14 September 2020

**RACING VICTORIA**

**and**

**MR DARREN McDONALD**

**Date of hearing:** On the papers, decision handed down 14 September 2020.

**Panel:** Judge John Bowman (Chairperson) and Judge Graeme Hicks (Deputy Chairperson).

**Representation:** Mr Daniel Bolkunowicz on behalf of the Stewards

Ms Claudette Chua on behalf of Mr McDonald.

**Charge:** AR 16(c)(iii)(B) states:

(c) in respect of any person who has been:

(iii) subject to any suspension, disqualification, or restriction imposed by any harness racing or greyhound racing club, authority, stewards or appeals tribunal (or authorised delegate of any of them) in Australia or in any other country

(B) warn off, suspend or disqualify, or place a restriction on that person under these Australian Rules.

**Particulars:** Mr Darren McDonald, was found guilty under rule AR 16(c)(iii)(B) of a charge of being someone who has been disqualified for live baiting offences and could significantly prejudice the image and interests of the thoroughbred racing industry.

**A. GENERAL BACKGROUND**

This matter comes before us by way of an appeal. It arises from a decision of “Racing Victoria Limited” (“RVL”) Stewards that was communicated to Mr McDonald by way of a letter dated 28 November 2019. As shall be discussed, there was no relevant hearing or communication prior to the letter.

The parties have asked us to determine the appeal ‘on the papers’ and without there being any oral evidence. Each has provided detailed written submissions. We shall proceed to so determine.

Insofar as this matter involves questions of law, or mixed fact and law, they have been decided by the Chairperson – see Section 50X of the *Racing Act 1958*. Valuable assistance has been provided by the Deputy Chairperson, but the ultimate decisions pursuant to Section 50X have been made by the Chairperson. Both have determined purely factual matters.

**B. THE FACTUAL BACKGROUND**

The undisputed factual background is as follows:

1. Mr McDonald was a prominent licensed greyhound racing trainer.
2. On 2 December 2015 the Greyhound Racing Appeals and Disciplinary Board (“the GRADB”) disqualified Mr McDonald for 20 years, 10 years of which were suspended, for live baiting. The period of disqualification was backdated to commence on 13 February 2015.
3. Over the next four years Mr McDonald attended numerous thoroughbred horse racing meetings as a spectator and punter. He attended these meetings without incident or complaint.
4. A letter dated 28 November 2019 was received by Mr McDonald, that letter setting out a decision of the RVL.
5. The letter was signed by Mr Dean Moore, Intelligence and Compliance Coordinator.
6. That letter informed Mr McDonald that he had been disqualified from that date until 13 February 2025, being ‘the expiry date’ of the disqualification period imposed by the GRADB should there be no further breach by him.
7. Essentially, the sole reason given by the RVL for the disqualification was as follows: “…..your presence as someone who has been disqualified for live baiting offences could significantly prejudice the image and interests of the thoroughbred racing industry”.
8. The Rule said to be relied upon was AR16(c)(iii)(B), herein after referred to as “the Rule”.
9. Prior to the receipt of the letter, Mr McDonald had not been interviewed, formally charged or taken part in any ‘show cause’ hearing or procedure.
10. Mr McDonald lodged a Notice of Appeal with the Registrar of this Tribunal, such Notice being dated 1 December 2019.
11. The grounds of the Appeal are stated to be as follows:

“1. I am an unlicensed person, and someone who has not otherwise agreed to be bound by the Australian Rules of Racing. It follows that RVL does not have power to impose a penalty against me (lack of jurisdiction); and/or

2. I was not given any opportunity to be heard, prior to the decision being made to disqualify me (denial of procedural fairness): and/or

3. The decision was not otherwise the correct and preferable decision”.

1. We would also point out the following:

(a) The GRADB described the live baiting engaged in by Mr McDonald as close to a worst case of live baiting, a practice which it described as “barbaric, vile and abhorrent”.

(b) Since 2 December 2015, Mr McDonald has complied with the terms of the disqualification imposed by the GRADB.

