Queensland Racing Appeals Panel

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-124
Name	Masayuki Abe
Panel	Mr K J O'Brien AM (Chairperson) Ms D Condon (Deputy Chairperson) Mr P Cullinane KC (Panel Member)
Code	Thoroughbreds
Rule	Australian Rules of Racing 115(1)(c) *A jockey or apprentice jockey must not bet, or have any interest in a bet, or facilitate a bet, on any race* Australian Rules of Racing 115(1)(e) *A jockey or apprentice jockey must not bet, or have any interest in a bet, on any race or contingency related to thoroughbred racing involving a race in which he or she is riding*
Penalty Notice number	PN-010903 PN-010904
Appearances & Representation	Applicant: Mr T Ryan KC Instructed by Clutch Legal Respondent: Ms E Ballard (Queensland Racing Integrity Commission)
Hearing Date	10 December 2024
Decision Date	20 December 2024
Decision	Pursuant to 252AH(1)(a) the Racing Decision is Confirmed

Case References	*James McDonald v Racing New South Wales 2017 NSWSC 1511* *Ings v Racing New South Wales 2022 NSWSC 1127* *Racing NSW v James McDonald Racing Appeals Panel NSW 10 April 2017* *Ings v Racing NSW Racing Appeals Panel NSW 2 May 2022* *Racing Victoria Stewards v Martin Kelly 19 June 2019*

Introduction

[1] The Applicant in this matter is licenced jockey Masayuki Abe. On the 27 November 2024, the Applicant was found guilty of two offences against the Australian Rule of Racing 115(1) and received by way of penalty, a licence disqualification of 16 months.

[2] He now makes application to this Panel pursuant to Section 252 AB of the *Racing Integrity Act 2016* ("the Act") for a review of that decision.

The Relevant Rules

[3] AR115, the Rule under which the Applicant was charged, provides as follows:

AR 115 Jockey and apprentice jockey misconduct

(1) A jockey or apprentice jockey must not:

(a) engage in misconduct;

(b) other than from his or her nominator, accept or agree to accept any money, gift, or other consideration in connection with a horse in a race without the consent of the Stewards and his or her nominator;

(c) bet, or have any interest in a bet, or facilitate a bet, on any thoroughbred race or contingency relating to thoroughbred racing in any jurisdiction anywhere in the world;

(d) be present in the betting ring during a race meeting;

(e) bet, or have any interest in a bet, or facilitate a bet, on any thoroughbred race or contingency relating to thoroughbred racing involving a race in which he or she is riding in any jurisdiction anywhere in the world.

(2) For the purposes of this rule, "bet" includes a lay bet.

(3) If a jockey or apprentice jockey breaches subrule (1)(e), a disqualification of not less than 2 years must be imposed unless there is a finding that a special circumstance exists or the relevant race occurred outside Australia, in which case that penalty may be reduced.

[4] AR 283 makes the following provisions in relation to penalties imposed for breaches of the Rules:

AR 283 Penalties

(1) Subject to subrule (3), a person or body authorised by the Rules to penalise any person may, unless the contrary is provided, impose:

(a) a disqualification;

(b) a suspension;

(c) a reprimand; or

(d) a fine not exceeding $100,000.

(2) Further to subrule (1), a disqualification or suspension may be supplemented by a fine.

(3) In respect of a breach of AR 132, the Stewards may, in addition to the penalties identified in subrules (1) and (2), order the forfeiture of the rider's riding fee and/or forfeiture of all or

part of the rider's percentage of prize money, notwithstanding that the amount exceeds $100,000.

(4) Unless otherwise ordered by the person or body imposing the penalty, a disqualification or suspension imposed under subrules (1) to (3) is to be served cumulatively to any other suspension or disqualification.

(5) Any person or body authorised by the Rules to penalise a person may in respect of any penalty imposed in relation to the conduct of a person and other than in relation to a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding 2 years, on terms they think fit.

(6) Where a person breaches any of the rules listed below, a 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, in which case that penalty may be reduced:

(a) AR 115(1)(e): 2 years;

(b) AR 116(1): 2 years;

(c) AR 129(5): 3 years;

(d) AR 229(1)(b): 5 years;

(e) AR 231(2)(a): 2 years;

(f) AR 243(1): 2 years;

(g) AR 244(1): 3 years;

(h) AR 248(1): 2 years;

(i) AR 249(1): 6 months; and

(j) AR 255(1) (subject to the conditions in AR 255(2)): 12 months

(7) A person or body authorised by these Australian Rules to suspend or disqualify any trainer may defer the commencement of the period of suspension or disqualification for no more than 7 clear days following the day the suspension or disqualification was imposed, and upon terms and conditions considered fit.

