

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z478/2019

CATCHWORDS

Racing Act 1958 (Vic) – Applicant pleaded guilty to five breaches of the *Australian Harness Racing Rules* – Appropriate penalty in all the circumstances – Whether mental health condition relevant to culpability, need for specific deterrence or appropriateness of imposition of a penalty for general deterrence.

APPLICANT	Scott Dyer
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	Member R Tang, AM
HEARING TYPE	Hearing
DATE OF HEARING	8 October 2019
DATE OF ORDER AND REASONS	14 November 2019
CITATION	Dyer v Harness Racing Victoria (Review and Regulation) [2019] VCAT 1792

FINDINGS

The applicant, having pleaded guilty as charged, is found guilty of:

Charge 3

A breach of Rule 189(9) of the Australian Harness Racing Rules, which reads as follows:

It is an offence for a person to fail to comply with a direction given under sub rule (5) or sub rule (7) or sub rule (8) or to interfere with or prevent the carrying out of a test or examination.

The particulars of the charge being:

1. On 8 December 2014, the horse Waterslide competed in and won race 5 at Charlton;
2. Stewards directed that a post-race blood sample be obtained from Waterslide approximately 2 hours following the race;
3. Before the post-race blood sample, you injected the horse Waterslide with the substance potassium in an [endeavour] to interfere with the carrying out of a blood test on the horse.

Charge 4 (as amended)

A breach of Rule 147(1) of the Australian Harness Racing Rules, which reads as follows:

A driver shall race a horse on its merits.

The particulars of the charge being:

1. On 15 December 2014, you drove the horse Sukovia in race 5 at Horsham, a race won by the horse Dynamite Dick;
2. You did not race Sukovia on its merits in race 5 at Horsham on 15 December 2014;
3. Prior to the running of Race 5 at Horsham on 15 December 2014, you have had discussions with Mr Larry Eastman regarding the fact that the horse Dynamite Dick would be stomach tubed before competing in this race;
4. You knew that this information could be used by Mr Eastman for betting purposes.

Charge 6

A breach of Rule 192(1)(c) of the Australian Harness Racing Rules, which reads as follows:

192.(1) – No person, unless he has first obtained the permission of the Stewards, shall have in his possession either on a racecourse or in any motor vehicle or trailer being used for the purpose of travelling to or from a racecourse any prohibited substance or a syringe, needle or other instrument which could be used –

(c) to administer any medication or substance to a horse.

The particulars of the charge being:

1. On 8 December 2014, the horse Waterslide competed in and won race 5 at Charlton;
2. Stewards directed that a post-race blood sample be obtained from Waterslide approximately 2 hours following the race;
3. You have injected the horse Waterslide with the substance potassium, via a syringe, in an [endeavour] to interfere with the carrying out of a blood test on the horse.
4. You have had a syringe in your possession at Charlton on 8 December 2014 without obtaining the permission of the Stewards.

Charge 7

A breach of Rule 240 of the Australian Harness Racing Rules, which reads as follows:

A person shall not, whether alone or in association with others, do, permit or suffer anything before, during or after a race which in the opinion of the Stewards or Controlling Body may cause someone to be

unlawfully advantaged or disadvantaged or be penalised or is corrupt or otherwise improper.

The particulars of the charge being:

1. Prior to the running of Race 7 at Swan Hill on 2 December 2014, you have had discussions with Mr Larry Eastman regarding the fact that the horse Cashisking would be stomach tubed before competing in this race;
2. You knew that this information could be used by Mr Eastman for betting purposes;
3. In the opinion of the Stewards this conduct is corrupt or otherwise improper.

Charge 8

A breach of Rule 240 of the Australian Harness Racing Rules, which reads as follows:

A person shall not, whether alone or in association with others, do, permit or suffer anything before, during or after a race which in the opinion of the Stewards or Controlling Body may cause someone to be unlawfully advantaged or disadvantaged or be penalised or is corrupt or otherwise improper.

The particulars of the charge being:

1. Prior to the running of Race 5 at Horsham on 15 December 2014, you have had discussions with Mr Larry Eastman regarding the fact that the horse Dynamite Dick would be stomach tubed before competing in this race;
2. You knew that this information could be used by Mr Eastman for betting purposes;
3. In the opinion of the Stewards this conduct is corrupt or otherwise improper.

ORDERS

- 1 The decision of the Harness Racing Victoria Racing Appeals & Disciplinary Board made on 22 May 2019 in respect of the penalty imposed on Scott Dyer is set aside and the following penalty is imposed instead:
 - a. in respect of charge 3, Scott Dyer is disqualified as a trainer and driver for a period of one year and two months;
 - b. in respect of charge 4, Scott Dyer is disqualified as a trainer and driver for a period of one year and two months;
 - c. in respect of charge 6, Scott Dyer is disqualified as a trainer and driver for a period of two months;
 - d. in respect of charge 7, Scott Dyer is disqualified as a trainer and driver for a period of one year and 10 months; and

- e. in respect of charge 8, Scott Dyer is disqualified as a trainer and driver for a period of one year and 10 months.
- 2 The period of disqualification confirmed by order 1(c) is to be served concurrently with the period of disqualification imposed by order 1(a). All remaining periods of disqualification are cumulative.
- 3 The periods of suspension and disqualification already served between 25 June 2018 and the date of these orders is declared as time already served.



