

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE: Z219/2016

CATCHWORDS

Harness racing – presentation charge – cobalt — whether due to inadvertence or bioaccumulation – whether performance-enhancing or harmful to horses – relevance of difference between knowledge at time and current knowledge – good character and reputation – specific deterrence – protection of integrity of harness racing industry – disqualification or suspension – Rule 190(1) – Rule 190B – Rule 259 (1) – Rule 256(2)(b), (f) and (h)

APPLICANT	Craig Demmler
RESPONDENT	Harness Racing Victoria Racing Appeals and Disciplinary Board
WHERE HELD	Melbourne
BEFORE	Vice President Judge Hampel
HEARING TYPE	Hearing
DATE OF HEARING	20 – 24 February 2017
DATE OF ORDER	3 May 2017
CITATION	Demmler v Harness Racing Victoria Racing Appeals and Disciplinary Board (Review and Regulation) [2017] VCAT 600

ORDER

1 Breach of Rule 190(1):

Order pursuant to Rule 256(2)(b), (f) and (h), all licences held by Mr Demmler to train and drive a horse, including training or driving a horse on a racecourse, track or training ground, are suspended for 10 months from today.

Order pursuant to Rules 195, 195A, and 200, the horse Christian Torado be disqualified with respect to race five at Cranbourne on 19 October 2014 (in which it finished in first place) and race 10 at Kilmore on 26 October 2014 (in which it finished in fifth place) and that all prize money such tools is received in such races be refunded immediately by the connections at that horse to the respective club or HRV controlling body.

- 2 Breach of Rule 190B: Order that Mr Demmler be fined the sum of \$250. A stay of seven days is granted with respect to the payment of fine.

Her Honour Judge Hampel
Vice President



APPEARANCES:

For Applicant

Mr D. Sheales of Counsel

For Respondent

Ms E. Brimer of Counsel with Mr P. Czarnota
of Counsel

REASONS

Introduction

- 1 On 14 October 2014 Harness Racing Australia announced the introduction of a national threshold for cobalt, the effect of which would be to prohibit a horse having cobalt at a level of or above 200 mcg/L in its urine when it presented for racing.
- 2 Two days later, on 16 October 2014 Harness Racing Victoria (HRV) adopted, with immediate effect, the national threshold. From that day on therefore cobalt was a prohibited substance if present in a horse at a concentration of 200 mcg/L or more when it presented for racing.
- 3 Concerns about whether cobalt was being used as a performance-enhancing substance in the racing industry – in Australia and internationally – had been the subject of considerable discussion by racing regulators and within racing circles more broadly, nationally and internationally, for some time. The introduction of the prohibition of cobalt above that threshold was well publicised in the racing industry.
- 4 Just three days after HRV adopted the new standard, on 19 October 2014 trainer Craig Demmler presented Christian Torado to race in race five at a harness racing meeting at Cranbourne.
- 5 Christian Torado won the race. A urine sample was taken from it after the race and sent for testing. The testing regime adopted by HRV required samples to be tested and retested in laboratories in Australia and offshore.
- 6 It was not until 11 March 2015 that HRV was notified that the test results confirmed a concentration of cobalt of between 350 and 372 mcg/L in the sample of urine taken from Christian Torado following his win in race five at Cranbourne five months earlier, on 19 October 2014.
- 7 As a result, on 13 March 2015 Mr Demmler's training and driving licences were suspended, pending further investigation. On the same day, stewards attended his stables. They interviewed him, took swabs and samples from a number of horses, and samples from various substances and products for testing.
- 8 On 31 March 2015 stewards again attended Mr Demmler's stables. A further interview was conducted with him, and samples were taken from Christian Torado. On 16 April 2015 stewards attended Mr Demmler's stables for a third time and conducted yet another interview with him.
- 9 Although Mr Demmler had been suspended on 13 March 2015, and questioned three times by 16 April, by 13 May 2015 no charges had been laid, and HRV's position was that it was still investigating. Mr Demmler successfully applied to the Tribunal for a stay of the suspension.
- 10 Charges were eventually laid on 7 September 2015, that is, nearly 12 months after the race.

