APPEAL PANEL OF RACING NEW SOUTH WALES

THE APPEAL OF LICENSED TRAINER MR NORMAN LOY

Appeal Panel:	**Mr. R Beasley SC – Principal Member; Mr. J Murphy; Mrs. J Foley**
Appearances:	**Mr. B Walker SC and Mr. O Jones of Counsel for the Stewards**
	Mr. D Sheales and Mr. T Purdey of Counsel for the Appellant
Date of Hearing:	**5 October 2021**
Date of Reasons and Orders on Penalty:	**14 October 2021**

REASONS FOR DECISION ON PENALTY

Mr. R Beasley SC

Introduction

1. On 3 September 2021, Racing NSW Stewards charged licensed trainer Mr Norman Loy ("the appellant") with a breach of AR228(a) of the Australian Rules of Racing (**the Rules**). That rule provides that *"a person must not engage in: (a) conduct prejudicial to the image, interests, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere".*

2. The particulars of the breach of the rule alleged that Mr *Loy "did engage in conduct that was prejudicial to the image and/or interests of racing in that he did…post on his private social media platform "Facebook" account two highly inappropriate comments in respect of a person who holds high public office".* The two Facebook "posts" referred to were posted by the appellant on 14 August 2021. They were placed on his personal Facebook account, not on his "Norm Loy Racing" account, which is operated like a website for his training business. The posts were capable of being read however by the appellant's Facebook "friends", of which there are about 2700.

3. The "person who holds high office" referred to in the particulars of the charge was at the time the Premier of NSW, the Hon. Gladys Berejiklian. The first post of the appellant was as follows:

   "You are the biggest fucking moron Gladys Berefucklien. How can you lockdown an entire state you stupid fucking mole."

   The second post was in the following terms:

   "All I can say is you tip turkey looking gonzo fuckhead should concentrate on your area and leave regional NSW out of your sewer another 2 weeks lockdown please don't forget her when you vote next."

4. The appellant pleaded "not guilty" to breach of AR228(a), but was found guilty by the Stewards, who imposed a penalty of a 3-month disqualification. The appellant appealed to the Panel against the finding of breach of the rule, and against the severity of the penalty imposed. A hearing took place on Monday, 5 October 2021, limited to the appeal against breach of the rule. The appeal was in the nature of a "new hearing", with no onus cast on the appellant to identify any particular error of any kind by the Stewards: *Thoroughbred Racing Act* 1996, s.43(1).

5. The appeal was dismissed: see *The Appeal of Norman Loy*, Racing Appeal Panel, 6 October 2021. It was agreed at the end of the hearing held on 6 October that in the event the appeal as to breach was dismissed, the appeal in relation not penalty could be determined without the need for a further oral hearing. Written submissions were lodged by The Stewards dated11 October 2021, and submissions for Mr Loy were lodged on 13 October. The following are the Panel's reasons for decision relating to the penalty appeal, and should be read with the reasons for decision of 6 October relating to the appeal against the finding of breach of AR228(a).

Findings relevant to determination of penalty

6. Mr Loy was found by the Panel to have engaged in conduct prejudicial to the image and interests of racing in breach of AR228(a). That conduct was the making of the

two Facebook posts referred to in [3] above. In summary that Panel found that the posts:

(a) were posted to a wide audience of 2,700 persons including many people connected to racing, and could be expected to be disseminated more widely,

(b) were sexist and misogynist in nature, and would be considered as such by a reasonable person,

(c) were relevantly not political commentary but "vile abuse", and

(d) were of a kind that had a tendency to prejudice the interests and image of racing in breach of the rule.

(See [18]-[20] and [24] of the Panel's reasons in *Loy* 6/10/21)

Approach to imposing penalties under the Australian Rules of Racing

7. The matters of most significance in considering penalties to be imposed for breaches of rules of professional or sporting organisations are well settled. Penalties for breaches of the Rules are not primarily imposed for the purpose of punishment. The main objective of a penalty is rather to be a means of protecting the sport, and the wider racing industry. Penalties serve the purpose of demonstrating to the public that racing officials will take steps to ensure that the reputation of the sport, and its integrity, are protected: *NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-4 ; *Day v Sanders; Day v Harness Racing New South Wales* (2015) 90 NSWLR 764 per Leeming JA at [70] and Simpson JA at [131]; *The Appeal of Hunter Kilner* (RAP, 27/12/17); *The Appeal of Noel Callow* (RAP, 3/4/17). It can be seen then that the Rules are not just a means by which racing authorities control, organise and supervise the sport, but are a means by which they can seek to preserve its image, interests and integrity.

