



DECISION ON PENALTY

RACING VICTORIA STEWARDS

and

**ROBERT SMERDON, GREGORY NELLIGAN, DENISE NELLIGAN, LIAM BIRCHLEY,
TONY VASIL, STUART WEBB, DANIEL GARLAND & TRENT PENNUTO**

Date of Hearing 30 April 2018, 1 and 3 May 2018

Date of Decision 8 May 2018

Date of Penalty 10 May 2018

Panel Judge J Bowman (Chair), Mr B Forrest (Deputy Chair) and
Mr G Ellis (Member)

Appearances Mr J Gleeson QC, with Mr D Bennett (instructed by Minter
Ellison) appeared on behalf of the RVL Stewards

Mr T McHenry appeared on behalf of Mr R. Smerdon, Mr S Webb
and Mr D Garland

Mr P. Wheelahan (instructed by Tony Hannebery Lawyers)
appeared for Mr A. Vasil

Mr G Croxford appeared for Mr T Pennuto

Mr M Grant-Taylor QC (instructed by Travis Schultz Law)
appeared for Mr L Birchley

Robert Smerdon

Charge One: AR 175(a)

*AR 175 The Principal Racing Authority (or the Stewards
exercising powers delegated to them) may penalise:*

*(a) Any person who, in their opinion, has been guilty of any
dishonest, corrupt or fraudulent, improper or dishonourable
action or practice in connection with racing.*

On 115 occasions during the period from 26 June 2010 to 7
October 2017, Mr Smerdon engaged in a practice that was
dishonest, corrupt or fraudulent, improper or dishonourable, in
that he was a party to the administration of alkalinising agents
and/or medications to a horse or horses on a race day.

Charge Two: AR 178E(1)

... [N]o person without the permission of the Stewards may ... cause to be administered any medication to a horse on race day prior to such horse running in a race.

On 8 October 2010, Mr Smerdon instructed Mr Nelligan to administer Vicks to the nose of *Disco Dan* after saddling that gelding prior to running in Race 8 at Bendigo.

Plea Charge 1 - Not Guilty
Charge 2 - Not Guilty

Decision **Charge 1** - The Board finds the charge proved.
Mr Smerdon is (a) disqualified for life; and (b) fined – amount subject to further submissions.

Charge 2 - The Board finds the charge proved.
Mr Smerdon is disqualified for a period of six months to be served concurrently with the penalty pursuant to AR 175(a).

Gregory Nelligan

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(a) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On 123 occasions during the period from 26 June 2010 to 7 October 2017, Mr Nelligan engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that he administered alkalinising agents and/or medications, and/or he was a party to the administration of alkalinising agents and/or medications to a horse or horses on a race day.

Charge Two: AR 178A(1)(a) [Alternative to Charge 1]

AR 178A(1) No, person, unless he has first obtained the written permission of the Stewards, shall have in his possession on a racecourse where a race meeting is being conducted or in any motor vehicle, horse float or other mode of transport used for the purpose of conveying a horse or horses to and/or from a race meeting any prohibited substance or a syringe, needle, nasogastric tube or other instrument that could be used:

(a) to administer a prohibited substance to a horse[.]

At the Flemington racecourse on 7 October 2017, Mr Nelligan was in possession of an instrument that could be used to administer a prohibited substance to a horse, namely a modified syringe.

Charge Three: AR 178AA – Lovani [Alternative to Charge 1]

178AA (1) A person must not administer an alkalinising agent, in any manner, to a horse which is engaged to run in any race ...:

(a) at any time on the day of the scheduled race ... and prior to the start of such event; ...

(2) Any person who:

(a) administers any alkalinising agent; [and/or]

(b) attempts to administer an alkalinising agent ...

contrary to AR 1788A(1) commits an offence and may be penalised.

On 7 October 2017 at or about 3:08pm, Mr Nelligan administered, alternatively attempted to administer, sodium bicarbonate, an alkalinising agent, to *Lovani* which was scheduled to run in Race 9, the Paris Lane Handicap, at 5:45pm at Flemington racecourse.