- 11 On 7 March 2016 Mr Demmler pleaded guilty before the Racing Appeals and Disciplinary Board (RAD Board) to a charge under Rule 190(1) of the Australian Rules of Harness Racing of presenting Christian Torado to race when a prohibited substance, namely cobalt, was present in a concentration in excess of 200 mcg/L in its urine.
- 12 The RAD Board disqualified him pursuant to Rule 256(2)(c) for a period of 12 months, effective from that day. This then was a 12 month disqualification in addition to the two month period of suspension served between 13 March and 13 May 2015.
- 13 Exercising his right under s 83OH of the *Racing Act 1958* (Vic), Mr Demmler applied to the Tribunal for a review of that decision. The review originally filed put HRV to proof in respect of the presentation charge, as well as contesting the severity of the penalty. However, on the first morning of the hearing, 20 February 2017, Mr Demmler through his counsel Mr Sheales advised that the review would proceed by way of application for review of penalty only. That is, Mr Demmler accepted the evidence before the Tribunal established Mr Demmler had, contrary to Rule 190(1), presented the horse to race with a concentration of cobalt in excess of the permitted maximum of 200 mcg/L, namely with a concentration of between 350 and 372 mcg/L of cobalt in its urine.
- 14 Mr Demmler was also charged with, and pleaded guilty before the RAD Board, to a breach of Rule 190B, relating to the failure to keep and maintain a log book listing all therapeutic substances in his possession and recording all details of treatments administered to any horse in his care. When his logbook for the period between 1 January 2014 and 13 March 2015 was inspected, treatments he had told the stewards he had administered to horses in his care, including to Christian Torado, were not listed. Relevantly, there was no recording of the administration of substances containing cobalt using treatment methods including stomach drenching, intravenous drip and injection to Christian Torado. He was fined \$250 by the RAD Board for the Rule 190B breach. Although the finding and penalty in respect of that charge is not part of the application for review before me, the failure to record treatments administered to Christian Torado meant there was no contemporaneous record of how much cobalt was administered to the horse in the months or the days leading up to the race. This added to the difficulty in assessing the truthfulness of the various accounts advanced by Mr Demmler to the stewards when interviewed in March and April 2015 of the amount of cobalt administered to Christian Torado in the lead up to the race on 19 October 2014.
- 15 On the evidence before me it was common ground that by 2014 concerns were being raised in the racing industry – not just in Australia but internationally – about the administration of cobalt in concentrations markedly higher than its naturally occurring levels in feeds and supplements to thoroughbred and harness racing horses. Cobalt is an

essential trace element, present in soil and plants, and found in a number of equine products. There was some speculation in scientific and horseracing circles as to whether it was performance-enhancing, capable of having an EPO-like effect. That is, that it increased stamina by increasing the productions of red blood cells and haemoglobin. Concerns had also been raised as to whether it was, if administered to a horse in quantities greater than its naturally occurring presence in feed and supplements, harmful to horses.

- 16 It was these concerns, the potential for performance enhancement, and the potential for harm to the horse, that led to the prohibition by the Australian racing regulators, including harness racing regulators, on the administration of cobalt to a horse in quantities that would result in a concentration of cobalt in excess of 200 mcg/L in its urine when it raced.
- 17 So it was that Rule 188A(2)(k) of the Australian Harness Racing Rules was introduced. By that rule, it was prohibited to present a horse for racing with a concentration of cobalt in its urine in excess of 200 mcg/L.
- 18 By the time this matter came on for hearing before me, Rule 188A(2)(k) had been amended to lower the quantity of cobalt which would exempt it from being a prohibited substance from 200 mcg/L in urine to 100 mcg/L in urine, or 25 mcg/L in plasma. This amendment was effective from 1 November 2016.
- 19 However, for the purposes of this application for review the relevant threshold is 200 mcg/L in urine, not 100 mcg/L in urine.
- 20 The relevant parts of Rule 190 provide:
 - (1) A horse shall be presented for a race free of prohibited substances.
 - (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.
 - ...
 - (4) An offence under sub-rule (2)...is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.
- 21 This is to be contrasted with Rule 196A, the relevant parts of which provide:
 - (1) A person shall not administer or cause to be administered to a horse any prohibited substance
 - (i) for the purpose of affecting the performance or behaviour of a horse in a race ...; or

(ii) which is detected in any sample taken from such horse prior to or following the running of any race.

(2) A person who fails to comply with sub-rule (1) is guilty of an offence.

- 22 The charge to which Mr Demmler has pleaded guilty is a charge of strict liability. It is not necessary to prove the cobalt was administered for the purpose of affecting the performance or behaviour of the horse in a race. All that is necessary to prove is that Mr Demmler is the trainer of a horse which had a prohibited substance, or a substance at a prohibited level, in its system when he presented it for a race.
- 23 It is well accepted that the purpose or object of Rule 190 is to ensure as far as possible that the integrity of racing is protected; racing is conducted on a level playing field; horses race without the assistance of drugs; racing is conducted safely; and racing is conducted fairly from the perspective of the betting public so that the horse's performance will not vary from start to start depending on whether or not a particular substance or medication has been administered to it.
- 24 In assessing the gravity of the breach of Rule 190, and the appropriate penalty, Mr Sheales submitted the breach was properly characterised as one of ignorance or inadvertence, thus leading to a finding of a low level of culpability and a commensurately low penalty. Mr Sheales submitted that the gravity of the charge was further reduced as cobalt was in fact neither performance-enhancing nor deleterious to horses. He submitted that I should find Mr Demmler to be a man of good character and reputation, who had suffered disproportionate financial and reputational loss by reason of the manner in which HRV dealt with the charge.
- 25 I will deal first with the gravity of the breach itself. Mr Sheales submitted that it was not open to make a finding that Mr Demmler had knowingly administered any more cobalt to Christian Torado than that which was found in authorised feeds and supplements administered in accordance with recommended dosages, in the ordinary course of training. He submitted I should find, or find myself unable to exclude as a reasonable hypothesis, that the level of cobalt detected was explicable by reason of the administration of cobalt-containing supplements at levels no greater than the recommended dosages in the lead up to the race. Christian Torado's recorded level of between 350 and 372 mcg/L, Mr Sheales submitted, could be explained either by the amount of cobalt administered to the horse in the 48 hours before the race, and which had not been eliminated from the horse's system by the time the urine sample was taken, or by longer-term bioaccumulation. That is, that the horse was registering such a high level of cobalt because it had, over a period of time, been administered cobalt-containing substances in accordance with recommended dosages which had accumulated in its body, rather than

