

DECISION

Racing Integrity Act 2016, section 252AB

Review application number	RAP-59	
Name	David Vandyke	
Panel	Mr Kerry O'Brien (Chairperson) Mr Peter O'Neill (Deputy Chairperson) Ms Dianne Condon (Deputy Chairperson)	
Code	Thoroughbreds	
Rule	Australian Rules of Racing Local Rule 68(1) <i>Further to the provisions of AR 181 if it is intended to withdraw a final acceptor from any race notice or withdrawal of the horse shall be given to the Racing Australia Service Centre not later than the time advertised in the approved program for the Race Meeting and thereafter a horse shall not be withdrawn except by permission of the Stewards.</i>	
Penalty Notice number	PN-008897	
Appearances & Representation	Applicant	Self-represented
	Respondent	Queensland Racing Integrity Commission Paul Zimmerman
Hearing Date	1 November 2023	
Decision Date	1 November 2023	
Decision <i>(delivered ex tempore)</i>	Pursuant to 252AH(1)(b) the Racing decision is varied to a \$200 fine.	
Case references	<i>R v Anderson; ex parte Ipec, Air Pty Ltd</i> (1965) 113 CLR 177 <i>Glen Baker v QRIC</i> RAP-18, 30 May 2023	

Reasons for Decision

- [1] Mr David Vandyke is the Applicant in this matter and is a licenced trainer of Thoroughbred racehorses.
- [2] On 25 September 2023, Mr Vandyke was found guilty by Stewards of an offence against Local Rule 68(1) of the Australian Rules of Racing and was fined \$500.00.
- [3] Local Rule 68(1) is in the following terms:
- “Further to the provisions of AR 181 if it is intended to withdraw a final acceptor from any race, notice of withdrawal of the horse shall be given to Racing Australia Service Centre not later than the time advertised in the approved program for the Race Meeting and thereafter a horse shall not be withdrawn except by permission of the stewards.”*
- [4] In relation to the charge that was brought by the Stewards against the Applicant the particulars of that charge were as follows.
- “Ipswich 25/09/2023 Race 8 – Failure to scratch Hollywood Park (NZ) within the prescribed time, subsequently costing an emergency a run.”*
- [5] It is uncontroversial in this matter that the relevant time was 7:30am on the morning of 25 September 2023.
- [6] The Applicant pleaded guilty to the charge, but now seeks a review of the decision pursuant to Section 252AB of the *Racing Integrity Act 2016* on the ground that the penalty imposed was excessive.
- [7] By way of factual background, the Applicant registered Hollywood Park to race in Race 8 at the Ipswich Racecourse on 21 September 2023.
- [8] The Applicant scratched the horse from the race on the evening of Tuesday, 19 September 2023, before the prescribed scratching time for the Ipswich meeting. In the summary that the Applicant has provided that accompanies the Application for Review, the Applicant confirmed that the reason for the scratching was because Hollywood Park had drawn a wide barrier.
- [9] The Applicant had also registered Hollywood Park to compete in a Lismore race meeting on the same day, 21 September 2023. On 21 September 2021, the Applicant ultimately ran the horse at Lismore in Race 8 at 5:10pm.
- [10] On 21 September 2023 at approximately midday a decision was made by the Stewards to call off the Ipswich race meeting due to the condition of the track.
- [11] On the same day, Racing Queensland rescheduled the called off Ipswich meet for Monday 25 September 2023.
- [12] An industry notice was posted on the Racing Queensland (RQ) website, advising that the postponed Ipswich Turf Club meeting had been rescheduled to Monday 25 September 2023. In this notice, it stated:
- In accordance with the standard RQ policy, the same race fields will be retained and scratchings reinstated.*
- [13] Another industry notice with a similar message was also published by Racing Australia on its website on 21 September 2023.

