

DECISION

Racing Integrity Act 2016, sections 252AH, 252BM

Review application number	RAP-79	
Name	Chloe Butler	
Panel	Mr K.J. O'Brien AM (Chairperson) Mr D. Kays (Panel Member) Mr J. McCoy (Panel Member)	
Code	Harness	
Rule	Australian Harness Racing Rule 156(3) <i>A driver shall not use a whip in an unapproved manner</i>	
Penalty Notice number	PN-009491	
Appearances & Representation	Applicant	Scott Neaves instructed by Ryan Lawyers
	Respondent	Queensland Racing Integrity Commission Norm Torpey
Hearing Date	7 February 2024	
Decision Date	7 February 2024	
Decision <i>(Delivered ex tempore)</i>	Pursuant to 252AH(1)(b) the Racing decision is varied to a 14-day suspension to be suspended after a period of 7 days for a period of 6 months, conditional upon the Applicant not committing any further offences against AHR156(3) during that period	
Case References	<i>Briginshaw v Briginshaw & Anor</i> 1938 60 CLR 336 <i>Nathan Xuereb v HRNSW</i> , Racing Appeals Tribunal New South Wales, 8 August 2022 <i>Graham v QRIC</i> , Racing Appeals Panel RAP 26, 5 July 2023	

Reasons for Decision

- [1] The Applicant in this matter is Ms Chloe Butler. Ms Butler is a licenced harness racing driver who now applies pursuant to section 252AB (1) of the *Racing Integrity Act* 2016 for the review of a racing decision made by Stewards on the 29 January 2024.
- [2] On that day, following a Stewards Inquiry into the running of Race 2 on the Redcliffe Harness Racing Program, the Applicant was found guilty of an offence against Australian Harness Racing Rule 156(3).
- [3] The penalty imposed upon her was a licence suspension of 14 days, commencing at midnight on 7 February 2024.
- [4] Australian Harness Racing Rule AHR156(3) provides:

a driver shall not use a whip in an inappropriate manner.

As to what constitutes an unapproved manner, Australia Harness Racing Rule 156(4) provides:

For the purposes of sub-rule (3) a driver shall be deemed to have used the whip in an unapproved manner in the following circumstances which are not exclusive:-

(a) If the whip is applied excessively, continuously and/or without allowing the horse time to respond.

(b) If the whip is applied when the horse: -

(i) is not visibly responding;

(ii) is not in contention;

(iii) cannot maintain or improve its position;

(iv) is clearly winning;

(v) has passed the winning post at the finish of a race.

(c) (Rule 156(4)(c) repealed, HRA approved 09.12.2021)

(d) If the whip is used in a prodding or jabbing fashion.

- [5] In the present case, the inappropriate manner of whip use is particularised as being “continuous use of the whip in the home straight on the winner of Race 2 Typhoon Torque”.
- [6] At the hearing before the Stewards, the Applicant had pleaded not guilty to the charge and in her Application for Review she asserts that she “did not breach the rule of racing”. She maintains, in essence, that the Stewards decision is not consistent with the evidence given and the video footage of the race, and that in any event, the penalty imposed is manifestly excessive.
- [7] In her evidence before the Stewards the Applicant denied the continuous use of the whip. Although she did strike the horse, the predominant use of the whip was to “swish it between the horse's tail” and to “put it between (the horses) legs”. Although it might appear that she was striking the horse continuously, she was not actually doing so. In essence, the Applicant maintained that there was a pause between whip applications, those pauses being marked by alternate use of the whip between the horses' legs and in swishing its tail.
- [8] The Stewards, having viewed the footage of the race, rejected the explanation provided by the Applicant and found her guilty of the charge. In assessing penalty, the Stewards had regard to the evidence, to the Penalty guidelines, and to the Applicants driving record under the Harness Racing

Rules of more than 5 whip offences in the previous 12 months. As indicated, the penalty imposed was one of 14 days suspension of licence.