being eliminated, and so resulted in an elevated baseline level of cobalt in its system, which exceeded the prescribed threshold.

- 26 When he was first interviewed by the stewards on 13 March 2015, Mr Demmler specifically denied using cobalt and said he had never given cobalt to Christian Torado. He acknowledged that he was aware that cobalt over a certain level was a prohibited substance. However, he was unable to say what that level was. He said he had not taken notice of the prescribed permissible level because he did not administer cobalt to his horses.
- 27 However later in the interviews conducted on that first day he acknowledged that cobalt was present in many of the supplements he used on his horses, including Christian Torado. He said none of his horses, including Christian Torado, had a cobalt deficiency. That is, he acknowledged it was not necessary to administer cobalt so as to raise the horse's cobalt level in order to remedy a cobalt deficiency. He had not sought veterinary advice in relation to the feed and supplements he could administer to his horses, including Christian Torado, without putting their cobalt levels over the threshold. Although he regularly had the blood of horses he had in training tested, he did not seek veterinary advice in relation to the interpretation of the results, or the adjusting of any feed or supplement regime based upon the blood readings, so as to ensure the cobalt levels of the horses did not exceed the threshold.
- 28 If this correctly reflects Mr Demmler's knowledge and attitude, it indicates, as Ms Brimer submitted, a poor standard of husbandry and a lack of care in respect of his obligation to ensure that he knew precisely what was being administered to Christian Torado, and the effect of that on the levels of cobalt in his system when he was presented for racing.
- 29 I am not satisfied however, that the level of cobalt found in the horse's urine on testing is attributable to ignorance, or failure to take sufficient care to monitor the horse's feed and supplement regime so as to ensure its cobalt level remained below the threshold.
- 30 So far as the treatments administered in the lead up to the race, Mr Demmler initially said he did not administer any treatments within 48 hours of a race. Later, he said he sometimes administered treatments the day before a race.
- 31 In his first interview, having resiled from his position he had not administered any cobalt to Christian Torado, he initially said he had given it a single injection of Hippiron, a cobalt-containing substance. Later, he said he routinely administered intravenous injections 48 hours before a race containing, amongst other substances, 10ml of VAM, 40ml of Coforta and 20ml of Hippiron, all of which he knew contained cobalt. Although he had not recorded it in his logbook, he said he believed he most likely injected Christian Torado with these substances before the

race which resulted in the detection of the cobalt the subject of this proceeding.

- 32 When re-interviewed on 31 March, he said he had given more thought to what he had given Christian Torado before the race. He increased the dosages of VAM, from 10mls to 20mls, and of Coforta from 40mls to 50mls, leaving the dosage of Hippiron at 20mls. He said he had administered those quantities 48 hours before the race in an IV drip, and again, by injection, 24 hours before the race. This was his first reference to administration by IV drip as well as injection. He later included the administration of Blut, another cobalt-containing substance, by trench, 48 hours before the race. And finally he told the stewards that as part of his daily supplement regime, not just in the 48 hours before a race he fed Christian Torado Activiron, a supplement which also contained cobalt. He confirmed that regime in his interview on 16 April 2015.
- 33 I am not satisfied on the evidence before me that the level of cobalt detected in Christian Torado's urine is explicable by reference to the amount of cobalt found in the feed and supplements Mr Demmler told the stewards he had administered to Christian Torado in the 48 hours before the race, or over an extended period of time. Mr Demler gave varying accounts of the amount of cobalt administered by him to the horse. Each time he returned to the topic, he increased the amount he said he had administered to the horse, and each time he fixed the time at which he had administered prerace treatments containing cobalt to a time much closer to the commencement of the race, closing in from 48 hours before the race, to 24 hours, and even to race day itself.
- 34 Nor am I satisfied on the evidence before me that the level of cobalt detected is attributable to longer-term bioaccumulation, that is, explicable by reference to an accumulation of cobalt in the horse's system as a result of a long-term program of administering feed and supplements containing cobalt at the levels described by Mr Demmler, and which raised the baseline to above the prescribed threshold.
- 35 Dr Martin Wainscott is a regulatory veterinarian, currently employed by the Emirates Racing Authority in the UAE. He was previously employed in a similar role by Harness Racing NSW. He provided a report at the request of HRV in relation to the current state of knowledge in relation to cobalt, and its potential to enhance the performance of or cause harm to horses, and was cross-examined by Mr Sheales. I found Dr Wainscott to be an impartial, credible, and reliable witness, experienced in, and knowledgeable about the subject matter.
- 36 I accept Dr Wainscott's evidence that, even taking the highest levels of cobalt Mr Demmler said he administered in the 48 hours before the race, it should have been eliminated from Christian Torado's system by the time the post-race urine sample was taken. He gave evidence of studies conducted both by Harness Racing New South Wales and the Hong Kong

