

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z262/2015

CATCHWORDS

Harness Racing Victoria; Rule 190(1) of the Australian Rules of Harness Racing; A horse shall be presented for a race free of prohibited substances; Urine sample tested positive for Cobalt above permissible threshold; HRV Racing Appeals and Disciplinary Board affirmed decision of HRV Stewards to suspend licence pending investigation under Rule 183(d); No indication of when investigation will be completed or charges laid; Applicant has no prior relevant history of offending; No compelling reason to suspend licence demonstrated; expert evidence did not support bases for exercising discretion; Decision of Board set aside.

APPLICANT	Craig Demmler
RESPONDENTS	Harness Racing Appeals and Disciplinary Board Harness Racing Victoria Stewards
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	6 May 2015
DATE OF ORDER	13 May 2015
CITATION	

ORDER

The decision of the Harness Racing Appeals and Disciplinary Board made on 18 March 2015, is set aside.


Judge Jenkins
Vice President



APPEARANCES:

For Applicant	Mr D Sheales of Counsel instructed by Melasecca Kelly & Zayler
For Respondent	Ms E Brimer of Counsel instructed by Mr A Rogers, General Manager Integrity Harness Racing Victoria

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REASONS

NATURE OF APPLICATION

- 1 This is an Application to the Victorian Civil and Administrative Tribunal (the 'Tribunal') pursuant to s 83OH of the *Racing Act 1958*, to review the decision of Harness Racing Appeals and Disciplinary Board (the 'Board') on 18 March 2015.

BACKGROUND

- 2 The Applicant had been a licensed horse trainer, for 18 years and driver, for 22 years, under the Rules of Harness Racing (the 'Rules').
- 3 It is not contested that the Applicant has never been charged with prohibited substance offences; and the longest suspension which the Applicant has received was a six week suspension for a driving transgression.
- 4 The Applicant's only form of income is that which he derives from his licensed activities as a trainer and driver of harness horses.
- 5 On 19 October 2014, the Applicant was the licensed trainer of the horse 'Christian Torado'. A urine sample was taken from the horse on that day at the Cranbourne Harness Racing Meeting.
- 6 A portion of the sample was screened for Cobalt at the National Measurement Institute ('NMI') and the level reported was 220 mcg/L.
- 7 A portion of the sample was also sent to the ChemCentre for quantitative confirmation of Cobalt and the contributory value reported by the ChemCentre was 360 mcg/L.
- 8 Given the difference between the screen test result and the confirmatory value reported by ChemCentre, a portion of the sample was sent for further confirmatory analysis to both NMI and ChemCentre.
- 9 The confirmatory value reported by ChemCentre was 350 mcg/L. The confirmatory value reported by NMI was 372 mcg/L.
- 10 On 11 March 2015, Horse Racing Victoria ('HRV') was notified of the results and an investigation into the reports of the chemical analysis was commenced pursuant to Rule 181 of the Rules.
- 11 On 13 March 2015, the Applicant was advised that an investigation into the analytical reports received from both chemical laboratories had commenced. The Applicant was also interviewed, at the conclusion of which the Stewards determined to suspend the Applicant's licence.
- 12 The reserve urine sample was sent to the Hong Kong Jockey Club Racing Laboratory (HKJCRL) for testing. On 25 March 2015, being after the hearing of the Applicant's appeal before the Board, Racing Analytical Services Ltd notified HRV that the concentration of total Cobalt in the reserve sample was determined to be about 360 mcg/L.

- 13 The respective Certificates of Analysis issued by each laboratory demonstrated the presence in the urine sample of Cobalt at levels in excess of the prescribed permissible level.
- 14 Pursuant to Rule 191(2), the HKJCRL Certification together with the ChemCentre and NMI confirmatory analysis is conclusive evidence of the presence of Cobalt in the Applicant's horse Christian Torado on 19 October 2014 at a level above the permissible threshold of 200 mcg/L.
- 15 Pursuant to Rule 191(3) the chemical Certificates of analysis are conclusive evidence that the Applicant's horse was presented for a race on 19 October 2014 not free of a prohibited substance, contrary to Rule 190(1).
- 16 On 18 March 2015, the Board heard the Applicant's appeal against the Stewards decision and determined to affirm the decision of the Stewards to suspend the Applicant's licence. In making its determination, the Board stated:

... The Board is of the opinion that the decision by the stewards to exercise their discretion was justifiable in the circumstance and therefore we dismiss this appeal.¹
- 17 Respondents' Counsel confirmed that the Applicant is still under investigation, which is being conducted as expeditiously as possible. No indication could be given as to the likely timing of when any charges would be laid.