APPEARANCES:

For Applicant

Mr A McMonnies, Solicitor

For Respondent

Mr A Anderson of Counsel

REASONS

- 1 Until 25 June 2018, when he was suspended by Harness Racing Victoria (HRV), Mr Scott Dyer was registered as a harness racing trainer and driver.
- 2 The suspension followed Mr Dyer being charged, on 30 April 2018, with eight breaches of the *Australian Harness Racing Rules* (**Rules**) relating to his conduct over a two week period in 2014, concerning four horses (Cashisking, Sukovia, Dynamite Dick and Waterslide) and three races (being race 7 at Swan Hill on 2 December 2014, race 5 at Charlton on 8 December 2014 and race 5 at Horsham on 15 December 2014).
- 3 On 22 May 2019, a hearing of the Harness Racing Victoria Racing Appeals & Disciplinary Board (**RADB**) was convened. Mr Dyer pleaded to, and was found guilty of, five breaches of the Rules (relating to charges 3, 4, 6, 7 and 8) (**Relevant Breaches**), while the remaining charges were withdrawn by the Stewards. The RADB disqualified Mr Dyer for an aggregate period of seven years and 34 days, taking account of the time (331 days) he had already served by way of suspension (**Decision**).
- 4 On 13 June 2019, Mr Dyer made an application to VCAT, under section 83OH of the *Racing Act 1958*, for review of the Decision.¹
- 5 The review hearing was held on 8 October 2019. The evidence before the Tribunal was:
 - a. two folders of material prepared by HRV in accordance with section 49 of the *Victorian Civil and Administrative Tribunal Act 1998* (**Section 49 Material**);
 - b. a character reference from Mr Brent Dyer of BRD Excavations dated 2 September 2019;²
 - c. a letter from Dr Rowan McIntosh to Healthworks Strathdale dated 15 August 2019 (**McIntosh Latest Opinion**);³
 - d. a bundle of correspondence between the Senior Steward at HRV and Mr McMonnies (the solicitor acting for Mr Dyer) between 20 September 2019 and 7 October 2019 relating to Mr Dyer's wagering activity after his disqualification;⁴ and

¹ By section 109(2) of the *Racing Act 1958*, section 83OH applies to the review of a RADB decision as if that section had not been substituted by section 9 of the *Racing Amendment (Integrity and Disciplinary Structures) Act 2018* which, amongst other things, resulted in such boards being replaced by the Victorian Racing Tribunal.

² Provided with the Applicant's Statement of Legal Contentions dated 9 September 2019 (**ASLC**).

³ Provided with the ASLC.

⁴ Applicant's Exhibits 1 to 4. This was provided in response to questions put to Mr Dyer in cross-examination. HRV also sought to tender Mr Dyer's betting transaction history with Ladbrokes for the period from 25 June 2018 to 22 July 2019. However, as some of those bets are the subject of further disciplinary action being considered or taken by HRV against Mr Dyer, and the potential prejudice to him of such material, I did not admit that transaction history into evidence.

e. an opinion from Dr Brendan Hyland dated 2 October 2019 (**Hyland Opinion**).⁵

6 Mr Dyer again pleaded guilty to the Relevant Breaches.

7 After hearing evidence from Mr Dyer, and the submissions of the parties in relation to penalty, I reserved my decision. I also gave the parties leave to file further written submissions in relation to the penalties imposed for comparable matters, which were received on 16 and 21 October 2019.

Agreed statement of facts

8 The Relevant Breaches came to light as a result of a ‘Mildura race-fixing investigation’ being conducted by Victoria Police, which intercepted calls made by another registered trainer, Mr Larry Eastman, between 28 October 2014 and 19 December 2014.

9 On 21 December 2017 and 25 January 2018, Mr Eastman pleaded guilty in the Bendigo Magistrates’ Court to five criminal offences, including using corrupt conduct information for betting purposes and engaging in conduct that corrupts or would corrupt a betting outcome of an event. He was convicted and fined \$20,000.

10 The parties have agreed that, subject to some minor redactions, the summary of charges used for the prosecution of Mr Eastman (**Prosecution Summary**) represents an agreed statement of facts for the charges against Mr Dyer.

Race 7 at Swan Hill on 2 December 2014

11 From pages 2 to 3 of the Prosecution Summary:⁶

The winning horse in this matter is known as CASHISKING. The driver of the horse was Scott DYER and the trainer was registered as Danny O’BREE (known as Breeza). [Mr Eastman] is a close friend to both men and in particular (sic) speaks and associates regularly with Dyer.

Lawfully intercepted telephone calls involving [Mr Eastman] suggested (sic) CASHISKING was drenched four hours prior to the race. Using this corrupt information for betting purposes...

On the 2nd of December 2014 at 7:05 am (day of race). DYER called the accused and they further discussed the drench.

DYER: “just trying to sort out tonight”.

[Eastman]: “what do you really think? You’ll have to go with a four”.

DYER: “yeah I’m going with a four”.

...

⁵ Applicant’s Exhibit 5.

⁶ Section 49 Material at 619-620.

... [Mr Eastman] discusses how Scott Dyer is upset that someone has heavily backed the horse and caused the odds to go down. The accused stated he will look after DYER, if it wins. [Eastman's associate] states 'not to give DYER too much of a sling, as he will become suspicious'.

[details of betting activity by associates of Mr Eastman]

...

On the 3rd of December 2014 at 11:31a.m [Mr Eastman] calls DYER and they discuss how things finished up and how hard it was to get all of the money on. They then discuss who had what bets on.

