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:	**6 October 2021**

REASONS FOR DECISION

The Panel

Introduction

1. On 3 September 2021, Racing NSW Stewards disqualified licensed trainer Mr Norman Loy ("the appellant") for 3 months after finding he had breached AR228(a) of the Australian Rules of Racing. 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 were 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 what he describes as 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 having breached AR228(a) at the Stewards' Inquiry, and maintained that plea on appeal to the Panel. He has also appealed against the severity of the penalty imposed upon him. He was represented by Mr. D Sheales and Mr. T Purdey of Counsel, while Racing NSW were represented by Mr. B Walker SC and Mr. O. Jones of Counsel. Prior to the appeal hearing, both parties lodged a written outline of submissions at the request of the Panel.

5. At the appeal hearing, an appeal book containing the exhibits from the Stewards' Inquiry, and the transcript of it, was admitted into evidence without objection: Exhibit A. Two screenshots of the appellant's Facebook page were also tendered by Mr. Walker: Exhibits B and C. These posts showed a number of photographs generally associated with racing, as well as a list of the appellant's Facebook "friends". From descriptions given as to position or occupation, it would appear a number of these "friends" are either associated with racing, or employed within the industry.

6. No oral evidence was given before the Panel. It can also be noted that prior to the appeal hearing, the appellant had been granted leave to have his appeal heard out of time (order made on 14 September 2021), and a stay of penalty was granted on 16 September 2021.

Facts

7. The appellant is 51 years of age, and has been a licensed trainer for over 20 years. He was a rider for about 12 years before that. His eldest son is a licensed jockey, and his younger son now has a license to ride trackwork: Appellant's submissions on stay at [10]. He presently trains seven horses, three of which are currently in work. He has a separate business moving electrical equipment and furniture.

8. The appellant operates two Facebook accounts. One is styled "Norm Loy Racing". The other is a more personal account in his name. He referred to this account as his "private account" at the Stewards' Inquiry: T3 L116. He also considered the posts to be his "own private thoughts" put "on my own private page": T4 L146-7. However, as stated above, the appellant has over 2700 "friends" that are able to follow his posts on his personal account. The evidence he gave at the Stewards' Inquiry was that he knew about 2000 of his friends: T3L105. By his admission, "a lot of racing people" were included in his list of "friends": T7 L 312.

9. The appellant admitted posting both posts that are set out at [3] above. In response to being asked at the inquiry, he felt the posts were "appropriate", but 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.

<u>Submissions</u>

Appellant

10. The overarching submission made by Mr. Sheales was that, whatever other findings the Panel might make, it could not be comfortably satisfied on the evidence that Mr. Loy's conduct in making the two Facebook posts had a tendency to prejudice the image or interests of racing. A view could be taken that such posts had a negative impact on the reputation of the appellant, without it being established that there was a flow on detriment suffered by the sport itself. This was central to the argument put on behalf of the appellant – a reasonable person "*would conclude that the posts reflected only on the image or reputation of* [the appellant] *and not the image or reputation of* [racing]*"*: Appellant's submissions at [19]. While this is at the heart of why it was submitted the appellant had not breached AR228(a), other matters were raised by Mr. Sheales relevant to his client's appeal.

11. First, Mr. Sheales submitted that as the appellant was in the two posts expressing his views about a person "unconnected with racing" (appellant's submissions at [9]), the expression of those views on Facebook was not conduct that could be caught by AR228(a). While conceding that the comments were in part "insulting", and perhaps even a breach of AR228(b) (which prohibits a person engaging in, relevantly, "unseemly behaviour"), the conduct here could not properly be found to be in breach of AR228(a), which requires a "nexus" with racing. For that reason, Mr. Sheales submitted, the appellant could also not be found to have breached AR228(a) if he had made similar posts about, for example, the CEO of BHP.