RELEVANT RULES AND LEGISLATION

- 18 Section 50J(1) of the *Racing Act 1958* provides:

A person may appeal to the HRV Racing Appeals and Disciplinary Board against a decision made under the rules to impose a penalty on the person if –

 - (a) the penalty is a suspension, disqualification or warning off...
- 19 Section 50N(1) of the *Racing Act 1958* provides:

Subject to this Part, the HRV Racing Appeals and Disciplinary Board –

...

 - (e) may conduct the rehearing of a matter by affidavit, statutory declaration or oral evidence; and
 - (f) is not required to conduct a hearing as a hearing de novo;...
- 20 Section 50O(2)(a) of the *Racing Act 1958* provides:

In determining an appeal, the HRV Racing Appeals and Disciplinary Board may:

 - (a) affirm, set aside or vary the decision appealed against ; or...

¹ Transcript of the Board's hearing at page 30.37.

- 21 Sub-section 83OH(1) of the *Racing Act 1958* provides:
- (1) A person whose interests are affected by a decision made by a Racing Appeals and Disciplinary Board may apply to VCAT for review of that decision.
- 22 Rule 183 of the Rules provides the following:
- Pending the outcome of an inquiry, investigation or objection, or where a person has been charged with an offence, the Stewards may direct one or more of the following:
- (a) that a horse not be nominated for or compete in a race;
 - (b) that a driver shall not drive or otherwise take part in a race;
 - (c) that the horses of certain connections shall not be nominated for or star in a race;
 - (d) that a licence or any other type of authority or permission be suspended.
- 23 Rule 188A sets out what are and are not prohibited substances under the Rules. Cobalt is a prohibited substance, falling within the description of prohibited substances set out in Rule 188A(a) and (b).
- 24 On 16 October 2014, Rule 188A(2)(k) was introduced, the effect of which was to exempt Cobalt at a concentration at or below 200 mcg/L in urine, from being a prohibited substance.
- 25 Rule 190 of the Rules provides the following:
- Presentation free of prohibited substances**
- Rule 190
- (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) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.
- 26 Rule 191 deals with the evidentiary status of drug testing certificates and provides as follows:
- Evidentiary certificates**
- Rule 191
- (1) A certificate from a person or drug testing laboratory approved by the Controlling Body which certifies the presence of a prohibited substance in or on a horse at or approximately at a particular time, or in blood, urine, saliva, or other matter or sample or specimen tested, or that a prohibited substance had at

some time been administered to a horse is prima facie evidence of the matters certified.

- (2) If another person or drug testing laboratory approved by the controlling body analyses a portion of the sample or specimen referred to in sub rule (1) and certifies the presence of a prohibited substance in the sample or specimen that certification together with the certification referred to in sub rule (1) is conclusive evidence of the presence of a prohibited substance.

...

- (7) Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.

27 Cobalt is a prohibited substance above the prescribed threshold. Rule 190 effectively creates an offence of absolute liability.² Accordingly, in determining whether a trainer has breached Rule 190(1), matters such as, the level detected above the prescribed limit; and the extent of any pharmacological effect of Cobalt; are irrelevant. Furthermore, the Respondent is not required to prove that the Applicant intended to administer Cobalt to the horse; or how Cobalt came to be present in the horse's urine.

28 Section 51 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') confers the following functions and powers on the Tribunal for the purpose of the current review:

Functions of the Tribunal on Review

- (1) In exercising its review jurisdiction in respect of a decision, the Tribunal—
 - (a) has all the functions of the decision-maker; and
 - (b) has any other functions conferred on the Tribunal by or under the enabling enactment; and
 - (c) has any functions conferred on the Tribunal by or under this Act, the regulations and the rules.
- (2) In determining a proceeding for review of a decision the Tribunal may, by order—
 - (a) affirm the decision under review; or
 - (b) vary the decision under review; or
 - (c) set aside the decision under review and make another decision in substitution for it; or

² *William Galea v Harness Racing Victoria* VCAT 3 September 2013 at para 23.

