 3 years (Mandatory minimum (MM) under AR 196(5) imposed)	Not guilty plea. Says: (a) did not know he had administered a PS; and (b) that he did not administer for the purpose of affecting performance	Guilty	3 years <sup>3</sup> (MM should be applied)
2. Cobalt – in competition	AR 175(h)(ii) – administer or cause to administer a PS detected in a sample taken prior to or following a race - cobalt -	Not guilty	Guilty – 2 years	Guilty (does not challenge finding of guilt).	Not in issue on appeal	2 years

<sup>1</sup> Where there was no challenge to the finding of guilt at first instance, the relevant row is italicised.

<sup>2</sup> At first instance, Sam Kavanagh was found guilty of 23 of 24 charges (he was found not guilty of charge 4). Before the Racing Appeal Panel he challenged 11 of 23 findings

of guilt. He was found guilty of 9 of the 11 charges that he challenged, and not guilty of 2 of them.

<sup>3</sup> For completeness, it is noted that all periods of time nominated in the final column which identify years and/or months relate to suggested periods of *disqualification* under the Australian Rules of Racing.

	<i>MS Sun- re Gosford Gold Cup - 9 January 15</i>							
3. Cobalt – in competition	<i>AR 178 – presence of PS in a sample – cobalt – MS Sun – Gosford Gold Cup – 9 January 15</i>	Guilty	<i>Guilty – 1 year</i>	<i>Guilty (maintains initial plea of guilty)</i>	<i>Not in issue on appeal</i>	<i>1 year</i>		
13. Cobalt – out of competition	AR 177B(6) – administer PS – substance prohibited at all times - cobalt – administration in the period between September 2014 and January 2015 – at Rosehill stables - MS Sun	Not guilty	Guilty – 2 years (MM imposed)	Not guilty plea. Says: (a) did not know had administered a PS; (b) that a guilty finding would require the threshold to have been exceeded; the threshold did not come in in NSW until 1 Jan 2015; and it could not be inferred that that threshold was breached during the relevant time; and (c) it is cobalt beyond a specific threshold which is prohibited under the rules, not cobalt per se	Guilty	2 years (MM should be applied)		
14. Cobalt – out of competition	AR 177B(6) – administer PS – substance prohibited at all times - cobalt - in the period between September 2014 and January 2015 – at Rosehill – Centre Pivot	Not guilty	Guilty – 2 years (MM imposed)	Not guilty plea. Says: (a) did not know had administered a PS; (b) that a guilty finding would require the threshold to have been exceeded; the threshold did not come in in NSW until 1 Jan 2015; and it could not be inferred that that threshold was breached during the relevant time; and	Guilty	2 years (MM should be applied)		

15.	Cobalt – out of competition	AR 177B(6) – administer PS – substance prohibited at all times - cobalt - in the period between September 2014 and January 2015 – at Rosehill – Spinning Diamond	Not guilty	Guilty – 2 years (MM imposed)	(c) it is cobalt beyond a specific threshold which is prohibited under the rules, not cobalt per se Not guilty plea. Says: (a) did not know had administered a PS; (b) that a guilty finding would require the threshold to have been exceeded; the threshold did not come in in NSW until 1 Jan 2015; and it could not be inferred that that threshold was breached during the relevant time; and (c) it is cobalt beyond a specific threshold which is prohibited under the rules, not cobalt per se	Guilty	2 years (MM should be applied)
24.	Cobalt – possession	AR 177B(5) – possession of a prohibited substance – cobalt - re finding of cobalt at on course premises – relates to the “Vitamin Complex” bottle found at Rosehill Gardens stable on 4 February 2015	Not guilty	Guilty – 1 year	Contends charge should be struck out as “duplicious”	Guilty	1 year
6.	Race-day administration (AR 178E(1))	AR 178E(1) – arranging and causing to be administered a race-day administration of a drench without Stewards’ permission – arrangement with Camilleri (drench effected by	Guilty	Guilty – 4.5 months. NB mandatory minimum penalty is 6 months, but credit given for	Guilty (no challenge to finding of guilt – plea of guilty maintained)	Not in issue on appeal	4.5 months