- [9] This Panel must make its own determination of the matter and form its own assessment of whether the Respondent has proven the Applicant to have been guilty of the offence as charged. The Panel accepts the standard a proof to be on the balance of probabilities in accordance with the observation of the High Court in *Briginshaw v Briginshaw*¹.
- [10] Before this Panel, the Applicant has given evidence in the form of an Affidavit in which she deposes essentially in the same terms as her evidence before the Stewards hearing.
- [11] Her Affidavit includes the following:

8. Having reviewed the footage, I maintain that while I did engage use of the whip over the concluding states of the race, some was with pause, in so far as I paused between 'strikes' by using the whip to otherwise encourage the horse.

a. I undertook the other encouragement, during the said 'pauses' by using the whip between the horse's legs and around its tail.

b. Such application is not striking of the horse with the whip.

c. Such application enabled the horse to respond to the urging of the strikes with the whip, prior to any further strikes being applied.

9. I did not continuously strike the horse with the whip along the final straight, or at all.

10. While I accept that in the footage it is hard to make out the exact movements I made with the whip, I say that there are two different actions apparent.

a. There is a downward action where I am doing what I have described as the strike.

b. There is a more 'round' action, which is where I am undertaking the required 'pause' between any strikes and am otherwise using the whip to encourage the horse by tickling between its legs and/or pushing its tail around.

i. An example of this is where at about the top of the home straight the tail can be seen entangled with the whip, resulting from such motion.

- [12] On the 29 August 2018, the Queensland Racing Integrity Commission issued an industry notice to harness racing participants to provide information to inform participants of the manner in which the new whip rules would be implemented and applied from 1 September 2018.

- [13] So far as Australian Harness Rule of Racing AHR156(3) was concerned, the following Steward's interpretation was provided.

"Drivers must demonstrate a pause in their use of the whip, continuous use without a pause will be considered to be a breach of the rule".

The reference to drivers being required to demonstrate a pause in the use of the whip should not be seen as a reversal of the responsibility of proof whereby some responsibility in that regard is cast upon the driver. The onus of proving the charge lies throughout with the prosecuting authority, the

¹*Briginshaw v Briginshaw & Anor* 1938 60 CLR 336

Queensland Racing Integrity Commission. The document, however, does afford some assistance as to the way the rule is to be applied.

[14] The word continuous or continually is not defined in the rules, and that term should therefore bear its ordinary meaning. The Shorter Oxford English Dictionary defines continuous in the following way:

“Characterised by continuity; extending in space without a break; uninterrupted in time or sequence; acting without interruption; connected.”

[15] To make out this charge under AHR 156(3), the Respondent must establish to the required standard, that the Applicant used the whip in a continuous manner in the home straight without allowing the horse time to respond. That requires proof that the whip was used without pause. For example, if the whip was used in an intermittent manner, as the Applicant appears to be describing, or if the Respondent has failed to prove that it was not so used, then the Respondent would not have established its case.

[16] This Panel has before it all the material that was before the Stewards hearing including a recording of the hearing itself as well as the footage of the race in question.

[17] It is the race footage which is of particular importance here. Mr Neaves, who appears for the Applicant, submits that on viewing the footage, there are two different bodily movements made by the Applicant during the course of about the last 250 metres of the race. The first, he argues, is associated with the application of the whip to the horse, and the other with some other encouragement by swishing of the whip through the tail.

[18] He submits that upon viewing the footage the difference in such movements will be apparent. He submits that having regard to the footage when considered in light of the explanation and evidence given by the Applicant as to their being two separate and different movements to consider, there is insufficient evidence to enable the Panel to find the charge made out to the requisite standard.

[19] The Respondent, on the other hand, contends that the race footage is compelling in showing the Applicant using the whip in a continuous manner, contrary to the requirements of the rule.

[20] This Panel has had the opportunity to review that footage on numerous occasions and considered it in association with the submissions we have heard this morning.

[21] It is the determination of this Panel that we cannot detect any discernible change in the whip action of the Applicant in the home straight. Nor can we identify any identifiable pause in the use of the whip during that part of the race.

[22] This Panel is satisfied that the charge is established to the requisite standard.

[23] The Applicant has maintained further that the penalty imposed upon her was excessive in the circumstances.