Jockey Club which showed that both oral and injectable cobalt-containing supplements given at therapeutic doses had a rapid urinary clearance.

- 37 The alternative hypothesis, namely that Christian Torado was, or could have been registering abnormally high baseline levels of cobalt as a result of bioaccumulation by reason of a sustained supplement regime high in cobalt, is not supported by the evidence.
- 38 During the period that Mr Demmler was suspended, Ms Quinlan took over training Christian Torado. During that time, on 31 March 2015, stewards took further urine samples from Christian Torado, and interviewed Ms Quinlan. Ms Quinlan told them of the feed and supplement regime she was administering to Christian Torado. I was told that as a result of the suspension of Mr Demmler, he was precluded from having any involvement whatsoever in the management of the horse. That included being prohibited from having anything to do with determining what feeds and supplements were to be provided to Christian Torado by Ms Quinlan, or administering any feeds or supplements to the horse himself.
- 39 The feed and supplement regime that Ms Quinlan detailed included the administration of cobalt through feeds and supplements in significantly higher quantities than the highest levels Mr Demmler acknowledged providing to the horse in the lead up to the race on 19 October 2014. Ms Quinlan told stewards that she had administered cobalt-containing supplements to the horse within the 24 hours immediately preceding the taking of the urine sample. The amount that she told the stewards she had administered to Christian Torado in the 24 hours immediately preceding the taking of the sample exceeded the highest amount Mr Demmler told the stewards he had administered to Christian Torado in the 24 hours preceding the race. Yet when the urine sample taken from Christian Torado on 31 March 2015 was also tested for cobalt, it revealed a cobalt level of only 11 mcg/L.
- 40 Dr Wainscott gave evidence about three large population studies undertaken by horse racing authorities around the world, involving in excess of 11,000 samples. All three population studies showed mean urinary cobalt levels to be less than 10 mg/L. In an Australia-specific study conducted by Harness Racing New South Wales, over 2000 race-day samples were collected between August 2013 and July 2015. 93% of samples had urinary cobalt levels of less than 30 mcg/L. Thus the sample taken from Christian Torado when it was being trained by Ms Quinlan falls comfortably within those results. That in itself, in my view, is sufficient to demonstrate that there is no support for the hypothesis that Christian Torado's levels recorded in October 2014 could be attributable to bioaccumulation. Had that been the case, one would have expected a similar reading for the samples taken in October 2014 and March 2015.

- 41 It follows that I do not accept Mr Sheales' submission that I should affirmatively find, or find myself unable to reject the proposition, that the cobalt level was attributable either to bioaccumulation, or administration of feed and supplements in accordance with the treatment regime identified by Mr Demmler in the days leading up to the race.
- 42 I accept Dr Wainscott's opinion that the only possible explanations for the level of cobalt recorded in Christian Torado's urine after the race are the administration of an injectable therapeutic cobalt-containing product, or the administration of a high concentration form of cobalt at some time prior to the time of sampling.
- 43 It follows from the findings I have just made, the dosage had to exceed, by a significant amount, the amount of cobalt Mr Demmler was prepared to acknowledge he had administered to Christian Torado over time, or in the 48 hours before the race.
- 44 Dr Wainscott's evidence also confirmed what was in the materials filed with the Tribunal, and what was put in submissions by the parties about the knowledge and belief in racing circles about cobalt at the time Christian Torado presented for racing. As a result I am satisfied on his evidence, and the other materials before me, that in the period leading up to the introduction of the prohibition of the presence of cobalt at a level exceeding 200 mcg/L, and continuing through to the period when Mr Demmler pleaded guilty before the HRV RAD Board, what little information there was in the published literature suggested cobalt administered in high doses could be performance-enhancing and could have a deleterious effect on horses.
- 45 So far as harm is concerned, there were reports in the literature – some of it in peer-reviewed journals, some of it not – of harm to horses. In particular it was reported that it could cause observable signs of distress such as twitching and abdominal discomfort exhibited as pawing, restlessness, flank twitching and a curling back of the upper lip exposing the teeth. There were references to reports of unexplained deaths of horses found to have elevated levels of cobalt, and one scientific paper posited it could be implicated in the development of laminitis.
- 46 This then was the state of knowledge at the time that Christian Torado was presented for racing on 19 October 2014 and later found to have recorded the elevated level of cobalt. Not surprisingly, there were no studies which revealed that it was actually performance-enhancing. And, so far as potential for harm is concerned, by the time this application for review came on for hearing before me, regulators and those representing trainers charged with administering cobalt above the threshold level, or presenting the horse with cobalt above the threshold level, were better informed.
- 47 Dr Wainscott acknowledged that the reports of unexplained deaths of horses with elevated levels of cobalt were anecdotal, and unsupported by