	Butterfield) to MS Sun – around 2pm on race day prior to Race 6 Gosford Gold Cup – 9 January 2015		special circumstances under RNSW LR 108(2)(a) (early guilty plea and assistance to the Stewards in investigating or prosecuting a breach of the rules)	Guilty (no challenge to finding of guilt)	Not in issue on appeal	6 months (MM should be imposed)
7. Race-day administration (AR178E(1))	AR 178E(1) – arranging and causing to be administered a race-day administration of a drench without Stewards' permission – arrangement with Camilleri (drench effected by Butterfield) to Ceda Miss – around 10am on race day prior to Race 2 at Warwick Farm – 7 January 2015	Not guilty	Guilty – 6 months (MM imposed)	Guilty (no challenge to finding of guilt)	Not in issue on appeal	6 months (MM should be imposed)
8. Race-day administration (AR 178E(1))	AR 178E(1) – arranging and causing to be administered a race-day administration of a drench without Stewards' permission – arrangement with Camilleri (drench effected by Butterfield) to Palazzo Pubblico – around 10am on race day prior	Not guilty	Guilty – 6 months (MM imposed)	Guilty (no challenge to finding of guilt)	Not in issue on appeal	6 months (MM should be imposed)

	<i>to Race 4 at Warwick Farm – 7 January 2015</i>							
9. Race-day administration (AR 178E(1))	AR 178E(1) – arranging and causing to be administered a race-day administration of a medication without Stewards' permission – arrangement with Camilleri and/or stablehand Michael O'Loughlin (intravenous injection of medication effected by Butterfield) to MS Sun – around 2pm on race day prior to Race 6 at Gosford (Gosford Gold Cup) – 9 January 2015	Not guilty	Guilty – 6 months (MM imposed)	Not guilty - challenge to finding of guilt. Says did not cause a race day medication to be administered to MS Sun	Guilty	6 months (MM should be applied)		
10. Race-day administration (AR 178E(1))	AR 178E(1) – administering a race-day medication without Stewards' permission – drench administered by SK to Invinzabeel before Race 1 at Randwick – 17 January 2015	Not guilty	Guilty – 6 months (MM imposed)	Not guilty - challenge to finding of guilt. Denies a race day drench was administered	Guilty	6 months (MM should be applied)		
11. Race-day administration (AR178E(1))	AR 178E(1) – administering a race-day medication without Stewards' permission – drench administered by SK to Palazzo Pubblico before Race 3 at Randwick – 17 January 2015	Not guilty	Guilty – 6 months (MM imposed)	Not guilty - challenge to finding of guilt. Denies a race day drench was administered	Guilty	6 months (MM should be applied)		
12. Race-day administration	AR 178E(1) –administering a race-day medication without Stewards' permission – drench	Not guilty	Guilty – 6 months (MM imposed)	Not guilty - challenge to finding of guilt. Denies a race day drench was	Not Guilty	Not applicable		



(AR178E(1))	administered by SK to Centre Pivot before Race 3 at Randwick – 24 January 2015			administered		
16. Conduct Prejudicial to racing	AR175A – that SK conducted himself in a manner prejudicial to racing in that he bought and received drenches from J Camilleri on 12.1.15, 17.1.15, 20.1.15, and 23.1.15 for the purpose of race day administrations to horses in his stable, and that such drenches were not registered or labelled and so if they had been found on his premises would have contravened AR 80E	Not guilty	Guilty – 3 months	Guilty. Accepts finding of guilt	Not in issue on appeal	3 months
4. Administration of caffeine	AR 175(h)(ii) – causing to be administered caffeine to MS Sun found in a sample taken from MS Sun following the Gosford Gold Cup – Race 6 – 9 January 2015	Not guilty	Not guilty	SK accepts finding of not guilty.	Not in issue on appeal – not guilty finding by the Stewards	N/A
5. Presence of caffeine	AR 178 – SK brought MS Sun to Gosford racecourse and following Race 6 (Gosford Gold Cup) a prohibited substance (caffeine) was detected in a sample taken from that horse –	Guilty	Guilty-1 year	Guilty. Plea of guilty is maintained	Guilty	1 year

