

## RACING NEW SOUTH WALES APPEAL PANEL

### IN THE MATTER OF THE APPEAL OF LICENSED TRAINER MR MARK SCHMETZER

Appeal Panel:	<b>Mr R. Beasley SC, Presiding Member; Mrs J. Foley; Mr J. Murphy</b>
Appearances:	<b>Racing New South Wales: Mr M. Van Gestel, Chairman of Stewards Appellant: Mr P. O'Sullivan, Solicitor</b>
Date of Hearing and orders:	<b>4 April 2022</b>
Date of Reasons:	<b>6 April 2022</b>
Rules involved:	<b>AR231(1)(a) – Committing an act of cruelty AR231(1)(b)(i) – Failing to exercise reasonable care and control and supervision to prevent acts of cruelty</b>
Outcome:	<b>Appeal against severity of penalty dismissed</b>

### REASONS FOR DECISION ON PENALTY

**Mr R Beasley SC, for the Panel**

#### **Introduction**

1. On 25 February 2022 licensed trainer Mr Mark Schmetzer (**the Appellant**) was charged with breaches of AR231(1)(a) and AR231(1)(b)(i) of the Australian Rules of Racing (**the Rules**). The charges related to acts of cruelty committed on the thoroughbred Ghost Hunter (**the Horse**) on 8 February 2022 at the Scone Equine Pool.
2. At a Stewards' Inquiry conducted on 3 March 2022, the Appellant pleaded guilty to the charges, although he did not accept at that time every particular alleged in respect to the charges. The charges and the particulars were as follows:

#### **Charge 1**

Licensed trainer Mr Mark Schmetzer you are hereby charged with committing acts of cruelty to a horse under AR231(1)(a) which states:

**AR 231 Care and welfare of horses**

(1) A person must not:

- (a) commit or commission an act of cruelty to a horse, or be in possession of any article or thing which, in the opinion of the Stewards, is capable of inflicting cruelty to a horse.

**AR2**

**cruelty** includes any act or omission as a consequence of which a horse is mistreated.

The details of the charge being that you, licensed trainer Mr Mark Schmetzer, did commit acts of cruelty to the racehorse Ghost Hunter at the equine pool area located at Scone racecourse on the afternoon of 8 February 2022 by reason of the following matters:

1. You are a licensed trainer with Racing NSW and the registered trainer of the racehorse Ghost Hunter.
2. On the afternoon of 8 February 2022, whilst assist by licensed foreperson Ms Ally Simmonds and licensed stablehand Ms Karina Janson, you attempted to swim Ghost Hunter in the equine pool located at Scone racecourse.
3. When Ghost Hunter refused to enter the equine pool, you committed acts of cruelty on Ghost Hunter by reason of the following actions which are captured on the CCTV (Exhibit 12) and detailed below.

	Time	Details
a.	15:20	<p>You repeatedly struck Ghost Hunter on numerous occasions with a length of black poly pipe approximately 1.6 metres in length (<b>“The Poly Pipe”</b>) with force on the gelding’s side and rump, with such strikes occurring repeatedly within 60 seconds.</p> <p>During this time, Ms Karina Janson struck Ghost Hunter on several occasions with a shorter piece of black poly pipe approximately 1 metre in length (<b>“The Shorter Poly Pipe”</b>) with force as the gelding swung around and faced the pool.</p> <p>Such actions detailed causing Ghost Hunter to lunge forward and make heavy contact with the equine pool entry.</p>
b.	15:21	<p>As Ghost Hunter pulled away from the pool and towards the entry/exit gate, you repeatedly struck ‘Ghost Hunter’ over the rump, back and hind legs on numerous occasions with <b>The Poly Pipe</b>, with many of the strikes being with force. Such actions causing Ghost Hunter to lunge forward and make heavy contact with the equine pool entry.</p>
c.	15:22	<p>You poked Ghost Hunter in the head with <b>The Poly Pipe</b>.</p> <p>You struck Ghost Hunter on several occasions with force using <b>The Poly Pipe</b> on the gelding’s rump and hind, causing Ghost Hunter, to make heavy contact with the pool entrance and rear, resulting in its front legs being caught over the entrance rail.</p> <p>You struck Ghost Hunter in the head with <b>The Poly Pipe</b> on approximately 12 occasions.</p>
d.	15:24	<p>You punched Ghost Hunter in the vicinity of the head with a closed fist. The force of the punch caused Ghost Hunter to react aversively and move</p>

		backwards.
e.	15:25 to 15:27	You, together with Ms Janson and Ms Simmonds, forcefully pulled against Ghost Hunter for an excessive period of time with lead ropes in an attempt to force the gelding into the pool, causing excessive flexion of the neck. During such period Ghost Hunter was sweating and was displaying aversive behaviour.