(c) Prior to 2015, Mr McDonald had been a licenced owner of racehorses. He has not owned any racehorses since then.

(d) Mr McDonald has been a regular attendee at Victorian thoroughbred race meetings as a spectator and without incident or complaint.

(e) In the present case, the Stewards of Racing Victoria, via the Deputy Chairman, Mr Rob Montgomery, alleged that in late October 2019 Mr McDonald was noticed by a Steward at a race meeting at Mornington racecourse. Whilst freely admitting he has attended race meetings, Mr McDonald denies that he was at Mornington on this occasion. No other sighting, complaint or incident is alleged by the Stewards.

(f) Mr McDonald is in ill health, having advanced Parkinson’s Disease. Attending Victorian thoroughbred race meetings with friends and relatives is very important to him.

**C. AR 16(c)(iii)(B) and SECTION 5F of the RACING ACT 1958**

Rule 16(c)(iii)(B) could be summarised as follows:

A person who has been subject to any suspension, disqualification or restriction by any horse racing or greyhound racing club, authority, stewards or appeals tribunal can be warned off, suspended, disqualified or have a restriction placed upon that person. Further, a copy of Section 5F of the *Racing Act 1958* is appended hereto. The Racing Act shall herein after be referred to as “the Act”.

The definition of “relevant person” as referred to in section 5F of the Act is to be found in section 3. It was conceded in submissions that Mr McDonald is a relevant person for the purposes section 5F.

**D. MATERIAL RELIED UPON**

The following material was placed before us:

1. The letter of RVL of 28 November 2019.

(ii) The statement of Mr Rob Montgomery, dated 24 February 2020.

This statement virtually forms the basis of the case of the Stewards. It is fully supportive of the decision of RVL. Essentially it asserts that persons who have been disqualified by other codes should be primarily banned from attending or participating in the Victorian thoroughbred racing industry. It refers to the reprehensible conduct associated with live baiting and to the fact that the separate codes are part of the one industry. It concludes by asserting that the presence of Mr McDonald in the thoroughbred industry could prejudice the image and interests of that industry. He should not be able to participate at any level, even as a mere spectator or punter.

(iii) A bundle of eleven references in support of Mr McDonald. These shall be discussed subsequently.

**E. THE SUBMISSIONS**

**(i) The submissions on behalf of Mr McDonald of 6 March 2020.**

Reference is made to the decision in *Clements V Racing Victoria Limited [2010] VCAT 114*. The Tribunal must first determine whether Mr McDonald is bound by the Rule. He had no contact or agreement, express or implied, with Racing Victoria. Mr McDonald had been in a contractual relationship with Racing Victoria when he was a licenced owner. That contract ended when his licence as an owner expired in 2015.

Regard should be had to fundamental rights and freedom.

The restrictions set out in AR263 – restrictions on entering racecourses and training premises, operating a betting account and the like – abrogate fundamental freedoms. There would be interference with individual rights. An important factor is Mr McDonald’s state of health. The proposed restrictions would have a significant impact upon this, as mentioned in the various references put before the Tribunal. Any doubt concerning interpretation of the Rule should be resolved in his favour.

In addition, Mr McDonald is not a ‘person’ as defined in the Rule. The Rule should not be interpreted so that it excludes from racecourses mere spectators.

The reason for excluding Mr McDonald has no merit. It is based on speculation. There is no evidence that his presence on a racecourse has had any prejudicial impact. There is no evidence of prejudice to the thoroughbred racing industry at the time of the offending or subsequently. There are impressive letters and references to the contrary. There has been no negative response to his being a spectator at racecourses over the past five years. He is unlikely to be recognised and keeps to himself. There is no evidence of any prejudice to the image of thoroughbred racing.

The statement of Mr Rob Montgomery speculates about potential prejudice. There is no evidence of actual prejudice to the industry.