[24] The Harness racing Penalty Guidelines to which we must now have regard are stated to have been drafted with careful consideration of relevant penalty precedents for the same or similar rule breaches in similar circumstances.

[25] The Penalty Guidelines have been designed to act as a general deterrent by ensuring that the penalty imposed on an individual for a rule breach is sufficiently serious to discourage other licensed participants from breaching the rule as well as taking into account the need for specific deterrence,

that is, the penalty imposed on individuals for the rule breach, must be sufficiently serious to discourage the offender from reoffending.

- [26] We should quite keep in mind the proceedings of this nature before this Panel are not penal in nature. The imposition of civil penalties such as these are concerned primarily with issues of deterrence and, of course, with the need to maintain appropriate standards within the industry.
- [27] The Penalty Guidelines provide a penalty starting point for particular charges. Each case must however be assessed according to its own merits, taking into account the penalty considerations that are set out in the guidelines.
- [28] The penalty considerations include the circumstances of the offence, including mitigating or contributing factors, the degree of culpability involved, whether there is an early plea of guilty, the frequency of participation of the Applicant in the harness racing industry, the offence record of the Applicant and also the race status.
- [29] So far as this last-mentioned consideration is concerned it is noted that this incident occurred in a weekday provincial race, of low monetary value.
- [30] We have been referred to a decision of *Xuereb v Racing Appeals Tribunal NSW*². In that case, the Tribunal said this at paragraph [32]:

This is not a case for a dissertation on the rules relating to penalty in civil disciplinary matters. Simply put, the Tribunal has to find a protective order. In doing so, it is apparent that a case of this nature with the facts surrounding it require that the message that is given to this individual driver and the industry generally as well as the supporting and unsupporting public is that continued breaches of this particular rule will warrant that the penalties cannot be as lenient as they might have been in the past.

- [31] Those observations are not inappropriate to the circumstances of this case. However, the guidelines recognise that each case must be considered according to its own merits and in an appropriate case a penalty that is either lesser than or greater than that referred to in the guidelines may be imposed.
- [32] The relevant Penalty Guideline here for whip offences suggests that a starting point for the penalty is a 14 day suspension where, as here, the Applicant has 6 such offences in the preceding 12 months. Three of those are for breaches of AHR156(3), the others are for breaches of the AHR156(2)(a) or 156(7). Although those offences do involve whips, they are not of the same nature as AHR156(3), which is concerned with the continuous use of the whip. The Panel notes that in *Graham v QRIC*³ this Panel recognised that an automatic disqualification of 14 days should not apply in every case of this nature.
- [33] The Applicant's record cannot be described as a good one. Although she is young, she is by no means inexperienced. Her Affidavit indicates that she has had some 2,869 race drives for a total of 335 winners. She commenced driving in 2018.
- [34] On the other hand, by way of mitigation, we accept that she has made a conscious effort to improve her whip usage. We accept her financial circumstances in that a lengthy suspension may make the payment of a fine difficult, though that should not of itself preclude the imposition of a monetary penalty that is otherwise reasonable and appropriate. The Panel considers that the appropriate course here is to mark the breach by the imposition of a period of a suspension. Such an outcome is necessary to achieve the purposes of penalty in this case.

² *Nathan Xuereb v HRNSW*, Racing Appeals Tribunal New South Wales, 8 August 2022

³ *Graham v QRIC*, Racing Appeals Panel RAP-26, 5 July 2023

- [35] We consider, however, that although a head penalty of a 14 day suspension is appropriate. The Applicant's efforts to improve her situation entitle her to an opportunity to demonstrate that she is genuine in that regard. We consider, therefore, that part of that suspension should itself be suspended, such that it will hang over her head for some time to come.
- [36] Pursuant to section 252AH of the *Racing Integrity Act* 2016, the decision of this Panel is to vary the racing decision by ordering that the 14 day suspension is confirmed. We further order that penalty should be suspended after a period of 7 days for a period of 6 months, conditional upon the Applicant not committing any further offences against AHR156(3) during that period.

racingappealspanel.qld.gov.au