4. Such conduct detailed above resulting in Ghost Hunter being mistreated, displaying aversive flight behaviour and sustaining the following injuries.
  - a. Generalised swelling over the bridge of the nose extending from the rostral border of the facial crest to the nostril.
  - b. Abrasions to various locations, including but not limited to the forehead and craniolateral aspect of the right stifle.

## Charge 2

Licensed trainer Mr Mark Schmetzer you are hereby charged with a breach of AR231(1)(b)(i) which states:

### ***AR 231 Care and welfare of horses***

*(1) A person must not:*

*(b) if the person is in charge of a horse – fail at any time:*

*(i) to exercise reasonable care, control or supervision of the horse so as to prevent an act of cruelty to the horse;*

### **AR2**

***cruelty includes any act or omission as a consequence of which a horse is mistreated.***

The details of the charge being that you, licensed trainer Mr Mark Schmetzer, did fail to exercise reasonable care, control and supervision to prevent an act of cruelty to the racehorse Ghost Hunter at the equine pool area located at Scone racecourse on the afternoon of 8 February 2022 by reason of the following matters:

1. You are a licensed trainer with Racing NSW, the registered trainer of the racehorse Ghost Hunter and the person in charge of Ghost Hunter on 8 February 2022.
2. On the afternoon of 8 February 2022, whilst assist by licensed foreperson Ms Ally Simmonds and licensed stablehand Ms Karina Janson, you attempted to swim Ghost Hunter in the equine pool located at Scone racecourse.
3. When Ghost Hunter refused to enter the equine pool, you failed to exercise reasonable care, control and supervision of Ghost Hunter, to prevent the acts of cruelty to Ghost Hunter by reason of the following actions which are captured on the CCTV (Exhibit 12) and detailed below.

	Time	Details
a.	15:15	Ms Janson struck Ghost Hunter with <b>The Shorter Poly Pipe</b> multiple times to the rear and as the gelding jumped backwards and whilst you pulled on Ghost Hunter's head and Ms Simmonds pulled on the tail of the horse forcefully with

		<p>a tail rope.</p> <p>Such actions detailed above causing Ghost Hunter to lunge forward and make heavy contact with the equine pool entry.</p>
b.	15:16	Ms Simmonds pulled a tail rope, attached to the tail of Ghost Hunter, with force.
c.	15:20	<p>You repeatedly struck Ghost Hunter on numerous occasions with a length of black poly pipe approximately 1.6 metres in length (“<b>The Poly Pipe</b>”) with force on the gelding’s side and rump, with such strikes occurring repeatedly within 60 seconds.</p> <p>During this time, Ms Karina Janson struck Ghost Hunter on several occasions with a shorter piece of black poly pipe approximately 1 metre in length (“<b>The Shorter Poly Pipe</b>”) with force as the gelding swung around and faced the pool.</p> <p>Such actions detailed causing Ghost Hunter to lunge forward and make heavy contact with the equine pool entry.</p>
d.	15:21	As Ghost Hunter pulled away from the pool and towards the entry/exit gate, you repeatedly struck ‘Ghost Hunter’ over the rump, back and hind legs on numerous occasions with <b>The Poly Pipe</b> , with many of the strikes being with force. Such actions causing Ghost Hunter to lunge forward and make heavy contact with the equine pool entry.
e.	15:22	<p>You poked Ghost Hunter in the head with <b>The Poly Pipe</b>.</p> <p>You struck Ghost Hunter on several occasions with force using <b>The Poly Pipe</b> on the gelding’s rump and hind, causing Ghost Hunter, to make heavy contact with the pool entrance and rear, resulting in its front legs being caught over the entrance rail.</p> <p>You struck Ghost Hunter in the head with <b>The Poly Pipe</b> on approximately 12 occasions.</p>
f.	15:23	Ms Simmonds struck Ghost Hunter with force using <b>The Poly Pipe</b> to the side and rear on numerous occasions.
g.	15:24	You punched Ghost Hunter in the vicinity of the head with a closed fist. The force of the punch caused Ghost Hunter to react aversively and move backwards.
h.	15:25 to 15:27	You, together with Ms Janson and Ms Simmonds, forcefully pulled against Ghost Hunter for an excessive period of time with lead ropes in an attempt to force the gelding into the pool, causing excessive flexion of the neck. During such period Ghost Hunter was sweating and was displaying aversive behaviour.