Further, Mr McDonald suffers from severe Parkinson’s disease. He is unable to work. Socialising is difficult. Friends take him to the races. This is almost his sole opportunity for socialising. Disqualification is likely to have a detrimental effect upon his socialising and quality of life. It is not the correct or preferable decision.

**(ii) The submissions on behalf of RVL of 20 March 2020.**

The reliance on the decision in *Clements* is erroneous. In 2013, three years after that decision, the Act was amended. A new section, Section 5F, extended jurisdiction to persons participating in an activity connected with racing. That is so, however ‘fleeting or casual’ that activity may be – see *Smerdon V Racing Victoria Ltd [2019] VCAT 1372*. A person who attends race meetings is bound by the Rules of Racing under contract law and statute.

In addition, the word ‘person’, as used in the relevant legislation and Rules, clearly includes an individual. Mr McDonald is subject to AR16(c).

The statement of Mr Rob Montgomery should be accepted. A person disqualified from other codes should be similarly banned from attending or participating in thoroughbred racing. That is especially important if such a person has been disqualified for the reprehensible conduct associated with live baiting. Further, the three codes are all part of one industry. Mr McDonald’s presence as a spectator or punter could significantly prejudice the image and interests of thoroughbred racing.

Racing Victoria contends that the correct and preferable decision is that Mr McDonald be disqualified, with the exception that he can hold a betting account and can socialise with close associates. AR263(1)(K) and AR263(3) will not apply.

The GRADB made certain observations as to the nature of the conduct. (referred to above in “The Factual Background”). There was considerable publicity. The behaviour involving the live baiting was barbaric, such behaviour including Mr McDonald’s own conduct. Such behaviour in one code should be capable of resulting in a person being similarly penalised in another code. If Mr McDonald is not worthy of being part of the greyhound industry, he should not be worthy of being part of the thoroughbred industry.

**(iii)** **Mr McDonald’s submissions in reply.**

It is a misconstruction of the legislation to state that a person who fits the definition of ‘relevant person’ in Section 5F is ‘subject to the Rules of Racing’. The appellant concedes that he fits the definition of a ‘relevant person’, but that alone does not bring him into the purview of the Rules.

Section 5F (1)(b) sets out a number of preconditions that must be met - for example, attending a race meeting. The Stewards must have reasonable grounds to suspect that the relevant person may have contravened the Rules or been involved in a contravention of the Rules or have knowledge of it because of the person’s attendance at a race meeting. The appellant does not fit within these preconditions. Therefore, the appellant is not bound by the Rules of Racing pursuant to Section 5F.

If the legislation had intended that any ‘relevant person’ was automatically bound by the Rules of Racing, Section 5F (1)(a) and (2) would have no work to do. Essentially, most Australians would have participated in ‘any’ activity ‘connected with’ racing – for example, activities connected with the Melbourne Cup. It cannot be correct that virtually all Australians are bound by the Rules of Racing. The same argument applies to LR2.

Mr McDonald did not agree to be bound by the Rules of Racing. For all these reasons, Section 5F and LR2 are not applicable to him. He is not bound by the Rules of Racing and there is no jurisdiction to disqualify him pursuant to AR16(c)(iii)(B).

Even if this not be so, Racing Victoria has not established to the *Briginshaw* standard that Mr McDonald could have significantly prejudiced the image and interests of the industry.

The opinion of Mr Montgomery has little probative value. The opinions of the eleven referees for the appellant are to be considered. This is more a public relations issue than a matter to do with the running of races and the like. Many of the referees have been at the races with Mr McDonald. Why did the Stewards wait 5 years, during which time Mr McDonald was attending race meetings, before disqualifying him? There is no evidence that Mr McDonald was present at Mornington racecourse on the occasion that he was ‘noticed’ by a Steward. He denies being there. However, he does not deny being at Victorian racecourses on a number of occasions over the last 5 years. There is no evidence of any public complaint, negative publicity or the like. There is no evidence of any prejudice. There is no evidence that the 2015 greyhound matters have had any prejudicial or other impact on thoroughbred racing. Mr Montgomery gives no example or evidence to support his opinion.