Race 5 at Charlton on 8 December 2014

12 From pages 3 to 5 of the Prosecution Summary:⁷

On the 8th of December [2014] a horse known as WATERSLIDE trained by Lynette EASTMAN ([Mr Eastman's] wife) won race 5 at Charlton. The race commenced at 4.30pm. [Mr Eastman] drenched WATERSLIDE 3-5 hours prior to the race and planned for it to go to the front and win however he did not intend for it to win so convincingly. WATERSLIDE was subject to 'hold back' by the Stewards for a blood test. Prior to the blood test [Mr Eastman] attempted to inject the horse with potassium to reduce the horses TCO (bi-carb) level. [Mr Eastman] knocked the syringe down the back of the wall in the horse stall prior to injection. [Mr Eastman] was unable to retrieve the syringe. [Mr Eastman] then contacted Scott DYER who successfully covertly injected WATERSLIDE with potassium before the blood test was conducted by HRV Stewards.

...

On the 8th of December 2014 at 6:10p.m, Scott DYER called [Mr Eastman]. [Mr Eastman] discusses how he accidentally knocked a syringe down the back wall of the horse stall and is unable to retrieve it.

On the 8th of December 2014 at 6:14p.m (four minutes late[r]), DYER calls the accused and confirms he successfully injected WATERSLIDE in the stall and has hidden the syringe.

On the 8th of December 2014 at 6:58p.m, [Mr Eastman] calls DYER and there is further discussion about a needle being administered. [Mr Eastman] stated:

[Eastman]: "thanks for your job, cos if there as (sic) any eyes on anyone, it would've been me, you know what I'm saying?"

[Mr Eastman] further describes how he knocked the syringe behind the board and that they will find it in 2060 when there [sic] pulling the joint down.

...

⁷ Section 49 Material at 623-625.

On the 9th of December 2014 at 5:55p.m, Scott DYER calls [Mr Eastman]. [Mr Eastman] again spoke of the post-race events, and worried that news of what they did will spread. [Mr Eastman] reinforces to DYER that what they did “goes to your grave”.

Race 5 at Horsham on 15 December 2014

13 From pages 5 to 7 of the Prosecution Summary:⁸

On the 15th of December 2014 the horse known as Dynamite Dick was drenched before race 5 at Horsham. [redactions]

Scott DYER was driving the favourite known as SUKOVIA. SUKOVIA was the favourite to win however finished in fifth place. [redactions] It is also alleged that [Dynamite Dick] had been drenched unbeknownst to [Zac] PHILLIPS approximately 3 hours prior to the race. [Mr Eastman] provided advice to DYER in respect of the best time to drench, prior the race and used this corrupt information for betting purposes.

...

On the 15th of December 2014 at 11:40a.m Otto CHRISTENSEN calls [Mr Eastman] and they talk about betting and [Mr Eastman] makes the following comment about DYER. “I’ve had a real good talk, we’ve planned it as best as you could possibly plan it” ...

The final result of the race was:

1st DYNAMITE DICK #8 Driver: Zac PHILLIPS Trainer: Danny O’BREE

5th SUKOVIA #3 Driver: Scott DYER

[Details of betting on the race]

Disqualification of Mr and Ms Eastman

- 14 On 25 May 2018, the RADB considered a charge issued by the Stewards against Mr Eastman under rule 267 of the Rules which provides that HRV may disqualify a person who is found guilty of a crime or an offence. This related to the five criminal charges on which Mr Eastman was convicted. Mr Eastman pleaded guilty and was disqualified for a period of 16 years, with the RADB ‘stating that the period would have been 20 years if not for the guilty pleas from Mr Eastman’.⁹
- 15 On the same day, the RADB considered three charges issue by the Stewards against Ms Lynette Eastman under rule 239A of the Rules which provides that a person whose conduct or negligence has led, or could lead, to a breach of the Rules is guilty of an offence. The three charges related to Waterslide and the events concerning race 5 at Charlton on 8 December 2014. Ms Eastman pleaded guilty to the three charges, and was disqualified for a period of four months on each, with the penalties to be served

⁸ Section 49 Material at 621-623.

⁹ Media Release, Racing Appeals & Disciplinary Board, 28 May 2018; Section 49 Material at 758.

cumulatively. The RADB stated that ‘the period of disqualification would have been for a period of 18 months if not for the guilty plea from Ms Eastman’.¹⁰

- 16 The media release dealing with those matters noted that the RADB was also scheduled to consider related charges against Mr Dyer and Mr O’Bree, however adjournments were granted at their request.¹¹

Findings

- 17 Having regard to the agreed facts, and that Mr Dyer has pleaded guilty as charged, I am comfortably satisfied that Mr Dyer is guilty on each of charges 3, 4, 6, 7 and 8 as particularised in the findings above.

What is the appropriate penalty for the breaches?

General principles

- 18 In *Williamson v Harness Racing Victoria (Williamson)*,¹² Judge Jenkins indicated that, in determining an appropriate penalty for a racing offence:

it is necessary to balance just punishment, specific and general deterrence, denunciation, the preservation of the integrity of racing; as well as the Applicant’s prospects for rehabilitation.

- 19 I note, in relation to general deterrence, the observation of Judge Jenkins¹³ that:

The punitive aspect of ... sentencing, and the specific deterrence that follows, is only one part of the consideration. The power to impose a penalty for a breach of the Rules is primarily protective, to preserve the integrity of ... racing as well as public confidence in the industry. For this reason, general deterrence must also be considered and be given priority.

- 20 The question of general deterrence in the present case needs to be considered having regard to the acceptance by (then) Senior Member Proctor in *Shayne Cramp v HRV Racing Appeals and Disciplinary Board*¹⁴ (*Shayne Cramp*) of the observation by the RADB in that case that:¹⁵

[The harness racing] industry is driven by off course turnover and if people think that it is not clean ... it’s not a clean set up well then they won’t bet on it, (and) if they don’t bet ... everybody suffers from breeders, people who want to have foals, the people at yearling sales, the people who pre-agist, the people that break in, if the horses are not there and the horse population is dropping, everybody suffers. People walk away from it ... but it’s true to say that harness racing now lags

¹⁰ Ibid at 759.