any evidence. He had recently attended an international conference at which it had been revealed for the first time that the dose of cobalt which had resulted in the observable signs of distress I have just recounted was so far in excess of the sort of dose which would result in a reading of the level recorded in Christian Torado, as to provide no foundation for evidence of harm from cobalt administered at the level detected in its urine. And there has been nothing published since the paper which hypothesised on a possible link between high cobalt levels and laminitis to advance that theory, or to apply it to horses specifically.

- 48 As Dr Wainscott pointed out, there are considerable and understandable ethical constraints on conducting clinical trials in respect of the administration of cobalt to horses. Those who seek to gain advantage from administering performance-enhancing substances, or substances believed to be performance-enhancing, are unlikely to publish papers, whether in reputable scientific journals or otherwise, or to conduct scientifically validated studies. Claims can be made which are later shown to be without foundation. Regulators and anti-doping authorities are often playing catch-up.
- 49 Given the evidence as to the current state of knowledge about cobalt – that is, it has not been shown to have a performance-enhancing effect, nor to be harmful to horses – it is clear I cannot make a finding that cobalt, administered at the level it must have been to Christian Torado to obtain the reading which was obtained, actually enhanced Christian Torado’s performance at this race, or was potentially harmful to it. However, that is not the end of the matter. In assessing the gravity of this particular offence, I must look not only at the state of current knowledge, but also at the evidence as to the state of knowledge or belief at the time, namely October 2014.
- 50 In my view it is no significant mitigating feature that, on evidence now available, cobalt has not been proved to be performance-enhancing, and has not been shown to be harmful to horses. This was not knowledge, it would appear, that was in the public domain generally or in the racing industry specifically at the time that Christian Torado was presented to race. The best that can be said is, fortunately for the horse, it did not suffer any deleterious effects. And fortunately for the integrity of racing, and public confidence in its integrity, cobalt has not been shown to provide an unfair advantage.
- 51 I am satisfied therefore that this is properly to be regarded not as a trifling or technical breach. Nor is it a case of inadvertence or understandable ignorance. The presentation of a horse for racing with the cobalt reading at the level detected in Christian Torado represents a serious breach of the obligations of a trainer in relation to ensuring that a horse presented by for racing is free of prohibited substances, or substances at prohibited levels. I am satisfied that the level of a cobalt in its system cannot be attributable to its stated feed and supplement regime; that cobalt at the

time was generally, if erroneously, believed to be performance-enhancing; and that at best it can be said that at that time its potential for harm to a horse was unknown.

- 52 It follows that the factors identified earlier – the protection of the integrity of racing, and in particular the maintenance of a sport free of drugs which may affect the safety of horses or drivers, or a horses performance, or introduce an unfair competitive or betting advantage – are all important considerations here when determining the appropriate penalty.
- 53 Ms Brimer who, with Mr Czarnota appeared for the respondent, submitted that the decision of the RAD Board was the correct and preferable decision. She submitted that I too should impose a period of disqualification of 12 months on Mr Demmler. She submitted that having regard to the penalties imposed in like cases this could be seen to be on the lenient rather than the harsh side.
- 54 Mr Sheales conceded a period of suspension or disqualification was warranted. It is important to understand this concession was made, notwithstanding his submission I should find the level of cobalt detected was inadvertent or accidental, resulting from administration of cobalt in no more than recommended therapeutic dosages in the 48 hours leading up to the race, and over an extended period. This concession was also made in full knowledge that HRV acknowledged that on the current state of learning, cobalt could not be shown to be performance enhancing or harmful to horses. He submitted I should suspend Mr Demmler's licenses to train and drive, but the not disqualify him. He further submitted that the period of suspension should be for a lesser period than the 12 months imposed by the RAD Board, and I should take into account the two months suspension already served.
- 55 In assessing the appropriate level of penalty, and having regard to Mr Sheales concessions, I wish to make it clear I do so on the basis that I have already rejected therapeutic pre-race dosage or bioaccumulation explanations advanced on Mr Demmler's behalf as possible explanations for the cobalt level detected. As Mr Demmler maintained that these were the only explanations he could advance for the horse's elevated cobalt level, and there is no other evidence as to how the horse came to have the cobalt reading it did, I am left in a position where I can find there is no innocent explanation for the horse registering the cobalt level it did. I can of course make no affirmative finding in relation to the motive for administering such a high dose of cobalt to the horse, but again any innocent explanation is excluded. As I have already noted, this is a presentation charge not one of administering a prohibited substance to a horse for the purpose of affecting the performance or behaviour of the horse in a race.
- 56 It follows that I consider this to be a serious example of a presentation offence, one where innocence or inadvertence is expressly rejected. I