	9 January 2015							
17. Breach of the rules	AR 175(k) – that SK breached AR 64M – entered MS Sun in an official trial at Warwick Farm on 10 October 2014-when that horse was subject to an intrarticular administration of a cortico-steroid within 8 days of that trial	Guilty	Guilty- \$1000 fine	Guilty. Accepts finding of guilt	Not in issue on appeal	\$1000 fine		
18. Improper action re racing	AR 175(a) – improper action in connection with racing – entering and racing The Sharpener on 2 September 2014 in an official trial at Rosehill having on that morning administered or caused it to have received a drench containing an alkalinising agent (bi-carb soda) – for the purpose of affecting performance and enhancing prospects of its sale at the Newmarket Inglis sales on 7 October 2014	Not guilty	Guilty – 3 months	Guilty. Accepts finding of guilt	Not in issue on appeal	3 months		
19. Administration of alkalinising agent proximate to official trial	AR 178AA – SK administered or caused to be administered an alkalinising agent (a drench of bi-carb soda) to The Sharpener on day of (and prior to) an official trial at Rosehill Gardens	Not guilty	Guilty – 2 months	Guilty Accepts finding of guilt.	Not in issue on appeal	2 months		

	<i>on 2 September 2014 (the horse finishing 6<sup>th</sup> of 14)</i>								
20. Administration of a substance prohibited at all times	AR 177B(6) – administration of a PS (xenon gas, being a substance prohibited at all times) to a horse trained by SK – in SK’s stables at Rosehill Gardens – in or around June 2014	Guilty	Guilty – 2 years (MM imposed)	Not guilty. Says: (a) that he did not know he had administered a prohibited substance; and (b) it was not until 1 May 2015 that xenon was specifically identified as a prohibited substance in the Rules of Racing	Not guilty	N/A			
21. Possession of a substance prohibited at all times	AR 177B(5) – possession of xenon gas (a substance that could give rise to a 177B offence) – found at Rosehill Gardens stables on 6 June 2014	Not guilty	Guilty – 1 year	SK contends the charge is duplicitous “subject to the finding on Count 20”	Guilty	1 year			
22. Incomplete Records	AR 178F – failure by SK to, between 20 Jan 2014 and 4 Feb 2015 record all treatments and medications administered to horses in his care (being the items of treatments and medications set out in Exhibits 48 and 50 not recorded in Exhibit 6 (being the stable treatment records of SK))	Guilty	Guilty – \$1000	Guilty. Maintains his plea of guilty	Not in issue on appeal	\$1000 fine			
23. Possession of substance not registered or labelled	AR 80E – possession at his stables on 4 and 16 February 2015 of unregistered and/or unlabelled substances and/or preparations, incl. the 2 x 100ml	Not guilty	Guilty – \$1000	Guilty. Accepts the finding of guilt	Not in issue on appeal	\$1000 fine			