¹¹ Ibid.

¹² [2013] VCAT 1965 [21].

¹³ Ibid [12].

¹⁴ [2017] VCAT 471.

¹⁵ Ibid [82].

third behind the terms of turnover. If you haven't got turnover, you haven't got a business. And that's the total sum of it.

- 21 In affirming the decision of the RADB in that case to disqualify Shayne Cramp for 12 years, the Tribunal said that this was:¹⁶

required to provide sufficient general deterrence and to send the message to all involved in the harness racing industry that if anyone participates in corrupt behaviour they are likely to effectively be permanently removed from the industry. If that is their livelihood, the results for them are likely to be catastrophic.

- 22 While it is the case that civil disciplinary hearings are proceedings of their own kind, that differ from criminal proceedings,¹⁷ it is also clear that when it comes to imposing a penalty, some of the considerations applied in criminal sentencing are relevant. Two of these principles have particular relevance in the present context.

- 23 In *Quinn v Law Institute of Victoria Limited (Quinn)*,¹⁸ the Court of Appeal indicated that:¹⁹

Relevantly for present purposes, the analogy with sentencing means that the existence of any mental condition, either at the time of the offending or at the time of the Tribunal's hearing, or both, may be relevant in one or more of the various ways described by this court in *R v Tsiaras* and, more recently, *R v Verdins*; *R v Buckley*; *R v Vo*. In the present case, it seems to me, very real questions arose as to whether Quinn's history of depression reduced his culpability for the offending, and hence its gravity, and/or reduced the need for specific deterrence and/or made him an inappropriate vehicle for general deterrence.

- 24 Although I was not referred to (and so did not cite) *Quinn*, I effectively applied the principles in *Quinn* in a greyhound racing context in *Diane Dooley v Greyhound Racing Victoria*.²⁰

- 25 In *Stirling v Legal Services Commissioner (Stirling)*,²¹ the Court of Appeal held that the rule requiring a separate sentence to be imposed for each criminal offence 'is an important one and should be applied, where applicable, in disciplinary proceedings', as:²²

it allows for a sentence on one count to stand where a conviction for another count is quashed. Secondly, it is easier to assess whether a penalty is manifestly excessive or inadequate when each sentence is clearly pronounced on each count. Thirdly, by sentencing for separate offences, the court makes it clear to the public what the penalty for each offence is, thus assisting in the process of general deterrence.

¹⁶ Ibid [86].

¹⁷ *Hanneberry v Legal Ombudsman* [1998] VSCA 142 [22].

¹⁸ [2007] VSCA 122.

¹⁹ Ibid [36] (footnotes omitted).

²⁰ [2019] VCAT 1514 [98(b)].

²¹ [2013] VSCA 374.

²² At [74].

Finally, as in this case, adherence to this rule prevents conduct from one charge being used as an aggravating factor in assessing the penalty for another charge.

26 This has also been applied in a greyhound racing context.²³

Determination of penalty

Disqualification or suspension?

27 The penalties which may be imposed on a person found guilty of an offence under the Rules are set out in rule 256(2) and include a fine, suspension, disqualification, warning off, exclusion from a racecourse, a bar from training or driving a horse on a racecourse, track or training ground, reprimand and caution.

28 In the penalty scheme established by rule 256 of the Rules, disqualification and warning off are the most serious because rule 259 then prohibits a person who is disqualified or warned off from doing various things, including racing, training or driving a horse; entering a racecourse; participating in any manner in the harness racing industry; and associating with persons connected with the harness racing industry for purposes relating to that industry.

29 It is the seriousness of disqualification that leads to the submission made by Mr McMonnies (representing Mr Dyer) that he should instead be suspended for such period as the Tribunal may determine.²⁴ It is contended that the Tribunal:²⁵

should take into account the difficulties in serving his time away from all forms of racing for a man whose only skills are in the training of horses.

30 The decision in *Demmler v Harness Racing Victoria Racing Appeals and Disciplinary Board (Demmler)*²⁶ is pointed to as an example where the Tribunal accepted suspension as being more appropriate than disqualification.

31 In *Demmler*, Vice President Judge Hampel commented on the effect of suspension in the following terms:²⁷

[Mr Demmler] 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

²³ *Phillips v Greyhound Racing Victoria* [2018] VCAT 1761 [38]-[40].

²⁴ ASLC at [2].

²⁵ Ibid.

²⁶ [2017] VCAT 600.

²⁷ Ibid [80]-[81].

to those who know, or know 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 ... and so enhance confidence in the efficacy of disciplinary hearings in protecting the integrity of racing. ...

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.

