RACING APPEALS TRIBUNAL

NSW

Mr D B Armati

13 August 2018

Reserved Decision

Appeal by licensed trainer Mr Sam Kavanagh v Racing NSW in respect of AR80E, AR175(a), AR175(h)(i), AR175(h)(ii), AR175(k), AR175A, AR177B(5) and (6), AR178, AR178AA, AR178E(1), AR178F

PENALTY DECISION

DECISION:

1. **Appeal dismissed**
2. **Disqualification for a period of 6 years 3 months to expire 19 August 2021 and monetary penalty of $3000.**
3. **Appeal deposit order stood over for 7 days**

BACKGROUND

1. The function of the Tribunal in this decision is to impose penalty in respect of a number of breaches of the rules by licensed trainer Mr Sam Kavanagh.

2. On 23 May 2018 the Tribunal published a reserved decision dealing with limited grounds of appeal from Appeal Panel decisions of 6 May 2016 and 17 June 2016. The first determination was a rejection of an appeal in respect of the ARR 175(h)(i) matters and the second determination the rejection of the argument that certain alleged breaches were alternatives.

3. On 23 May 2018 the Tribunal ordered the appeal re-listed for penalty hearing and as a result of submissions determined that the matter would proceed on the basis of written submissions with a right for a possible oral hearing reserved. The determination will be made on the basis of the written submissions.

4. Attached to this decision is a charge sheet setting out the 24 breaches of the rules originally alleged against the appellant. As a result of the stewards hearing and the Appeal Panel decisions and after further consideration here, the matters remaining for determination of penalty in this decision are breaches 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24.

5. The grounds of appeal further limit the matters for consideration.

6. The breaches now identified as the “cobalt charges" are for matters 1, 2, 3, 13, 14, 15 and 24 on the basis there was insufficient weight given to the appellant's state of mind about the contents of the vitamin complex bottles. Further in respect of breaches 1, 13, 14, 15 there was a failure to properly apply principles in respect of special circumstances. Further in respect of breaches 2, 3 and 5 the penalties were manifestly excessive and inconsistent with parity. Further it is said there was an error in grouping the cobalt charges so that concurrency was not properly applied based on a commonality of course of conduct and lack of knowledge. Finally arguments are advanced on totality and weight to be given to subjective factors.

7. The appellant does not contest the individual Appeal Panel penalties imposed in respect of breaches 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 21, 22, and 23. The respondent says those penalties are appropriate.

8. For completeness it is noted breach 4 was found not established by the stewards and breaches 12 and 20 found not established by the Appeal Panel.

PENALTY POWERS

9. The powers are set out in AR196 and it is relevantly as follows:

> “AR.196. (1) Subject to sub-rule (2) of this Rule any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so by disqualification, suspension, reprimand, or fine not exceeding $100,000. Provided that a disqualification or suspension may be supplemented by a fine.
>
> (2) not relevant

(3) Unless otherwise ordered by the person or body imposing the penalty, a penalty of disqualification or suspension imposed in pursuance of sub-rules (1) and (2) of this Rule shall be served cumulatively to any other penalty of suspension or disqualification.

(4) Any person or body authorised by the Rules to penalise any person may in respect of any penalty imposed on a person in relation to the conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding two years upon such terms and conditions as they see fit.

(5) Where a person is found guilty of a breach of any of the Rules listed below, a penalty of disqualification for a period of not less than the period specified for that Rule must be imposed unless there is a finding that a special circumstance exists whereupon the penalty may be reduced:

…

…. AR.175(h)(i) – 3 years … AR.177B(6) – 2 years AR.178E – 6 months …

For the purpose of this sub-rule, a special circumstance is as stipulated by each Principal Racing Authority under its respective Local Rules.

(6) (a) Any person or body authorised by these Rules to suspend or disqualify any trainer may defer the commencement of the period of suspension or disqualification for no more than seven Clear Days following the day on which the suspension or disqualification was imposed, and upon such terms and conditions as seen fit.

(b) Notwithstanding that the commencement of a period of disqualification may be deferred pursuant to AR.196(6)(a), a trainer must not start a horse in any race from the time of the decision to disqualify that trainer until the expiration of the period of disqualification. “

10. The relevant local rule under 196(5) is so far as it applies to this matter as follows:

“LR 108. (1) not relevant

(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.

(c) in the case of offences under AR178E, the medication in the opinion of the Stewards does not contain a prohibited substance, is of an insignificant nature and is for the welfare of the horse; or

(d) the person proves, on the balance of probabilities that, he did not know, ought not to have known and would not have known had he made all reasonable inquiries, that his conduct was in breach of the Rules of Racing.

(3) Except where one or more of AR196(3) (in relation to cumulative penalties), AR 196(6) (in relation to deferral of a period of disqualification), or sub-rule (4) of this rule (in relation to backdating of a period of disqualification) apply, a period of disqualification imposed on a person is to commence on the day that it is imposed.

(4) At the discretion of Racing NSW (or the Stewards exercising powers delegated to them), a period of disqualification may be backdated, but only if:

(a) a person has been suspended pursuant to AR8(z) pending the determination of the relevant charge, in which case it may be backdated to a point no further back than when the suspension commenced; or

(b) Racing NSW (or the Stewards exercising powers delegated to them):

(i) have communicated in writing to a person (whether or not following an application from the person) prior to the Racing NSW (or the Stewards exercising powers delegated to them) determining the penalty for a charge against the person, to the effect that any period of disqualification may commence from a date the person ceased doing all the things set out in AR 182(1); and

(ii) consider that backdating the period of disqualification to the date on which the person ceased do all the things set out in AR 182(1) or some other date is appropriate at the time of determining the penalty for the relevant charge."

THE TESTS

11. The parties are in agreement that the tests to be applied in determining penalty are those set out by the Tribunal in a number of recent decisions.

12. In Darren Smith v Racing NSW 15 August 2015 RATNSW it was said:

"5 In determining penalty this Tribunal emphasises that it is not imposing sentence. It in particular is not imposing sentence in a criminal law sense, therefore the

adoption by the stewards and the Appeal Panel of what might be called a general sentencing approach, in this Tribunal's opinion, is incorrect. These are civil disciplinary proceedings in which it is necessary to have regard to the conduct which has been disclosed, to have regard to all the relevant facts and circumstances relating to the facts themselves and those of the individual person concerned, and then looking to the future to determine what order is required within the scope and purpose of the rules. The scope and purpose of the rules relevantly to prohibited substance matters enlivens two issues: one, integrity and, two, welfare of the horse.

6. To the extent that criminal law principles such as deterrence are considered, they are not relevant. To the extent that proportionality of sentencing is said to be considered, it is not relevant. In respect of the first of those, the Tribunal in determining what order is appropriate has regard to what message is to be given to this individual trainer to ensure that in the future this type of conduct is not repeated, but to ensure that there is an appropriate penalty imposed to indicate the response of the community to integrity and welfare issues. In addition, it is a question of 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.

7. In this matter there are issues on the question of integrity. That issue arises on the question whether cobalt is a performance enhancing substance or not. There is no doubt that the other principle of integrity, namely, the level playing field, is very much in issue. That is, that all those associated with the individual races in which this horse was engaged, and might have been engaged having regard to the second group of matters, are entitled to expect that every horse will run on its true merits and not enhanced or dis-enhanced by substances it should not have received. That level playing field applies to each of the owners of the horses engaged, to the other trainers, to all those associated with the preparation of the horse, whether they be stablehands, strappers or the like, because each of them stands to benefit from a fair success. But also, importantly, it applies to the wagering public and those who may attend races but not wager because of a love of a fair contest. Those matters require, in this Tribunal's opinion, that those who chose to cheat, as it might be described, are seen to have no ongoing place in respect of this industry, whether it be for a short term, a long term or permanently."

13. In MacDonald v Racing NSW 10 April 2017 RATNSW it was said:

"11. It is agreed that as this is a de novo hearing it is the function and duty of the Tribunal to determine for itself an appropriate penalty.

12. That principles governing sentencing in the criminal law are not applicable.

13. That there can be no direct application of the principles generally governing the interpretation of legislation establishing criminal offences to the interpretation of the rules. That is the regulatory scheme bears a closer relationship to professional discipline than to the general criminal law (Day v Saunders [2015] NSWCA 324 at [70].