	<p>bottles labelled "Vitamin Complex" containing concentrated cobalt</p>				<p><b>TOTAL PENALTY CONTESTED FOR BY RNSW:</b>  <b>8 years 3 months disqualification, and a fine of \$3000</b>  RNSW contends this penalty is arrived at by the following grouping and aggregation:  a) breaches of charges 1,2,3 and 5 (which have a total cumulative penalty of 7 years): <b>3 years</b>  b) breaches of charges 13, 14, 15 and 24 (which have a total cumulative penalty of 7 years): <b>2 years</b>  c) breaches of charges 6 to 11, and 16 (which have a total cumulative penalty of 3 years, 1.5 months): <b>2 years</b>  d) breach of charge 17: <b>\$1000</b>  e) breach of charges 18 and 19: <b>3 months</b>  f) breach of charge 20 and 21: <b>2 years</b>  g) breach of charge 22: <b>\$1000</b>  h) breach of charge 23: <b>\$1000</b></p> <p>SK appeals against penalty on the grounds it was manifestly excessive,</p>
	<p><b>PENALTY IMPOSED BY THE STEWARDS' PANEL:</b> Cumulative total of penalties imposed was reduced to a period of <b>9 years three months disqualification, and a fine of \$3000.</b></p> <p>To get to that ultimate penalty, the various penalties were grouped (and then aggregated) as follows:  a) breaches of charges 1,2,3 and 5: 3 years  b) breaches of charges 13, 14, 15 and 24: 2 years  c) breaches of charges 6 to 12, and 16: 2 years  d) breach of charge 17: \$1000  e) breach of charges 18 and 19: 3 months  f) breach of charges 20 and 21: 2 years  g) breach of charge 22: \$1000  h) breach of charge 23: \$1000</p> <p>SK appeals against penalty on the grounds it was manifestly excessive,</p>				<p><b>TOTAL PENALTY CONTESTED FOR BY RNSW:</b>  <b>8 years 3 months disqualification, and a fine of \$3000</b>  RNSW contends this penalty is arrived at by the following grouping and aggregation:  a) breaches of charges 1,2,3 and 5 (which have a total cumulative penalty of 7 years): <b>3 years</b>  b) breaches of charges 13, 14, 15 and 24 (which have a total cumulative penalty of 7 years): <b>2 years</b>  c) breaches of charges 6 to 11, and 16 (which have a total cumulative penalty of 3 years, 1.5 months): <b>2 years</b>  d) breach of charge 17: <b>\$1000</b>  e) breach of charges 18 and 19: <b>3 months</b>  f) breach of charge 20 and 21: <b>2 years</b></p>

				and reserves his right to make other submissions once decided facts are known		year g) breach of charge 22: \$1000 h) breach of charge 23: \$1000
Dr Tom Brennan (TB) <sup>4</sup>	Short summary of charge	Initial plea	Finding at 1 <sup>st</sup> instance	Appellant's position on appeal (as to plea and substance of defence raised)	Finding by the Racing Appeal Panel	Penalty contended for by RNSW before the Racing Appeal Panel
1. Cobalt - in competition	AR 175(l) – conniving at or being a party to SK committing a breach of AR 175(h)(i) (administration of a PS for the purpose of affecting performance) – cobalt - MS Sun-re Gosford Gold Cup-9 January 2015 – re supply of two bottles of “Vitamin Complex” (see exhibits 4A and 38) containing cobalt in concentrations 175 times the concentration found in registered vet products	Not guilty	Guilty – 3 years	Not guilty. Says: (a) insufficient evidence to be satisfied that the cobalt detected in the race-day sample on 9 Jan 2015 came from a bottle sent to SK by Dr Brennan in September 2014; (b) not a party to the offence as did not know the bottles contained cobalt, and did not know which horses were being administered the substance	Guilty	3 years

<sup>4</sup> At first instance Dr Brennan was found guilty of 12 charges (though in respect of charge 11, only in respect of particular (c) of that charge). He challenged 10 of 12 charges before the Racing Appeal Panel; he did not challenge the guilty findings on charges 10 and 12. He was found guilty of 7 of the 10 charges that he challenged before the Racing Appeal Panel, and not guilty of three.