Charge Four: AR 178E(1) – Lovani [Alternative to Charge 1 and 3]

178E(1) ... [N]o person without the permission of the Stewards may administer ... any medication to a horse on race day prior to such horse running in a race.

On 7 October 2017 at or about 3:08pm, Mr Nelligan administered, alternatively attempted to administer, sodium bicarbonate and Tripart, both of which are medications, to *Lovani* which was scheduled to run in Race 9, the Paris Lane Handicap, at 5:45pm at Flemington racecourse.

Charge Five: AR 175B(2) – Darney Gub

175B(2) Any person employed by a trainer in connection with the training or care of racehorses must not lay a horse under the control of the trainer for whom he is or was employed, while so employed ...

On 9 March 2015, Mr Nelligan, who was at all relevant times employed as a stablehand by Mr Robert Smerdon, a licensed trainer, bet \$100 on *Darney Gub* in Race 6 at Moonee Valley to lose that race.

Charge Six: AR 175B(2) – Reldas

175B(2) Any person employed by a trainer in connection with the training or care of racehorses must not lay a horse under the control of the trainer for whom he is or was employed, while so employed ...

On 27 March 2015, Mr Nelligan, who was at all relevant times employed as a stablehand by Mr Robert Smerdon, a licensed trainer, bet \$100 on *Reldas* in Race 2 at Moonee Valley to lose that race.

Charge Seven: AR 175B(2) – *The Bowler*

175B(2) Any person employed by a trainer in connection with the training or care of racehorses must not lay a horse under the control of the trainer for whom he is or was employed, while so employed ...

On 11 April 2015, Mr Nelligan, who was at all relevant times employed as a stablehand by Mr Robert Smerdon, a licensed trainer, bet \$330 on *The Bowler* in Race 8 at Flemington to lose that race.

Charge Eight: AR 178E(1)

AR 178E(1) ... [N]o person without the permission of the Stewards may ... cause to be administered any medication to a horse on race day prior to such horse running in a race.

On 8 October 2010, Mr Nelligan administered Vicks to the nose of *Disco Dan* after saddling that gelding prior to running in Race 8 at Bendigo.

Charge Nine: AR 175(p)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:
...

(p) Any person who fails to comply with any order, direction or requirement of the Stewards or any official.

On 31 October 2017, during an inquiry, Mr Nelligan refused and failed to comply with the direction of the Stewards, directing him to produce his mobile telephone for the purpose of facilitating the imaging of his telephone.

Charge Ten: AR 175(f)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:
...

(f) Any person who refuses or fails to attend or give evidence at any investigation, inquiry or appeal when directed or requested by the Principal Racing Authority, or other person authorised by the Principal Racing Authority, to do so.

On 31 October 2017, during an inquiry, Mr Nelligan refused and failed to give evidence in relation to the on-course race day treatment of Lovani at Flemington on 7 October 2017.

Plea

Charge 1 - No plea entered (treated as not guilty)
Charges 2 - No plea entered (treated as not guilty)
Charges 5 to 7 - No plea entered (treated as not guilty)
Charge 8 - No plea entered (treated as not guilty)
Charges 9 - No plea entered (treated as not guilty)
Charge 10 - No plea entered (treated as not guilty)

Decision

Charge 1 - The Board finds the charge proved.
Mr Nelligan is disqualified for life.

As Charge 1 is proved Charges 2 - 4 (alternatives to Charge 1) fall away.

Charges 5 to 7 - The Board finds the charges proved.
Mr Nelligan is convicted and disqualified for a period of six months on each charge, a total of 18 months to be served concurrently with the principal sentence.

Charge 8 - The Board finds the charge proved.
Mr Nelligan is convicted and disqualified for a period of six months to be served concurrently with the principal sentence.

Charge 9 - The Board finds the charge proved.
Mr Nelligan is convicted and disqualified for a period of six months to be served concurrently with the principal sentence.