14. That the statutory scheme and the rules impose an overriding duty and function to protect the public interest and the welfare of the horse racing industry."

14. In Sprague v Racing NSW 27 June 2018 RATNSW it was said:

"16. There is a recent decision of Kavanagh and O'Obrien v Racing Victoria Ltd, a decision of Justice Garde in VCAT [2018] VCAT 291 where at 15 His Honour summarised the decision of McDonagh vHarness Racing Victoria. McDonagh remains an undated decision at the moment. To paraphrase Justice Garde's findings, he adopted the principles set out in McDonagh and they, paraphrased, are that in assessing a presentation matter at the end of the day the conduct can fall into three categories. The first category is where the responsible trainer admits the conduct. The second is where at the end of the day the decision maker is unable to decide what was the cause of the elevated level or, alternatively, rejects the theories advanced in the matter. The third category is where the person can point to conduct by a third party which clearly exculpates the licensed person from any wrongdoing.

17. As was said in McDonagh and adopted in Kavanagh and O'Brien, the penalties are at their lowest, if not nominal, in the third category. In categories one and two no such leniency is available.

18. The Tribunal's function is to assess the objective seriousness of the conduct and then apply any appropriate reductions because of the subjective circumstances of an appellant. There is not a starting point under the rules of thoroughbred racing in respect of this particular matter. In certain cases there is a starting point and that is provided by mandatory minimum penalties for other types of breaches. In other codes, for example harness racing, there are penalty guidelines which themselves provide, whilst they are for guidance only and not tramlines so far as the Tribunal is concerned, starting points. Greyhound racing itself has adopted a similar form of penalty guidelines. In this code, thoroughbred racing, there are none. There is therefore no mandatory minimum penalty, no starting point and the Tribunal's approach to the consideration of the appropriate civil disciplinary penalty sending the appropriate message to this appellant and the industry at large and looking to the future, is based upon the test just outlined, assessing the seriousness of the conduct first. It is important to recognise that the facts and circumstances of this individual case are those to which the objective seriousness test must be directed."

15. Some of these breaches raise for consideration the mandatory minimum penalties and the application of LR 108 on the issue of special circumstances. This Tribunal dealt with that test for the first time in McDonald (supra) and its determination was not disturbed on appeal in McDonald v Racing NSW [2017] in NSWSC 1511.

16. In MacDonald it said:

"87. The Tribunal finds that its approach to determining penalty should be as follows:

(i) determine an appropriate penalty under 196(1) having regard to the objective seriousness of the breach and the subjective circumstances of the appellant,

(ii) determine if rule 196(5) is enlivened because the breach may involve one of the rules specified in that sub rule, here being 83(d),

(iii) If the penalty determined under (i) is not a disqualification then a disqualification must be imposed,

(iv) if the penalty determined under (i) is less than the mandatory minimum disqualification of two years then disqualification of two years is imposed,

(v) if the penalty determined under (i) is a disqualification of more than two years then that longer disqualification is imposed,

(vi) determine if special circumstances in LR 108(2) are established,

(vii) determine the reduction in penalty, if any, that will flow from the particular special circumstances established.

92. That Tribunal is satisfied that the racing authorities amended 196 by the addition of sub-rule(5) with the express purpose and intention of increasing penalties where they might otherwise be considered lenient and to address a series of rule breaches of concern to them on integrity and welfare issues. … The rule-makers have therefore imposed a broad policy issue of the reduction of leniency by the exercise of their power to address the seriousness of what are seen to be undesirable activities affecting the integrity and welfare of the racing industry. The rule-makers have decided that the various breaches will be so serious that consideration of particular circumstances of the breach and the personal circumstances of the offender should not mitigate the minimum penalties considered appropriate to achieve those objectives. That perceived harsh or unfair penalties are a possible outcome.

93. That is the rule-makers have intentionally fettered part of the available discretion on determining penalty. That is not to say however that the rule-makers have supplanted the function of the Tribunal in assessing the appropriate and proportionate penalty for the breach under consideration.

94. Accordingly the text and context considerations must be made in recognition of that express purpose.

95. The text and context arguments therefore are considered on the basis that the rule-makers have set out to provide a scheme that may lead too(sic) harsh or, to the some, unfair results. Assessment of the meaning of the words in the sub- rule and their application to the facts must recognise those matters.

….

101. In respect of various arguments on behalf of the appellant it is accepted that the instinctive synthesis of the penalty determination exercise is still required to be undertaken but that the overall discretion to consider the ultimate penalty has been intentionally fettered by the rule-maker. It is still necessary to determine objective seriousness and then have regard to subjective factors but the end result may become harsh or unfair by reason of the imposition of the intentional limitation on discretion imposed by the rule- maker.

102. It is accepted that the sub-rule does not set the starting point to determine penalty.

103. There can be no warrant to find therefore that upon special circumstances being established that the determination of penalty enlivens consideration of penalties other than disqualification as provided for in 196(1). The submissions on that argument are analysed below.

104. It is accepted that the expression “may be reduced” introduces a discretion to reduce the mandatory minimum penalty but it is not so broad, when considered alone or in conjunction with the balance of the words of the sub- rule, that it imports a return to the general penalty powers in 196(1).”

TRIBUNAL’S APPROACH TO THE SUBMISSIONS AND GROUNDS OF APPEAL

17. The appellant has narrowed, in his grounds of appeal, the issues to be determined and the submissions by both parties have followed the outline of those grounds of appeal. While it is the function of theTribunal in a de novo hearing to determine penalty for itself, it is satisfied to follow the approach adopted by the parties. This is particularly so because the parties adopted the grouping which the Appeal Panel, after very detailed consideration, found to be appropriate.

18. Accordingly the Cobalt charges will be determined first then the appropriate penalties for breaches of 2, 3 and 5 then the grouping of the out of competition testing matters with the in competition testing matters namely breaches 13, 14, 15 and 24.The Tribunal will then determine the appropriateness of the penalties for the remaining matters even though the parties suggest no change to those penalties. Consideration will then be given to the totality principle.

19. The facts relevant to many of these matters have not been summarised in detail at the stewards’ inquiry or by the Appeal Panel because of the admissions made by the appellant. Accordingly, as might usually be expected, facts in respect of every matter are not available, in some cases because there was no need to record them as findings. A broad brush approach was taken at those two hearings to matters where there were admissions. This is entirely understandable having regard to the other voluminous exhibits examined below and the necessity to issue practical conclusions. The parties in this appeal have not taken the Tribunal, on the vast majority of the breaches, to the detailed facts. The Tribunal will therefore adopt a similar approach.

THE INDIVIDUAL BREACHES

The In- Competition Cobalt Breaches -Breaches 1, 2, and 3 and the In -Competition Caffeine Breach-breach 5 -Group 1

20. While the detailed breaches are set out on the annexure, a brief description will give context to the decision:

Breach 1- AR175 (h (i)- administer cobalt for purpose of affecting performance (mandatory minimum matter)
Breach 2- AR175(h)(ii)- administer cobalt
Breach 3 - AR178 - race-day presentation cobalt

Breach 5 - AR178- race-day presentation caffeine

21. Applying the tests set out above it is first necessary to determine the objective seriousness then consider the subjective factors.

Objective Seriousness

22. Breaches,1,2, and 3 related to the administration of the vitamin complex containing cobalt to a horse and it was presented to race. Relevant to breach 1 the administration was for the purpose of affecting performance. This is a category 1 matter on the McDonagh principle as he has admitted the conduct. The cobalt readings were 547 and 550.

23. Breach 5 is a case where detailed facts are not known. It is only known that there was a race day presentation and the horse contained caffeine. The reasons for the presence of caffeine and its level are not known. This is a category 2 matter on the McDonagh principle as it is not possible to determine the cause.

24. While more relevant to the consideration of the totality principle it is found that the appellant engaged in serious misconduct involving several undisciplined attempts to cheat and undermine the concept of a level playing field over a period of some five months with sustained and serious wrongdoing. These incidents were not isolated or one off aberrations.