- 32 On the other hand, HRV contends that the decision to disqualify Mr Dyer should be affirmed, having regard to the 'grave seriousness of the conduct of Mr Dyer' in that he was 'knowingly involved in race fixing, corrupt conduct, and the injection of a substance to deliberately interfere with a blood test'.²⁸ It points to the decision in *Shayne Cramp* in support of its submission that '[r]ace fixing strikes at the heart of the integrity of the harness racing industry' and 'threatens the existence of the industry and the livelihoods of the many people who depend on it'.²⁹ Accordingly, it is contended that the penalty is appropriate.³⁰
- 33 The breaches committed by Mr Dyer involving admitted corruption relating to multiple horses over multiple races are extremely serious. In my view, the protection of the integrity of the harness racing industry would ordinarily demand the imposition of a significant period of disqualification as a matter of both specific and general deterrence and to preserve the integrity and reputation of the industry.
- 34 While Mr Dyer relies on various matters in terms of mitigation (discussed later in these reasons), I consider that they largely go to the period of any penalty, rather than whether disqualification or suspension is appropriate.
- 35 The only question in the present case which does in my view go to the appropriateness of the type of penalty is whether Mr Dyer's mental health condition could be said to have 'reduced his culpability for the offending, and hence its gravity, and/or reduced the need for specific deterrence and/or made him an inappropriate vehicle for general deterrence' in the manner discussed in *Quinn*.

²⁸ Respondent's Statement of Legal Contentions dated 3 October 2019 (RSLC) [20]-[21].

²⁹ RSLC [22]-[23]. See also *Bartley, Jack & Pitt v HRV Racing Appeals and Disciplinary Board* [2018] VCAT 1981 [72] (cited at RSLC [25]) and *Harper v Racing Penalties Appeals Tribunal of Western Australia* (1995) 12 WAR 337 at 347-8 (cited at RSLC [26]).

³⁰ RSLC [31].

- 36 In this regard, it is necessary to carefully consider the medical evidence from Mr Dyer's psychiatrists, as follows:³¹
- Letter from Dr Rowan McIntosh to Healthworks Strathdale dated 17 August 2017 (**McIntosh 2017 Opinion**).³²
 - Letter from Dr Rowan McIntosh to HRV dated 23 May 2018 (**McIntosh 2018 Opinion**).³³
 - Letter from Dr Rowan McIntosh to HRV dated 16 April 2019 (**McIntosh April 2019 Opinion**).³⁴
 - McIntosh Latest Opinion.
 - The Hyland Opinion.
- 37 It appears that Dr Hyland was Mr Dyer's psychiatrist at or around the time the Relevant Breaches occurred, and that Dr McIntosh has been treating Mr Dyer since August 2017 when Mr Dyer was unable to get hold of Dr Hyland.³⁵
- 38 In the Hyland Opinion, Dr Hyland reports that Mr Dyer has 'suffered from fluctuating symptoms of major depression since a fracture dislocation of his left shoulder in 2013' and that he has 'been prescribed the antidepressant Pristiq for a number of years'. Dr Hyland suggests that:³⁶
- Mr Dyer's psychiatric condition and use of opiate medications may have affected his judgment at the time of offending. I personally wasn't prescribing him analgesic medications in the November/December 2014 period but if he were taking pain killers at the time it may be have been (sic) a contributing factor to the offences.
- 39 Dr Hyland also notes that he has not seen Mr Dyer for a number of years:³⁷
- but my understanding is that his professional life centres around horses and he has no other experience or training in any other areas of work so a prolonged disqualification may have an adverse effect on his mental health.
- 40 Unfortunately, Dr Hyland was not called and did not attend to give evidence to clarify his opinion. Having regard to the various qualifications in his opinion, I am not satisfied that this demonstrates that there was a connection between Mr Dyer's depression and offending which may operate to reduce his culpability for the offending or suggest that specific deterrence is not required or – of itself – make the case that the penalty to be imposed on Mr Dyer is not an appropriate vehicle for general deterrence.

³¹ There was also an opinion from Dr David Weissman dated 16 August 2017, which appears to have been prepared for Workcover purposes, confirming that Mr Dyer has 'chronic Major Depressive Disorder' and is 'totally incapacitated for all work for at least the medium-term future'.

³² Section 49 Materials at 644-646.

³³ Section 49 Materials at 647-648.

³⁴ Section 49 Materials at 649-651.

³⁵ McIntosh 2018 Opinion.

³⁶ Emphasis added.

³⁷ Emphasis added.

- 41 Further, while Dr Hyland expresses some concern about *prolonged* disqualification, his opinion does not suggest the imposition of *any* period of disqualification is inappropriate.
- 42 In the McIntosh 2017 Opinion, Dr McIntosh noted that it ‘is very reasonable to suggest that [Mr Dyer] is classically depressed’, and that he feels ‘dysphoric, tired and often morose’, often waking up in the middle of the night with a ‘nocturnal panic’. Given that this opinion was issued prior to Mr Dyer being charged, it would appear the cause of the depression is likely to be the injuries referred to in the Hyland Opinion. Dr McIntosh also noted Mr Dyer telling him that ‘he has had passive suicidal thoughts on and off “for years”,’ although he reported that Mr Dyer ‘is not a particular danger at present’. Dr McIntosh concludes that Mr Dyer appears to have ‘treatment refractory depressive disorder’ and that attempts should be made to address this with different medications, given prior treatments had not worked.
- 43 The McIntosh 2018 Opinion was issued in May 2018, after Mr Dyer had been charged, but before his suspension. In that opinion, Dr McIntosh ‘declare[s] that Mr Dyer is clearly somewhat better than was the case, but still suffering from a spectrum of symptoms, albeit at a lesser intensity than previously’. Dr McIntosh suggested an adjournment of his hearing for the ‘next few months’, noting that he was ‘anticipating that Mr Dyer’s mental health will probably improve quietly over the next three months’.
- 44 In the McIntosh April 2019 Opinion, after Mr Dyer was suspended or warned off (but prior to the RADB hearing), Dr McIntosh indicates that Mr Dyer ‘is still significantly hindered/impeded by ongoing (at times intense) depressive phenomena’. It is noted that ‘it is reasonable to suggest that Mr Dyer’s depression clearly predates the [events which lead to the Relevant Breaches]’.
- 45 In the McIntosh Latest Opinion issued in August this year, Dr McIntosh refers to Mr Dyer having ‘clearly had an issue with depression over a period of time’, and noting particular treatment he received at Bendigo Hospital in 2015/2016. Relevantly, although this letter was written after the RADB hearing and after Mr Dyer had been disqualified, Dr McIntosh expressed the view that ‘[i]n the past 6 months, my sense is that Scott is possibly a little better’ and that, while his physical injuries mean ‘he would struggle to do active labouring’, ‘he might be a good candidate for driving machinery’ (although noting ‘[h]e doesn’t have too many skills as yet in this domain’).
- 46 The evidence of Dr McIntosh makes it clear that Mr Dyer is still suffering from depressive illness. While Dr McIntosh’s opinions are consistent with Dr Hyland’s opinion that the depression likely preceded the Relevant Breaches, they do not bear on the question of whether that depression impacted on Mr Dyer’s culpability or the need for specific deterrence.
- 47 Dr McIntosh’s evidence that Mr Dyer’s condition has improved – despite the Decision and his consequent disqualification for over seven years –