	containing cobalt and vitamin B12-also being a 5% shareholder in MS Sun						
2. Cobalt – in competition	AR 175(l) – conniving at or being a party to SK committing a breach of AR 175(h)(ii) (administration of a PS found in a sample taken before or after a race) – cobalt - MS Sun- re Gosford Gold Cup-9 January 2015 – re supply of two bottles of "Vitamin Complex" (see exhibits 4A and 38) containing cobalt in concentrations 175 times the concentration found in registered vet products containing cobalt and vitamin B12-also being a 5% shareholder in MS Sun	Not guilty	Guilty – 2 years	Not guilty. Says: (a) insufficient evidence to be satisfied that the cobalt detected in the race-day sample on 9 Jan 2015 came from a bottle sent to S Kavanagh by Dr Brennan in September 2014; (b) not a party to the offence as did not know the bottles contained cobalt, and did not know which horses were being administered the substance	Guilty	2 years	
3. Cobalt – in competition	AR 175(l) – conniving at or being a party to SK breach of AR 178 – presence of PS in a sample – cobalt – MS Sun – Gosford Gold Cup – 9 January 2015	Not guilty	Guilty – 1 year	Not guilty. Says: (a) insufficient evidence to be satisfied that the cobalt detected in the race-day sample on 9 Jan 2015 came from a bottle sent to S Kavanagh by Dr Brennan in September 2014; (b) not a party to the offence as did not know the bottles contained cobalt, and did not know which	Guilty	1 year	

						horses were being administered the substance		
4. Cobalt – in competition	AR 175(k) – his conduct or negligence led to breach by SK of charge 1 against SK (re breach of AR 175(h)(i)) – MS Sun – 9 Jan 2015 – Gosford Gold Cup – supply of two bottles of Vitamin Complex	Not guilty	Guilty – 3 years	Not guilty. Says: insufficient evidence to be satisfied that the cobalt detected in the race-day sample on 9 Jan 2015 came from a bottle sent to S Kavanagh by Dr Brennan in September 2014	Guilty	3 years		
5. Cobalt – in competition	AR 175(k) – his conduct or negligence led to breach by SK of charge 2 against SK (re breach of AR 175(h)(ii)) – MS Sun – 9 Jan 2015 – Gosford Gold Cup – supply of two bottles of Vitamin Complex	Not guilty	Guilty – 2 years	Not guilty. Says: insufficient evidence to be satisfied that the cobalt detected in the race-day sample on 9 Jan 2015 came from a bottle sent to S Kavanagh by Dr Brennan in September 2014	Guilty	2 years		
6. Cobalt – in competition	AR 175(k) – his conduct or negligence led to breach by SK of charge 3 against SK (of AR 178) – MS Sun – 9 Jan 2015 – Gosford Gold Cup – presence of prohibited substance (cobalt) detected in a sample provided after the race	Not guilty	Guilty – 1 year	Not guilty. Says: insufficient evidence to be satisfied that the cobalt detected in the race-day sample on 9 Jan 2015 came from a bottle sent to SK by Dr Brennan in September 2014	Guilty	1 year		
7. Cobalt – party to administration out of	AR 177B(6) – party to breach by SK of charge 13 against SK (re breach of AR 177B(6) – administer substance prohibited at all times) – cobalt - in the	Not guilty	Guilty – 2 years (MM imposed)	Not guilty. Says: (a) not a party to the offence as did not know the bottles contained cobalt, and did not know which horses were being administered the	Guilty	2 years (MM should be applied)		