25. Each particular breach however must be considered on its own facts and circumstances.

26. The appellant accepts that a disqualification must be imposed and that requirement is not analysed further. The Tribunal has consistently imposed penalties of disqualification for prohibited substance matters. Draconian penalties may follow.

27. Administering for the purpose of affecting performance must be considered as objectively very serious and that is reflected in the mandatory minimum penalty of three years to which the Tribunal will return. Having administered a substance with that purpose the horse was presented to race. The level playing field test is breached. The detection of an administration other than for affecting performance is also a serious matter not consistent with a level playing field. A strong message of the type described above must be given to this appellant and the industry at large.

28. For reasons expressed in earlier cases an administration for the purposes of affecting performance is the most serious matter and must be considered to be more serious than an administration matter and each of these more serious than a presentation matter.

29. On the issue of objective seriousness, and very strongly on the subjective factors, the appellant argues the issue of his knowledge of the contents of the vitamin complex. That is a focus on what he has done.The respondent equally strongly challenges the level of knowledge. That knowledge must be analysed.

30. As found in the 23 May 28 decision at paragraph 16:

"16. It is not in issue that: the appellant did not know that the bottle contained cobalt; that he had been specifically told by Dr Brennan that it did not contain cobalt; the bottle gave no indication of who manufactured it, what its precise ingredients were or where it came from. It is accepted that the appellant obtained the bottle from Dr Brennan and that the appellant trusted Dr Brennan. It is also an agreed fact that the appellant did not know that the bottle contained a high concentration of cobalt. The appellant believed that it was vitamin complex and that it was a legal substance to administer."

31. The appellant emphasises the similarity to the Victorian case involving his father and in a related case of Racing NSW v Rudolph Appeal Panel 19 October 2015 (no reference is made to the subsequent RAT decision). These matters do not alter the level of knowledge of this appellant as set out.

32. The appellant's submissions further emphasise the vitamin complex was recommended by a highly credentialled, well regarded and trusted vet with a number of leading stables in his practice and the fact that the vet had assured the appellant it did not contain any prohibited substance. He had made positive inquiries of that vet. It is submitted that there were no further inquiries that he could have made.

33. The respondent relies upon the physical appearance of the vitamin complex bottle with minimal labelling and no statement of who the manufacturer was, where it came from or its ingredients. Therefore he should have been put on notice by the appearance of the bottle that its ingredients were not clear and as such the administration from it could breach the rules. Therefore on that basis he should have had the bottle tested by private arrangements or by asking the respondent to arrange it on his behalf. It is submitted therefore that he ignored warning signs and continued to take a chance on the very questionable provenance of the bottle. Further Dr Brennan did not tell the appellant where it was made or who made it. He therefore took a chance, particularly as there was no evidence anyone had tested it. The fact that he paid $1000 per bottle for each of the two bottles would be paying a price many times more than similar products used by trainers in horse-racing-it was estimated this could be up to 20 times more. In addition it was submitted that the trainer is responsible for what goes in to horses and his actions were his own responsibility. It is said he should have made further inquiries.

34. The respondent does accept that the appellant's state of mind is relevant in assessing objective seriousness.

35. In reply the appellant re-emphasises the relationship with Dr Brennan and his recommendation of a product of vitamins to aid recovery and used by other trainers. It is submitted that at a cost of $1000 for 20 doses this works out at $50 per treatment which is comparable price to other treatments. It is said there was nothing secretive about the delivery of the product and that is the same price as was paid in the Victorian case. It was said that the labelling was not a cause of concern because Dr Brennan was a compounder who often provided his own brands which were not commercially available. Accordingly alarm bells would not be ringing. Importantly the lack of subterfuge is established by the fact that the appellant recorded the payments and the treatments in his books. Next it is said that the emphasis should be on Dr Brennan's negligence and not that of the appellant. It is submitted that it would be inimical to require trainers to test products given to them

by trusted veterinarians who are registered professionals with ethical responsibilities. It is submitted it would be harsh and unreasonable to impose on trainers a requirement to second-guess the professionals with a requirement to commission independent testing of products provided by such professionals. The inquiries made by the appellant of Dr Brennan were re-emphasised. Further the other cases where adverse findings have been made where trainers have administered substances without professional advice correctly cannot be relied upon. Finally it is said that he special circumstances are exculpatory and that the appellant is entitled to that here.

Subjective Factors

36. These findings are relevant to all of the breaches.

37. The matters put to the stewards at the inquiry and now relied upon here were that at the time of offending he was 28 years of age (2015). He is in a stable de facto relationship with two children. A life in racing is all he has ever known with associations from his grandfather and grandmother to the present time. For confidentiality reasons two disabilities are taken into account but not set out. Notwithstanding these disabilities he started working in stables as a boy and was first registered when he was 15. He moved from stable hand to stable foreman to owning and racing horses. He became a trainer at age 25 with his own stables. His partner works with him in the industry. It is said he had a reasonably meteoric rise and responsibility after very much hard work. It is implied that the high pressure he was under may have led to his poor decision-making. It is said that the standard of horses he was receiving improved rapidly and he was making a name for himself. Because of his disabilities he used professional administrators to run his business. He had substantial debts.

38. It was emphasised that when spoken to by the stewards he made full admissions about his conduct with the denials of knowledge of cobalt.

39. He is entitled to a 25% discount for those admissions and cooperation in respect of matters 2, 3 and 5.

40. He challenged matter 1 and a full discount is not available. However that challenge was on a legal issue which was argued at all three hearings, in each case unsuccessfully. It was an important legal issue and he otherwise admitted the relevant facts and co-operated fully. A discount of 15% is therefore allowed.

41. He has no prior matters for prohibited substances or of any seriousness at all.

42. In submissions to the Appeal Panel the fact of his admissions was re-emphasised as they were contrary to his interests and reflected general honesty and how he is to be assessed in the future. It was said he was effectively a decent man but he did wrong things for a short period of time. It was submitted that he has taken on board and accepted the need for the integrity of racing. it was therefore said he would not reoffend. The devastating impact upon him was emphasised, in particular the alienation from family members and close friends. On this point his lack of accommodation and limited income capacity was referred to. The impact of social media upon him has been substantial. He was then in desperate financial

circumstances. Reliance is placed upon his expressions of contrition reflected in his cooperation with the processes.

43. It was submitted that he was a young man at the time of offending with prior excellent good character.

44. On this appeal the following matters are advanced. He has a young partner and daughter and was reliant on his work in the racing industry to support his family. He had a previous unblemished record. He grew up in racing and racing has been his life. He suffers from a disability. The consequences for him have been devastating with alienation from his family and bullying on social media. He faces financial ruin.

45. Character references were tendered on his behalf to the stewards. They have not been updated.

46. In September 2015 well-known horse racing and business person Mr Gerry Harvey provided a character reference having known the appellant since he was 17 when he started working for him. The appellant trained horses for him. He found him to be a pleasant person to deal with and very professional in his dealings with horses and owners. The appellant has been honest and upfront in all his transactions with him. He will use him once this matter comes to an end. He says the appellant has made some very large mistakes and taken full responsibility for them. He opines that the appellant has been naive and influenced by wrong people but that he has learned his lesson and will not make the same mistakes again. He explains that the appellant has sincere regret for his conduct.

47. Next is dated September 15 by Mr Harry Mitchell of Yarraman Park. He has known him for five years and found him to be honourable in their dealings and that he is a young businessman with great ambition and passion for the industry. He opines that the appellant will not make these mistakes again.

48. Next is dated September 2015 by by Mr Dale West. He met the appellant three years earlier in relation to shares in horses. His found him to be honest and has seen his professional approach and skills as a trainer. He was shocked by the charges. He is familiar with people who make wrong decisions when they are desperate and whilst they cannot be excused and will have significant consequences he believes in restorative justice. He believes given those opportunities the appellant will commit himself to mending the breach of trust.

49. Next is dated September 2015 by Mr Julian Carson. They were school students together and at that time the appellant demonstrated he was able to discern right from wrong. Contact continued and he is deeply disappointed by the appellant's conduct. He says the appellant succumbed to temptation but has been open in acceptance of this wrong conduct. He has demonstrated remorse and contrition. He says the appellant understands he is liable to a penalty but that he is the likely to turn his life around.