8. Deterrence is another important matter, itself related to the protection of the sport. Both the racing industry, and the racing and betting public, need to be protected from a variety of conduct that constitutes an objectively serious breach of the Rules. One

question to be asked is what kind of penalty is required to deter the conduct involved for a particular breach?

9. Consistency in the imposition of penalties is also an important matter. For penalties imposed under the Rules, similar breaches of similar rules should attract penalties that are in a similar range.

Resolution of this appeal

10. Determining an appropriate penalty for the specific breach of AR228(a) in this appeal is not straight forward. There have been many prior breaches of AR228(a), but, as with a rule like this that imposes a broad obligation not to damage the image and interests of racing, the underlying facts can differ considerably. It is a relief of course that there are not multiple instances of licensed trainers making social media posts of the kind set out in [3], but it does mean the Panel has little to rely on of much precedent value. To this extent, I agree in part with the submission made at [3] of the appellant's penalty submissions (**APS**). Further, there seems no particularly "neat" way of weighing up the conduct involved here with not only other breaches of AR228(a) that involve significantly different factual circumstances, but with the kind of penalties that might be imposed for lesser offending under the Rules (for example, careless riding), or with the penalties that might be imposed for more serious offending like the deliberate administration of a prohibited substance to a horse, something that is enormously damaging to the integrity of the sport.

11. A number of observations however can immediately be made. The offending here is serious. The posts made by the appellant have been found to have a tendency to prejudice the image and interests of racing. That is bad enough. There are aspects of the sport of racing that are fundamental to it that some people find to be, at a minimum, controversial. Racing can do without one of its own participants (a person granted the privilege of a license to train) engaging in conduct that damages its reputation or image.

12. Then there is the precise nature of the posts themselves, or the words and phrases used. I suppose with further effort, or at least a further lack of restraint, the appellant might have been able to craft posts even more offensive than the ones in breach of the

rule. They nevertheless remain, as the Panel found them to be, "vile abuse". Any error in that description would be limited to it being too polite.

13. Despite the derogatory nature of the posts, at the Stewards' Inquiry, the appellant expressed the view that he considered his posts were "appropriate": T2 L93. In complete fairness, there is some context to this point of view. First, the appellant said the posts had been made by him after he had a "few beers", and when he was "probably a bit inebriated" or "a bit drunk": T2 L93-4; T6 L259. Secondly, the appellant (wrongly) thought he was doing something that was private in nature. He referred to his Facebook account as his "private account": T3 L116. He considered the posts to be his "own private thoughts" (which he hardly kept to himself), that he had put "on [his] own private page": T4 L146-7. With arguably blind optimism he said he did not want the posts to go "public," and that he was "venting": T8 L355-8.

14. Despite these descriptions of the posts and the intent behind them, the appellant has expressed no contrition. While the Panel rejected the submissions made by Mr. Sheales as to why he said the appellant had not been in breach of the rule, including as to its proper construction and application, I do not consider that those submissions were in the main not reasonably open to be made. However, even in circumstances where a challenge to the finding of breach is made by way of appeal, I am surprised that the appellant has not expressed some remorse for the nature of the posts given their abusive nature and tone.

15. In circumstances where a disqualification is being considered, the Panel must also weigh up the consequences to an appellant of such a penalty. In many instances it results in great financial hardship. The prohibitions on a person that has been disqualified are extensive: see AR 263. Much the same can be said about the prohibitions on a trainer arising from suspension: see AR 267. In relation to a disqualification, a further matter is that the formerly licensed person will need to reapply to the authorities for a license. In this appeal, the Stewards submit that this is appropriate or an "advantage", at least in the sense of requiring Racing NSW to ensure the appellant is a fit and proper person to hold a license, and to *"bring home to* [the appellant] *the seriousness of his conduct"*: Steward's penalty submissions at [13].

16. In the APS, reference is made to a number of prior decisions of the Panel in support of an overall submission that the appropriate penalty in this appeal is a fine in the range of $1,000 to $2,000. It is necessary then to consider those decisions briefly, and to determine if any proper analogy can be made to the offending conduct in this appeal, or whether they provide any rational guide as to what penalty is appropriate to be imposed on the appellant.

17. In *The Appeal of Anthony Newing* (RAP, 21/2/20) a licensed trainer appealed against the penalty imposed upon him for engaging in "improper conduct" in breach of AR228(b). That improper conduct involved slamming a car door, causing a serious injury to the driver's nose. That driver was further assaulted by the appellant by being grabbed and shaken. The Panel found that the appellant had not intended to harm the driver when slamming the door. A three-month suspension of the appellant's licence was confirmed, but that penalty was suspended by the Panel for good behaviour under AR283(5).