The case for Racing Victoria is unsupported opinion evidence from Mr Montgomery in relation to a field not necessarily within his specialised knowledge. There is no evidence concerning similar ‘past examples or an adverse opinion’ from people in the racing community, or such an opinion from members of the public. There is no evidence to rebut that of the referees. There is no evidence to support the purported nexus in public relations issues between the different codes. Similarly, there is no evidence that, since 2015, the public or the media have had any interest in the appellant’s life or raised any concern. There is no evidence that he is readily recognised by the public. His attendance at race meetings does not cause prejudice.

Mr McDonald is supported by eleven persons of considerable standing, including Mr Colin Alderson, OAM. Many of the referees give compelling and unchallenged evidence that they have observed no negativity as a result of the appellant’s presence at thoroughbred race meetings. They also give evidence as to the high esteem in which he is held. This is compelling evidence.

The Stewards can give no example of how or why significant prejudice might occur. There is not even a hypothetical situation advanced. There is no explanation as to why, after 5 years, significant prejudice might suddenly crystalise.

That Mr McDonald suffers from severe Parkinson’s disease should be accepted. That he so suffers was not challenged in 2015 and there is no evidence to the contrary now. Further, the GRADB stated in 2015 that Mr McDonald’s conduct was not as reprehensible as that of the two other persons charged and noted his level of contribution to the industry. He should not be re-punished in the present proceedings. General deterrence has been dealt with by the GRADB in 2015 and should not be dealt with again here. The evidence is contrary to the assertion that his attendances at thoroughbred races has encouraged licensed persons to commit offences. In any event, it is the image of thoroughbred racing that is the basis of the present purported disqualification, not the deterrence factor.

Given Mr McDonald’s medical condition, attending race meetings is one activity that gives him the opportunity to socialise with friends. His illness makes it difficult for him to socialise easily. Attending race meetings with people he knows is of great value to him. The balance of convenience ought to favour the appellant.

**(iv)** **Further submissions on behalf of RVL**

This is not a situation where an investigation or inquiry was required. The requirements in Section 5F(2) of the Act and LR2(2) of the Rules of Racing did not need to be undertaken. If Mr McDonald attends race meetings in Victoria, he is bound by the Rules of Racing.

It is a misconstruction of the legislation to state that the words ‘subject to subsection (2)’ in Section 5F(1)(b) mean that the conditions in Section 5F(2) need be satisfied before a relevant person can be found to be bound by the Rules of Racing. In fact, those words only apply if there is to be an investigation or inquiry. If there is not to be an investigation or inquiry, those requirements do not need to be met. Section 5F(2) seeks to protect persons from being unfairly penalised for such matters as obstructing or hindering an investigation or failing to provide mobile phones.

Section 5F was inserted in the Act after the decision in *Clements*. He had failed to comply with a direction of the Stewards to produce his telephone records. An investigation or inquiry was not required. In the present matter, Mr McDonald had already been investigated and inquired into by the GRADB. LR(2)(2) makes it clear that the requirements of Section 5F(2) are only necessary if there is going to be an investigation or inquiry.

AR16(c)(iii)(B) is clear. A Principal Racing Authority has the power to warn off, suspend, disqualify or place a restriction on persons who have been the subject of disqualification or the like by any harness racing or greyhound racing authority.

The argument advanced on behalf of Mr McDonald, if adopted, effectively would make redundant AR16(c)(iii)(B) when a person disqualified in the greyhound code was not licensed under or had not contravened the thoroughbred Rules.

This would fly in the face of the purpose of the Rule, which entitles Principal Racing Authorities to protect the integrity of their industries by reciprocating decisions made in other codes. As was said in *Smerdon V Racing Victoria Ltd [2019] VCAT 1372*, Section 5F(2)(a) and (b) set out the criteria in relation to investigations of relevant persons. Thus, those sub-sections are there to enact fairness only in relation to the conduct of investigations and inquiries. Those sub-sections are not preconditions to being able to reciprocate a penalty handed to a relevant person in another code where no investigation or inquiry is required.