competition	period between September 2014 and January 2015 – at Rosehill - MS Sun – alleged that this was by virtue of 5% share in MS Sun and supply of the two bottles of Vitamin Complex (see exhibits 4A and 38) prior to 9 Jan 2015			(b) cobalt was not a prohibited substance under the rules of racing in NSW at the time to which the charge relates		
8. Cobalt – party to administration out of competition	AR 177B(6) – party to breach by SK of charge 14 against SK (re breach of AR 177B(6) – administer substance prohibited at all times) – cobalt - in the period between September 2014 and January 2015 – at Rosehill – Centre Pivot	Not guilty	Guilty – 2 years (MM imposed)	Not guilty. Says: (a) not a party to the offence as did not know the bottles contained cobalt, and did not know which horses were being administered the substance; and (b) cobalt was not a prohibited substance under the rules of racing in NSW at the time to which the charge relates	Not guilty	N/A
9. Cobalt – party to administration out of competition	AR 177B(6) – party to breach by SK of charge 15 against SK (re breach of AR 177B(6) - administer substance prohibited at all times) – cobalt - in the period between September 2014 and January 2015 – at Rosehill – Spinning Diamond	Not guilty	Guilty – 2 years (MM imposed)	Not guilty Says: (a) not a party to the offence as did not know the bottles contained cobalt, and did not know which horses were being administered the substance; and (b) cobalt was not a prohibited substance under the rules of racing in NSW at the time to which the charge relates	Not guilty	N/A
10. Improper	AR 175(a) – improper practices in connection with racing –	Guilty	Guilty – 4 years	Guilty – pleads guilty but challenges penalty.	Not in issue on	4 years



<p>practices in connection with racing</p>	<p>supply of two bottles of Vitamin complex (containing cobalt) between September 2014 and January 2015 to SK – alleged that he advised SK that a 5 ml dosage should be administered knowing SK was likely to administer to horses he was training and presenting to race – awareness that cobalt administration was of wide concern – awareness that finding of the V Complex would place SK in breach of AR 80E and of AR 177B(5)</p>			<p>NB: in the outline/issues document provided on behalf of Dr Brennan, it states "[t]he essence of Dr Brennan's wrongdoing is captured by charge 10"</p>	<p>the appeal as to liability, though penalty in issue</p>	
<p>11. Influencing SK's evidence</p>	<p>AR 175(k) – in that conduct could have led to a breach by SK of AR 175(g) (false or misleading evidence) – two phone calls on 25 Feb 2015 – in concert with A Corby – attempted to persuade SK to give false evidence – by saying that he was not to disclose that the source of the two 100ml bottles of the V Complex (secured by Stewards from SK on 4 Feb 2015 and 9 March 2015) was the Flemington Equine Centre (FEC) – three</p>	<p>Not guilty</p>	<p>Guilty – but only as to particular (c) (re warnings that if FEC was implicated it would have a negative effect on SK's father, Mark Kavanagh) - 4 months</p>	<p>Not Guilty</p>	<p>Not guilty</p>	<p>N/A</p>

	<p>material respects alleged: (a) a threat of filing for bankruptcy re debts owed by SK to FEC; (b) a threat of defamation proceedings by FEC against SK; and (c) re warnings that if FEC was implicated it would have a negative effect on SK's father, Mark Kavanagh</p>					
<p>12. Giving false evidence to the Stewards</p>	<p>AR 175(g) – giving false evidence to the Stewards – re evidence given in material respects on 9 June 2015 (with it changed in significant respects on 20 July 2015) – being: (a) that he had never seen a bottle of the injectable Vitamin Complex bottle; (b) that he did not provide two bottles of V Complex to SK; (c) that he did not know what happened to the exercise book used by the FEC to record postage; (d) that the payment he received (of \$1000 per bottle) from Nigel Haynes (on behalf of SK) was for drenches, not the V Complex; (e) his evidence that he did not get a bottle of the V Complex from</p>		<p>Guilty - 1 year</p>	<p>Guilty</p>	<p>Not in issue on appeal</p>	<p>1 year</p>