must deal with it on the basis Mr Demmler has been unable to satisfy me of any matters which would mitigate the seriousness of the charge.

- 57 That leads me to a consideration of the matters personal to Mr Demmler. He is now 43. In a harness racing career of over 20 years, this is the first time he has been charged with any doping breach of the Harness Racing Rules. It would appear from the decision staying the suspension, that apart from one short period of suspension for a driving infringement, Mr Demmler has not been dealt with in all that time for any other training or driving offences.
- 58 I was told Mr Demmler comes from a harness racing family and has been involved in harness racing virtually all his life. By the time he was 18 he was a licensed driver, and he became a licensed trainer three years later. He began by working and riding for his father before branching out on his own. When his father suffered what I understand was a career-ending injury, he returned to take over running his father's training operations for some years. Eventually he returned to training in his own right from his own premises. His partner Ms Quinlan is also a licensed trainer in her own right, and they live together on the property where they each conduct their separate training operations.
- 59 A considerable body of testimonials in relation to Mr Demmler's reputation within the harness racing industry, his family's reputation within the harness racing industry, and his contributions to the harness racing industry and to charitable endeavours, were placed before the RAD Board and form part of the section 49 material. I accept he is held in high regard and his otherwise good reputation should be taken into account in his favour.
- 60 Mr Sheales placed considerable reliance on the financial and reputational damage suffered by Mr Demmler as a result of being charged. To the extent that that is an inevitable consequence of a breach of the anti-doping rules of harness racing, that cannot be regarded as a matter which should reduce the penalty otherwise appropriate. But as I understand the way he put his case, Mr Sheales submitted the financial and reputational damage went further than that which could reasonably be regarded as the inevitable or deserved consequence of a breach such as this. He submitted the conduct of the racing authorities generally, including but not limited to HRV, caused additional and unnecessary reputational damage and financial loss to Mr Demmler.
- 61 So far as reputational damage was concerned, he relied on the effect on Mr Demmler of what was, he submitted, considerable misinformation in the public domain about the performance-enhancing and deleterious effect of cobalt. He submitted the racing authorities contributed to the dissemination of such misinformation in the press and the racing world. That even when they knew that there was no reliable evidence cobalt was performance-enhancing or deleterious to horses, they not only failed to

take steps to correct the public misapprehension about that, but continued to contribute to the propagation of information they knew to be incorrect.

- 62 Mr Sheales was also critical of the position taken by HRV and Racing Victoria in other cobalt cases where they, he submitted, continued to assert in disciplinary hearings that cobalt was harmful to horses when they knew it was not. As I understood his submission, that had led to harsher penalties being imposed than were warranted, and also contributed to the public perception that cobalt was performance-enhancing and harmful to horses when the racing authorities knew it was not. Again, submitted Mr Sheales, this resulted in an unwarranted (or additional) stain on Mr Demmler's reputation.
- 63 I do not consider Mr Demmler is entitled to call in aid the reputational loss he has and is likely to suffer as a result of the detection of cobalt in the horse, or his acknowledgement that he, in breach of Rule 190(1) presented a horse for racing with a prohibited level of cobalt in his system. I do not consider he is entitled to call in aid the fact that cobalt, on the scientific knowledge now available, is not proved to have any performance-enhancing effect. Nor do I think he is entitled to call in aid the fact that the scientific evidence now available dispels the concerns previously raised about the possible deleterious effect of cobalt on horses. The fact remains, at the time Christian Torado was presented for racing on 19 October 2014 with a cobalt reading of between 350 and 372 mcg/L, cobalt at that level was a prohibited substance. Mr Demmler knew that cobalt over a certain level was prohibited. At the time, it would appear it was widely (if erroneously) believed to be performance-enhancing, and was widely (if erroneously) believed to be possibly deleterious. It is good fortune, not good management on Mr Demmler's part, that current learning indicates it is neither of those things.
- 64 I am satisfied that in the climate of the times, with the knowledge that was then available not just to racing authorities but also within the public domain, cobalt posed a real threat to the integrity of racing. There was also a real concern about the welfare of horses. That some of that fear was later dispelled is not to the point.
- 65 Mr Sheales was also critical of the conduct of HRV in suspending Mr Demmler from training and racing as soon as the cobalt reading was known to it, but without laying charges at the time, or in fact, until six months later. That was, as HRV acknowledged in the stay proceedings, solely due to the fact the detected substance was cobalt. Suspension before the laying of charges, or the hearing and determination of a matter was, and still is, a most unusual course for HRV to take. Usually a trainer is permitted to continue to train and ride until charges are heard and determined. In this case, not only was Mr Demmler suspended as soon as the reading was known, but he was not charged at the time. Even after the suspension was stayed, two months later, HRV was still not ready to lay charges. Charges were not laid until six months after it was first in