**(v)** **Further submissions of Mr McDonald in reply**

In essence, the further submissions on behalf of Racing Victoria are that the Tribunal ought to find that, in the absence of an investigation or inquiry, all persons who fit the description of ‘relevant person’ pursuant to the Act will be bound by the Rules of Racing. The Tribunal should be very cautious in accepting this. It should not infer powers in a circumstance when the legislation has not expressed a clear intention to grant them. That is particularly so when RVL is seeking a finding that would broaden powers so that any person who fits the definition of a ‘relevant person’ is bound by the Rules. The consequences are that, as earlier argued, participants in activities surrounding the Melbourne Cup would be relevant persons. As long as a person was not connected to an investigation, Stewards could hear matters related to their conduct and penalise them, along with having associated powers. There would be scope to impose penalties of considerable severity on such people. The Stewards would have higher coercive powers than the police, the ATO and other bodies.

There is no clear and unambiguous language of such an intention and fundamental rights are involved. References are made to *Lee V Director of Public Prosecutions (cth) [2009] NSWCA 347*. Section 5F does not provide an irreversibly clear intention that, in the absence of an inquiry or investigation, all ‘relevant persons’ will be bound by the Rules of Racing.

The argument of Racing Victoria is bad in law. It denies ‘relevant persons’ procedural fairness in order to gain jurisdiction over them. Mr McDonald was not given the chance to be heard at any hearing. The removal of the requirement of procedural fairness was not the intention of the Act.

The legislation assumes a requirement for procedural fairness – see *Saeed V Minister for Immigration and Citizenship [2010] HCA 23* and the cases referred to therein. Also see *Re Refugee Tribunal*; *Ex partie Ala (2000) 204 CLR 82*.

The Tribunal would fall into error if it adopted an illegal procedure in order to vest itself with jurisdiction over the appellant.

AR22(1) makes it clear that the powers of Stewards to require the production of mobile phones and the like are intended to aid investigation and inquiries.

In relation to Section 5F, following the decision in *Clements*, it was the intention of the legislation to require persons not previously bound by the Rules to produce records and the like in respect of inquiries into third parties (in that case, Mr Danny Nikolic). It was not the intention to bring all other persons involved in investigations into the purview of the Rules.

The approach submitted on behalf of Mr McDonald would not result in AR16(c)(iii)(B) becoming redundant. The purpose of the Rule is to broaden the jurisdiction of the Stewards over licensed persons so that they can consider breaches in other codes and whether it is appropriate that such persons remain licenced in thoroughbred racing. An example is the administration of a prohibited substance to a standardbred horse by a person licensed in thoroughbred racing. That is the purpose of the Rule, as opposed to preventing unlicensed persons with limited involvement in thoroughbred racing from attending racecourses.

Racing Victoria’s interpretation makes no sense. Why confer such broad powers over a large number of people and only seek to limit them if Stewards have a reason to commence an investigation?

**F. FINDINGS AND OBSERVATIONS**

There is a number of questions to be determined. We shall deal with them in turn.

Firstly, we are of the opinion that the first ground of appeal, as set out in the Section 50K document, has not been made out. This is the assertion of lack of jurisdiction, essentially because Mr McDonald was not and is not a licensed person during the relevant period.

In our opinion, the assertion on behalf of RVL that Section 5F of the Act operates is correct. This was inserted in the legislation to deal with the lacuna or gap created by the decision in *Clements* *V Racing Victoria Limited [2010] VCAT 1144*. Section 5F provides that the Rules of Racing apply to and may be enforced against a relevant person. ‘Relevant person’ is defined, inter alia, as a person who attends a race-meeting for the purpose of horse racing in Victoria or participates in an activity connected with or involving horse racing in Victoria or wagering on horse racing in Victoria. We would also refer to LR2(3).