suggests that the risk of a prolonged disqualification period having an ‘adverse effect’ on Mr Dyer’s mental health is not as significant as the Hyland Opinion may otherwise suggest. Given that Dr Hyland does not appear to have seen Mr Dyer for more than two years, and Dr McIntosh has been treating Mr Dyer through the period that he was charged, was suspended or warned off and then disqualified, I prefer the opinion of Dr McIntosh in this respect.

- 48 Further, while Mr McMonnies contends that Mr Dyer should be suspended (rather than disqualified) so that he could work as a stable hand given his only skills are in the training of horses, Dr McIntosh’s most recent opinion indicates there may be ‘good’ potential for Mr Dyer to retrain in other fields, provided he is not required to undertake ‘active labouring’.
- 49 Having regard to the totality of the evidence before me, I consider that a period of disqualification is appropriate for each of the Relevant Breaches.

Period of disqualification – comparability

- 50 It is relevant to consider penalties imposed for other comparable cases. As Judge Jenkins observed in *Williamson*:³⁸

Clearly, the principle of parity in sentencing is important, both to ensure consistency in the penalties imposed for the same or comparable offences; and, as far as practicable, to avoid a perceived sense of grievance or injustice on the part of the person charged, who might otherwise perceive that they have been dealt with unduly harshly. However, equally, a penalty is imposed in the particular circumstances of a case, after taking into account relevant mitigating factors, if any. Accordingly, particular care must be taken not to slavishly use earlier cases as providing a benchmark penalty, particularly where little if any facts or circumstances of the other cases are known.

- 51 For Mr Dyer, it is contended that:
- a. The penalties imposed on Shayne and Greg Cramp are not relevant because the race fixing in those cases involved having ‘horses run in a particular order’, which ‘required [the] co-operation of the group to cheat on the result’.³⁹
 - b. While HRV has identified various cases where a penalty has been imposed for a breach of rule 240 (engaging in improper conduct to allow someone to be unlawfully advantaged), it is conceded that they related to ‘improper conduct’ rather than ‘corrupt conduct’ as charged.⁴⁰ It is said that the real issue is whether Mr Dyer was ‘in fact charged under the correct section’. However, given that Mr Dyer has

³⁸ At [7].

³⁹ Applicant’s Submissions Pursuant to Orders 8 October 2019 (**Applicant’s Further Submissions**) [1].

⁴⁰ Applicant’s Further Submissions [2].

pleaded guilty to that charge, it is not clear to me that any issue can now be taken with this.

- c. In relation to the breach of rule 147 (the failure to run a horse on its merits), there have been a number of cases in Victoria and elsewhere where the driver has been disqualified for 12 months, although it is suggested that unlike those other cases, 'there is no evidence to suggest that [Mr Dyer] assisted any other horse by not allowing his horse to run on its merits'.⁴¹
- d. In relation to the breach of rule 192(1) (possession of a syringe on course), Mr Dyer contends that 'there is an issue whether the [RADB] has the power to hear and determine this charge', having regard to 'Victoria Local Rules 47(2) and definitions'.⁴² It is submitted that 'this is not a serious offence so this charge must be struck out'. Again, this faces the difficulty that Mr Dyer has pleaded guilty to the charge.

Assuming that the charge remains, it is contended that the penalties in comparable cases range from a \$100 fine to disqualification in one case in Western Australia.

It is also said that Mr Dyer's case 'is different to others' in that:

- the syringe he had was from his then partner, who conducted a business of selling gear, equipment, medications and associated items delivered to race meetings; and
- there is:

evidence that [Mr Dyer] received a phone call from [Mr Eastman], that his horse has an after race condition that he needed to treat, and asked [Mr Dyer] if he had a needle and potassium in his vehicle so that he could treat the horse. [Mr Dyer] got the needle and what I⁴³ think is an Amino Acid... There is nothing unusual about having this type of equipment in the vehicle. Yes [Mr Dyer] was wrong in treating the horse for [Mr Eastman].

- e. In relation to penalties under rule 189(9) (interference with an examination), Mr Dyer notes there are several offences, with penalties ranging from a \$250 fine (for not obtaining a permission) to a nine month disqualification (for preventing a test).⁴⁴ Again, it is suggested that Mr Dyer's case is different in that:

he was asked by [Mr Eastman] to provide him with a needle and a substance. He was told that the horse had an after race condition. There is no evidence that he was told by either [Mr Eastman] or the stewards that the horse was

⁴¹ Applicant's Further Submissions [3].