18. In *The Appeal of Luke Price* (RAP, 17/8/20) a licensed trainer appealed to the Panel challenging both a finding that he had engaged in "unseemly behaviour" in breach of AR 228(b), and against a penalty of a $1,500 fine. The appellant was found by the Panel to have made remarks that were intimidatory in nature to witnesses to an Inquiry, including that he would "be watching their every move", and that they would have "a target on their backs". While it was accepted that he also told the witnesses to tell the truth, the Panel felt the appellant's remarks to the witnesses were "unseemly behaviour" in breach of the rule. Prior to commencement of submissions on the penalty appeal, the Presiding Member gave a "Parker warning"[1] to the appellant, indicating that the Panel was contemplating imposing an increased penalty to that imposed by the Stewards. The penalty appeal was immediately withdrawn by the appellant's legal representative.

19. In my view, neither *Price* nor *Newing* are of any assistance in this appeal to either the appellant, or to the Panel. The principles upon which penalty determination are made are the same as set out above in [7] to [9], but the facts are wholly different, and no useful analogies can be drawn.

[1] *Parker v DPP* (1992) 28 NSWLR 282 at 295

20. The appellant also relies on the Panel's decision in *The Appeals of Lambourne and Pollett* (RAP, 6/10/20). In these appeals, a majority relevantly found the appellants to have breached AR228(a) and (d) for making comments they considered to be prejudicial to the image of racing, and defamatory. The comments were made on a subscription-based video program titled "Racing Rant" that the appellants are presenters of. The comments that the Stewards and a majority of the Panel found to be in breach of the rules were about a jockey referred to as "J Mac", which racing people would know to be a reference to James McDonald. Some comments were then made suggesting J Mac was "back on the punt" – seemingly a reference to a prior breach of the rules by Mr McDonald relating to a bet he was found to have placed on a horse he rode some years ago in breach of the rules, for which he received a long disqualification. The Stewards imposed fines of $2,000 each on Lambourne for the breaches of AR228(a) and (d), and a fine of $5,000 on Mr Pollett for the breach of AR228(a). While the majority dismissed the appeals against breach of the rules, they reduced the amounts of the fines imposed such that Mr Lambourne was fined a total of $1,000[2] and Mr Pollett $2,000. The Convenor of this appeal, Mr T S Hale SC, would have allowed the appeal in relation to breach of the rules. His reasoning was preferred on appeal to the Racing Appeal Tribunal.

21. Again, I fail to see how an analogy can usefully be drawn between *Lambourne and Pollett* and this appeal. On any view, Mr Lambourne and Mr Pollett were, in the comments they made, attempting to be humorous, and make a joke. They were not in a serious manner suggesting any improper conduct by Mr McDonald. They did not attack his appearance in a nasty way. They were comments that cannot rationally be compared to the highly offensive and abusive nature of the comments posted on Facebook that are the subject of this appeal.

22. In the APS reliance is also placed on the Panel's decision in *The Appeal of Deborah Prest* (RAP, 24/12/20). In this appeal, the appellant was found to have breached AR228(c) on numerous occasions through posts she made on the social media platform Twitter. As set out at [4] of the APS, the Panel found that the tweets posted by the appellant implied that Racing NSW acted in a manner that lacked integrity,

[2] Mr Lambourne was also fined $1,000 for a breach of AR232.

favoured certain racing participants over others, and did not follow its own rules and procedures. Other tweets carried the suggestion that the CEO of Racing NSW also lacked integrity in his failure to follow proper procedures, that he inappropriately favoured certain participants in racing, and that he had no regard for the safety of riders and horses. The appellant's license to train was suspended for 1 month, and she was fined a total of $7,500.

23. While there are in my view some significant differences between the tone and nature of the tweets posted by Ms Prest, and the Facebook posts made by the appellant, I have had regard to this decision in determining what I consider to be an appropriate penalty.

24. I have also had regard to the subjective circumstances of the appellant, to the extent that there is evidence or submission about them. He has been involved in racing for his entire adult life as rider and then trainer. His sons are involved in racing. I accept as an obvious matter that any suspension or disqualification imposed will have a negative financial impact on him, and perhaps others: APS at [12].