Mr McDonald accepts that he is likely to have attended at Victorian racecourses at various times in the last five years (although denying that he was at Mornington racecourse on the occasion referred to by Mr Montgomery). Thus, Mr McDonald falls within the definition of ‘relevant persons’ and the Act and Rules apply to him.

Further, given that the definition of ‘persons’ in the Rules uses the word ‘includes’ before referring to syndicates and the like, we do not accept that this particular definition does not extend to natural persons such as Mr McDonald.

Whether this interpretation means that a very broad mass of people could fall within the operation of the Act and the Rules is not to the point.

In our opinion, individuals who attend racetracks when a meeting is being held fall within the definitions and the Rules operate. That was the intention of the amendments made following the decision in *Clements* and is the approach taken thereafter – see for example, the decisions of both the RAD Board of 24 April 2018 and subsequently of VCATin *Smerdon V Racing Victoria [2019] VCAT 1372*.

The second broad ground of appeal in the notice relates to an alleged denial of procedural fairness. In our opinion, there was a lack of procedural fairness. Mr McDonald was not interviewed. He was not formally charged. He was not granted a hearing. We understand that, in essence, he simply received a letter informing him that he was disqualified for a period in excess of five years. The only ground given was that his presence as someone who had been disqualified for live baiting offences could significantly prejudice the image and interests of the thoroughbred racing industry.

It seems to be clear that Mr McDonald was denied procedural fairness. The letter gave scant information. It was not in the nature of a ‘show cause’ summons, which would have provided to Mr McDonald the opportunity to be heard before a decision was handed down. Given that the decision was a five-year disqualification, this is a somewhat disturbing approach.

However, the next question is as follows. Given that Mr McDonald has appealed (and that the parties have requested that the matter be dealt with on the papers), has the lack of procedural fairness at first instance been overtaken by the appeal process? Even though, by agreement, the matter is to be determined on the papers, is now the appeal process a hearing de novo? – that is, a complete rehearing.

In the particular circumstances of this case, we note that the initiating document is a standard Section 50K appeal form. The statement of Mr Montgomery has been put before us. Some eleven references concerning Mr McDonald have been provided. The facts are largely not in dispute. Mr McDonald’s disqualification in 2015 is an undisputed matter of record. That he has been attending thoroughbred race meetings since then is not in dispute.

Thus, this is not simply an appeal seeking a Ruling on a question of law or procedure. Whilst no evidence was called, it is an appeal to which Section 50Q applies. The hearing can be on the case stated by the parties. It is not required to be a de novo hearing, although obviously it can be. In this case, we are so treating it because of the matters set out above. We are required to act fairly and according to the substantial merits of the matter. We are bound by the rules of natural justice.

Bearing all this in mind, it seems to us that the denial of procedural fairness on the part of RVL has been overtaken by events - namely, the lodging of the appeal form, the statement of Mr Montgomery, the putting before us of detailed submissions from both parties in circumstances where there is essentially no argument as to the factual background, and the mutual request that the matter be determined on the papers.

If the appeal is to be treated in this way, what then is the outcome? We have found that Mr McDonald is bound by the Rules of Racing. We have found that he is a ‘person’ to whom the Act and the Rules apply. We have found that there was a denial of procedural fairness, but that this has been overtaken by events – namely, the appeal. That brings us to the outcome of the appeal ‘on the merits’.

In relation to the appeal, we find the following.