Charge 10 - The Board finds the charge proved.
Mr Nelligan is convicted and disqualified for a period of six months to be served concurrently with the principal sentence.

Denise Nelligan

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(b) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On 13 occasions during the period from 24 February 2011 to 25 February 2017 Mrs Nelligan engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that she was a party to the administration of alkalising agents and/or medications to a horse or horses on a race day.

Plea

Charge 1 - No plea entered (treated as not guilty)

Decision

Charge 1 - The Board finds the charge proved.
Mrs Nelligan is disqualified for life.

Liam Birchley

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(a) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On three occasions, on 3 November 2011, 6 November 2012 and 3 November 2015, Mr Birchley engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that he was a party to the administration of alkalising agents and/or medications to a horse or horses on a race day.

Plea Charge 1 - Not Guilty

Decision Charge 1 - The Board finds the charge proved. Mr Birchley is disqualified for one year. The commencement date of the disqualification is subject to submissions from the parties.

Pursuant to AR 196(6)(b) Mr Birchley must not start a horse in any race from the date of the Board's decision, 10 May 2018, until the expiration of the period of disqualification.

Tony Vasil

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(a) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On seven occasions during the period from 26 December 2010 to 7 June 2013, Mr Vasil engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that he was a party to the administration of alkalising agents and/or medications to a horse or horses on a race day.

Plea Charge 1 - Not Guilty

Decision Charge 1 - The Board finds the charge proved. Mr Vasil is disqualified for three years. The commencement date of the disqualification is subject to submissions from the parties.

Pursuant to AR 196(6)(b) Mr Vasil must not start a horse in any race from the date of the Board's decision, 10 May 2018, until the expiration of the period of disqualification.

Stuart Webb

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(a) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On three occasions, on 15 August 2010, 26 December 2010 and 28 April 2017, Mr Webb engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that he was a party to the administration of alkalising agents and/or medications to a horse or horses on a race day.

Plea Charge 1 - Not Guilty

Decision Charge 1 - The Board finds the charge proved. Mr Webb is disqualified for four years. The commencement date of the disqualification is subject to submissions from the parties.

Pursuant to AR 196(6)(b) Mr Webb must not start a horse in any race from the date of the Board's decision, 10 May 2018, until the expiration of the period of disqualification.

Daniel Garland

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(a) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On two occasions, on 3 November 2011 and 25 May 2013, Mr Garland engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that he was a party to the administration of alkalising agents and/or medications to a horse or horses on a race day.

Plea Charge 1 - Not Guilty

Decision Charge 1 - The Board finds the charge proved. Mr Garland is disqualified for one year. The commencement date of the disqualification is subject to submissions from the parties.

Trent Pennuto

Charge One: AR 175(a)

AR 175 The Principal Racing Authority (or the Stewards exercising powers delegated to them) may penalise:

(a) Any person who, in their opinion, has been guilty of any dishonest, corrupt or fraudulent, improper or dishonourable action or practice in connection with racing.

On four occasions during the period from 22 August 2010 to 9 December 2011, Mr Pennuto engaged in a practice that was dishonest, corrupt or fraudulent, improper or dishonourable, in that he was a party to the administration of alkalising agents and/or medications to a horse or horses on a race day.

Plea

Charge 1 - Not Guilty

Decision

Charge 1 - The Board finds the charge proved. Mr Pennuto is disqualified for two years. The commencement date of the disqualification is subject to submissions from the parties.

Pursuant to AR 196(6)(b) Mr Pennuto must not start a horse in any race from the date of the Board's decision, 10 May 2018, until the expiration of the period of disqualification.