Parity

50. There are no prior cases involving ARR175(h)(i), that is a purpose of affecting performance case, advised to the Tribunal. Generally older cases , especially prior to the mandatory minimum penalty regime and a stronger approach now taken in

the industry, are of little weight. As so often expressed interstate/territory decisions are noted but do not necessarily apply to the penalty system in NSW

51. The most recent Tribunal decision on a cobalt presentation was Sprague (supra). He received a 10 month disqualification for a reading of 190 and his explanation was not accepted so it became a category 2 on the McDonagh principle. He had satisfactory referees, was 55 years of age, involved in the industry all his life with no prior matters and a number of horses in training. An admission of the breach and full cooperation. The case also summarised a number of recent matters namely Moses, Lawson, Cooper, Farley and the respondent's table of like penalties for other matters.

52. Moses was a presentation matter with reading of 270 and he received a 12 month disqualification. He had been licensed for many years but had one prior matter in 1995.

53. Lawson received a 12 month disqualification for a presentation but did not admit the breach. His reading was 330. He had only had 13 years in the industry but no priors.

54. Cooper was a presentation because of failure of supervision by a stable hand. He had 2 prior matters. The breach was admitted. Other facts were not recorded.

55. Farley received a 12 month period of disqualification with a reading of 377. He had a 14 year history with no priors and 24 horses in training. He admitted the breach.

56. The table of prior penalties for other matters considered in Sprague, but without any detailed facts, are: Smith, 12 months disqualification; McCarney 12 months disqualification; Fleming 3 years disqualification with a high level; Want 15 months disqualification; York 18 months disqualification.

57. The appellant relied upon Kavanagh, Moody, Quinton, Waller. Maher, Homann, Vale,Worthington and Xuereb. Only very sketchy details of these cases were outlined and are summarised below.

58. Kavanagh & O'Brien v RVL [2018] VCAT 291 involved the father of this appellant and another trainer engaged with the same vet and administration by that vet of the vitamin complex containing cobalt without their knowledge. It became a category 3 on the McDonagh principle and fines were imposed.

59. In RVL v Moody RAD Vic 2016 a 12 month suspension with six months of that suspended was imposed for failing to adequately supervise tasks and responsibilities within the stable.

60. Quinton was dealt with by the NSW stewards in 2017 who imposed no penalty where after exhaustive testing it was found that the prohibited substance was contained in a legitimate horse feed that the trainer had been using for many years and which contained vastly excessive levels of cobalt.

61. Xuereb injected an unregistered product containing cobalt that he obtained from an authorised dealer and did not seek appropriate advice. A six-month disqualification was imposed by the RAD Board Vic in 2018.

62. Waller was a NSW stewards decision in 2013 where the stewards found the trainer could not reasonably have anticipated that the legitimate feed he was using was contaminated. No penalty was imposed.

63. In Homann VCAT in 2009 imposed a four-month unspecified penalty for a careless and reckless breach on an administration matter.

64. In Vale QCAT in 2017 a 12 month suspension was imposed for four presentation matters with cobalt.

65. In Worthington the NSW Appeal Panel in 2004 imposed a three-month suspension for a presentation with caffeine after an admission of the breach.

66. The respondent says that the parity cases relied upon by the appellant can be distinguished.

67. It says the Kavanagh case is on quite different facts with the appellants there having no knowledge that the vitamin complex was being administered whereas here the appellant administered the complex.

68. It says Moody should be distinguished because it could not be determined how cobalt came to be present. This was a cause to be administered case and not an administration case and the wrong conduct was stable management and systems, not an administration. The fact it was a Victorian case is also relied upon.

69. It says the Quinton case has no relevant analogy as the readings of his two horses were 118 and 157. The different facts with contaminated feed can be clearly distinguished from the issues here.

70. It says Waller can be distinguished because there was contamination with a drug which was found in feed.

71. The other cases were not the subject of submissions.

72. The respondent submits that Sprague does have relevance and this would mean at least 12 months disqualification for the AR178 matters.

73. In reply the appellant submits that the decision in Sprague was delivered after the appellant's primary submissions on penalty were lodged. The Tribunal does not understand the weight to be given to that submission but advises the parties that it had not read the submissions here prior to delivering its decision in Sprague.. The appellant accepts that Moses, Lawson and Farley are relevant to this matter. It says Sprague is of limited assistance where there is a mandatory minimum penalty matter dealing with a presentation. Therefore it is said that Sprague is not directly attributable to mandatory minimum matters. It is pointed out that the respondent did not respond to some of the cases relied upon by the appellant.

74. In response therefore the appellant says that the penalties he has suggested, and to which the Tribunal will return, are appropriate.

The Parties Submissions On Penalty

75. The appellant says that in respect of breach 1, under consideration under ARR196(1), a penalty of 3 months disqualification is appropriate.

76. Next it is said that breaches 2 and 3 are less serious than 1 and a lesser penalty than that for 1 is appropriate. Therefore it is said that there should be no disqualification but a suspension or fine to be served concurrently with that for breaching 1- no quantum is given.

77. In respect of breach 5 it is submitted that a three-month disqualification is appropriate.

78. It is said that each of 1, 2, 3 and 5 should be served concurrently.

79. The respondent says that these penalties would be manifestly inadequate. It submits that the penalties considered appropriate by the Appeal Panel should be imposed.

Determination of penalty under 196(1)

80. Having regard to the objective seriousness and the subjective factors, and it not being contested that a disqualification is required, in each matter it is determined that there be a period of disqualification.

81. There is a gradation of scale of seriousness. Breach 1 is more serious than breach 2 and breach 2 more serious than breaches 3 and 5.

82. There are no precedents for an administration for the purposes of affecting performance. Guidance can be obtained from past administration and presentation matters. The parity cases set out above make it clear that on similar facts and circumstances a penalty of 18 months disqualification is a starting point for a presentation. Therefore a starting point for an administration could not be less than 24 months. By similar reasoning a starting point for an administration for the purposes of affecting performance could not be less than 36 months.

83. Without repeating the tests on the message to be given in a civil disciplinary penalty it is apparent that the message to the industry and public at large for matters of this gravity must be substantial.

84. The message to this individual can be reduced because it is found that the likelihood of him reoffending on the facts he has presented and the character references he has advanced are in his favour. The balance is the integrity of the industry and his failure to ensure a level playing field.

85. On the issue of his knowledge of the contents of the vitamin complex there are mixed conclusions. Each of the agreed facts in his favour reduce his culpability. However the respondent's submissions about his failure to make inquiries on an unreliable bottle have some merit. It is not found that he should have made arrangements for individual testing because that would place too great an onus on a trainer who is entitled to rely upon the professionalism and ethical approach if the trainer uses a well respected and recognised vet experienced in the industry. The

argument that the cost paid of $1000 per bottle should have put him on notice is not accepted as the evidence establishes that is not out of the range.

86. The subjective argument that he was a young person at the time is rejected. He was not a young, naive trainer just starting out nor a young person just leaving his teenage years. He was a person of advanced years with plenty of knowledge and experience of the industry and its rights and wrongs.

87. In respect of breach 1 it is determined that there be a starting point of 36 months disqualification.

88. From that starting point there will be a 20% discount on the issue of knowledge and on his other subjective circumstances. From that starting point there will be a 15% discount as outlined earlier.

89. That is a total discount of 40% which equates to approximately 14 months 2 weeks.

90. Therefore in respect of breach 1 there will be a period of disqualification of 21 months 2 weeks.

91. In respect of breach 1 the mandatory minimum penalty of 3 years is required to be imposed subject to the following consideration of special circumstances.

92. In respect of breach 2 it is determined that there be a starting point of 24 months disqualification.

93. From that starting point there will be a 20% discount on the issue of knowledge and on his other subjective circumstances. From that starting point there will be a 25% discount as outlined earlier.

94. That is a total discount of 45% which equates to approximately 11 months.

95. Therefore in respect of breach 2 there is a period of disqualification of 13 months.

96. In respect of breaches 3 and 5 there will be a starting point of 18 months disqualification.

97. The same discounts are applied as for breach 2 namely 45% which equates to approximately 8 months.

98. Therefore in respect of breaches 3 and 5 there is a period of disqualification of 10 months.

99. The parties have not invited the Tribunal to do other than make these penalties concurrent. It seems open to consider whether the caffeine matter should be treated as a concurrent matter. That issue will be further canvassed although the parties agreed upon grouping for in competition testing matters.

