

**RACING PENALTIES APPEAL TRIBUNAL DETERMINATION**

**APPELLANTS:** MR DAVID HOPPERTON

**APPLICATION NO:** 24/2220

**PANEL:** MR ROBERT NASH (CHAIRPERSON)  
MR PHILLIP GLEESON (MEMBER)  
MR BENJAMIN WILLESEE (MEMBER)

**DATE OF HEARING:** 6 MAY 2024

**DATE OF DETERMINATION:** 11 JUNE 2024

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**IN THE MATTER OF an appeal by DAVID HOPPERTON against a determination made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 13 March 2024 to impose a disqualification of 6 months and a fine of \$500 for breach of Rule AR 240(2) and Rules LR 97F (a) and (b) of the Rules of Thoroughbred Racing**

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Dr Tom Ahern appeared for the Appellant.

Mr Denis Borovica appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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**Result of the Appeal**

1. For the reasons that follow, the Appellant's appeal against the penalty imposed is dismissed.

**Overview of the Appeal**

2. Mr Hopperton was charged with two offences under the Rules:

- a) **(Charge 1 – Breach of AR 240(2))** - That Mr Hopperton, as the trainer, presented the 3 year old filly PLAY DICE to race at Bunbury on Thursday, 21 December 2023 where it did race and win Race 2, with Metformin, a prohibited substance on Prohibited List A, being detected in a post-race urine sample taken from PLAY DICE.
- b) **(Charge 2 – Breach of LR 97F (a) and (b))** - That Mr Hopperton, a licensed trainer, stabled his racehorses at a property other than his registered stable address, as notified on his licence renewal for the 2023-24 racing season, without having made written application and obtained the consent of the Stewards.

3. At a Stewards inquiry on 7 March 2024, Mr Hopperton pleaded guilty to both charges.

4. On 13 March 2024, the Stewards notified Mr Hopperton that they had imposed penalties of:
  - a) Charge 1 – a disqualification of six (6) months, back dated to 28 February 2024; and
  - b) Charge 2 – a fine of \$500.
5. By Notice of Appeal dated 19 March 2024, Mr Hopperton appealed against the penalties imposed on the following grounds:
  - a) He is a 72 year old hobby trainer and has been in the industry for 50 years and has never been charged before.
  - b) That the penalty is manifestly excessive for a “first offence for any kind”.
  - c) The penalty is inconsistent with those imposed for similar offences in other codes.
6. While the Notice of Appeal refers to both Charges 1 and 2, the grounds of appeal refer to a single penalty. Further, the submissions made on behalf of Mr Hopperton at the hearing of the appeal were directed solely to the penalty imposed for Charge 1.
7. Accordingly, we have treated the appeal as being confined to an appeal against the six month disqualification for breach of Rule AR 240(2). These reasons reflect that approach.

## **Background**

8. Mr Hopperton has been a licensed trainer for approximately 50 years.
9. On 21 December 2023, Mr Hopperton presented PLAY DICE for Race 2 at Bunbury.
10. Following the race, a routine sample was taken from PLAY DICE.
11. On 24 January 2024, Dr Nicola Beckett, Team Leader Racing Chemistry Laboratory, ChemCentre, wrote to the Stewards advising that the sample was positive for Metformin.
12. On 31 January 2024, RWWA investigators attended Mr Hopperton’s registered stable address and were told that he had moved premises some months ago. The investigators then attended Mr Hopperton’s home and interviewed him in respect of the positive reading of Metformin in PLAY DICE’s sample. As part of the interview, Mr Hopperton advised that he was taking Metformin twice a day in connection with treating his diabetes.
13. On 27 February 2024, the positive test result was confirmed by Racing Analytical Services Ltd (Vic).
14. On 28 February 2024, the Stewards wrote to Mr Hopperton directing him to attend a Stewards inquiry into the test results and advising him that his training licence was suspended pursuant to Rule LR 22 pending the outcome of the inquiry.
15. On 7 March 2024, a Stewards inquiry was held into the positive test result. The inquiry also dealt briefly with the matters the subject of Charge 2.
16. Relevantly, for the way in which aspects of the appeal were conducted, Dr Buddhika Dorakumbra, a Chemist and Research Officer for the Racing Chemistry Team at the ChemCentre, gave evidence that the level of Metformin detected in the sample was 12 nanograms.
17. Dr Buddhika gave evidence that the only other reported case of Metformin being detected in equine urine was detected at 17 nanograms and, as such, Dr Buddhika was unable to comment on whether the level detected in PLAY DICE was high, medium, or low.