	<p><i>Adam Matthews; (f) his evidence that he divided up the money from N Haynes between he and Dr Church; and (g) his evidence he had never used the product labelled "Vitamin Complex", including in relation to using it in a drip at Danny O'Brien's stable in September/October 2014</i></p>				
			<p><b>PENALTY IMPOSED BY THE STEWARDS' PANEL: a total period of disqualification of 6 years.</b></p> <p>To get to that ultimate penalty, the various penalties were grouped (and then aggregated) as follows:</p> <ul style="list-style-type: none"> <li>a) breaches of charges 1 to 6: 3 years</li> <li>b) breaches of charges 7 to 9: 2 years</li> <li>c) breach 10 (to be served concurrently with the cumulative penalty of 5 years in respect of breaches of charges 1 to 6 (3 years) and 7 to 9 (2 years)): 4 years</li> <li>d) breach of charges 11 and 12: 1 year</li> </ul>		<p><b>TOTAL PENALTY CONTEENDED FOR BY RNSW: a total period of disqualification of 6 years</b></p> <p>RNSW contends this penalty is arrived at by the following grouping and aggregation:</p> <ul style="list-style-type: none"> <li>a) breaches of charges 1 to 6 (which have a total cumulative penalty of 12 years): <b>3 years</b></li> <li>b) breach of charge 7 (which has a 2 year MM): <b>2 years</b></li> <li>c) breach of charge 10 (to be served concurrently with the cumulative penalty of 5 years in respect of breaches of charges 1 to 6 (3 years) and 7 (2 years)): <b>4 years</b></li> </ul>

				<p>TB challenges the penalties imposed which lead to that result on the grounds they were excessive in the light of: the principle of proportionality; the alleged underlying commonality of charges 1-9; alleged failure to provide credit for his previous good character and record; cooperation since 20 July 2015 (including assistance in the Matthews case); and his degree of culpability having regard to the fact that he did not administer the V Complex to any of the horses or know which horses were being administered the V Complex</p>		<p>d) breach of charge 12: 1 year</p>
<p>Dr Adam Matthews<sup>5</sup> (AM)</p>	<p>Short summary of charge</p>	<p>Initial Plea</p>	<p>Finding at 1<sup>st</sup> instance</p>	<p>Appellant's position on appeal (as to plea and substance of defence raised)</p>	<p>Finding by the Racing Appeal Panel</p>	<p>Penalty contended for by RNSW before the Racing Appeal Panel</p>

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<sup>5</sup> Dr Matthews pleaded not guilty to all 6 charges at first instance, and also did so before the Racing Appeal Panel. He was found guilty of the first of the six charges, and not guilty of the others.

1. Party to race day administration	<p>AR 175(l) – party to race day administration – contacted JC by phone on 31.12.14 on behalf of SK to arrange a race day medication to be administered to MS Sun – put SK in touch with JC – race day administration given by Butterfield after contact from Camilleri of race day administration to MS Sun – Gosford – 9 Jan 2015 – prior to Gosford Gold Cup - the underlying breaches being those of M Butterfield (contravening AR 178E(1)), SK (contravening AR 178E(1)) by causing the race day administration effected by MB by arrangement with JC) and JC (being party to the breach by MB of 178E(1))</p>	Not guilty	Guilty – 6 months	<p>Not guilty. Denies being involved or complicit in any race day breach. Denies knowing, at any material time, of any illicit race day administration of any substance.</p> <p>Also puts in issue: (a) whether MS Sun administered the relevant medication; and (b) whether AM a party to the administration</p>	Guilty	6 months
2. Party to offences arising from cobalt detected in sample from MS Sun on 9 Jan 2015	<p>AR 175(l) – party to contravention of AR 175(h)(i), 175(h)(ii), and AR 178 breaches by SK in relation to cobalt – MS Sun – Gosford Gold Cup (and/or to TB's breaches of 175(l) and 175(k) in relation to those facts) – by virtue of supply by AM to TB (who on supplied them to SK)</p>	Not guilty	Guilty – 3 years	<p>Not guilty. Denies being in any way involved or complicit in the procuring, sale or delivery of the V Complex bottles.</p> <p>Also puts in issue: (a) whether MS Sun administered a PS; (b) whether AM was a party to</p>	Not guilty	N/A