- (d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.
- 29 The Applicant, having had the suspension of his licence confirmed by the Board, is a person whose interests are affected by the decision subject to review.³
- 30 In *Galea v Harness Racing Victoria*⁴ His Honour Judge Nixon gave the following useful synopsis of the Tribunal's function upon review:

The Tribunal's functions in reviewing a decision of the Board are not appellate. On review, the Tribunal stands in the shoes of the original decision-maker and must determine the correct decision on the material before it. The review is conducted without any presumption as to the correctness or otherwise of the decision subject to review. The Tribunal is not confined to the material upon which the original decision was made and may receive evidence or material which was not before the original decision-maker.

APPLICANT'S CASE

The Hearing before the Board

- 31 The contentions advanced on behalf of the Stewards before the Board were:
- a. That the directions of the Stewards under Rule 183(a), (c) and (d) of the Rules:

... was made owing solely to the nature of the substance involved and the seriousness of which HRV regard its presence in an analysed sample at a level over the threshold;⁵
 - b. That it was not routine for a trainer to be stood down where other prohibited substances have been detected;⁶ and
 - c. That it was intended to call Dr Cust to give expert evidence as to the nature of substance involved;⁷ and that such evidence was relied upon to justify the suspension, for the purposes of work, health and safety.⁸
- 32 In my view, for reasons given below, the Respondents have not established a sufficient basis for treating Cobalt differently to other prohibited substances.
- 33 Counsel submitted to the effect that the evidence of Dr Cust did not support the bases upon which the discretion to suspend was exercised, by reason that:

³ Section 83OH *Racing Act 1958*.

⁴ *William Galea v Harness Racing Victoria* VCAT 3 September 2013 at para 12.

⁵ Transcript 19.22-26.

⁶ Transcript 19.30-32.

⁷ Transcript 19.25.

⁸ Transcript 34.32-40.

- a. He did not have relevant expertise in relation to the effects of Cobalt in horses;
- b. His reference to findings in research papers before the Board contained inaccuracies; and
- c. The scientific research into the effects of Cobalt at elevated levels in horses is still ongoing.

Stay Application before VCAT

- 34 An application was lodged at VCAT on behalf of the Applicant, seeking a stay of the decision of the Board. That application was heard and refused by Member Davis on 8 April 2015.
- 35 Counsel for the Applicant impressed upon the Tribunal that:
- a. In a written ‘Outline of Submissions’ advanced on behalf of the Stewards, Dr Cust’s evidence given before the Board was relied upon generally, and particularly in relation to the likely detrimental effect of Cobalt upon the health of horses; and
 - b. Dr Cust conceded under cross-examination that he was not an expert in the scientific studies being conducted into the use and effect of Cobalt.

Grounds of Appeal before the Tribunal

Ground 1

- 36 The Board misdirected itself as to the appropriate manner of conducting the hearing in that it limited its determination to whether the exercise of the Stewards’ discretion under Rule 183 was justifiable and not as to how the Board would have exercised its discretion in the circumstances.
- 37 Counsel submitted that:
- a. Sections 50N and 50O of the *Racing Act 1958* give broad powers to the Board which are not limited in the manner enunciated by the Board;
 - b. Section 50N(f) of the *Racing Act 1958* relieves the Board of any *obligation* for hearings to be conducted *de novo*, but does not *forbid* hearings to be *de novo* in nature; and
 - c. The corresponding Board which hears appeals in the thoroughbred industry pursuant to Local Rule 6A(2)(b) of the Rules of Racing, has identical powers and functions conferred upon it and hears all matters appealed to it as a hearing *de novo*, as a matter of practice.
- 38 In my view, the of the *Racing Act 1958* is quite clear in giving broad jurisdiction to the Board, in its discretion, to conduct a rehearing as a hearing *de novo*, in appropriate circumstances. Equally, it is empowered to affirm the decision made by the Stewards, provided the Board is satisfied

that the Stewards have afforded the Applicant a right to be heard and that their decision is justifiable in the circumstances. It is not incumbent upon the Board to substitute its own decision or be satisfied that the Stewards made the precise decision that it would have made.

- 39 However, in my view, there ought to be compelling reasons for suspending a licence indefinitely, while an investigation is being conducted and prior to any charges being laid.
- 40 In this particular case, for reasons given below, in my view the Board failed to take into account matters relevant to the exercise of its discretion and gave undue weight to other matters.