⁴² Applicant's Further Submissions [4].

⁴³ It is not clear, but the reference to "I" appears to be a reference to Mr McMonnies.

⁴⁴ Applicant's Further Submissions [5].

to be swabbed. He was not the owner, trainer, driver or strapper of the horse.

52 For HRV, it is contended that:

- a. Mr Dyer's circumstances are comparable with those of Greg Cramp, who was disqualified for 12 years, given the evidence in that case that:⁴⁵
- the disqualification intensified Greg Cramp's depression which he has suffered from prior to the offences,
 - Greg Cramp was not the trainer of any of the horses involved but was the driver of one of the horses;
 - did not prove he had made any profit; and
 - the bet made by Shayne Cramp was only \$100, and returned \$820,

and that

[w]hile Greg Cramp was involved in a corrupt scheme to influence the finishing order [in a race], Mr Dyer was party to a corrupt scheme whereby Cashisking was illicitly advantaged over other runners in the race, assisting it to win, knowing this information would be used for corrupt betting purposes in the sort of sting that does immeasurable damage to the integrity and reputation of the harness racing industry⁴⁶

and also

a corrupt scheme whereby he did not allow the favourite, Sukovia, to perform on its merits, while knowing that Dynamite Dick had been illicitly advantaged over other runners in the race, assisting it to win, and knowing that information would be used for corrupt betting purposes' which was 'at least as corrupt and damaging to the integrity and reputation of the integrity of the harness racing industry as those of Greg Cramp.'⁴⁷

- b. In relation to charges 7 and 8, involving breach of rule 240, HRV says that even though the majority of cases relate to 'improper conduct', this 'does not prevent the rule being properly invoked to deal with circumstances of corrupt conduct'.⁴⁸ HRV points to the penalties involving 10 years' disqualification for corrupt conduct under rule 241

⁴⁵ Respondent's Submissions Pursuant to Orders of 8 October 2019 (**Respondent's Further Submissions**) [1]-[2], citing Shayne and Gregory Cramp, decision of RADB 29 February 2019 and *Gregory Cramp v Harness Racing Victoria RADB* [2017] VCAT 471 [4], [7] and [93] (**Gregory Cramp**).

⁴⁶ Respondent's Further Submissions [3].

⁴⁷ Respondent's Further Submissions [4].

⁴⁸ Respondent's Further Submissions [6].

which were referred to in the decision concerning Greg Cramp,⁴⁹ as well as a further decision relating to Cameron Fitzpatrick where a 12 year disqualification was imposed.⁵⁰

- c. In relation to charge 4, involving breach of rule 147(1), HRV notes that another driver in Queensland, Mathew Neilson, received a one year disqualification.⁵¹ HRV contends that Mr Dyer's case involves circumstances which 'severely aggravate the penalty' in that the conduct of not racing Sukovia on its merits involved:
- contemporaneous knowledge or involvement in the drenching of a rival horse, having regard to the (amended) particulars regarding the discussion with Mr Eastman that Dynamite Dick would be stomach tubed before competing in the race; and
 - knowing that this information could be used by Mr Eastman for corrupt betting purposes.⁵²
- d. In relation to charge 6, involving breach of rule 192(1)(c), HRV says that the RADB did have power to hear and determine the charge under Victorian Local Rule 49(5).⁵³ HRV submits that the penalties imposed for breaches of this rule range from fines to a disqualification of four months and that the penalty should be 'at the upper end of the range in this case' given that Mr Dyer 'conceded in cross examination that the syringes in his possession were used to supply Mr Eastman with a needle to inject potassium as well as for his own use' and that no permission to have the syringe was sought under rule 192.⁵⁴
- e. In relation to charge 3, relating to breach of rule 189(9), HRV notes there are two cases in the National Offences Table where one person received a six month disqualification, and the other received a nine month disqualification.⁵⁵ However, HRV submits 'it is difficult to draw any meaningful comparison' to those cases given the limited information available.⁵⁶ Having regard to submissions made for Mr Dyer at the RADB hearing, HRV contend that his conduct involved a 'deliberate attempt to interfere with the carrying out of a blood test in circumstances where Mr Dyer knew that the horse had been drenched', which 'was a dishonest and brazen attempt to pervert the stewards' activities after Waterslide had just won by a suspicious

⁴⁹ Respondent's Further Submissions [7] (citing *Gregory Cramp* [47] and [50]).

⁵⁰ Respondent's Further Submissions [10] (citing a decision of the Racing Appeals Tribunal NSW of 19 June 2018).

⁵¹ Respondent's Further Submissions [11]. There is also reference to another matter involve Justin Abbott, however the decision that he was guilty of the offence was set aside on appeal: *Abbott v Racing Queensland Ltd* [2010] QCAT 668.

⁵² Respondent's Further Submissions [13]-[14].

⁵³ Respondent's Further Submissions [15].

⁵⁴ Respondent's Further Submissions [17]-[19].

⁵⁵ Respondent's Further Submissions [20].