18. Dr Judith Medd, RWWA Head of Veterinary Services, gave evidence that the amount of Metformin recorded in the test was “not a particularly high level” but that it was hard to gauge given there are only a few points of reference.
19. Dr Medd further gave evidence that there are no screening limits or thresholds for Metformin because it is not a drug that has an equine therapeutic application nor is it a naturally occurring substance.
20. Dr Medd’s evidence was that Metformin is indicated for the control of diabetes in humans.
21. Further, Dr Medd gave evidence that research has indicated that Metformin has an action as an indirect adenosine monophosphate protein kinase activator – being a drug that can lead to insulin and inflammation suppression, protection of the nervous system, increased body fat burning, and improved anaerobic exercise capacity.
22. Dr Medd’s evidence was that, in human athletes, Metformin is potentially performance enhancing, which is why it is on the list of banned substances.
23. Dr Medd’s evidence was not challenged during the inquiry. Nor was the fact that Metformin is a permanently banned substance under the Rules.
24. Rather, the issues raised by Mr Hopperton during the inquiry were that:
  - a) he was not aware of the potential issue with Metformin;
  - b) that the only communication regarding contamination risk of human medications was in a veterinary notice which he only became aware of after being notified of the positive test;
  - c) the contamination risk was not clearly identified as part of the racing calendar or otherwise communicated to trainers; and
  - d) vets he had spoken to did not consider that Metformin would have any performance enhancing effect on a horse, indeed it may detract from the horse’s performance.
25. The significance of the contamination risk in this case is that the unchallenged evidence of Mr Hopperton was that the only possible basis for the positive test was the result of contamination from human urine mixing with the hay in PLAY DICE’s horsebox which would then have been consumed by PLAY DICE.
26. As noted above, Mr Hopperton is a diabetic and takes Metformin as part of his treatment. Without unnecessarily going into Mr Hopperton’s medical history, there was also unchallenged evidence as to certain medical factors which mean that Mr Hopperton needs to urinate often and that there were no toilets at the stables where PLAY DICE was stabled such that he often urinated in PLAY DICE’s horsebox.
27. In addition to the explanation as to how the positive test result came about, Mr Hopperton pointed to the fact that:
  - a) he has been training for almost 50 years and has never been charged with any similar offence;
  - b) he has had other horses swabbed after the incident (including PLAY DICE) and no positive tests have been returned; and
  - c) in response to an incident involving Darren Hancock in New South Wales, which Mr Hopperton characterised as being similar, the New South Wales Stewards had imposed a fine by way of penalty.
28. Having regard to the above factual background, the Stewards charged Mr Hopperton with Charge 1 and Charge 2 as described above. Mr Hopperton pleaded guilty to both charges.

29. The inquiry concluded and the Stewards adjourned to consider the penalty. On 13 March 2024, the Stewards notified Mr Hopperton that they had imposed penalties of:
- a) Charge 1 – a disqualification of six (6) months, back dated to 28 February 2024; and
  - b) Charge 2 – a fine of \$500.

### **The Appeal**

30. By Notice of Appeal dated 7 March 2024, Mr Hopperton appealed against the penalty imposed on the basis that it was manifestly excessive for a first offence and inconsistent with penalties handed down for similar offences in other codes.
31. As noted above, the Notice of Appeal refers to both Charges. However, the grounds of appeal and the manner in which the appeal hearing were conducted were both directly solely to the penalty imposed for Charge 1.
32. At the hearing of the appeal, Dr Ahern identified five factors which he submitted were relevant in assessing the appropriate penalty for Charge 1:
- a) Mr Hopperton's historical record as a trainer – Mr Hopperton has no previous offences.
  - b) The taking of responsibility for the incident – Mr Hopperton plead guilty to the Charge.
  - c) The nature of the concern arising out of a positive test of this type – which it was said could be contrasted to the concern that arises in response to a positive test for, say, methamphetamine.
  - d) The level at which the drug was detected – which was said to be well below that required for a clinical dose.
  - e) The effect of the drug on a horse's performance – in that there was unlikely to be a positive effect on the horse's performance from the drug being in its system.
33. Other than the evidence of Dr Medd and Dr Buddhika referred to above, there was no evidence in respect to factors (d) and (e) as part of the inquiry nor was any evidence sought to be adduced as part of the hearing of the appeal. Further, the propositions contended for in (d) and (e) were not put to the Doctors at the inquiry.
34. While the Stewards took no objection to these matters being raised in the way they were, it must be observed that the Tribunal is not able to meaningfully deal with submissions relating to matters of a technical nature that are unsupported by evidence in appeals of this kind.
35. Had Mr Hopperton wanted to challenge the evidence of Dr Medd about the nature of Metformin it ought to have been put to the Doctor during the inquiry. Alternatively, if Mr Hopperton wanted to advance the proposition that, notwithstanding Dr Medd's evidence, the Tribunal should reach a particular view as to the nature of Metformin and its potential impact on a thoroughbred, expert evidence would need to have been led on the topic.
36. Dr Ahern then referred generally to two instances outside Western Australia where animals had tested positive for Metformin – one in harness racing and one in greyhound racing – where Stewards had determined that a fine was an appropriate punishment.
37. The final matter that Dr Ahern raised was that PLAY DICE winning the race was explicable having regard to the horse's form prior to the race and, as such, there was no fraud or relevant loss of confidence in the integrity of the industry.
38. Having regard to the matters he had raised, Dr Ahern submitted that the appropriate punishment was a fine, having regard to the fact that Mr Hopperton had already lost the stake money for the race and would have the conviction as a black mark on his record.