Ground 2

- 41 Prior to the hearing before the Board, the Applicant had been advised by the Stewards that the reason for the suspension was that the urine sample of a horse trained by the Applicant, 'Christian Torado' which raced on 19 October 2014 at Cranbourne, had returned a level of Cobalt in excess of 200 micrograms per litre. Cobalt is deemed a prohibited substance when detected in quantities in excess of 200 micrograms per litre of urine.
- 42 However, the Applicant was effectively denied natural justice at the hearing in that he was given no notice of the intention to call Dr Cust or the nature of the expert evidence sought to be relied upon.
- 43 In view of the importance placed upon Dr Cust's evidence, I accept that there is substance in this ground.

Ground 3

- 44 The Board failed to adequately satisfy itself of the expertise of Dr Cust in relation to Cobalt, particularly in light of evidence given by Dr Cust at the Stay hearing before the Tribunal on 8 April 2015.⁹
- 45 For reasons given below, while I accept that Dr Cust had the relevant expertise to give the opinions which he did, the Board apparently relied upon those opinions in an improper manner.

Ground 4

- 46 At the time of this hearing, the Applicant has not been charged with any breach of the Rules of Harness Racing. He was first notified of the results of chemical analysis on 11 March 2015 and his licence was suspended on 15 March 2015. He was initially advised that the investigation would take approximately three weeks and that charges could be expected thereafter. It has now been nearly 6 weeks since the licence was first suspended. The Stewards could give no indication as to when the investigation would be completed other than to instruct Counsel that it was being conducted as expeditiously as possible. No reasons were given why a charge had not

⁹ Refer T41.5, T42.25.

been laid in relation to breach of Rule 190(2), which on the face of the three certificates of analysis, which the Applicant accepts, is conclusive evidence. In the meantime, the Applicant could not place before the Board, and cannot place before the Tribunal, evidence as to the circumstances of any alleged breach.

- 47 In my view, this circumstance assumes particular significance in the context of the Applicant. I will return to this matter shortly.

Ground 5

- 48 There has been no reasonable basis presented for making a distinction between Cobalt and other prohibited substances for the purpose of justifying a suspended sentence prior to charges being laid against the Applicant.
- 49 In particular, Counsel for the Applicant submitted that the scientific learning in relation to the adverse effects of elevated levels of Cobalt in horses, is unsettled and the subject of continuing scientific research. Accordingly, it is not either possible or reasonable to categorise Cobalt in the hierarchy of prohibited substances.
- 50 Finally, the seriousness of the circumstances of any charges finally made against the Applicant cannot be determined at this stage. Accordingly, it cannot be assumed that the Applicant will be subject to any period of suspension or disqualification.
- 51 In my view, I find merit in each of these contentions for the reasons more fully set out below.

EXPERT EVIDENCE

- 52 **Dr Richard Cust, Principal Veterinary Consultant** to HRV, gave evidence before the Board, relevant to this application, in summary as follows:
- a. The supplementation of Cobalt in the horse, in larger quantities than is normally required for maintenance of haemoglobin levels, indirectly will stimulate the EPO production and therefore the production of increased levels of red blood cells;¹⁰ it works by effecting or producing an environment of hypoxia which in turn stimulates EPO release, which in turn targets the pregeneticus cells in the bone marrow to produce red blood cells (as well as white blood cells); the red blood cells mature over a period of 10 to 20 days so that although the Cobalt will have been excreted, the stimulation of the red blood cells via the EPO will take 10-20 days to mature, at which time the red blood cells will be of assistance to the horse;¹¹

¹⁰ Transcript 25.16-21.

¹¹ Transcript 28.1-14.

- b. The normal horse would have a level of Cobalt somewhere between 2-10 micrograms per litre of urine;¹²
 - c. The threshold of 200 mcg/L was a generous threshold being representative of a level that might be achieved through normal feed and supplement regimes;¹³
 - d. The international racing codes are working to get a consensus to bring the threshold down to 100 mcg/L of urine;¹⁴
 - e. The chances of producing a level over 200 mcg/L is very unlikely, the most likely reason being a large administration given on the day of racing or the day before;¹⁵
 - f. The window of opportunity to detect Cobalt is very small; it has a half-life of 0.9 hours;¹⁶
 - g. Elevated Cobalt levels are detrimental to the health of horses in that:¹⁷
 - (i) It is known to affect the myocardium and produce congestive heart failure and death in humans and horses;
 - (ii) It affects the thyroid gland;
 - (iii) It is thought to produce tumours in a number of tissues; and
 - (iv) It can also have an effect on the kidneys and liver.
 - h. With the use of normal supplements in the training and maintenance of the racing animal, depending on the horse, you may get levels up to 50, 60 or more depending on how big the doses of the supplements are and how frequently they are administered, but the chances of producing a level of over 200 is very unlikely.¹⁸
- 53 A witness statement of Dr Cust, dated 29 April 2015, was also filed and served after the date of the Board hearing. In that statement, in summary Dr Cust says:
- a. He is the Principal Veterinary Consultant to HRV where he has worked for more than 30 years. He has also worked with Racing Victoria Limited for a number of decades as a Veterinary Consultant and official regulatory veterinarian;
 - b. He has given expert veterinary evidence in over 100 Stewards enquiries and appeals and has appeared before numerous Stewards' panels, boards and tribunals regarding various matters including the nature of prohibited substances detected in collected samples and the place of such substances being used within the industry;