12. Further, Mr. Sheales submitted that in considering whether AR228(a) had been breached, it was relevant to consider the prominence of the appellant in the industry compared to some of the leading city trainers. Insulting comments by a licensed trainer who has horses that regularly compete in principal races and who may be at the upper end of the trainer's premiership are far more likely to be potentially prejudicial to racing than comments made by a lesser known regional trainer.

13. While acknowledging in oral submissions that not all aspects of the comments made by the appellant in the two posts were an expression of political view, and accepting that they were insulting, and possibly involved an element of sexism, Mr. Sheales submitted that the description of them as "misogynist" in the Stewards' submissions was "overreach". While insulting, they fell short of expressing "hatred toward women", and were not comments of a kind that would cause a reasonable person to think lesser of thoroughbred racing because they were made by the appellant.

Stewards

14. Mr. Walker's submissions began with an analysis of the text of AR228 as a whole. That rule in entirety provides as follows:

AR 228 Conduct detrimental to the interests of racing

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;

(b) misconduct, improper conduct or unseemly behaviour;

(c) improper or insulting behaviour at any time towards a PRA, the Stewards, a Club, or any official, employee, contractor or agent of any of them in relation to the relevant person's functions, powers or duties;

(d) publishing or posting on any social media platform or channel any material, content or comment that is obscene, offensive, defamatory, racist, threatening, harassing, discriminatory or abusive to or about any other person involved in the racing industry;

(e) conduct which threatens, disparages, vilifies or insults another person ("other person") on any basis, including but not limited to, a person's race, religion, colour, descent, national or ethnic origin, special ability/disability, or sexual orientation, preference or identity, while the other person is acting in the course of his or her duties in the racing industry.

15. Mr. Walker described sub-rules (c) to (e) as being directed toward conduct, behaviour or actions that could be described as "internal" to racing. They address conduct directed towards persons associated with the "racing industry". Sub-rules (a) and (b) are in another category. Contrary to the appellant's submissions, there is nothing in the text of AR228(a) that suggests the conduct must be directed towards a person connected to racing. Further, as a matter of context, the absence of any reference to persons connected to racing in the first two sub-rules, in contrast to the next three, suggest no such link is required.

16. Beyond the text and relevant context of AR228(a), Mr. Walker submitted that in any event there was an obvious connection between the appellant's conduct and racing. That connection is that he is a licensed trainer. He is contractually bound by the Australian Rules of Racing not to engage in conduct prejudicial to the image and interests of racing. If by conduct a licensed person prejudices the image and interest of racing, it does not matter if that conduct is directed to the Premier, the CEO of BHP, or any other person that might not be directly involved in the racing industry.

17. The other submissions made on behalf of the Stewards' can be summarized as follows:

(a) It was acknowledged that for AR228(a) to be breached, there must be an element of "public knowledge" of the conduct: *Pollett v Racing NSW* (Racing Appeal Tribunal, 16 March 2021 at [21], [28]-[29]. This, Mr. Walker submitted, was obviously satisfied by posting the relevant messages on a site where they could be read by up to 2700 people. It was satisfied again when, perhaps inevitably, one or more of those people disseminated the posts beyond the appellant's Facebook "friends" group. These were not "private posts" on a page that could properly be describe as entirely "private" in nature. There was no real resistance from Mr. Sheales that this aspect of what is described as the "charge" against the appellant was satisfied.

(b) The posts were insulting in the sense that this word would ordinarily be understood. They were rude and contemptuous. Care should be taken however to describe them as "mere" insults. They contained "vulgar abuse", and were intended to, or likely to, wound.

(c) If the posts contained even strong language expressing disagreement with the State Government's actions in response to the Covid-19 pandemic, or the actions of the Premier, they would not be caught by AR228(a). Nor would posts expressing an opinion about who to vote for, or who not to vote for. The relevant parts of the posts in this matter however were not an expression of a political opinion, or political commentary. They were "an aggressive and demeaning personal attack" on Ms. Berejiklian, and were apt to be described as both "sexist" and "misogynist". This is how they would be viewed by a reasonable person: Stewards' submissions at [12(c) and (d)].