(8) Notwithstanding that the commencement of a period of disqualification may be deferred under subrule (7), 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.

[5] Reference should also be made to LR 117B which provides as follows:

LR.117B.

For the purposes of these Rules and the imposition of a penalty under AR 283(6), a special circumstance may be found if:

(a) the person has i. pleaded guilty at an early stage; and ii. assisted the Stewards and/or Racing Queensland, after the imposition of a penalty on that person, in the investigation or prosecution of a breach of the Rules; or

(b) the person proves on the balance of probabilities that at the time of the commission of the offence, he or she: i. had impaired mental functioning; or ii. was under duress that is causally linked to the breach of the Rule and substantially reduces his or her culpability.

(c) in the case of offences under AR 249, 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.

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

The Charges

[6] The Applicant had been charged with two offences against AR 115(1) which prohibits betting by a licenced jockey. The first offence alleged a breach of AR 115(1)(c) in that the Applicant, between 20 February 2023 and 30 January 2024, had placed 50 bets on Australian or international races. The second offence alleged a breach of AR 115(1)(e) in that, between 26 February 2023 and 30 January 2024 the Applicant had placed four bets on three races in which he was riding as a jockey. Those three races had taken place on 3 June 2023, 22 September 2023 and 21 January 2024.

[7] The Applicant had pleaded guilty to both of these charges. In respect of the second charge, which was rightfully considered by the Stewards to be the most serious of the two, a disqualification period of 16 months was imposed. In determining the length of that disqualification, the Stewards took into account the Applicant's "previously clear record" and "his admissions and cooperation throughout…the hearing"[1]. In the Steward's assessment, each of those two factors attracted a discounting of four months from the head penalty of a two-year disqualification, thereby leading to an eight-month discount from the two year disqualification period referred to in AR 283(6)(a) and giving rise to the period of 16 months disqualification imposed. In relation to the first offence, a concurrent period of three months disqualification was imposed.

[8] The Applicant contends that the penalties imposed on him were excessive in the circumstances. He submits that AR 283(6)(a), properly construed, permits of a penalty other than one of disqualification. He submits that special circumstances exist in his case, such that a suspension from race riding rather than a disqualification is appropriate. In the alternative, he submits that a lesser penalty of 12 months disqualification should be imposed rather than the 16 months the subject of the application.

Mandatory Minimum Penalty

[9] AR 283(6), or AR 196(5) as it was previously numbered, has been judicially considered on two occasions in the New South Wales Supreme Court. The first occasion was in *McDonald v Racing New South Wales*[2]. That case involved a licensed jockey who had been found guilty of an offence involving betting in a race in which he was riding contrary to the Rule then numbered AR 83(d). He received a penalty of an 18-month disqualification of licence. Jockey McDonald appealed to the New South Wales Racing Appeals

[1] Transcript of Stewards' Hearing 22 November 2024, lines 250-253
[2] James McDonald v Racing New South Wales [2017] NSWSC 1511

Tribunal[3] arguing that AR 196(5) allowed for a penalty other than disqualification being imposed in cases where special circumstances were shown to exist. The Tribunal rejected this argument holding that there was no warrant for holding that upon special circumstances being established the determination of penalty enlivened consideration of penalties other than disqualification.

[10] Jockey McDonald then sought leave in the New South Wales Supreme Court for the quashing of the Tribunal's determination, again arguing that, because a special circumstance was established, the mandatory minimum period of disqualification became irrelevant and the Tribunal was free to impose any penalty it considered appropriate such as a suspension, reprimand or fine[4]. The respondent argued that the Rule provided no scope for any reduction of the penalty from a period of disqualification. Once the offence was established, the Tribunal must impose at least the mandatory minimum of two years where a special circumstance is not established. If such a circumstance is established, then the Tribunal may reduce the specified mandatory minimum[5].

[11] In dismissing the Application, Rein J concluded as follows: -[6]

In my view AR196(5) is to be read as:

(a) Imposing a penalty of at least 2 years disqualification for a breach of AR83 (d), unless a finding of special circumstance is made;

(b) If a finding of special circumstance is made, the penalty may be reduced to below 2 years by reason of the special circumstance, but not for any other reason;

(c) Although not strictly relevant in this case, for reasons I have mentioned, I do not think AR196(5) permits the Tribunal, where a special circumstance is established, to change the penalty from a period of disqualification to a suspension, reprimand or fine – that is not a reduction of the penalty referred to in 196(5) but the imposition of a different penalty.