¹² Transcript 25.22-24.

¹³ Transcript 25.49-26.08.

¹⁴ Transcript 26.2-9.

¹⁵ Transcript 26.15-19.

¹⁶ Transcript 26.20-23, Dr Cust refers to a research paper by Wainscott.

¹⁷ Transcript 26.45-50.

¹⁸ Transcript 26.8-18.

- c. He gave evidence before the Board on 18 March 2015; and before the Tribunal on 8 April 2015, in appeals concerning the Applicant;
 - d. In regard to a research paper about which he was cross-examined but had not read at the time of the previous Tribunal hearing, by authors Knych and others, he has now read such paper and it did not change his opinion with regard to the substance Cobalt and its elimination from the body;
 - e. The misuse of the prohibited substance Cobalt is an issue of great concern to racing authorities and has only come to prominence relatively recently;
 - f. Dr Cust can speak to such concern as a result of his knowledge of the manner in which Cobalt works on mammalian systems and the various studies performed that happen to establish an appropriate threshold for Cobalt, which is present naturally (in low levels) in the body;
 - g. The nature of Cobalt's action and effect on the mammalian systems and the potential for it to be misused in the horse, through inappropriate dosage and administration, make it a substance comparable with the use of synthetic erythropoiten ('EPO');
 - h. Dr Cust has given expert evidence in the four cases involving the detection of synthetic EPO use in Harness Racing in Victoria and also the only thoroughbred matter involving synthetic EPO use in Victoria; Dr Cust is aware of only one other subsequent case in Australasia that commenced in 2009;
 - i. At the Tribunal 'stay hearing' Dr Cust said that he was not an expert on Cobalt by which he meant that, like others in the industry, he has not studied Cobalt for a lengthy period of time. However, Dr Cust considers that it is within his qualifications and experience to provide expert opinion evidence as to the nature of Cobalt and its role in the horse and racing industry;
 - j. Horses have naturally very low levels of Cobalt and require minimal supplementation. The amount of literature available regarding this substance is as a result of Cobalt only recently coming to light in terms of being misused in the racing industry. This led to the scientific establishment of the threshold (now reflected in Rule 188A(k)); and
 - k. Dr Cust lists a number of papers and studies which he has considered in the preparation of his witness statement.
- 54 Dr Cust again gave evidence before the Tribunal during which he adopted his witness statement and generally confirmed the evidence previously given.
- 55 Under cross-examination Dr Cust:

- a. Acknowledged that he had not quoted certain statistics correctly from a paper to which he had referred in evidence before the Board, as he was doing so from memory. However, the import of his evidence remained unchanged;
- b. Referred to a number of papers listed in his witness statement, which cite various research into the use and effects of Cobalt administration in horses;
- c. Confirmed that the Wainscott paper concluded that the probability of a false positive in detecting Cobalt levels is less than 1/50,000;
- d. Confirmed that he was not aware of any documented case where the welfare of the horse had been attributed to Cobalt. However, the potential for Cobalt to affect the welfare of a horse is highly likely;
- e. Agreed that there has been much scientific work done in relation to Cobalt in the last 18 months;
- f. Agreed that the half-life of Cobalt, which can give an indication of metabolism excretion rate, will vary considerably between species and according to the frequency and manner of administration, for example whether intravenous or oral;
- g. Agreed that the 54 minute or 0.9 hour half-life to which he referred in his evidence before the Board, was an absorption half-life which probably related to humans and he could not say whether it related to horses;
- h. Agreed that he could not say what the relationship is between the absorption half-life in one mammal to the elimination half-life in another;
- i. While it is not appropriate to merely transpose information from one species to another, each species (humans, horses and rats) have similar cardiovascular systems and excretion systems;
- j. Suggested there was 'plenty of anecdotal evidence' of horses having died following suspected administration of Cobalt, but agreed he was not aware of any autopsies that have been conducted;
- k. Agreed that there have been no scientific studies examining the chronic administration of Cobalt;
- l. Was unaware of threshold levels for Cobalt established in various foreign jurisdictions, but is aware that Hong Kong, France, Australia, New Zealand and the United Kingdom are all participating in studies for the purpose of setting a common threshold;
- m. Suggested that a mammal will be at risk at any level of Cobalt above the threshold; and
- n. It is highly possible that if Cobalt affects one mammal it will affect another mammal.