4. Such conduct detailed above resulting in Ghost Hunter being mistreated, displaying aversive flight behaviour and sustaining the following injuries.
  - a. Generalised swelling over the bridge of the nose extending from the rostral border of the facial crest to the nostril.
  - b. Abrasions to various locations, including but not limited to the forehead and cranial aspect of the right stifle.

3. As can be seen from the above, licensed foreperson Ms Ally Simmonds and licensed stablehand Ms Karina Janson were also charged with breaches of AR231(1)(a) arising from the same set of circumstances. Like the Appellant, they entered pleas of guilty. They were both penalised by suspension of their licence for 2 months. The Appellant was disqualified for a period of 10 months on each charge. The Stewards determined that the base penalty for each breach of the rules was a 12-month disqualification which was reduced to 10 months on account of his pleas of guilty, and partial acceptance of the particulars. They further determined that the penalties should be served concurrently.
4. The Appellant appealed to the Panel against the severity of the penalty imposed upon him. He was represented by Mr P. O'Sullivan, solicitor. The Stewards were represented by Mr M. Van Gestel, the Chairman of Stewards for Racing NSW.
5. No oral evidence was called at the appeal hearing. An Appeal Book containing the transcript of the Stewards' Inquiry and the various exhibits from that Inquiry were tendered on appeal. The exhibits have retained their same number before the Panel. These include Exhibits 12 and 13 which is film of the incident the subject of the charges that was captured by a CCTV camera at the Scone pool.

## **Facts**

6. At the commencement of the appeal hearing Mr O'Sullivan advised the Panel that the Appellant now accepted all particulars in relation to the two charges. The only particular that was vaguely contended was particular 4 relating to the injuries said to have been suffered by the horse. Although no evidence was called, the submission was made that the injuries particularised might have been caused by some equipment worn by the horse. However, amongst the exhibits is a veterinary report by Dr Rose Bensley, veterinarian, dated 12 February 2022 which contained these details following examination of the horse:

“7     *Generalised swelling was evident over the bridge of the nose, extending from the rostral border of the facial crest to the nostrils.*

8     *Abrasions were visible in various locations, including (but not limited to) the forehead and craniolateral aspect of the right stifle.”*

7. Given the observations made by Dr Bensley were made one day after the incidents the subject of the charges, the Panel is comfortably satisfied that the observations of injury made by Dr Bensley are consistent with and were caused by the horse being struck in the head on multiple occasions by the Appellant with the poly pipe.
8. The film of the incident at the pool supports the particulars to both charges. It shows the Appellant striking the horse with a 1.6m long poly pipe on multiple occasions on its side and rump in order to “encourage” the horse to get into the pool. The horse is struck forcefully. The film also shows the Appellant hitting the horse in the head with the poly pipe on multiple occasions. The film shows the Appellant punch the horse in the head. It shows excessive pulling on lead ropes by both the Appellant, Ms Janson and Ms Simmonds in an attempt to get the horse to go into the pool.
9. Throughout all of this conduct, the horse appears to be in a state of distress, and to otherwise be reacting in the manner outlined in the particulars. To the extent that any criticism could be made that the Panel’s view that the horse was in a state of distress is not an expert view, it is supported by expert opinion: see the observations of Dr T. Koenig, (then) Chief Veterinary Officer of Racing NSW, in his report dated 24 February 2022, having observed the film.

### **Proper approach to imposing penalties**

10. As has been said in other decisions of the Panel, the purpose of imposing penalties for breaches of the Rules is not to punish the offender. The purpose is to protect the sport, uphold its integrity, and to deter conduct in breach of the Rules.
11. The penalty to be imposed for a breach of the cruelty rules is at the discretion of the Panel. That discretion, however, must be exercised in such a manner as to fulfil the principal purpose of imposing penalties, being the protection of the sport. Any principled penalty will of course also be proportionate to the seriousness of the offence. As the Panel said in *The Appeal of Lisgny* (RAP, 9 June 2021) and repeated in *The Appeals of McLean, Henkel and Olden* (RAP, 21 December 2021), acts of cruelty against racehorses in breach of AR231(1)(a) involve amongst the most serious offending under the Rules. Any licensed person who intentionally engages in an act of cruelty against a horse will almost invariably be disqualified, and frequently for a

significant period of time: see *Lisgny* at [13]-[14] and [20]; repeated in *McLean & Ors* at [24].

12. Any subjective circumstances of an appellant relevant to the determination of penalty will also be taken into account by the Panel, and the Appellant here is of course entitled to a discount for his early plea (further discussed below).