the public domain that Mr Demmler's horse had returned a positive cobalt reading, and he had been suspended as a result. That, submitted Mr Sheales, led to a public perception his misconduct was considerably more serious than it actually was, and caused a considerably greater emotional and financial penalty than would normally be the case.

- 66 Although the suspension was stayed by the Tribunal after two months, during the period Mr Demmler was suspended he was unable to train or ride horses, or have anything to do with harness racing. The consequences of this continued after the suspension was stayed. The owners of the horses he was training had to place their horses with other trainers. Some, but not all of them, returned to him after the suspension was stayed. Some owners indicated they would re-engage Mr Demmler as a trainer once the disciplinary proceedings were finalised. Others indicated they would not return to Mr Demmler in the future. I accept he has suffered a significant downturn, that he has not returned to his pre-suspension level of business, and is unlikely to do so in the short-term when he is again free to train.
- 67 The suspension, followed by the stay, but with the charges still pending was, Mr Sheales submitted, unfair. It imposed a greater punishment on Mr Demmler than on trainers whose horses were detected with other prohibited substances in their systems. Acknowledging that trainers might lose some custom once doping charges were laid, even before an adverse finding led to the imposition of a period of suspension or disqualification, it was Mr Sheales' submission that the financial impact caused by the suspension, stay, and delay whilst the charges were laid and finalised imposed a disproportionate financial penalty compared to other trainers charged with doping offences involving substances other than cobalt. It was also his submission that the immediate suspension created a public perception that a cobalt offence was more serious than other doping offences, thus leading to more reputational damage than was justified.
- 68 Of course, any trainer who was facing doping charges will likely lose patronage whilst charges are pending, and one would hope they would suffer reputational loss as a result of the detection of prohibited substances in a horse trained by them. Any trainer who was suspended or disqualified once doping charges are found proven loses their livelihood during the time they are unable to train. They are likely to suffer reputational harm and lose some current and future patronage as a result of being charged, and if found guilty, being subject to suspension or disqualification. Those are not matters that should mitigate the penalty. They are nothing more than the known and deserved consequences of a breach of the anti-doping rules of racing.
- 69 So far as reputational damage is concerned, even if it could be said that HRV overreacted to the threat that cobalt posed, and I am not satisfied that is the case, in my view any trainer who presents a horse for racing

with a prohibited substance must bear the consequences of their own conduct. They cannot mitigate the penalty to be imposed because they feel aggrieved by the manner in which the regulatory authorities dealt with them, or because the particular substance was one which captured the public interest more than other substances have, or because later knowledge dispelled the concerns that the substance was in fact providing an unfair advantage to horse, or was potentially harmful to it.

- 70 However in this case I am satisfied the combination of the initial suspension followed by the stay, and the delay in laying and dealing with the charges, has caused a far greater financial impact than would otherwise be the case. In my view it is appropriate to take that into account in considering the appropriate penalty. I wish to make it abundantly clear however that I am in no way suggesting there is a basis for making any finding of improper purpose on the part of HRV in acting as it did.
- 71 In addition to the financial cost to Mr Demmler of the suspension, there was what I consider to be a significant personal cost. Initially Mr Demmler was unable even to remain living in his home with his partner, as their home was also the location of their shared licensed training facilities. He left their home and moved in with his mother. So, he lost not only his livelihood, but his ability to live with his partner in their home.
- 72 For these reasons I consider I should take into account in considering the appropriate penalty now to impose, the financial and personal cost of the period of suspension already served.
- 73 I am satisfied that the only appropriate penalty is one which prevents Mr Demmler from having any involvement in training or riding horses for a further period. Protection of the integrity of racing, and of public confidence in its integrity requires no less. I am satisfied the penalty must serve as a deterrent on him personally because, having rejected his explanations, the presence of cobalt at the level at which it was detected is unexplained.
- 74 I have considered the cases and the table of penalties provided to me. It is clear many of the earlier cobalt cases refer to the potential for cobalt to harm horses, and to enhance performance. Those factors are relied on as one of the measures of the gravity of the breach. But, for the reasons I have expressed, I consider that the gravity of the breach here must be informed by the state of general knowledge at the time, as well as the fortuitous result that current learning reveals cobalt appears to be neither harmful to the horse nor performance-enhancing. I do not consider the earlier cases are therefore to be dismissed from all consideration. It remains the case, no two cases are alike, that each case must be considered on its own facts.