[12] The second occasion on which AR 283(6), or its predecessor, has received judicial consideration was in *Ings v New South Wales Racing*[7]. Ms Ings was a licensed trainer who had pleaded guilty to an offence to which the mandatory penalty requirement of AR 283(6) had application. Since the decision in *McDonald* there had been some minor changes to the wording of the Rule such that it now appeared in its current form. Ms Ings had appealed to the New South Racing Appeals Tribunal[8]arguing that the Rule allowed for a penalty other than disqualification in a case where special circumstances were established. The Tribunal rejected this argument, holding that "the principles dealt with in the Supreme Court and by the Tribunal in McDonald remain apt on this point"[9]

[13] Ms Ings then applied to the New South Wales Supreme Court seeking Judicial review of the Tribunals decision. Baston AJ rejected the argument that the definition of "penalty" in AR2, which included suspension, reprimand and fine as well as disqualification, should in some manner be inserted into AR 283(6) to thereby expand the scope of available penalties beyond disqualification. His Honour said:[10]

[3] Racing NSW v James McDonald Racing Appeals Panel NSW 10 April 2017
[4] James McDonald v Racing New South Wales supra at Para [11]
[5] James McDonald v Racing New South Wales supra at Paras [17]-[18]
[6] McDonald v Racing New South Wales supra at Para [34]
[7] Ings v New South Wales Racing [2022] NSWSC 1127
[8] Ings v Racing New South Wales Racing Appeals Tribunal New South Wales 2 May 2022
[9] Ings v Racing New South Wales (Tribunal) Supra at Paras [311]-[319]
[10] Ings v New South Wales Racing supra at [75]-[77]

75 This reading of the rules is untenable. Both rules use the phrase "that penalty" to identify the subject matter of possible reduction. In each case, the reference is to the minimum period of disqualification which is to be imposed absent special circumstances. There is no plausible constructional choice to be made.

76 In McDonald, Rein J held that the phrase then found in former AR 196(5) which read, after referring to a finding of special circumstances, "whereupon the penalty may be reduced", meant that there was to be a penalty of disqualification but not one necessarily reaching the minimum period. While the reasoning of Rein J was expressed to be obiter, it was clearly correct. The change to the present rule involved the removal of the word "whereupon" and its replacement with "in which case". This change, which was part of a course of modernisation of the rules, involved no change in meaning. The reasoning in McDonald remains correct, notwithstanding the change in wording, which was immaterial.

77. The contention that what may be reduced is the penalty of disqualification, rather than the minimum period, cannot be the preferred reading of the provision. Further, as counsel for the defendant noted, the reworking of the rules occurred some two years after the decision in McDonald. It may be assumed that a body responsible for republishing and, where necessary amending, the Australian Rules of Racing would be aware of a Supreme Court decision regarding the construction of a particular rule. That it did not amend the rule is supportive of the then authoritative construction being accepted as correct.

Submissions and Discussion

[14] Mr Ryan KC who appears for the Applicant does not dispute the correctness of the reasoning in either of the New South Wales decisions. He submits however that the Rule should now be interpreted in accordance with s 48 of the Human Rights Act 2019. The wording of the Rule is not unambiguous, and it can mean either that there may be a reduction in the period of disqualification or that there may be a reduction from disqualification to a penalty lesser than disqualification, such as suspension. He submits that the impact of the Human Rights Act requires that legislation imposing penalties which affect the livelihood of individuals should be construed "in a way that meaningfully recognises the individual merits of the matter, rather than in a way which results in the imposition of arbitrary penalties". [11]The right to own property is a human right recognised in the Legislation and it should either not be limited or limited only to the extent that is reasonably and demonstrably justified in accordance with s8 of the Act.[12]Mr Ryan submits that a penalty other than one of disqualification is both possible and appropriate in this case.

[15] Ms Ballard, for the Respondent, submits that the Panel would apply the reasoning of the well-established New South Wales authorities. She submits that the "mandatory minimum" interpretation is a "proportionate" outcome when regard is had to the considerations set out in s13 of the Human rights Act. She identifies four main factors. Firstly, the mandatory minimum achieves a legitimate objective by maintaining the integrity of racing and deterring misconduct. It is conducive to achieving those statutory purposes. Secondly, there is a rational connection between the mandatory minimum penalty and the objective of deterring breaches of a serious nature. Thirdly, the penalty is necessary to achieve the objective by ensuring that serious breaches are dealt with appropriately. There are only ten Rule

[11] Applicant Outline of Argument Pars [12]
[12] Human Rights Act 2019 s8

breaches to which the mandatory minimum penalty applies. Mr Ryan concedes that the plain purpose of the Rule makers in purporting to increase the applicable penalties for breaches of AR115(1)(e) was to deter activity which might undermine the integrity of racing.[13]Finally, Ms Ballard submits that the penalty is proportionate in the strict sense as it balances the need for need for deterrence with the rights of individuals by allowing flexibility in the case of special circumstances.

