

- (a) prior to the 100-metre mark in a race, official trial or jump-out:*
- (i) the whip must not be used in consecutive strides;*
 - (ii) the whip must not be used on more than 5 occasions except where there have only been minor infractions and the totality of the whip use over the whole race is less than permitted under subrules (7)(a) and (b) and also having regard to the circumstances of the race, including distance and context of the race (such as a staying race or a rider endeavouring to encourage the rider's horse to improve);*
 - (iii) the rider may at the rider's discretion use the whip with a slapping motion down the shoulder, with the whip hand remaining on the reins;*
- (b) in the final 100 metres of a race, official trial or jump-out, a rider may use the whip at the rider's discretion. (8) A trainer, owner or their authorised*

5. How clearly this rule is drafted need not be debated. Riders will be in breach of the rule if they strike their mount with the whip more than 5 times prior to the 100m mark of the race, subject to exception. As Mr Van Gestel submitted, the exception is if there have:

- (a) been only “minor infractions”; AND
- (b) the totality of the whip use over the whole race is less than permitted under subrules 7(a) and (b); AND
- (c) having regard to the circumstances of the race, including distance and context of the race (such as a staying race or a rider endeavouring to encourage the rider's horse to improve).

Facts

6. Certain matters of fact were not in dispute:

- (a) The appellant struck his horse 12 times prior to the 100m mark.
- (b) He struck the horse only 3 times inside the 100m mark.
- (c) The race was run over 2000m, but because of the Soft 7 track, the last 600m was run in over 36 seconds, and the race was somewhat of a slog.
- (d) The appellant's use of the whip was only to encourage it to improve.
- (e) The appellant has breached the rule 4 times in the last 12 months. He was suspended for a week for a breach in a Group 1 race on 18 April 2020. Further,

back on 28 September 2019, he was suspended for a week for a breach of the whip rule, also in a Group 1 race.

Submissions

7. Mr Van Gestel first reminded the Panel as to why the rule was brought in. This is set out in *The Appeal of Ben Melham* (RAP, 31/3/17) at [8]-[9], where reference was made to the comments of the then Chairman of the Australian Racing Board who spoke of the rule being “*fully attuned to ...contemporary community expectations*”, and also for the need to develop a template of penalties that set a “*suitable set of deterrents*”.
8. Mr Van Gestel then informed the Panel that he would view a “minor infraction” of the rule to be one involving 6 to 8 strikes. As stated, the offending of the whip rule here involved 12 strikes. He then referred to the appellant’s record of prior breaches of the rule, including in Group 1 races. He submitted, reasonably, that it was time to send a firm message to the appellant about the number of occasions he was fallen foul of the rule. The Penalty Guidelines were then referred to, which, given the appellant’s record, point to a suspension of “up to 2 weeks”. He also asked the Panel to note that the Guidelines provide for the possibility of heavier penalties for “breaches in Group and Feature races”.
9. Aside from some observations about the proper construction of the rule, Mr Pasterfield pointed to the fact that of the 12 strikes prior to the 100m, perhaps 4 were what he described as “backhanders” with the left hand. That might be so, but the Panel feels it should not start to make decisions about force. The rule is in relation to “use” of the whip. Deciding how hard it is being used may not be relevant, or always easy to discern. Mr Pasterfield’s points about the Soft Track, the hard slog of the race, and the fact that the appellant put the whip away after the horse took the lead were however well made. He also asked the Panel to note that another horse in the race was struck 20 times (compared to 15 for the appellant’s mount), with 9 of those strikes before the 100m (for which the rider, who has a much better relevant record than Mr Berry, received a \$4000 fine).

10. The other matter brought to the attention of the Panel was that any suspension at this time of the year can carry very significant financial penalties to a rider. The Penalty imposed by the Stewards would see Mr Berry miss both the Tancred meeting on 3 April, and also Day 1 of the Championships on 10 April, which includes 4 Group 1 races, and about \$10 million in total prizemoney. Such a matter is a consideration in the careless riding penalty guidelines, although so too is offending (as a premium) of the careless riding rule in feature races.

Resolution

11. The reasons for the introduction of this rule must be respected by the Panel, and form part of our consideration as to penalty. So too must the appellant's record. However, when giving consideration to the appropriate penalty to be applied here, we were unanimously of the view that in all the circumstances a suspension that prevented the appellant from riding on two feature Saturdays was a greater penalty than his breach of the rule warrants. Given his prior record however, that was a close-run thing.

12. In our view, a penalty commencing on 31 March 2021, and including the meeting on 8 April 2021 (a six-meeting suspension) is an appropriate one, although in reducing the number of meetings the appellant is suspended for, we consider it appropriate to increase the fine imposed upon him from \$5,000 to \$10,000.

13. We make the following orders:

1. Appeal against severity of penalty allowed.
2. In lieu of a two-week suspension, the appellant's licence to ride is suspended for 6 meetings from 31 March 2021 until and including the meeting on 8 April 2021, with the appellant able to resume riding on 9 April 2021.
3. In lieu of a fine in the sum of \$5000, a \$10,000 fine is imposed on the appellant.
4. Appeal deposit forfeited.