75 The consequences of disqualification are severe and wide-ranging. By Rule 259(1):

A disqualified person ... cannot do any of the following –

- (a) associate with persons connected with the harness racing industry for purposes relating to that industry;
- (b) be a member or employee of the Controlling body;
- (c) be an office holder, official, member or employee of a club;
- (d) enter a racecourse or any place under the control of a club or Controlling body;
- (e) race, lease, train, drive or nominate a horse;
- (f) conduct breeding activities;
- (g) enter any premises used for the purposes of the harness racing industry;
- (h) participate in any manner in the harness racing industry;
- (i) permit or authorise any person to conduct any activity associated with the harness racing industry at his/her registered training establishments;
- (j) place, or have placed on their behalf, or have any other interest in, a bet on any Australian harness racing race.

76 The Tribunal cannot limit or vary any of these conditions of disqualification. Mr Demmler can apply to the stewards for a variation of any of the conditions of disqualification, but they have an unfettered and unreviewable discretion to allow or refuse any such application.

77 By contrast, if Mr Demmler is suspended, he will be unable to train or drive for the period of suspension, but will not be prevented from associating with persons connected with the harness racing industry for purposes related to it; entering race courses and attending harness racing meetings; entering and remaining on premises used for harness racing purposes; conducting harness racing associated activities at a registered training establishment; and betting on harness racing.


78 Ms Brimer submitted a suspension would not sufficiently serve to protect the integrity of racing. In particular, that public confidence that cobalt breaches were treated seriously would be undermined, if the racing public were to see Mr Demmler attending harness racing events, or working as a stable hand during his period of suspension, and because there would be public perception he was still permitted to train and drive, if he remained on the premises he shared with Ms Quinlan.

79 She also submitted that it would be too hard for HRV to ensure Mr Demmler was not breaching the terms of a training suspension if he were to continue to share the training premises he occupies with Ms Quinlan during his period of suspension.

- 80 I am not persuaded by these arguments. Mr Demmler will now have to live with a doping blemish on a previously unblemished record as a result of this. He will, during any period of suspension or disqualification, be unable to earn his livelihood from the only occupations he knows, namely training and driving. If suspended, and he chooses to attend races, his status as a suspended person, to those who know him as a trainer and driver, would, I would have thought, been obvious. If suspended and he chooses to work as a stable hand, again, it seems to me that would only highlight the fact to those who know, or know of him as a trainer and driver, that he is doing so because he is unable to train or drive. This seems to me to enhance the public perception that doping breaches are serious charges which attract a severe penalty, ones which impose significant restrictions on a person's ability to earn their livelihood as a trainer or driver, and so enhance confidence in the efficacy of disciplinary hearings in protecting the integrity of racing. So far as HRV's concerns about enforcement, that is a matter for them. The stewards have considerable powers to investigate, inquire and take steps to ensure only licensed trainers and drivers operate in the harness racing industry, and to deal with breaches by unlicensed or suspended persons. And for Mr Demmler, he is no doubt aware that were he to flout the suspensions, and train or drive, he would risk suffering further penalty, and further personal, financial and reputational loss.
- 81 Whilst I am satisfied Mr Demmler must be excluded from training and driving, I consider that in the circumstances, the protective and punitive purposes I have identified can properly be served by a period of suspension, not disqualification.
- 82 Whilst Mr Demmler should be excluded from training and driving, and deriving an income from those pursuits for a period, in order to protect the integrity of racing, mark the gravity of the breach and deter him from acting in like manner again, I do not think it necessary to impose a penalty which imposes the additional restriction on permitted activities, or freedom of movement and association that disqualification does.
- 83 In my view, a total period of suspension of 12 months is appropriate. Having regard to the two months already served, I direct that all licences permitting Mr Demmler to train and drive, including training or driving a horse on a racecourse track or training ground, be suspended for a period of 10 months.
- 84 Breach of Rule 190(1): Order pursuant to Rule 256(2)(b), (f) and (h), all licences held by Mr Demmler to train and drive a horse, including training or driving a horse on a racecourse, track or training ground, are suspended for 10 months from today.
- 85 Order pursuant to Rules 195, 195A, and 200, the horse Christian Torado be disqualified with respect to race five at Cranbourne on 19 October 2014 (in which it finished in first place) and race 10 at Kilmore on 26

October 2014 (in which it finished in fifth place) and that all prize money such tools is received in such races be refunded immediately by the connections at that horse to the respective club or HRV controlling body.

- 86 Breach of Rule 190B: Order that Mr Demmler be fined the sum of \$250. A stay of seven days is granted with respect to the payment of fine.


Her Honour Judge Hampel
Vice President