- 56 While Dr Cust conceded that he has not been directly involved in scientific studies concerning Cobalt, I accept that he is qualified to give expert opinion in respect of the physiological use and impact of Cobalt in mammals generally and the likely impact in horses.

RECENT AUTHORITIES

- 57 Both parties sought to rely upon recent decisions of the New South Wales Supreme Court and Court of Appeal. I propose to examine these cases briefly.

- 58 In *Day v Harness Racing New South Wales*,¹⁹ two plaintiffs were challenging suspensions of their training and driving licences. Mr Day's horse had won a race and the urine sample taken subsequently tested positive for a concentration of Cobalt in the order of 710 mcg/L. Mr McDowell had wins from two of his horses which subsequently tested positive for a concentration of Cobalt in the order of 550 and 570 mcg/L respectively. Both trainers had their licences suspended pending further investigation and enquiry. The relevant rules made under the *Harness Racing Act 2009* NSW are equivalent to the Victorian Rules.

- 59 Her Honour Justice Adamson had to consider a number of challenges not relevant to the current application. However, Her Honour usefully considered the purpose of the suspension power in question:

167. In my view, the suspension was an action that could reasonably be characterised as being either for disciplinary purposes or for the purposes of work health and safety...

168. The words "disciplinary purposes" ought not, in my view, be limited to the period following the laying of charges. They are apt to include an enquiry, or investigation, which may be anterior to the laying of charges. The event that triggered the interim suspension was the detection of a prohibited substance in post-race horse urine. The rules make the presentation of a horse for racing in that condition an offence. Although no charges had been laid, the plaintiffs' conduct was the relevant subject of the enquiry. Action taken by a body such as HRNSW to suspend a participant in advance of such an enquiry can, in my view, properly be characterised as being for a disciplinary purpose. The words "disciplinary purpose" connote a wider concept than, for example, disciplinary charge or disciplinary proceedings (which are regarded as *sui generis* in that they are concerned with protection of the public: *Wentworth v NSW Bar Association* 176 CLR 239 at 250-251. The interim suspension of a participant before enquiry or charge tends to protect the public interest. It ensures that the industry, which HRNSW is responsible for protecting in the public interest, is not affected by possible interference from someone in respect of whom there is *prima facie* evidence of a contravention. It protects a person from participating in the industry until the enquiry

¹⁹ [2014] NSWSC 1402.

has determined guilt one way or another (assuming a charge is laid) and also determined the appropriate penalty.

171. I also consider an interim suspension such as occurred in the present case to be for the purposes of work health and safety. The evidence established that amounts of inorganic Cobalt (such as would be involved above the threshold concentration) is adverse to the health of the horse to which such amounts had been administered. The health and safety of such animals is compromised by such administration. The short term effect of such a substance is to enhance the horse's performance in a race to the detriment of its long term health and longevity. The interim suspension of a trainer who has presented a horse for a race where there is *prima facie* evidence of a prohibited substance can properly be seen, in my view, as falling within that purpose.

201. Failure to suspend the plaintiffs' licenses on an interim basis in the circumstances would have left hanging the cloud over the industry that the tests had engendered.