- [14] Two notifications by SMS text message were sent to industry participants by Racing Queensland, firstly on 21 September 2023 at approximately 4:38pm and then at approximately 6:25am on Friday 22 September 2023.
- [15] There is no apparent dispute that the Applicant received those text messages.
- [16] The Respondent QRIC has also provided the Panel on the morning of the hearing with a copy of an SMS text message sent by Cameron Partington from the Australian Trainers' Association about the rescheduling of the Ipswich race meeting. In that text message it was mentioned that scratchings from the original Ipswich meeting would be reinstated.
- [17] Mr Vandyke failed to see any of the text messages or emails that had been sent regarding the rescheduling of the Ipswich race meeting to Monday 25 September 2023.
- [18] The Applicant has provided copies of the text messages sent by Racing Queensland and points out in the submissions accompanying the Application for Review, that in neither of those text messages is it mentioned that the scratchings would be reinstated.
- [19] The Applicant contends that usually, text messages received from Racing Queensland about rescheduled race meetings also advised that any scratchings would be reinstated. He has provided an example of such a text message sent by Racing Queensland on 28 August 2022 in relation to a race meeting at Aramac.
- [20] Both in the Stewards' Inquiry and before the Panel during the hearing of the application for review, the Applicant admitted that he had not read any of the SMS text messages sent about the rescheduling of the Ipswich race meeting to Monday 25 September 2023 prior to 7:30 am on Monday 25 September 2023.
- [21] In circumstances where the Applicant admits that he did not read any of the above communications including the SMS text messages sent by Racing Queensland, the failure by Racing Queensland to mention the scratched horses being reinstated could not have misled the Applicant. Consequently, this alleged failure by Racing Queensland had no impact on the failure of the Applicant to scratch Hollywood Park in time, and it is of limited relevance in the determination of this hearing.
- [22] The consistent explanation that the Applicant has provided, at the Stewards' Inquiry, the Preliminary Hearing conducted by the Racing Appeals Panel, and in this hearing, is that he had effectively put the Ipswich race meeting completely out of his mind following Hollywood Park being scratched from the initial race.
- [23] On 25 September 2023 at approximately 7:29am, Senior Steward Paul Zimmerman attempted to call the Applicant to confirm whether Hollywood Park was still running. The Applicant confirmed in the submissions accompanying the application for review that he missed this call due to having another appointment.
- [24] It has subsequently become apparent that the cause of this was that he was attending a medical appointment from 7:00am and therefore he was not aware of that phone call until after that medical appointment.
- [25] The Applicant did not scratch the horse before the prescribed new scratching time on the newly allocated day of the race meeting, namely by 7:30am on 25 September 2023.
- [26] At approximately 7:59am the Applicant returned Senior Steward Zimmermann's missed call and advised that Hollywood Park would be scratched.

- [27] As a result of the late scratching of Hollywood Park, one of the emergencies, Ascot Express was denied the opportunity of competing in the race.
- [28] As noted above, on 25 September 2023, Stewards conducted an inquiry and found the Applicant guilty of the charge and imposed \$500.00 fine as the penalty.

Penalty

- [29] In dealing with the issue of penalty, the Panel in an application of this nature must conduct its own review of the material and form its own determination as to the appropriate penalty to be imposed, considering all of the factual circumstances and the guidance provided by the Penalty Guidelines.
- [30] The Penalty Guidelines (‘the Guidelines’) have been published by the Respondent, the Queensland Racing Integrity Commission. In clause three the Guidelines note that the penalty guidelines have been designed to identify the starting point for the imposition of a penalty for a particular offence.
- [31] The Guidelines further confirm in Clause three that the purpose of a penalty under the rules is to:
- maintain standards of integrity and animal care through the enforcement of the rules of racing;
 - to provide general deterrence to the industry by ensuring that any penalty imposed is sufficient to discourage other participants from breaching the rule; and
 - to provide specific deterrence to the individual.
- [32] Clause five of the Guidelines details how decisions are made pursuant to the Guidelines. Under Clause five it is noted that the Thoroughbred Rules of Racing empower the Commission Stewards to impose a reprimand, caution, monetary fine, suspension of a licence and disqualification from participating in a code of racing, as well as the power to warn off participants from participating in the Thoroughbred code of racing.
- [33] The Guidelines lists penalty starting points for nominated offences listed in the schedule, however, the Guidelines specifically confirm that Stewards will review and assess each participant's case on its own merits.
- [34] Clause five of the Guidelines additionally provides that imposing a penalty involves a balance between the severity of the offence, the need for deterrence for both the individual concerned and the industry participants generally, and any mitigating factors.
- [35] Clause five also relevantly provides various (non-exclusive) considerations to be considered when determining an appropriate penalty for a breach of the rules. These include:
- the circumstances of the offence;
 - the degree of culpability involved in the offending;
 - whether there has been an early plea of guilty;
 - the disciplinary record for the person charged;
 - the frequency of participation in racing; and
 - the race status.