Special Circumstances under 196(5) and LR108(2)

100. Under the McDonald principles and in accordance with the rules, breach 1 carries a mandatory minimum period of disqualification of 3 years. Steps 2, 3, 4 and 5 of

those principles indicate that that mandatory minimum period of three years may be reduced under step 6 if special circumstances as provided in LR108(2) are established.

101. To summarise that local rule the burden is upon the appellant, on the balance of probabilities, to prove that he did not know, or not to have known and would not have known had he made all reasonable inquiries that his conduct was in breach of the rules.

102 The parties accept that the appellant must establish each of these three points.

103. The appellant says that he does but the respondent says that he does not satisfy the second or third points even if the first point is found in his favour.

104. The appellant relies upon RVL v Kavanagh and O'Brien [2017] VSCA 334 where a different local rule was relied upon. There it was an the interests of justice test and the court found that left plenty of scope to consider the mental state of the accused. Little assistance is gained from this case as the test here is entirely different.

105. The appellant submits that the factual findings about the state of knowledge of the contents of the vitamin complex bottle are such that each of the three limbs is established. He says that if he did not know of the presence of the prohibited substance then he could not have reasonably anticipated it would be contaminated and he relied upon professional advice.

106. The respondent concedes point 1 is made out but says that the appellant has not established points 2 and 3.

107. In that regard it is submitted that the appellant was on notice because of the appearance of the bottle. It is said he should have made inquiries and those enquiries were outlined earlier.

108. The Tribunal earlier determined on the issue of knowledge that there were no other inquiries that this appellant could reasonably have been expected to undertake having regard to his then level of knowledge and reliance upon a well-known and well respected and very professional vet. As previously found the absence of labelling was not enough to put the appellant to the unnecessary steps of further testing. No evidence has been adduced to indicate what other type of knowledge he might have gained if he had made other inquiries.

109. In those circumstances the appellant proves on the balance of probabilities each of the three points required to be proved to satisfy the special circumstances test in the local rule.

Determination of the Special Circumstances Discount

110. As set out in step 7 of the McDonald principle it is now necessary to determine the discount on the special circumstances found.

111. At the outset it is noted that there is no discount under subparagraph (2)(a) because there was no plea of "guilty". This distinguishes the finding made on the discounts available under the 196 test.

112. The only discount to be considered is under (d).

113. In considering an applicable discount under the 196 test a discount of 20% was given on the issue of knowledge and subjective circumstances.

114. Having regard to that finding a discount of 11% is considered appropriate on the issue of knowledge, which is the special circumstance found.

115. Accordingly the mandatory minimum penalty of 36 months is reduced by 11%. For ease of calculation that discount is rounded to 4 months.

116. In respect of breach 1 there will be a period of disqualification of 32 months.

Summary Group 1

117. Breach 1- 32 months

Breach 2- 13 months

Breach 3- 10 months

Breach 5- 10 months

The Out -of -Competition Cobalt Administration Breaches - breaches 13,14,15 and the Out-of-Competition Cobalt Possession Breach- Breach 24-Group 2

118. Breach 13- AR177B(6)- administer

Breach 14- AR177B(6)- administer

Breach 15- AR177B(6)- administer

Breach 24- AR177B(5)- possession

Objective Seriousness

119. Very few facts are advanced by the parties. The Cobalt came from the same vitamin complex bottle that was referred to in the group 1 matters. The conduct occurred between September 2014 and January 2015 at the appellant's stables and for the administration involved three different horses . The possession matter relates to the vitamin complex bottles seized from his stable and another surrendered to the stewards.

120. The same issue of knowledge in respect of these matters is relied upon by the appellant.

121. The appellant submits that the penalties for breaches 13, 14 and 15 should be less than that for breach 1 because the administration was not connected to race-day performance and the breach was only found because of the admissions volunteered by the appellant. Therefore it is said that these become administration matters solely because of the admissions made by the appellant and he should receive a

benefit for the fact that he made an admission rather than the fact that he was caught out-see Smith (supra) paragraph 23.

Subjective Factors

122. These are the same submissions as were outlined for the group 1 matters.

Parity

123. No parity cases are relied upon for the possession matter.

124. Breaches 13, 14 and 15 are mandatory minimum penalty matters.

The Parties Submissions on Penalty

125. It is submitted by the appellant that there is no reason to differentiate group 1 from group 2 matters when considering concurrency. This is said to arise because on objective seriousness the cobalt charges, whether in or out of competition, cannot be reasonably distinguished. Therefore the differing physical elements of the various breaches cannot properly be said to increase the objective seriousness of the appellant's conduct because the delinquency is the failure of the appellant to have in place safeguards sufficient to preclude any possibility in any eventuality of the introduction of cobalt into the horses

126. The appellant submits that a period of disqualification of 1 month is appropriate.

127. The respondent submits that the Appeal Panel penalties were appropriate.

Determination of Penalty under 196(1)

128. As the Tribunal found in McNair v Racing NSW RATNSW 4 December 2015 when dealing, inter alia, with stable security at 33:

> “Importantly, it is this Tribunal's opinion that the need for an appropriate level of security for a horse about to race is much greater than it would be at other times. When an experienced trainer knows that their horse is to race so much greater is the responsibility to ensure that it cannot be got at."

129. This and other similar determinations support a differentiation between conduct connected to race-day and other day-to-day activities in a stable. Activities which lead to wrong conduct on race-day therefore are more serious than activities which occur about a stable on other days.

130. Therefore it is accepted that the group 2 matters are less serious than the group 1 matters. Lesser penalties are required.

131. Likewise it is accepted that the issue of concurrency between the out of competition administration and the in competition administration is enlivened.

132. In the group 1 matters the horse was presented to race. In the group 2 matters the horse was not presented to race and the conduct in both cases occurred at the stables.

133. For the cobalt administration matters therefore in groups 1 and 2 the actual fact of administration is the gravamen of the allegations.

134. However the mandatory minimum penalties for a race-day administration and presentation are greater than those for a non-race day administration. This reflects the difference between the two activities.

135. Accordingly the penalties for the group 2 matters are also assessed under the general penalty provision as having a lesser starting point.

136. The possession matter might have been embraced in the factual scenario for the administration matters in group 2. However the possession was at a later time and accordingly a penalty is appropriate and it should be cumulative.

137. For breaches 13, 14 and 15 a starting point of disqualification of 18 months is imposed. This is based upon the objective seriousness of the breaches being less than that for the race-day presentation matters.

138. Consistent with the determinations above a discount of 25% must be allowed for the early admission of the breach- and thus their detection- and cooperation with the stewards, the Appeal Panel and the Tribunal.

139. Consistent with the determinations above a discount of 20% must be allowed for the subjective factors including the fact the appellant reported the breaches and the knowledge issue.

140. Total discounts of 45% from a starting point of 18 months gives an approximate discount of 8 months.

141. Therefore in respect of breaches 13, 14 and 15 there will be a period of disqualification of 10 months in each matter.

142. In respect of each of these breaches a mandatory minimum penalty of 2 years is required to be imposed, subject to the consideration of special circumstances.

143. In respect of breach 24 a starting point of penalty of 12 months disqualification is imposed.

144. Consistent with the determinations above a discount of 25% is allowed for the early admission of the breach and cooperation with the stewards, the Appeal Panel and the Tribunal.

145. The issue of knowledge is also enlivened in respect of this possession matter. Accordingly, consistent with the determinations above a discount of 20% must be allowed for the subjective factors and the knowledge issue.

146. Total discounts of 45% from a starting point of 12 months gives an approximate discount of 5 months 2 weeks.

147. Therefore in respect of breach 24 there will be a period of disqualification of 6 months 2 weeks.

Special Circumstances under 196(5) and LR108(2)

148. The same determination is made on special circumstances in respect of the group 2 matters as it was for the group 1 matters. That is in particular on knowledge.