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RACING APPEALS AND DISCIPLINARY BOARD

HIS HONOUR JUDGE J. BOWMAN, Chairman

MR B. FORREST, Deputy Chairman

MR G. ELLIS

EXTRACT OF PROCEEDINGS

PENALTY

RACING VICTORIA STEWARDS

and

AQUANITA RACING

MELBOURNE

THURSDAY, 10 MAY 2018

MR J. GLEESON QC, with MR D. BENNETT (instructed by Minter Ellison) appeared on behalf of the RVL Stewards

MR T. McHENRY appeared on behalf of Mr R. Smerdon, Mr S. Webb and Mr D. Garland

MR P. WHEELAHAN (instructed by Tony Hannebery Lawyers) appeared for Mr A. Vasil

MR G. CROXFORD appeared for Mr T. Pennuto

MR M. GRANT-TAYLOR QC (instructed by Travis Schultz Law) appeared for Mr L. Birchley

CHAIRMAN: It is important to remember at the outset that all persons charged are so charged pursuant to AR 175(a). The charge relates to dishonest, corrupt action and the like. The instances of administration listed are particulars of the charge and we agree with the proposition that was put that it is not a matter of mathematical multiplication of those particulars. The penalties to be imposed in this case are to reflect the gravity of what occurred.

Eight people, associated one way or the other with Aquanita, including a director, engaged in a scheme to attempt to gain an illegal and unfair advantage. To employ the wording of the rule which they breached, they have been found guilty of dishonest, corrupt or fraudulent, improper or deceitful action or practice. Further, it was organised and structured conduct designed to strike at something which is of vital importance to racing, namely, its integrity. The public's perception of that integrity is of major importance. It was an organised attempt at cheating over a seven-year period.

The Aquanita case reflects very badly on all those parties involved. Further, none of the charged cooperated with the Stewards, with the exception of Mrs Nelligan, who then attempted to resile from her admissions. None pleaded guilty. One only, Mr Birchley, gave evidence. Thus, there are no discounting factors operating in respect of the Stewards' conduct of the investigation or the conduct of this hearing.

We turn now to the individuals charged and the penalties to be imposed.

(1) Mr Robert Smerdon. Mr Smerdon was the leading and most prominent trainer in the Aquanita group, as well as being a director of Aquanita. It is sad that a trainer of his eminence and from such a strong racing family should have been a major driving force behind the scheme.

There was effectively a hierarchical ladder of those running and involved in the illegal scheme and Mr Smerdon was at the top of it. He was involved in 115 breaches of the rule. His scandalous conduct deserves the strongest condemnation. He has surrendered his trainer's licence. We note that his record as a trainer was not unblemished. For his frequently repeated and highly damaging breaches of AR 175(a), he is disqualified for life.

We are also contemplating a fine, which would not be nominal. As the prospect of this has taken Mr McHenry, appearing on behalf of Mr Smerdon, by surprise, perhaps understandably by surprise, we will give him the opportunity of placing any relevant financial material before us. We would want such material and any written submissions accompanying it within the next seven days and the Stewards can then respond in writing within three days.

Returning to Mr Smerdon, in relation to his breach of AR 178E(1) relating to the administration of Vicks to the horse Disco Dan on 8 October 2010, he is disqualified for a period of six months, obviously to be concurrent with the penalty pursuant to AR 175(a). The breach of AR 178E(1) is a serious offence.

(2) Gregory Nelligan. Gregory Nelligan, whilst further down the hierarchical ladder, was a prime mover of the whole nefarious affair over the full seven-year period. He appears to have been a promoter and organiser of the scheme, whilst also obviously taking orders from Mr Smerdon and Mr Webb. He also did some freelancing. He was involved in 123 particulars supporting the proposition of breach of the rule. He has also been convicted of three breaches of AR 175B(2), the laying of horses. Such a breach is a serious offence. He is disqualified for a period of six months on each charge, a total of 18 months to be served concurrently with the principal sentence. I say now that the principal sentence and the end result is disqualification for life.