(d) For the rule to be breached, the Facebook posts made by the appellant must be conduct that has a *"tendency to give rise to an unfavourable opinion or feeling* [about racing] *amongst the public or a segment of the public made aware of that conduct"*: Stewards submissions at [11] citing *Pollett* at [38]-[39]. It may be that most of the damage done by the posts is to the appellant's own reputation (at least amongst some, perhaps many of the persons who read them), but "off course" conduct such as this can equally be seen to have a tendency to be prejudicial to racing itself: See *Zucal, RWWA Chairman of Stewards and Ors v Harper* (2005)

29 WAR 563 per Steytler P at [50]. Given that racing authorities have seen fit to grant a license to the appellant, there would be a tendency to think lesser of a sport that has given a license to a person who engages in conduct of the kind demonstrated by the vulgar and abusive posts made by the appellant.

(e) One (but not the only) means of testing whether the conduct has a tendency to be prejudicial to racing is to consider what the reaction of a reasonable person would be if racing took no action against a licensed person in response to the conduct. Would it be damaging to the image of racing if it did nothing? While it is the appellant's conduct that must be prejudicial to racing, and not the reaction of racing authorities, if a lack of such action by the authorities would be prejudicial to racing, that is at least some guide that the original conduct is also prejudicial. Given the highly insulting and demeaning nature of the posts toward Ms. Berejiklian, it was submitted that it would be prejudicial to racing if authorities did not take some form of disciplinary action against the relevant licensed person. This is some indication – without of course being decisive – that the conduct itself is prejudicial to racing.

Resolution

18. The posts made by the appellant are not his "private thoughts" disseminated on an entirely "private" platform. They had an audience of more than 2700 people, including people involved in racing. There was not merely an "element" of the appellant's conduct that was public or became public knowledge – that element was relatively large.

19. The posts contain abuse and derogatory comments towards Ms. Berejiklian. The fact that she was at the time they were made the Premier of NSW and a member of parliament does not make this abuse "political" in nature. The insulting aspects of the posts were not political commentary. It was vile abuse, period.

20. Each member of the Panel comes from a different background, and has different educational, career and life experiences. It should be obvious enough that we are not all of the same gender. Whether in spite of all this or because of it, we are all comfortably satisfied that the posts made by the appellant are – and would be

considered to be by a reasonable person of any political persuasion or affiliation – comments that are sexist and misogynist. This is not "ivory tower" or "high horse" thinking. It is basic and fundamental. There are no contemporary standards we are aware of whereby any sane and reasonable person could view describing any woman on a social media post made to 2700 people that she is a *tip turkey looking gonzo fuckhead* as anything other than sexist and misogynist. It is unnecessary in these reasons to provide some dissertation on the history of oppression, discrimination, feminism or the rules of civility to explain our view. The comments made by the appellant are almost classically out of that line of "thinking" (if it can be described that way) that a woman should be judged by, or is a lesser human because of, some aspect of her appearance. When that kind of commentary is then couched in foul and otherwise abusive terms, the Panel fails to see how it is anything other than a misogynist comment. That is not an attack on the appellant. It is a finding about his Facebook posts. The pressures of the pandemic have been felt by many people in this state and beyond, and some have suffered terribly from the impacts of lockdowns. Many have been acutely affected directly by the disease caused by the Covid-19 virus itself. Perhaps the lockdowns have impacted the appellant in some way – if he has been, obviously he is not alone. However, any reasonable person of reasonable intelligence that read the appellant's posts would be appalled.