- [36] The Panel also specifically notes that the Guidelines provide that a breach of local rules 68(1) by a trainer “will be penalised **at the discretion of the Stewards**”.¹ (emphasis added)
- [37] In accordance with Clause three of the Penalty Guidelines the purpose of imposing penalties is not to punish the offender. As noted by the Guidelines, issues of general and specific deterrence and the maintenance of standards of integrity and animal care in the Thoroughbred code are all relevant considerations in determining the appropriate penalty.
- [38] in the matter of *Glen Baker*², Mr Baker faced the same charge as Mr Vandyke, pursuant to Local Rule 68(1) arising from a late scratching of his horse. In that matter, Mr Baker put forward a number of extenuating circumstances to explain his failure to scratch the horse within time.
- [39] The decision of the Racing Appeals Panel in that matter was to vary the penalty from a \$200.00 fine to a reprimand.
- [40] In the *Baker* decision, the Racing Appeals Panel noted at paragraph [21] as follows:
- AR 283 sets out the range of penalties that might be imposed for a breach of the Rules. Although the guidelines provide for this offence a starting point of a \$200.00 fine, that is not to say that a much lesser penalty cannot be imposed. So much is clear from the wording of AR 283*
- [41] This Panel adopts that reasoning as being correct and applicable in the present review.
- [42] It is apparent from the audio of the Stewards Inquiry conducted on 25 September 2023 at timestamp 1min 30 sec of the second audio file that the Stewards in determining the penalty to be imposed in relation to the Applicant’s breach of LR 68(1), felt that they were constrained or obligated by the penalty guidelines to impose as a minimum penalty a fine of \$500.00.
- [43] After noting that the minimum penalty identified by the Guidelines as a starting point for a breach of LR 68(1) where the breach costs another runner a start was a \$500.00 fine, Mr Zimmerman states as follows:
- “So that is what we’re required to put in place today, that is what I was trying to head off this morning, I do understand what you have put forward but that was what I was trying to head off this morning, the phone call I did to you at 7:29, which unfortunately you did not answer, so that is what we have to put in place David and against our decision you do have a right of appeal.”*
- [44] The Panel notes that where a statute provides an unconfined discretion, that discretion ought not be exercised capriciously, arbitrarily or inflexibly. That was indicated by the High Court in decision of *R v Anderson; ex parte Ipec Air Pty Ltd*³.
- [45] That principle, identified by the High Court, applies equally to the interpretation and application of the Penalty Guidelines.
- [46] The audio of the Stewards Inquiry appears to confirm that the Stewards have exercised the discretion provided by the Australian Rules of Racing in AR 283, the Local Rules in LR 68(1) and the Penalty Guidelines in this matter inflexibly and as a consequence, the Stewards did not give consideration to relevant mitigating factors that applied to the Applicant in the circumstances.

¹ Penalty Guidelines 1.8.1

² *Glen Baker v QRIC RAP-18*, 30 May 2023.

³ *R v Anderson; ex parte Ipec Air Pty Ltd* (1965) 113 CLR 177.

[47] At paragraph 19 of the decision of the Racing Appeals Panel in the matter of *Baker*⁴ the Panel noted in relation to Mr Baker:

[19] It is to be accepted that he was an experienced trainer and therefore should have known the proper scratching time. His ignorance in that regard does not afford him any defence, but it is a matter which bears upon the culpability of his conduct. This is not a case which involves any deliberate flouting of the rule or any wilful blindness to the rule.

[48] Those observations appear to be equally pertinent and applicable to the case of Mr Vandyke.