[16] The current mandatory minimum penalty for a breach of AR 115(1)(e), or AR 83(d) as it was then numbered, was introduced on 1 March 2013[14]As Rein J observed in *McDonald*, it was one of a suite of Rule changes designed to elevate the significance of infringements of certain Rules.[15]The rule makers clearly felt that the penalties imposed had been insufficiently severe and, said Rein J, the Tribunal could not ignore the seriousness with which an offence against AR 83(d) is to be treated. Rein J went on to consider the submission, not unlike that advanced for the Applicant in the present case, that mandatory minimum penalties can lead to harsh outcomes[16]. Rein J referred to the decision of the High Court in Magaming v R[17] before observing that "if there is some harshness in the penalty imposed by AR 196(5), it is a result of the rule making and it has been imposed for policy reasons to deal with the perceived need for integrity in racing and increased penalties"[18]

[17] In *McDonald*. Rein J. also considered a submission that AR 196(5), being a Rule which imposed a penalty, should be interpreted in accordance with the 'lenity rule' thereby inclining to a construction favourable to the potential recipient of the penalty.[19]Rein j. rejected this submission, holding that 'on close analysis and with consideration of the purpose of the Rule, AR 196(5) is sufficiently clear in its words and necessary intendment"[20]In *Athwal v State of Queensland*[21]Mitchell AJA observed that s48 of the Human Rights Act is but one of the rules of statutory interpretation to be applied, with other rules, in determining the objective meaning of a provision.

[18] The Panel accepts the submissions made on behalf of the Respondent. The rule makers clearly saw breaches of this nature , impacting as they do on the fundamental integrity of the industry, as being of such seriousness as to require a mandatory period of disqualification, We are satisfied that the Rule properly construed does not permit of an outcome other than one of disqualification and we apply the reasoning of Rein J and Baston AJ in the cases referred to above. However, even if we were persuaded by the submission that another interpretation of AR 283(6) was possible, we consider for the reasons set out below that the only appropriate penalty for this offending is one which involves disqualification. That being so, the provisions of AR 283(6) are immediately engaged and absent a finding of special circumstances a period of at least two years disqualification must be imposed.

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[13] Applicant Outline of Argument Para [17]
[14] It seems that change had occurred as the result of disquiet concerning the handling of a case involving Jockey Damien Oliver- See Index of Documents, Doc No, 17 "Damien Oliver Inquiry "2012.
[15] McDonald v Racing New South Wales Supra at para [25]
[16] McDonald v Racing New South Wales supra at Para [27]
[17] Magaming v R (2013) 252 CLR 381
[18] McDonald v Racing New South Wales supra at para [29]
[19] McDonald v Racing New South Wales supra at [19]
[20] McDonald v Racing New South Wales supra at [35]-[36]
[21] Athwal v State of Queensland [2023] QCA 156 at [91]-[93]

Penalty Considerations

[19] The purposes of penalty under the Thoroughbred Racing Penalty Guidelines are threefold.[22] There is firstly the need to maintain standards of integrity and animal care in the thoroughbred code. Secondly there is the need to provide general deterrence to the industry by ensuring that the penalty imposed on an individual for breach action is sufficiently serious to discourage other participants from breaching the Rule. Thirdly, there is the need to provide specific deterrence to the individual contravening the Rule, that is, the penalty imposed on the individual must be sufficiently serious to discourage the particular individual from engaging in similar conduct.

[20] The charge under AR115(1)(c) involved some 50 bets totalling about $3600 over a period of about eleven months. The Applicant has no prior Rule breaches of this nature, but this is clearly not a case of an isolated occurrence. Moreover, he had previously been placed on notice in relation to possible betting activities.[23]A breach of AR 115(1)(c) is a serious offence and one which regularly attracts a period of suspension.[24]Where the offence is committed in conjunction with a breach of AR 115(1)(e), as in this case, a period of disqualification, may not be inappropriate.

[21] Clearly the most serious of the charges here is that involving AR 115(1)(e). Jockeys placing bets in races in which they are participating is conduct which strikes at the very heart of the integrity of the industry. As Ms Ballard has submitted, the purpose of the Rule is to control the conduct of riders in order that the public might have confidence in the propriety of the sport and in the efforts of all competing participants. The Applicant had been placed on notice with regard to betting activity and this is not a case of an isolated incident. Both general and specific deterrence are important considerations. As noted above, in 2013 the current mandatory minimum penalty was introduced to cover conduct of this nature- an indication in itself of the seriousness with which the conduct is viewed.