25. The penalty contended for by the appellant is for a fine in the range of $1,000 to $2,000. I consider such a penalty would be wholly inadequate having regard to the sentencing principles referred to above. It would not reflect the seriousness of the offending. The appellant's conduct does not merely tend to damage the image of racing. When posts of this kind are made about someone at a high level of government, they have a tendency to damage racing's "interests" as well – that is, they have a tendency to damage what might be advantageous to racing or of advantage to it.

26. Such a fine would also be a near trivial penalty given the vile and abusive nature of the posts. It would serve as little protection to racing from this kind of conduct. It would be inadequate as a deterrent. I am not in favour of the imposition of a fine in any event in this appeal – the posts made by the appellant here are so offensive that quantifying a fine as a penalty in my view is inappropriate. A penalty other than a fine is warranted.

27. The Stewards imposed a 3-month disqualification. It has been unsurprisingly submitted that this penalty is appropriate: Stewards' submissions at [15]. While I am of the view it is not an inappropriate penalty, I take a different view as to what is an appropriate penalty for the appellant's breach of the rule here. In my view, a 2-month suspension should be imposed in lieu of a 3-month disqualification. Such a penalty is in my view a sufficiently strong sanction to fulfil the objects of imposing penalties under the Rules. It recognises the serious nature of the offending, and is a demonstration that racing will take proper and adequate steps to protect its image and interests from such conduct. It prohibits the appellant from nominating a horse for a race or trial for the period of the suspension, or from training or preparing a horse for racing during the period of suspension, or from providing services to another trainer: AR 267.

28. Further, while I note the submission made by the Stewards that a disqualification would have the advantage of a greater deterrent effect by requiring the appellant to have to reapply for a license to train, I consider that a suspension of 2 months has an adequate and appropriate deterrent effect. The appellant's conduct was prejudicial to racing, and his posts have been adequately described for what they are, but his conduct is damaging to the image or interests of racing, rather than to its *integrity*. I am not suggesting that what can be described as offending under the Rules damaging to integrity – such as deliberately administering a prohibited substance to a horse – are the only kind of offending that might warrant a disqualification. However, the conduct here, as bad as it is, is not in my view as serious as the deliberate administration of prohibited substances (which I recognise carry mandatory disqualification periods far longer than that imposed by the Stewards here).

29. Further, while the appellant's posts have an obvious tendency in my view to damage the interests and image of racing, the main actual damage done is probably to the appellant's own reputation. At least his reputation would be damaged by these posts in the minds of reasonable people, if not in those of persons who, perhaps because of cognitive impairment, or a lack of decency (or both) take the view that the posts are not very serious, or, worse still, somehow okay.

30. Finally, while I am concerned about the appellant's lack of remorse for his conduct – or even a hint of recognition that his posts were well beyond "insulting"- I remain of the view that a 2-month suspension is the appropriate penalty to impose.

31. I note that my view on penalty is not shared by the other Panel members. I only add that my disagreement with them is respectful. As stated above, a 3-month disqualification is not a penalty that in my view is properly described as "inappropriate". I simply have a different view as to the most appropriate penalty.

Mr Murphy and Ms Foley

32. We agree with much of what the Principal Member has said above, including the nature of the Facebook posts themselves. We respectfully disagree that a suspension in lieu of a disqualification is appropriate, for the reasons that follow.

33. First, the posts were disgraceful conduct. They were properly described as sexist, misogynist and as vile abuse in our reasons of 6 October. We consider that would be the view of any reasonable person.

34. Secondly, the appellant has provided us with little or nothing to suggest that he has any insight into just how offensive his posts were. He has expressed no contrition about even their "insulting" nature, something he conceded at the hearing of the appeal as to breach.

35. Thirdly, we accept the submission of the Stewards that a disqualification will have a necessary and appropriate protective and related deterrent effect: Stewards Penalty Submissions at [12]-[13].

36. Fourthly, nothing short of a disqualification in our view reflects the serious nature of the offending here, and the need to protect racing from conduct that in our view obviously tends to damage both the image and interests of the sport and broader industry. We are therefore of the same view as the Stewards – a 3-month disqualification is the appropriate penalty for the breach of AR228(a) here.

Orders (in full)

37. The Panel confirms and makes these orders:

1. Appeal against finding of breach of AR228(a) dismissed (see reasons of 6 October 2021).
2. Finding of breach of AR228(a) confirmed.
3. Appeal against severity of penalty dismissed (by majority).
4. Penalty of a 3-month disqualification confirmed. That disqualification commenced on 10 September 2021, but a stay was granted on 16 September which was in effect until 6 October. The disqualification ends on 31 December 2021.
5. Appeal deposit forfeited.