- 60 On appeal, contrary to submissions of Applicant's Counsel, in my view, there is nothing in the comments of the NSW Court of Appeal which in any way detracted from the relevance of the above considerations.
- 61 In addition, the Trial Judge heard considerable expert evidence given in relation to both:
- a. The likely effect of excessive quantities of Cobalt in horses, in terms of both its performance enhancing effect and the long term adverse consequences to the health and safety of the horse; and
 - b. The process and methodology by which the permissible threshold of detectable Cobalt in urine of 200 mcg/L was determined.
- 62 Adamson J accepted this expert evidence, which was not contested on appeal.
- 63 On appeal,²⁰ the NSW Court of Appeal held that:
- ... the appellants' arguments were correctly rejected by the primary judge, save for the denial of procedural fairness. The appellants should have been given an opportunity to be heard before their licences were suspended.
- 64 While there is no question in this case that the Applicant was afforded a right to be heard by the Stewards, the findings of the NSW Court of Appeal are instructive as to the proper process which should be adopted at this stage. In particular, the Court found that:²¹
- a. The question whether the valid exercise of the power [in this case to suspend a licence] is conditioned upon the obligation to accord

²⁰ *Day v Harness Racing New South Wales* [2014] NSWCA 423.

²¹ At [106], [107], [108], [123], [132].

procedural fairness, does not depend on the particular facts of a case, but upon the nature of the power;

- b. The power to suspend is not invariably of short duration;
- c. The particular facts of the case will impact the content of any obligation to accord procedural fairness, so that for instance, an oral hearing with cross-examination may not be warranted in circumstances where a suspension for a week is proposed;
- d. Specific limited urgent action may be required where there is a 'likely immediate detriment to the public';
- e. The Trial Judge erred in accepting that the failure to accord a hearing in the circumstances would not have made any difference to the exercise of the Stewards discretion to suspend; and
- f. The use of prohibited substances is a serious problem in Harness Racing which calls for strong measures, including the steps recently put in place by HRNSW. However, 'basal considerations of fairness, recognised by the law for centuries, are not thereby to be set aside'.

65 I was referred to two further NSW decisions.

66 On 25 July 2014, the NSW Racing Appeals Tribunal dismissed a stay application by Mr Jake Stockton who had his licence suspended on 17 July 2014. A urine sample taken from Mr Stockton's horse following its win at a race on 16 May 2014 demonstrated Cobalt with a reading of 810 mcg/L. Analysis of the B sample was anticipated within the next two weeks after which an enquiry would commence.

67 In his stay application Mr Stockton said in part:

I believe I didn't willing (sic) breach any of the rules of racing as no alleged substance was given to this horse...

68 The New South Wales Tribunal noted that there was nothing raised in support of the appellant's application based on personal circumstances or hardship. In dismissing the application the Tribunal said:

the Tribunal in considering a competing interest of the appellant and respondent having regard particularly to the level of the reading... is not satisfied given the overarching obligation of HRNSW to ensure that the integrity of the industry is protected for all participants. The Tribunal is not satisfied that the appellant has discharged the onus upon him necessary to discharge the balance of convenience.

69 In my view, this case is not helpful in the context of the current case for reasons developed below.

70 Finally, I was referred to the decision of the Appeal Panel of Racing New South Wales dated 22 April 2015 concerning the licensed trainer Darren Smith. In this case, Mr Smith was the subject of 42 charges relating to the

period between 14 February and 20 May 2014.²² The charges related to 20 race day and one non-race day samples taken from 17 thoroughbred race horses. Chemical analysis revealed Cobalt levels ranging from 224 mcg/L to 6470 mcg/L. Twelve horses had readings over 1000 and four horses had readings over 2000. Mr Stockton admitted that he administered the substance Cobalt to the horses particularised in the charges.

71 The Tribunal found no mitigating circumstances and described the appellant as having been evasive and untruthful to Stewards when first interviewed. He also had nine previous breaches in respect of prohibited substances. In dismissing the appeal, the Tribunal confirmed the findings of guilt made by the Stewards and the aggregate penalty of 15 years disqualification.

72 In its reasons for decision, the Tribunal noted that:

there is no challenge to the expert veterinary evidence given by Professor Mills..., Dr Suann and Dr Robertson Smith that levels of Cobalt at and in excess of 100 mcg/mL cannot be attributed to naturally produced Cobalt in a horse or to commercially available veterinary supplements being administered to a horse... Further, the evidence of Prof Mills... And Dr Suann... was that Cobalt is potentially performance enhancing in mammals in amounts “in excess of normal physiological requirements”... It can be noted here however that the issue of performance enhancement was not relevant to the appellants guilt in relation to any charge and that Dr Robertson Smith did not think any conclusion could yet be drawn about whether Cobalt had a performance enhancing effect at any level in horses... Finally the unchallenged evidence of Professor Mills was that Cobalt is known to be toxic and in high amounts poses a “potential risk to the health and welfare” of horses. In his evidence before the panel he expressed concern in this regard in relation to the reading at least for the horse “Testarhythm” whose urine sample showed the presence of 6200 µg of Cobalt per litre.²³