21. As for whether it is necessary for Ms. Berejiklian to be directly connected in some way to racing for the posts to constitute a breach of AR228(a), the Panel accepts the submissions made for the Stewards. The appellant's submissions have at least three difficulties. One is the language deployed in AR228(a). Another is the contrast between that language (and that of AR228(b)), with that of the other sub-rules. The third is that any connection required to racing comes from the appellant himself – he is a licensed trainer. He has the obligation not to prejudice the image of racing. The image of racing can be prejudiced (that is harmed, damaged, looked unfavourable on) by conduct of a licensed person that is not directed to another licensed person or person connected to racing.

22. Further, while clearly not decisive given our view on the construction of the rule, the Panel is far from certain that the Premier of NSW has no connection to racing or the racing industry. Precise figures are not necessary, but racing provides employment to

tens of thousands of people. Tens of thousands more are in some way "engaged" in racing. Racing contributes a sum in the billions to the NSW Economy.

23. The Premier would generally be considered a person highly interested in the NSW economy, and with any industry or sport that contributes that kind of economic output, and that employs so many people. Racing in NSW is also governed by statute – the *Thoroughbred Racing Act*, which provided for the establishment of Racing NSW, and gave it the functions and powers set out in ss.13 and 14 of that Act. The Premier, by dint of being a member of parliament, is also a legislator. NSW has an Office of Racing, and a government Minister has responsibility for the legislation that governs racing in NSW. That Minister sits in Cabinet, with the Premier. To say then that the Premier is unconnected to racing only seems to us to hold good if the point sought to be made is that the Premier does not train or ride horses. Although it does not matter for our decision, we are not convinced that the Premier does not have a real connection to the racing industry, even if she is not the Minister directly responsible for the legislation that governs it, or is not employed within the industry, or a licensed person.

24. As to whether the posts made by the appellant have a tendency to prejudice the image of racing, we do not doubt that a large part of the damage done by making them is to the appellant's own reputation. However, he is a licensed trainer, and has been for over 20 years. His association with racing dates back before this to his time as a rider. His sons are participants in the sport. He is not an "unknown", and his post was made to a large audience – the 2700 people (many "racing people") who he had permitted to immediately read his posts. It could not be a surprise to anyone that such posts, or repetition of their content, might reach an even larger audience. We are comfortably satisfied – in fact in no doubt – that the appellant's posts have a tendency to prejudice the image and interests of racing. He is a representative of racing by the fact of having been granted a license. There would be an obvious tendency in our view for reasonable people to read the appellant's posts and think – *this is what racing is like/this is what racing people are like/this is an example of what racing people are like/this is the kind of abuse that is associated with racing/racing people* etc. There are probably other possibilities, but they are enough. The appellant's posts in our view

constitute conduct that has a tendency to prejudice the interests and image of racing. The appeal in relation to the finding of breach of AR228(a) must be dismissed.

25. At the appeal hearing, the Panel indicated that it did not want to hear from the parties on the penalty appeal until such time as the Panel delivered reasons and made orders on the breach appeal. It was agreed by the parties that in the event it was necessary to proceed with the appeal as to penalty, an oral hearing was not necessary, and that written submissions will suffice. An order to this effect is made below.

26. Further, the appellant was on a stay pending the outcome of his appeal, or until further order. The Panel is of the view that the stay should be dissolved in light of the outcome of the appeal against finding of breach of AR228(a). The Panel has set a short timeframe for lodging submissions as to penalty, and is satisfied that it can promptly reach a determination and make orders after considering submissions. We are therefore no longer satisfied that the appellant might suffer a "substantial injustice" if a stay is not granted: see LR 107(1)(a).

27. The Panel makes the following orders:

    1. Appeal against finding of breach of AR228(a) dismissed.
    2. Finding of breach of AR228(a) confirmed.
    3. The stay granted on 16 September 2021 is dissolved.
    4. As to the appeal against severity of penalty:
        (a) the Panel notes that the parties consider an oral hearing is unnecessary; and
        (b) the parties are to lodge written submission on the penalty appeal, limited to 10 pages, by close of business Monday 11 October 2021.