In addition, Gregory Nelligan is convicted of a breach of 178E(1), the race-day administration of Vicks to Disco Dan as referred to previously. Again, the penalty is six months' disqualification to be served concurrently with the principal penalty. In addition, he is guilty of AR 175(p), refusing to comply with a direction or requirement of the Stewards and AR 175(f), failing to attend at an investigation or inquiry when directed to do so. He is disqualified for six months on each charge, again to be concurrent with the principal charge and the end result, we repeat, is disqualification for life.

(3) Mrs Denise Nelligan. Mrs Nelligan played a prominent role in the whole illegal enterprise. She made top-ups, passed on messages and instructions, took an interest in the betting and at times encouraged the use of top-ups. She took an avid interest in the whole illegal business. While she briefly cooperated with the Stewards, this being important in bringing down the whole

crooked mess, she then attempted to renege. For her breach of AR 175(a), she is disqualified for life.

(4) Mr Stuart Webb. Mr Webb was well up in the hierarchy of command. He was a licensed trainer operating under the Aquanita banner. He organised Aquanita transport and at times this played a significant role in the administration of top-ups. He issued instructions and advice in relation to top-ups. It's apparent that he also requested a top-up for one of his own horses. He was involved essentially for the whole duration of this crooked enterprise. He has surrendered his licence, as we understand it. He has been in previous trouble relating to prohibited substances and, notably on one occasion, bicarbonate of soda. For his breach of AR 175(a), he is disqualified for four years.

(5) Mr Tony Vasil. Mr Vasil was also a licensed trainer linked to Aquanita until July 2013 and thereafter trained out of its stables. Between December 2010 and July 2013, he was involved in seven breaches relating to top-ups. To do this on one occasion is bad enough; to do it or be party to it on seven occasions, and some apparently involving more than one horse, is serious and calculated, corrupt behaviour. His record is far from perfect, having four prior convictions relating to prohibited substances, one relating to sodium bicarbonate. We appreciate that his offences ended in approximately July 2013. For his breach of AR 175(a), Mr Vasil is disqualified for three years.

(6) Trent Pennuto. Mr Pennuto was a licensed trainer who, between August 2010 and December 2011, acted as Mr Vasil's foreman. During that period, he played an active role in requesting and organising top-ups. As referred to in our decision of 8 May 2018, he was well aware of what they were, was prepared to request them and give advice concerning the appropriate time for their administration. Whether it be called a circle of trust, a team or whatever, he was an active member of the top-ups conspiracy, as was his employer, Mr Vasil. We have considered the difficulties which he has been experiencing in his personal life and the fact that his offending occurred in excess of six years ago. For his breach of AR 175(a), Mr Pennuto is disqualified for two years.

(7) Mr Daniel Garland. Mr Garland was well down the hierarchy of command. He was a float driver for Mr Smerdon and Aquanita. However, he was a member, if a nervous one, of the top-ups team. It is also clear on at least one occasion he administered a top-up. The evidence might not suggest that he was as regularly, deeply or enthusiastically involved as some of the others. He must nevertheless be regarded as a serious offender. For his breach of AR 175 (a), Mr Garland is disqualified for a period of one year.

(8) Mr Liam Birchley. We have left Mr Birchley until last because whilst he had been an Aquanita trainer until 2011, thereafter he was independent of that organisation and was not part of the hierarchy of corruption. He was based in Brisbane. However, as described in our decision of 8 May 2018, he kept up his contact with Gregory Nelligan. Between 2011 and 2015, on three occasions he

engaged in conduct involving top-ups. This was not as a member of the team that was operating, but as someone who requested and used top-ups supplied either by that team or by Gregory Nelligan, possibly when freelancing. Each of these instances occurred during the spring carnival, and the last on Melbourne Cup Day. At least on that occasion he specifically contacted Gregory Nelligan in order to get a top-up.

We also note that Mr Birchley has for all intents and purposes an unblemished record. He is a prominent Brisbane trainer, with in excess of 60 horses in work. A period of disqualification will hit him hard. He may not have been part of the inner circle, he may have been outside the tent, but these are serious matters and constituted conduct in breach of AR 175(a). For that breach, Mr Birchley is disqualified for one year.