					the alleged breaches			
3.	Conduct and/or negligence leading to offences arising from cobalt detected in the sample taken from MS Sun on 9 Jan 2015	of 2 bottles of Vitamin Complex prior to 9 January 2015	Not guilty	Guilty – 3 years	Not guilty. Denies being in any way involved or complicit in the procuring, sale or delivery of the V Complex bottles.  Also puts in issue: (a) whether MS administered a PS; (b) whether any conduct and/or negligence by AM led to the alleged breaches	Not guilty		N/A
4.	Party to out of competition administration of cobalt by SK	AR 175 (k) – conduct and/or negligence led to contraventions of AR 175(h)(i), AR 175(h)(ii), and AR 178 breaches by SK and/or TB in relation to cobalt – MS Sun – Gosford Gold Cup (and also to TB’s breaches of 175(l) and 175(k) in relation to those facts) – by virtue of supply by AM to TB (who on supplied them to SK) of 2 bottles of Vitamin Complex prior to 9 January 2015	Not guilty	Guilty – 2 years (MM imposed)	Not guilty. Denies being in any way involved or complicit in the procuring, sale or delivery of the V Complex bottles.  Also puts in issue: (a) whether the alleged administrations of a PS occurred; (b) whether AM was a party to the alleged administrations	Not guilty		N/A
		AR 177B(6) – being party to the out of competition administrations the subject of charges 13, 14 and 15 against SK (being contraventions of AR 177B(6) by SK) – being administration out of competition of cobalt to MS Sun, Centre Pivot, and Spinning Diamond – on account of supply prior to 9 Jan 2015 of two bottles of the V Complex on supplied by TB to SK	Not guilty					

5. Conduct and/or negligence leading to out of competition administration of cobalt by SK	AR 175(k) – conduct and/or negligence leading to out of competition contraventions of SK and/or TB of AR 177B(6) - being administration out of competition of cobalt to MS Sun, Centre Pivot, and Spinning Diamond – on account of supply prior to 9 Jan 2015 of two bottles of the V Complex on supplied by TB to SK	Not guilty	Guilty – 2 years	<p>Not guilty.</p> <p>Denies being in any way involved or complicit in the procuring, sale or delivery of the V Complex bottles.</p> <p>Also puts in issue:</p> <p>(a) whether the alleged administrations of a PS occurred;</p> <p>(b) whether any conduct and/or negligence of AM led to the alleged administrations</p>	Not guilty	N/A
6. Improper practices in connection with racing	AR 175(a) – improper practices in connection with racing - supply to TB of two bottles of V Complex containing cobalt – knowing that TB was acquiring them to supply for administration by trainers to horses - TB then on supplying to SK – also awareness that cobalt was of widespread concern – awareness that the finding of the bottles would place SK in contravention of AR 80E – awareness that the finding of the bottles would also place SK in breach of AR 177B(5) (possession of a substance which	Not guilty	Guilty – 4 years	<p>Not guilty.</p> <p>Denies being in any way involved or complicit in the procuring, sale or delivery of the V Complex bottles.</p> <p>Puts in issues whether he engaged in any improper practice in connection with racing</p>	Not guilty	N/A

	could give rise to an offence under the Rules)				
			<p><b>PENALTY IMPOSED BY THE STEWARDS' PANEL:</b> A total penalty of 5 years 6 months disqualification.</p> <p>To get to that ultimate penalty, the various penalties were grouped (and then aggregated) as follows:</p> <ul style="list-style-type: none"> <li>a) breach of charge 1: 6 months</li> <li>b) breaches of charges 2 and 3: 3 years</li> <li>c) breaches of charges 4 and 5: 2 years</li> <li>d) breach of charge 6 (to be served concurrently with the combined penalty of 5 years for charges 2 to 5): 4 years</li> </ul> <p>AM reserves his right to make submissions on penalty if the question of it arises.</p>		<p><b>TOTAL PENALTY CONTENTED FOR BY RNSW:</b> a total period of disqualification of 6 months</p>