Determination of the Special Circumstances Discount

149. These group 2 matters enliven subparagraphs (2)(a) and(d).

150. Under subparagraph (a) a discount of 25% is allowed.

151. As for the group 1 matters, under subparagraph (d) a discount of 11% is allowed.

152. From the mandatory minimum penalty of 2 years disqualification a discount of 36% is allowed. This equates to approximately 8 months and 2 weeks.

153. In respect of breaches 13, 14 and 15 there will be in each matter a period of disqualification of 15 months and 2 weeks.

Summary Group 2

154. Breach 13- 15 months 2 weeks

Breach 14- 15 months 2 weeks

Breach 15- 15 months 2 weeks

Breach 24 - 6 months 2 weeks

The Raceday Drenches and Treatment Related Breaches 6,7,8,9,10,11,16- Group 3

155. Breach- 6 -AR178E(1)- cause to be administered drench prior to race-4 months 2 weeks disqualification

Breach 7- AR178E(1)-cause to be administered drench prior to race- 6 months disqualification

Breach 8- AR178E(1)-cause to be administered drench prior to race- 6 months disqualification

Breach 9- AR178E(1)-cause to be administered iv injection prior to race- 6 months disqualification

Breach 10- AR178E(1)-cause to be administered drench prior to race- 6 months disqualification

Breach 11- AR178E(1)- administer drench prior to race- 6 months disqualification

Breach 16- AR175A- purchase drenches- 3 months disqualification

Determination of Penalty

156. The appellant does not appeal against the findings of the breaches of the rules and the penalties imposed by the Appeal Panel.

157. On this appeal the respondent says that those penalties are appropriate.

158. Accordingly the Tribunal, on those submissions, determines the same penalties as being appropriate.

159. The Appeal Panel determined, and the Tribunal adopts, the finding that some of the group 3 penalties should be served concurrently with each other with the result that the total penalty for group 3 penalties is 18 months disqualification, to be served cumulatively to the penalties imposed in relation to groups1 and 2.

The TCO2 Breaches 18 and 19

160. Breach 18- AR175(a)- administer alkalising agent on race-day to affect performance - 3 months disqualification

Breach 19-178AA-administer alkalising agent before trial - 2 months disqualification.

Determination of Penalty

161. The appellant does not appeal against the findings of the breaches of the rules and the penalties imposed by the Appeal Panel.

162. On this appeal the respondent says that those penalties are appropriate.

163. Accordingly the Tribunal, on those submissions, determines the same penalties as being appropriate.

164. The Appeal Panel determined, and the Tribunal adopts, the finding that the penalties should be served concurrently with each other with the result that the total penalty is 3 months disqualification, to be served cumulatively to the penalties imposed in relation to groups1, 2 and 3

The Possession of Xenon Gas Breach 21

165. Breach 21- AR177B(5)- possess Xenon gas- 6 month disqualification

Determination of Penalty

166. The appellant does not appeal against the findings of the breaches of the rules and the penalties imposed by the Appeal Panel.

167. On this appeal the respondent says that those penalties are appropriate.

168. Accordingly the Tribunal, on those submissions, determines the same penalties as being appropriate.

169. The Appeal Panel determined, and the Tribunal adopts, the finding that the penalty is 6 months disqualification, to be served cumulatively to the penalties imposed in relation to groups1, 2 and 3 and to the breaches for 18 and 19.

The Intra-Articular Administration Breach 17,

Incomplete Treatment Records Breach 22

Have in Stable Unregistered and Unlabelled Vitamin Complex Breach 23

170. Breach 17 - AR175(k)- enter and trial ineligible horse after injection within 8 days of trial -Fine $1000

Breach 22 - AR178F - fail to record treatments and medications - Fine $1000

Breach 23 -AR80E- possess non registered etc preparations - Fine $1000

Determination of Penalty

171. The appellant does not appeal against the findings of the breaches of the rules and the penalties imposed by the Appeal Panel.

172. On this appeal the respondent says that those penalties are appropriate.

173. Accordingly the Tribunal, on those submissions, determines the same penalties as being appropriate.

TOTALITY

174. The fourth and final ground of appeal agitated by the appellant raises the totality principle.

175. In doing so the appellant acknowledges it is strictly a criminal law concept.

176. It is submitted that in structuring the penalty elements, commonality should be given weight to provide concurrency. It is suggested that the Appeal Panel made insufficient allowance on concurrency but was correct in considering the principle of totality. It is of course a matter for this Tribunal to determine penalty for itself. Various calculations based upon the submissions are then made, but as these have not been successful those calculations need not be repeated.

177. It is submitted that the appellant has now served over 3 years of disqualification without a stay and based upon the facts of the matter no more than 3 years disqualification should be imposed and that that would be sufficient to promote the integrity of racing and provide a suitable "deterrent". Finally it is submitted the appellant is a young man who has made some silly mistakes in a short period of time and paid dearly for it.

178. Reference is made to Racing NSW v Callander and Prior, NSW Stewards, 10 March 2016, on the basis that the stewards took into account the impact upon their livelihoods and support of young families. This is found to be of little assistance.

179. As set out earlier the respondent says that the existing penalties are appropriate for the message needed to be sent and having regard to objective and subjective matters. It is submitted there is no double punishment. In particular the respondent relies upon the several undisciplined attempts to cheat and undermine the concept of a level playing field and that the appellant engaged in sustained and serious wrongdoing through a course of conduct that must be considered to be very serious. It is submitted there was no isolated or one off aberration but sustained and repeated wrongdoing across several types of conduct. The protective function must be engaged.

180. It is submitted that the suggested penalties by the appellant are remarkable and would not be consistent with the message required. As Tribunal has determined individual penalties this need not be further considered.

181. The respondent accepts that there is an overlap in respect of culpability for some matters and that should be reflected in the ultimate penalties. The respondent also accepts that the principle of totality should be considered in the instinctive synthesis exercise being undertaken. Emphasis is placed upon the need for a strong message for the above reasons.

182. In reply the appellant accepts that a strong message has to be sent to him and industry but that he has received that message "loud and clear". It is repeated that certain penalties are not challenged. The appellant says he does not seek to minimalise or trivialise his conduct.

FINAL DETERMINATION ON TOTALITY AND CUMULATIVE/CONCURRENT

183. The final determination requires the application of AR196(3) which requires disqualifications to be cumulative unless another order is made and LR108(3) which requires a disqualification to commence on the day it is imposed unless (4) is applied which, on the exercise of a discretion, enables the commencement date to be backdated if certain conditions are met. It is not in issue tin the circumstances that (4) is established and the commencement date of the disqualifications will be backdated as was determined by the Appeal Panel.

184. The application of the tests and law earlier set out requires the individual and the general message to be given on the basis that the integrity and welfare of the industry is paramount and that a protective order is required. That order must take into account the circumstances at the time it is made. The tests and the law require that an instinctive synthesis be applied. The reasonably recent introduction of mandatory minimum penalties and the reason for that introduction must be recognised in considering totality and whether cumulative penalties should be applied.

185. It is accepted that in looking at multiple breaches that the individual penalties for each breach, when taken as a whole, do not lead to a disproportionate protective order.

186. The Tribunal accepts the arguments of the respondent that there were numerous undisciplined attempts to cheat and undermine the concept of a level playing field and that there was sustained and serious wrongdoing. The conduct was not isolated or one-off but sustained and repeated. The conduct varied.

187. The Tribunal accepts the argument for the appellant that there is some overlap of culpability and that must be reflected in the protective order.

188. The Appeal Panel made each of the group 1 in competition matters concurrent. The Tribunal does not agree.

189. The caffeine administration, breach 5, is unrelated to the cobalt administration. It involved the administration of a different prohibited substance at a different time. Those facts warrant that that penalty be cumulative on the other group 1 matters. There is no reason to make it partially cumulative.

190. The group 2 matters involving out of competition testing and possession do, as submitted by the appellant, have an element of commonality to the conduct in the group 1 matters. That is the administration of cobalt and its possession. The cobalt could not have been administered by the appellant unless he possessed it-it was not a cause to be administered matter. The fact it was out of competition administration has been reflected in the lesser penalties set out earlier. Indeed the administration took place at the appellant's stables in both the group 1 and group 2 administration matters.