⁵⁶ Respondent's Further Submissions [21].

margin'.⁵⁷ Noting that HRV's guidelines on penalties for serious offences, which commenced operation on 1 January 2019, prescribe a minimum penalty of two years' disqualification for administration of a level 2 prohibited substance, HRV submits a penalty 'of at least that level is appropriate' in the circumstances involving the deliberate administration of 'another substance to interfere with the carrying out of a test for a level 2 prohibited substance'.⁵⁸

- 53 While there are certainly similarities between Mr Dyer's circumstances and those relating to Greg Cramp, there is also a critical difference in that Greg Cramp was charged and convicted under section 195C of the *Crimes Act 1958* (Vic) with engaging in conduct that corrupts or would corrupt a betting outcome of an event, and was then charged with a breach of rule 267 which provides for disqualification of a person 'who is found guilty of a crime or offence in any State or Territory'. Mr Dyer has neither been charged, nor found guilty, of any criminal offences.
- 54 However, the penalty imposed on Greg Cramp is useful in that it perhaps suggests the top of the range for corrupt conduct in circumstances where the person involved suffered from depressive illness preceding the offending and the disqualification has or will have some compounding effect on that depression.
- 55 Although arising from the same events, I do not think much assistance can be gained by considering the penalty imposed on Mr Eastman for a number of reasons. Firstly, Mr Eastman was found guilty of criminal offences, whereas Mr Dyer has not been charged or found guilty. Secondly, the material suggests that Mr Eastman was effectively the mastermind of the arrangements and that Mr Dyer was influenced by Mr Eastman. Thirdly, Mr Eastman was charged with a single breach of rule 267 in respect of all the criminal charges he was convicted on, with no information included in the RADB decision to enable a comparison of the penalty he would have received if charged under the applicable rules relating to the underlying offending.
- 56 Some assistance can be gained from considering the penalty imposed on Ms Eastman in that she received a disqualification of four months (reduced from six months for pleading guilty) in relation to each charge of 'negligence', to be served consecutively. In a broad sense, her total penalty period of 12 months sets the bottom of the range because negligent conduct is less serious than corrupt conduct.

⁵⁷ Respondent's Further Submissions [23].

⁵⁸ Respondent's Further Submissions [24].

- 57 Having regard to *Stirling*, it is then necessary to consider the comparable range in other cases for each offence. In this regard, I consider that the appropriate penalty range for:
- a. charge 3 is disqualification for a period between six months and two years, with Mr Dyer's conduct at the upper end given the deliberateness of the actions and the knowledge about the circumstances;
 - b. charge 4 is disqualification for a period between 12 months and two years, with Mr Dyer's conduct at the upper end given his awareness that another horse in the same race was to be stomach tubed and that the information could be used for betting purposes;
 - c. charge 6 is the imposition of a fine (at the lower end) or disqualification for a period of up to four months, with Mr Dyer's conduct at the upper end given that he took the syringe from his then partner (who appears to have had legitimate reasons for its possession) and, apart from its use for the injection of potassium to interfere with a blood test, did not appear otherwise to have legitimate reason to have it in his possession;
 - d. each of charges 7 and 8 is disqualification for a period of 12 months to five years, with Mr Dyer's conduct at the middle of the range given that the conduct is accepted as being corrupt (which is more serious than improper), but his involvement was not as significant as Mr Eastman's.
- 58 I consider that, in all the circumstances, an aggregate penalty period of 10 years and four months is appropriate, subject to discounts for the mitigating factors discussed below.

Mitigating and aggravating factors

- 59 The mitigating factors in the present case are:
- a. Mr Dyer's guilty plea, which the RADB in both Mr and Ms Eastman's case accepted should give rise to a significant penalty discount (from 20 to 16 years for Mr Eastman, and from 18 to 12 months for Ms Eastman).
 - b. The lengthy delay in bringing this case before the RADB, from 2014 to May 2018 (with the delay thereafter occasioned by Mr Dyer's request for adjournment).
 - c. The impact that the sequence of events, including being charged, then suspended or warned off and finally disqualified, has already had and may continue to have on Mr Dyer's depression.
 - d. Other matters relied on by Mr Dyer are the absence of evidence of financial gain from the offending, that he remains on the Newstart Allowance, that he was unable to stay with family in Darwin (because

they live on a racecourse) and character references from Christopher Alford, Elizabeth McLean and Brent Dyer.⁵⁹

- 60 Taking all of those matters into account, I consider the aggregate penalty should be reduced from 10 years and four months to six years and two months, an effective discount of 40%.
- 61 For completeness, I have not had regard to the potential breaches of the rules arising from betting transactions undertaken by Mr Dyer following his disqualification as aggravating factors. These have yet to be dealt with and I consider them too prejudicial. For the same reason, I do not have regard to the matters put to Mr Dyer in cross-examination regarding his possible involvement with possible breaches of the rules committed by his former partner in recent times.

Whether periods of disqualification should be served cumulatively or concurrently

- 62 Given that charges 3 and 6 arose out of the same race and concerned the same horse, I consider that it is 'fair and just'⁶⁰ for the disqualification period for charge 6 to be served concurrently with the disqualification period for charge 3. While charges 4 and 8 also relate to the same race, they are two separate charges relating to two different horses and so the periods of disqualification ought to be served cumulatively, as should the period of disqualification in respect of charge 7. This means that the total cumulative period of disqualification will be six years.

Impact of time already served

- 63 Account should also be taken of the time already served by Mr Dyer in terms of suspension by the stewards on 25 June 2018 and disqualification by the RADB from 22 May 2019 to the date of this order. As such, the disqualification will expire on 25 June 2024.

The seal of the Victorian Civil and Administrative Tribunal (VCAT) is circular. It features the text "VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL" around the perimeter and "VCAT" in the center. A blue ink signature is written across the seal. Below the seal, the text "R Tang, AM" and "Member" is printed.

R Tang, AM
Member

⁵⁹ Applicant's Submissions [3(f)-(k)] and [6].

⁶⁰ *Hope v Racing Victoria Limited (No 3)* [2019] VCAT 82 [72]-[77].