[22] There were four bets involved in the AR 115(1)(e) offence. Those bets were placed on 3 June 2023, 22 September 2023 (two bets) and 28 January 2024, and involved amounts of $10, $50, $45 and $1000 respectively. The Applicant's betting conduct ceased, apparently of his own volition, in January 2024. In the circumstances we do not consider that any greater period than the mandatory minimum 24-month disqualification is required to achieve the purposes of penalty in this case.

Special Circumstances

[23] The only special circumstances identified in this case is the Applicants plea of guilty and associated general cooperation. None of the other matters referred to in LR 117B have been raised. It is argued for the Applicant that a discount of as much as 50% might be applied to reflect the subjective factors that weigh in the Applicant's favour. However, LR 117B makes no provision for any such discounting. The Respondent contends that a discount of no more than six months (25%) might be allowed for the plea of guilty and that the stewards erred in allowing a further period of four months for the subjective circumstance of the Applicant's "previously clear record".

[24] The Applicant has produced a number of references and statements from trainers in far north Queensland who speak of the hardship that a lengthy disqualification of the Applicant would cause for trainers in the Cairns area where there is already a scarcity of track work riders and trial riders. It is indeed unfortunate that that should be so, and it identifies a problem that racing authorities must

[22] QRIC Thoroughbred Racing Penalty Guidelines 2023 Para 3
[23] Transcript of Stewards Hearing 1 November 2024 LL 44-58
[24] Index to Documents Doc No. 18

confront in a large and decentralised State such as Queensland. There are some rule breaches in which such a consideration may have a bearing on penalty determination. However, when considering the 'mandatory minimum' requirement of AR 283(6) that is a circumstance which arises as a consequence of the Applicant's offending and is not something which can constitute a 'special circumstance" for the purposes of AR 283(6) or LR117B. That is not to say that subjective factors or considerations other than those referred to in LR117B can never be of relevance in determining penalty in cases where the objective seriousness of the breach would lead to the imposition of a penalty of more than the mandatory minimum of a two-year disqualification. As Rein J. observed[25]in McDonald, the reason why such considerations are not given weight at the low end of the scale is a consequence of the introduction of a mandatory minimum.

[25] It is desirable that there should be a level of consistency with penalties imposed for offences such as these and the Panel has been referred to three cases involving betting by jockeys in races in which they were participating. In the *McDonald* case referred to above, the penalty was one of 18 months disqualification. *McDonald* involved only one bet, that for an amount of $1000. The present case involved four bets, the largest of which was for $1000. *In Racing Victoria Stewards v Kelly*[26]a period of 16 months disqualification was imposed in a case involving four bets in races in which the offender was participating, each for a small amount. The Disciplinary Board stated that were it not for his plea of guilty, Kelly was facing "an automatic disqualification of a minimum two years" For a breach of AR 115(1)(c) Kelly received a concurrent penalty of three months disqualification and for a further offence of giving false and misleading information to stewards a cumulative penalty of four months was imposed. The result was a total period of 20 months disqualification. In In *Queensland Racing Integrity Commission v Seymour*[27]the offending involved two bets totalling $700. A penalty of 21 months disqualification was imposed.

[26] The *McDonald* case involved a discounting of 25% from the 24-month minimum penalty prescribed. In *Kelly* the discount was one-third, as it was in this case. In *Seymour* the discount was much less. No case of which we are aware has involved a discounting as large as the 50% contended for by the Applicant. We consider that there is little point embarking on some mathematical calculation of a penalty outcome. On the basis of the penalties imposed in the *McDonald* and *Seymour* cases, a disqualification period of 18 months could be considered as being within the penalty range for the Applicant's offending. However, we consider that the penalty imposed of a 16-month disqualification for the AR 115(1)(e) offence, such as was imposed in *Kelly*, is also within the range appropriate in the circumstances. Given issues of totality, the concurrent penalty of a three-month disqualification for the AR115(1)(c) is also an appropriate outcome.

Decision

[27] Pursuant to section 252AH(1)(a) of the *Racing Integrity Act 2016*, the order of the Panel is that the racing decision the subject of this Application is confirmed.

[25] McDonald v Racing New South Wales supra at [37]
[26] Racing Victoria Stewards v Kelly racing Victoria appeals and Disciplinary Board 19 June 2019
[27] QRIC v Seymour Stewards Report 17 May 2021