... Two vital purposes of the rules are to protect the integrity of racing and to protect the health and well-being of horses involved in the thoroughbred racing industry.²⁴

ANALYSIS AND FINDINGS

73 The Stewards clearly had authority to suspend the licence of the Applicant in the current circumstances where there is already conclusive evidence that the Applicant presented a horse for race not free of a prohibited substance. However, the discretion of the Stewards is not unfettered and is not informed solely by considerations of the integrity of the Harness Racing industry or the health and welfare of the horse concerned. These are

²² The charges related to both administering a prohibited substance; and presenting a horse for race not free of any prohibited substance.

²³ At [66].

²⁴ At [70].

matters which are present at least to some degree in every breach of the Rules, based upon the presence of a prohibitive substance.

- 74 In my view, the error committed by the Stewards and endorsed by the Board is effectively equivalent to the error identified by the Court of Appeal in *Day's* case. Although in this case, the Applicant was accorded a right to be heard by the Stewards, in reality there is no evidence that his personal circumstances and background were taken into account. Furthermore, I am not satisfied that there was a reasonable basis either before the Board or this Tribunal:
- a. to treat the nature of Cobalt, as a prohibited substance, more severely in all cases than other prohibited substances; or
 - b. to treat the subject case as one which warranted the urgent sanction of licence suspension, pending completion of the investigation.
- 75 In my view, the following circumstances, in aggregate, weigh significantly in favour of the Applicant:
- a. He has no relevant prior offending history and, in particular, no prior offending relating to the administration of prohibited substances or the presentation of a horse not free of a prohibited substance;²⁵
 - b. There is no suggestion that he was not cooperative;
 - c. To date, there has been no incriminating evidence obtained from his property, which might have been, for instance, consistent with possession of substances containing Cobalt;
 - d. The Applicant has not admitted to administering Cobalt;
 - e. Only one horse owned or trained by the Applicant has been the subject of an incriminating urine sample; and
 - f. Nearly 6 weeks after the Applicant's licence suspension, there has been no explanation as to why he has not been charged already with a breach of Rule 190(2); and there is no indication as to when a charge or charges may be laid in future.
- 76 In my view, having regard to all of the above circumstances, there is no compelling reason why the Applicant ought to be subject to a licence suspension, which is currently of indeterminate duration.
- 77 In relation to the principal grounds relied upon by the Respondents to justify a suspension in this instance, there is no question that the discretion to suspend a licence is an important mechanism, in appropriate circumstances, to maintain the integrity of the Harness Racing industry and to protect the health and welfare of horses generally. However, in this case, I am not satisfied that these important objectives outweigh the personal circumstances of the Applicant, as outlined above.

²⁵ In this respect alone, the Applicant is markedly distinguishable from *Smith's* case.

- 78 Furthermore, in my view, there has been misplaced reliance upon expert evidence. In particular, there are certain opinions of experts, given in various cases to which the Tribunal was referred and by Dr Cust, which are uncontroversial. These opinions relate to the physiological mechanism by which Cobalt is processed and metabolised within mammalian systems. In addition, there is no question as to the potential for Cobalt to have a deleterious effect upon the health and welfare of mammals, potentially including horses, as well as a secondary impact upon increased red blood cell production. However, I accept the submissions made by Applicant's Counsel to the effect that:
- a. Scientific research into the effect of Cobalt levels above normal endogenous levels, is continuing;
 - b. The precise impact of Cobalt upon a horse, in the context of a range of variables, including frequency and level of dosage, is far from clear;
 - c. The Respondents have sought to distinguish Cobalt from other prohibited substances on the basis of the likelihood of its effect in horses rather than upon empirical evidence; and
 - d. No evidence was advanced on behalf of the Respondents that the Harness Racing industry is experiencing an epidemic of Cobalt administration.

CONCLUSION

- 79 For the reasons stated, I am not satisfied that there has been a proper exercise of the discretion to suspend the Applicant's licence in the circumstances, pending investigation. I am also not satisfied that any consideration was given to other less draconian directions, such as available pursuant to Rule 183(a), (b) or (c), which would not have precluded the Applicant from continuing to train horses.
- 80 The decision of the Board will be set aside.


Judge Jenkins
Vice President