## **SUBMISSIONS**

### **Summary of Mr Van Gestel's submissions**

13. Mr Van Gestel's submission that the offending here is extremely serious was not in contest. He described the conduct evidenced by the film as being damaging to what he referred to as Racing's "social licence". We take that submission to mean that the Appellant's conduct is damaging to the acceptance and approval of the public for the sport of racing and the industry as a whole. That submission is accepted. Mr Van Gestel's submission that the conduct is damaging to Racing's social licence is not an exaggerated position. It is a measured observation supported by the evidence in this appeal. At a minimum, the conduct evidenced by the film and particularised in the two charges have the potential to do enormous damage to Racing. It would be difficult to overstate that.
14. Finally, Mr Van Gestel drew the Panel's attention to a range of precedent penalties for similar offending. They confirm the Panel's views as set out in *Lisgny* and *McLean and Ors* that deliberate acts of cruelty will almost invariably result in disqualifications.

### **Summary of Appellant's submissions**

15. Mr O'Sullivan conceded that the Appellant's conduct warranted disqualification. Neither he, nor his client, offered an excuse for the conduct. The submission was made that the Appellant had lost his cool. It was conceded by the Appellant that he "went too far" and that he "lost his head".
16. Mr O'Sullivan informed the Panel that Mr Schmetzer intends to seek help in managing his impulses or lack of control through a counsellor. The Panel accepts that this is the Appellant's intent, and has taken that into account in determining penalty.

17. The Appellant has recently been suspended for an incident involving his sister, and also disqualified in relation to a matter that is unrelated to the charges here, although it concerned a violent incident. Those breaches of the Rules, and the one before the Panel now, arguably emphasise that the Appellant's stated intention in seeking professional help is a good and perhaps overdue thing.
18. In summary, whilst not disputing that a disqualification was appropriate, Mr O'Sullivan submitted that the 12-month starting point for each breach imposed by the Stewards was excessive. He also submitted that the Appellant should now receive a full discount for his pleas in complete acceptance of the particulars of each charge.

### **Resolution**

19. The Panel has taken into account all submissions made by both Mr Van Gestel and Mr O'Sullivan. In particular for the Appellant, in addition to the matters referred to above, we have had regard to the fact that any disqualification will obviously cause him severe financial hardship. In this regard, we note that he employs at least one full-time member of staff, he has had up to 20 horses in training, that for his entire working life he has relied on the racing industry for his income (whether as a jockey or subsequently as a trainer), and that he has financial obligations in relation to the lease over his stables.
20. Further, we have had regard to various matters that in recent months have placed the Appellant under stress. These relate to some family difficulties that do not need to be spelt out in these Reasons, as well as some incidents of aggravation involving another stable. That should not be taken by the Panel as an attribution of blame to any party – it is merely a recognition that the Appellant has been under stress.
21. Even taking every matter into account that can be put in mitigation for the Appellant's conduct, all members of the Panel were greatly disturbed by what we saw in the film. This appeal involves really serious offending, a matter appropriately accepted by Mr O'Sullivan on the Appellant's behalf. That demonstrates to us, with an eye to the future, that the Appellant at least has proper insight into the seriousness of his conduct, and is contrite. However, the fact remains that his conduct involves very grave breaches of the Rules. As a result, we are unanimously of the view that the proper penalty for each charge was a 12-month disqualification as imposed by the



Stewards. The Stewards imposed a 10-month concurrent disqualification taking into account the Appellant's pleas of guilty while noting that at least at the Stewards' Inquiry he did not accept every particular. There was some suggestion that a further discount should be applied now, given that the Appellant has accepted all the particulars to the charges. We do not agree. We consider the 2-month discount to be sufficient. This is particularly so given that the conduct here was caught on film. There is always utility in a plea of guilty, but it would frankly have been impossible, given the film, for the Appellant to suggest he had not breached these Rules on any rational basis. As such, we agree with the Stewards that a 10-month concurrent disqualification for the breaches of the Rules is the appropriate penalty. The appeal is dismissed.

**Mrs Foley and Mr Murphy**

22. We agree with the above reasons and orders set out below.

**Orders**

23. The Panel makes the following orders:

- (1) Appeal against severity of penalty dismissed.
- (2) Penalty of a period of disqualification of 10 months on each charge to be served concurrently is confirmed. In view of a prior disqualification currently being served, this further disqualification commences on 3 June 2022, and will expire on 4 April 2023 on which day the Appellant may reapply for his licence.
- (3) Appeal deposit forfeited.