39. By way of response, Mr Borovica:
- a) accepted that factors (a), (b), and (c) identified by Dr Ahern were relevant matters to factor into the penalty that was appropriate;
  - b) identified difficulties for authorities in placing reliance on the levels at which a drug is detected in a horse's system, as the test is limited to determining the level of the drug at that point in time and says nothing of the levels at which the drug may variously have been in the horse's system at other points in time; and
  - c) submitted that whether or not the drug had a performance enhancing effect was not relevant as the offence is one of strict liability.
40. Mr Borovica then took the Tribunal through decisions in Western Australian racing where penalties of disqualification had been imposed for offences relating to the detection of prohibited substances – including two disqualifications that have been imposed in relation to Metformin.
41. Mr Borovica identified to the Tribunal that there had never been a case in Western Australia where an animal had tested positive for a permanently banned substance and it had not resulted in some form of disqualification.
42. By reference to the history of decided cases, Mr Borovica submitted that a six month suspension sat comfortably within the appropriate range of penalties for offences of this kind and, as such, the penalty was not manifestly excessive in the circumstances.
43. In reply, Dr Ahern made submissions which were, with respect, directed to broader matters of policy as to how the Rules, and associated practices and procedures, might be changed to deal with similar situations in the future.
44. Those submissions raise matters beyond the scope of the Tribunal's jurisdiction and do not bear on the outcome of this appeal.

### **Determination of the appeal**

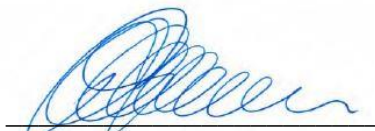
45. The approach this Tribunal takes when reviewing penalties imposed by the Stewards has been consistently stated in previous decisions of the Tribunal: see *Ferguson v RWWA (Harness)*, Appeal No. 853 (October 2021) [73]-[74]; *Oliveri v RWWA (Thoroughbred)*, Appeal No. 861 (February 2023) [40]; *Lewthwaite v RWWA (Thoroughbred)*, Appeal No. 863 (September 2023) [88]-[91].
46. The key feature of those statements is that it is not for this Tribunal to interfere with the penalty that has been imposed by the Stewards simply because it might have preferred to impose a different penalty had it been exercising the discretion. The discretion to impose a penalty is entrusted to the Stewards by reason of their considerable background experience and knowledge of the racing industry.
47. Rather, the time for the Tribunal to intervene is where a penalty has been imposed in error.
48. As the Stewards' Penalty Reasons note at [2]-[4], the assessment of the penalty in a case like this must be done by reference to the well-established principle that the maintenance of public confidence in the integrity of the racing industry is facilitated by the imposition of stringent controls on trainers presenting horses to race without prohibited substances in their system – regardless of whether or not the trainer is at fault: see *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337 at 349.
49. Rule AR 240(2) is a rule directed squarely at furthering that principle.