191. The commonality of conduct enables concurrency. However that concurrency must be reduced otherwise there would be inadequate penalty for repeated conduct. No party can expect that the penalty for a single administration should be the same as for multiple administrations, or breaches generally. To do otherwise would enable a multiple breach of rules to essentially go unpunished. The fact that there was no intervening act to disrupt that conduct cannot avoid the application of that principle.

192. Accordingly the penalties for the group 2 matters must be partially cumulative. In view of the number of matters and the circumstances of the administration it is determined that one half of the penalties for the group 2 matters will be cumulative to the group 1 matters.

193. The remaining penalties and their accumulation/concurrency is not in issue.

194. The effect of those determinations is as follows:

Breaches 1, 2, 3- see paragraph 117- disqualification 32 months.

Breach 5- see paragraph 117- disqualification 10 months cumulative to that period of 32 months.

That makes a total period of disqualification of 42 months.

Breaches 13, 14, 15, 24-see paragraph 154- disqualification 15 months 2 weeks partially cumulative as to 8 months to the first period of disqualification of 42 months.

That makes a total period of disqualification of 50 months.

Breaches 6, 7, 8, 9, 10, 11, 16 -see paragraph 159- disqualification 18 months cumulative to the period of 50 months.

That makes a total period of disqualification of 68 months.

Breaches 18,19 -see paragraph 164- disqualification 3 months cumulative to the period of 68 months.

That makes a total period of disqualification of 71 months.

Breach 21-see paragraph 169- period of disqualification of 6 months cumulative to the period of 71 months.

That makes a total period of disqualification of 77 months.

Breaches 17, 22 23-see paragraph 173-in each matter a fine of $1000.

195. The final calculation of those determinations is a period of disqualification of 77 months and fines totalling $3000.

196. The addition of the fines has not been directly argued on the submissions on totality. They are considered to be individually and cumulatively to each other to be correct and should be cumulative on the disqualifications. Further consideration will only be given to the periods of disqualification.

197. The period of disqualification determined on this appeal of 77 months is greater than the determination of the Appeal Panel of 75 months.

198. The appellant submitted that that period of disqualification of 75 months was excessive and that part of the appeal has not been successful.

199. The respondent submitted that the period of disqualification determined by the Appeal Panel of 75 months was appropriate.

200. At no time was the Tribunal asked to determine a greater penalty than 75 months. Accordingly, as that determination was only made after the submissions were complete, no warning was sought nor given to the appellant that he might suffer a heavier penalty if he continued with his appeal. In other places this might be called the Parker principle. As a principle, or its equivalent, was not applied it is inappropriate in the final determination to impose a greater penalty upon the appellant than that was found below.

201. The appeal against severity is dismissed.

202. The penalties set out above are imposed but reduced on the submissions and by the application of the equivalent of the Parker principle.

203. It is not an issue in these proceedings that the commencement date of that period of disqualification be backdated so that it will conclude 19 August 2021.

204. A total period of disqualification of 6 years and 3 months to expire on 19 August 2021 is imposed together with a monetary penalty of $3000.

APPEAL DEPOSIT

205. The parties were not asked to make submissions on the appeal deposit. The Tribunal's function at the determination of the appeal is to order it refunded, forfeited or repaid in part.

206. In view of the fact that the severity appeal has been unsuccessful and there appears to be no other factual matter upon which an order for repayment in whole or in part could be made it is open to the Tribunal to order the appeal deposit forfeited.

207. However as submissions have not been received on that order of forfeiture, or any other appropriate order, no such order will be made for a period of 7 days from the date of this decision to enable the appellant to make an application for repayment of the whole or part of that deposit. If no such written application is made within that period of 7 days then, without further order, the appeal deposit will be forfeited.

Annexure

Charge Sheet

Licensed trainer Mr Sam Kavanagh, you are hereby charged with twenty-four breaches of the rules of racing:

Breach 1. AR175(h)(i)	Breach 13. AR177B(6)
Breach 2. AR175(h)(ii)	Breach 14. AR177B(6)
Breach 3. AR178	Breach 15. AR177B(6)
Breach 4. AR175(h)(ii)	Breach 16. AR175A
Breach 5. AR178	Breach 17. AR175(k) (breach of AR64M)
Breach 6. AR178E(1)	Breach 18. AR175(a)
Breach 7. AR178E(1)	Breach 19. AR178AA
Breach 8. AR178E(1)	Breach 20. AR177B(6)
Breach 9. AR178E(1)	Breach 21. AR177B(5)
Breach 10. AR178E(1)	Breach 22. AR178F
Breach 11. AR178E(1)	Breach 23. AR80E
Breach 12. AR178E(1)	Breach 24. AR177B(5)

Breach (1) The details of the charge under AR175(h)(i) being that you, licensed trainer, Mr Sam Kavanagh, did administer or cause to be administered, a prohibited substance to the gelding, Midsummer Sun (GB) for the purpose of affecting the performance of that horse in race 6, the Gosford Gold Cup, at Gosford racecourse on 9th January 2015 as;

a. cobalt was detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015;

b. cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B;

c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B.

Breach (2) The details of the charge under AR175(h)(ii) being that you, licensed trainer Mr Sam Kavanagh, did administer or cause to be administered, a prohibited substance which was detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015, as:

a. cobalt was detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015;

b. cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B;

c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B.

Breach (3) The details of the charge under AR178 being that you, licensed trainer Mr Sam Kavanagh, did bring Midsummer Sun (GB) to Gosford racecourse for the purpose of engaging in race 6, the Gosford Gold Cup, on the 9th January 2015 and a prohibited substance was detected in a sample taken from Midsummer Sun (GB) following it running in that race as:

a. cobalt was detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015;

b. cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect, within the blood system and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B;

c. further or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B.

Breach (4) The details of the charge under AR175(h)(ii) being that you, licensed trainer Mr Sam Kavanagh, did cause to be administered a prohibited substance which was detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015, as:

a. caffeine and its metabolites theophylline, paraxanthine and theobromine, were detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015;

b. caffeine is a prohibited substance pursuant to AR178B(1) as it has an action or effect on principally the nervous system and/or the cardiovascular system and/or the respiratory system;

c. caffeine is a prohibited substance pursuant to AR178B(2) as it is categorised as a central nervous system stimulant and/or a stimulant;

d. theophylline, paraxanthine and theobromine are prohibited substances under AR178B(3) as they are metabolites of caffeine.

Breach (5) The details of the charge under AR178 being that you, licensed trainer Mr Sam Kavanagh, did bring Midsummer Sun (GB) to Gosford racecourse for the purpose of engaging in race 6, the Gosford Gold Cup, on the 9th January 2015 and a prohibited substance was detected in a sample taken from Midsummer Sun (GB) following it running in that race as:

a. caffeine and its metabolites theophylline, paraxanthine and theobromine, were detected in a sample taken from Midsummer Sun (GB) following that gelding running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on the 9th January 2015;

b. caffeine is a prohibited substance pursuant to AR178B(1) as it has an action or effect on principally the nervous system and/or the cardiovascular system and/or the respiratory system;

c. caffeine is a prohibited substance pursuant to AR178B(2) as it is categorised as a central nervous system stimulant and/or a stimulant.

d. theophylline, paraxanthine and theobromine are prohibited substances under AR178B(3) as they are metabolites of caffeine.

Breach (6) The details of the charge under AR178E(1) being that you, licensed trainer Mr Sam Kavanagh, by arrangement with Mr John Camilleri, did, without the permission of the Stewards, cause to be administered medication by way of drench to the gelding Midsummer Sun (GB), such administration being effected by Mitchell Butterfield at or around 2pm on race-day, prior to such horse running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on Friday, 9th January 2015.

Breach (7) The details of the charge under AR178E(1) being that you, licensed trainer Mr Sam Kavanagh, by arrangement with Mr John Camilleri, did, without the permission of the Stewards, cause to be administered medication by way of a drench to the mare, Ceda Miss, such administration being effected by Mr Mitchell Butterfield, at or around 10am on race-day, prior to such horse running in race 2, the Fillies & Mares Handicap, conducted at Warwick Farm racecourse on the Wednesday, 7th January 2015.