[49] Turning to the issue of the Penalty Guidelines and Clause five, as has been noted, the Guidelines set out a number of considerations which the Stewards are required to give some consideration to determining an appropriate penalty for a breach of the rules.

[50] The first of those identified by the Penalty Guidelines is the circumstances of the offence.

[51] In this matter, the Applicant did not actually enter Hollywood Park in the rescheduled meeting on the 25th of November of 2023, the horse was reinstated in the rescheduled meeting without his knowledge or involvement. Therefore, this can be distinguished from a situation where a trainer has actively registered a horse for the race and then deliberately, or by error, failed to scratch the horse within time.

[52] That being the case, this is a factor that the Panel considers should be taken into account in mitigating the penalty to be imposed.

[53] The next factor identified under Clause five is the degree of culpability. In the course of the hearing, in response to questioning from the Panel the Applicant confirmed that he had been participating in the industry for approximately thirty-six years and he had been actively training for twenty-nine of those years. It is fair to characterise the Applicant as being a very experienced trainer.

[54] The Applicant also confirmed in response to a question from the Panel that he was aware that it was not an uncommon occurrence that where a race meeting is rescheduled that horses scratched from the original race meeting are reinstated for the rescheduled meeting. Given the extent of the Applicant's experience as a trainer the Panel accepts that he would have been aware of the possibility (if not likelihood) that Hollywood Park would be reinstated as a runner in the rescheduled meeting.

[55] Given the circumstances outlined in paragraph [51] by which Hollywood Park came to be entered in the meeting on the 25th of September of 2023, the breach of the rules seems to have occurred because of inattention or inadvertence on the part of the Applicant, rather than as any intentional or deliberate conduct on his part. The Panel however finds that due to the Applicant's failure to appropriately check his messages and to keep himself updated as to what had occurred with the rescheduled Ipswich race meeting, the Applicant bears some culpability for his breach.

[56] The next factor identified under Clause five is an early guilty plea. The Guidelines note that an early guilty plea is a mitigating factor that may result in a lesser penalty being imposed.

[57] In this case, there was in fact a timely and early plea of guilty made by the Applicant. The Panel is satisfied that this is a factor that can be taken into consideration in mitigation of the penalty to be imposed.

[58] The next factor identified by Clause five is frequency of participation in the racing industry.

⁴ *Glen Baker v QRIC RAP-18*, 30 May 2023.

- [59] The guidelines note the frequency in which the person participates in racing. As noted above, the Applicant has a long history of involvement in the racing industry and is still an active participant. The Panel is satisfied that this is also a consideration that should have been taken into account when considering the relevant penalty to be imposed.
- [60] The next factor identified by Clause five is Mr Vandyke's disciplinary record.
- [61] In relation to Mr Vandyke's disciplinary record, he does have some disciplinary history, but in light of the length of time that he has been training, the Panel regards that disciplinary history as having far less significance.
- [62] It is noted that within the last approximately 6 years that there are approximately four breaches of the rules. Significantly, in relation LR 68(1), the Applicant in the course of his training history has never been charged with a breach of that rule. Consequently, the Applicant can be regarded as effectively having no relevant disciplinary history in relation to a breach of LR 68(1). The Panel considers that this is a factor which favours a reduced penalty.
- [63] The final matter raised by Clause five of the Guidelines as a relevant consideration is the race status.
- [64] In this case this was a provincial meeting conducted at Ipswich and the race was of no particular higher status.
- [65] An aggravating factor in this case is the fact that because of the late scratching of Hollywood Park, the trainer and owners of Ascot Express were in fact disadvantaged by being denied the opportunity of participating in the race at Ipswich, and the opportunity of winning some prize money as noted in the Respondent's submissions. This is a factor that justifies the imposition of an actual penalty beyond a reprimand.
- [66] Weighing up all of the various considerations that have been summarised in these reasons, and in particular the mitigating factors that have been identified, the Panel is satisfied that the penalty imposed in this case of a \$500.00 fine was excessive.
- [67] The application for review is allowed and pursuant to section 252AH(1)(b) of the *Racing Integrity Act* 2016 the decision of the Panel is that the racing decision is varied to a penalty of a fine of \$200.00.