50. Rule AR 240(2) is a rule of strict liability. Mr Hopperton accepted as much as part of his pleading guilty to Charge 1.
51. However, the circumstances of the breach may be relevant to the appropriate exercise of the discretion to impose a penalty.
52. In that regard, we adopt a level of caution in respect of Mr Borovica's submission that the effect of a drug on the performance of a horse is not a relevant matter in an appeal such as this. However, when that submission is understood in the context of the Penalty Reasons as a whole, and indeed the penalty that was imposed, we do not consider that the adoption of that approach led the Stewards into error in imposing a six month disqualification.
53. Though they do not establish a mathematical equation for assessing whether a penalty is manifestly excessive, we have had regard to other decided cases in the context of positive tests for prohibited substances as a relevant factor in the broader assessment of whether the penalty imposed by the Stewards in this case was manifestly excessive.
54. In this regard, we note the following penalties that have been imposed historically.
55. In *Oliveri v RWWA (Thoroughbred)*, Appeal No. 861 (February 2023), a three month disqualification was imposed following appeal. Relevantly, the drug in issue in that case (Pregabalin) was not a permanently banned substance – i.e., it falls into a less serious classification of prohibited substance than Metformin. Further, the accepted hypothesis for the contamination in that case was that it was introduced by the action of a person other than Mr Oliveri. However, Mr Oliveri had previously been found guilty of breaches of the Rules.
56. In *Lewthwaite v RWWA (Thoroughbred)*, Appeal No. 863 (September 2023), a ten month disqualification was imposed which was upheld on appeal. The prohibited substance in question was an elevated level of testosterone. Mr Lewthwaite had no previous record.
57. In *Ferguson v RWWA (Harness)*, Appeal No. 843 (October 2021), a twelve month disqualification was imposed which was upheld on appeal. Again, the prohibited substance in question was an elevated level of testosterone. Mr Ferguson had previously been found guilty of breaches of the Rules.
58. The two other instances of positive tests for Metformin in Western Australia were the Harness Racing case of Mr Kevin Eggerton-Green who was disqualified for nine months and the Greyhound Racing case of John Vuletich who was disqualified for six months.
59. Mr Eggerton-Green had previously been found guilty of one breach of the Rules. Mr Vuletich had no previous record for similar offences and the evidence indicated that the contamination had arisen in materially the same way as is understood to have occurred in this case.
60. As the decisions in the cases above reflect, there will then be a range of periods of disqualification that will be appropriate following a positive test for a prohibited substance depending on the particular circumstances of the case.
61. As the Stewards identified in the Penalty Reasons, and accepted during the course of the appeal hearing, there are certain factors in this case which tend towards a period of disqualification at the lower end of the spectrum – namely Mr Hopperton's good record of a long period of time in the industry, the fact that he has accepted responsibility for his actions, and the fact that the drug in question is not one that is likely to raise acute levels of public concern.
62. To those factors may be added the fact that Mr Hopperton did not act to deliberately cause PLAY DICE to present with a prohibited substance in its system.

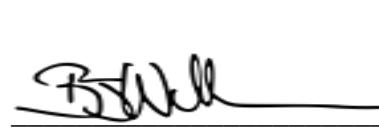
63. Having regard to the decisions referred to above, we are satisfied that the six month disqualification the Stewards imposed on Mr Hopperton sits comfortably within the range of disqualifications in similar cases and reflects a reasonable exercise of the discretion having regard to the individual circumstances of Mr Hopperton's case.
64. The decision relied upon by Mr Hopperton in respect of his appeal ground that the disqualification is inconsistent with penalties imposed in other codes is the decision of Harness Racing New South Wales Stewards in the case of Mr Darren Hancock. In that case the New South Wales Stewards determined that a \$1,500 fine was sufficient penalty in response to a positive test for Metformin.
65. Limited evidence as to the processes of the Hancock case was presented to the Tribunal. However, as the Stewards identified in the Penalty Reasons, the report of the decision does appear to indicate that the New South Wales Stewards appear to have erred in not identifying that Metformin is a permanently banned substance.
66. Of course, we are not in a position to comment on whether the proper classification would have made a material difference to the penalty imposed. Or whether the difference in penalty simply reflects a difference in approach by the authorities in other jurisdictions.
67. As this Tribunal has explained in the past, there could be a number of reasons why authorities in other jurisdictions may take different approaches to penalising offences of various kinds: see *Britton v RWWA Stewards*, Appeal No. 775 at [49] to [52], adopted with approval by the Tribunal in *Ferguson v RWWA*, Appeal No. 843 [44].
68. Accordingly, while regard may be had to the approaches being taken in other jurisdictions, they do not fetter or supplant the power of the Stewards to exercise their judgment as to what is necessary for the control of the local industry by setting the standards they consider are appropriate for the regulation and control of the local industry.
69. Accordingly, there is nothing in the decision in Hancock, at least as evidenced before the Tribunal, which causes us to doubt the correctness of the Stewards' determination in this case.
70. In all of the circumstances, we are not persuaded that there is any proper basis to interfere with the Stewards determination that a period of 6 months disqualification is appropriate in this case.



**ROBERT NASH**  
**CHAIRPERSON**



**PHILLIP GLEESON**  
**MEMBER**



**BENJAMIN WILLESEE**  
**MEMBER**