Breach (8) The details of the charge under AR178E(1) being that you, licensed trainer Mr Sam Kavanagh, by arrangement with Mr John Camilleri, did, without the permission of the Stewards, cause to be administered medication by way of a drench to the filly, Palazzo Pubblico such administration being effected by Mr Mitchell Butterfield, at or around 10am on race-day, prior to such horse running in race 4, the 3YO Fillies Benchmark 67 Handicap, conducted at Warwick Farm racecourse on the Wednesday, 7th January 2015.

Breach (9) The details of the charge under AR178E(1) being that you, licensed trainer, Mr Sam Kavanagh, by arrangement with Mr John Camilleri and/or stablehand, Mr Michael O'Loughlin, did, without the permission of the Stewards, cause to be administered medication in the form of an intravenous injection of a substance to the racehorse, Midsummer Sun (GB), such administration being effected by Mr Mitchell Butterfield, at or around 2pm on race-day, prior to such horse running in race 6, the Gosford Gold Cup, conducted at Gosford racecourse on Friday, 9th January 2015.

Breach (10) The details of the charge under AR178E(1) being that you, licensed trainer, Mr Sam Kavanagh, did, without the permission of the Stewards, administer medication by way of a drench on race-day, to Invinzabeel prior to such horse running in race 1, the 3YO BM72 Handicap, at Royal Randwick racecourse on Saturday, 17th January 2015.

Breach (11) The details of the charge under AR178E(1) being that you, licensed trainer, Mr Sam Kavanagh, did, without the permission of the Stewards, administer medication by way of a drench on race-day, to Palazzo Pubblico prior to such horse running in race 3, the 3YOF BM72 Handicap, at Royal Randwick racecourse on Saturday, 17th January 2015.

Breach (12) The details of the charge under AR178E(1) being that you, licensed trainer, Mr Sam Kavanagh, did, without the permission of the Stewards, administer medication by way of drench on race-day, to Centre Pivot prior to such horse running in race 3, the BM80 Handicap, at Royal Randwick racecourse on Saturday, 24th January 2015.

Breach (13) The details of the charge under AR177B(6) being that you, licensed trainer, Mr Sam Kavanagh, did between September 2014 and January 2015, in your Rosehill Gardens racecourse on-course stables, administer a prohibited substance, cobalt, to the racehorse, Midsummer Sun (GB), being trained by you as:

a. Cobalt is a prohibited substance pursuant to AR177B(2)(a) as it is an erythropoiesis simulating agent;
b. Cobalt is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.

Breach (14) The details of the charge under AR177B(6) being that you, licensed trainer, Mr Sam Kavanagh, did between September 2014 and January 2015, in your Rosehill Gardens racecourse on-course stables, administer a prohibited substance, cobalt, to the racehorse, Centre Pivot, being trained by you as:

a. Cobalt is a prohibited substance pursuant to AR177B(2)(a) as it is an erythropoiesis simulating agent;
b. Cobalt is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.

Breach (15) The details of the charge under AR177B(6) being that you, licensed trainer, Mr Sam Kavanagh, did between September 2014 and January 2015, in your Rosehill Gardens racecourse on-course stables, administer a prohibited substance, cobalt, to the racehorse, Spinning Diamond, being trained by you as:

a. Cobalt is a prohibited substance pursuant to AR177B(2)(a) as it is an erythropoiesis simulating agent;
b. Cobalt is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.

Breach (16) The details of the charge under AR175A being that you, licensed trainer, Mr Sam Kavanagh, did conduct yourself in a manner prejudicial to the image and/or interests and/or welfare of racing in that on or about Wednesday 12th January 2015, Saturday 17th January 2015, Tuesday 20th January 2015 and Friday 23rd January 2015, you did purchase and receive drenches from Mr John Camilleri on the basis that such drenches were for the purposes of race-day administration to racehorses in your stable, contrary to the provisions of AR178E(1) and/or that such drenches, were not registered and/or labelled and/or obtained in compliance with relevant State and Commonwealth 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) and as a consequence, if found in your possession or on your premises, would have placed you in breach of AR80E.

Breach (17) The details of the charge under AR175(k) being that you licensed trainer, Mr Sam Kavanagh, did commit a breach of AR64M in that you entered and trialled the racehorse, Midsummer Sun (GB), in an official trial at Warwick Farm racecourse on the 10th October 2014, when that horse was ineligible to participate in such trial having on the 7th October 2014, been subjected to an intra-articular administration of a cortico-steroid, such administration occurring within eight clear days of the said racehorse participating in such trial.

Breach (18) The details of the charge under AR175(a) being that you, licensed trainer, Mr Sam Kavanagh did commit an improper action in that you did enter and start the racehorse, The Sharpener, in an official trial at Rosehill Gardens racecourse on the 2nd September 2014, when on the morning of such trial, you administered or caused to be administered to The Sharpener, a drench containing the alkalinising agent, bicarbonate of soda, for the purposes of affecting the performance of such horse in the said trial and therefore enhancing the prospects of the sale of that racehorse which had been entered on the 18th June 2014, for the Inglis 2014 Ready to Race sale at Newmarket on the 7th October 2014.

Breach (19) The details of the charge under AR178AA being that you, licensed trainer, Mr Sam Kavanagh did administer or cause to be administered, a drench containing the alkalinising agent, bicarbonate of soda, to the racehorse, The Sharpener, on the morning of the 2nd September 2014, prior to such horse participating in and finishing in 6th position in trial 14 at the official trials conducted by the Australian Turf Club at Rosehill Gardens racecourse on that day.

Breach (20) The details of the charge under AR177B(6) being that you, licensed trainer, Mr Sam Kavanagh did in or around June 2014 in your Rosehill Gardens racecourse on-course stables, administer a prohibited substance, xenon gas, to a horse being trained by you as;

a. Xenon gas is a prohibited substance pursuant to AR177B(2)(a) as it is a erythropoiesis simulating agent;
b. Xenon gas is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser;

Breach (21) The details of the charge under AR177B(5) against you, licensed trainer, Mr Sam Kavanagh, being that a substance that could give rise to an offence under AR177B, if administered to a horse at any time, namely xenon gas, was at your Rosehill Gardens racecourse on-course stable premises on or around the 6th June 2014, and was therefore in your possession, as:

a. Xenon gas is a prohibited substance pursuant to AR177B(2)(a) as it is a erythropoiesis simulating agent;
b. Xenon gas is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser;

Breach (22) The details of the charge under AR178F being that you, licensed trainer, Mr Sam Kavanagh, did between the 20th January 2014 and the 4th February 2015, fail to record all treatments and medications administered to horses in your care, such failures being specified as those items of treatments and medications set out in Exhibits (48) and (50) being the accounts of Flemington Equine Clinic, that are not recorded in your stable treatment record, Exhibit (6), as made available to the Stewards on the 4th February 2015.

Breach (23) The details of the charge under AR80E being that you, licensed trainer, Mr Sam Kavanagh did have in your possession and/or on your Rosehill Gardens racecourse on-

course stable premises, when visited by RNSW Officials on the 4th and 16th February 2015, the following substances and/or preparations that had not been registered and/or labelled and/or prescribed and/or dispensed and/or obtained in compliance with relevant State and Commonwealth 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).

(I) SGF-1000 (2 x 20ml bottles) and/or;
(II) Formaldehyde 10% (1 x 100ml bottle) and/or;
(III) Vitamin Complex, containing concentrated cobalt (2 x 100ml bottle) and/or;
(IV) P Block (1 x 100ml bottle).

Breach (24) The details of the charge under AR177B(5) against you, licensed trainer, Mr Sam Kavanagh, being that a substance that could give rise to an offence under AR177B if administered to a horse at any time, namely cobalt, was at your Rosehill Gardens racecourse on-course stable premises on the 4th February 2015 and was therefore in your possession as:

a. Cobalt is a prohibited substance pursuant to AR177B(2)(a) as it is an erythropoiesis simulating agent;
b. Cobalt is a prohibited substance pursuant to AR177B(2)(l) as it is a hypoxia inducible factor (HIF)-1 stabiliser.

Cobalt in concentrations approximately 175 times the concentration of cobalt found in registered veterinary injectable products for horses containing cobalt and vitamin B12, was detected in an injectable bottle for veterinary use labelled ‘Vitamin Complex’ found