1. Mr McDonald’s offence in relation to live baiting was a serious one indeed and deserving of the lengthy period of disqualification from greyhound racing that was imposed.
2. Mr McDonald has regularly been attending thoroughbred race meetings over the last five years.
3. During that time, he has not engaged in conduct that has attracted the attention of the thoroughbred racing Stewards.
4. There is only evidence of him being seen or noticed by Stewards on one occasion at Mornington. This was the occasion when he is adamant that he was not in attendance. In any event, it is not asserted that, on such occasion, he was engaging in improper conduct, was the subject of complaint, or had been noticed by anyone other than a Steward.
5. There is no evidence of there ever being any complaint from Stewards, race officials or the general public concerning his behaviour at the thoroughbred races.
6. There is no evidence of him ever being seen at the thoroughbred races by any member of the general public, other than those in his company.
7. There is no evidence of any complaint to the Stewards or authorities that people of his ilk should not be admitted to a thoroughbred racecourse.
8. There is no evidence of any complaint to the Stewards to the effect that he is a disqualified person in another code and that the nature of his offence and punishment in that code should be penalised in the way that it has been.
9. He suffers from severe Parkinson’s disease and attendance at thoroughbred race meetings with friends or relatives is one of the few enjoyments which he has.
10. There is no suggestion or evidence that, when attending at thoroughbred race meetings, he has been in any way obtrusive, attention seeking, offensive or the like. We accept that he essentially ‘keeps to himself’, save for the company of a few friends and relatives who may accompany him on these outings.
11. Mr McDonald has put before us a bundle of most impressive references. This bundle includes a long and detailed reference from Mr Colin Alderson, a retired thoroughbred trainer, who was the recipient of the Medal of Australia and the Medal of the Order of Australia, both such awards being in the context of the thoroughbred industry. He is also a former President of the Trainers’ Association. It is a reference in particularly strong terms, emphasising Mr McDonald’s many virtues and the importance of his being able to attend thoroughbred race meetings, given his advanced Parkinson’s disease.
12. The above emphasis upon the letter of Mr Alderson is not to detract from the other references. Some were apparently prepared for the 2015 hearing at the GRADB, but the majority is directed at the current situation. They speak of the importance of his being able to attend at thoroughbred race meetings during this time of declining health. They also speak of his behaviour at racetracks, along with the fact that he is unobtrusive, discrete and respectful.
13. Whilst his attending thoroughbred race meetings brings Mr McDonald within the purview of the Rules, there is no additional Rule that a penalty imposed in another code must be replicated by Racing Victoria Stewards. The question of penalty can be viewed de novo and, if a penalty is imposed, it should reflect the circumstances surrounding and relevant to the operation of the Rule.
14. The penalty imposed in summary fashion by RVL appears simply to disqualify Mr McDonald for the period of approximately five years and two months that coincided with the primary term then remaining of the period of disqualification imposed by the GRADB. Mr McDonald’s situation, the lack of complaint and the like was not considered. As stated, he simply received a letter informing him that he was disqualified until 13 February 2025. That does not bind this Tribunal on appeal. Procedurally, it is simply not good enough.
15. Live baiting is an issue that has the potential to do great damage to greyhound racing. Whilst not being familiar with all the facts, we have no doubt but that Mr McDonald fully deserved the penalty that was imposed. Live baiting is a shameful scourge. That does not mean that some type of virtually automatic equivalent penalty in relation to thoroughbred racing must or should be imposed. Apart from anything else, in the present case it would take no account of matters such as Mr McDonald’s serious illness and deteriorating health, in addition to the many matters listed above.

**F. DECISION**

1. We are of the opinion that Mr McDonald was denied natural justice. He was simply informed that he had been disqualified pursuant to AR16(c)(iii)(B) for a very lengthy period. He had not been charged. There had been no hearing. He had not even been asked what he wished to say or submit, either by way of facts or law. He was simply told that he had been found guilty and was disqualified until 13 February 2025. The rules of natural justice were clearly breached.
2. However, we are of the opinion that such breach has been healed by this appeal. The matter has been fully argued, in detail, ‘on the papers’. Through his legal representatives, Mr McDonald has had the opportunity to present his case. RVL has had the opportunity to contest that position. The parties opted to do this ‘on the papers’ and without oral evidence or submissions. That was appropriate. Natural justice in relation to the charge has now been afforded.
3. Having considered the largely uncontested evidence and applied the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336, we are comfortably satisfied that the charge pursuant to AR16(c)(iii)(B) has been made out. There is no dispute but that Mr McDonald was disqualified by the GRADB for 20 years, 10 of those years having been suspended. He was disqualified after being found guilty of committing an offence of great magnitude. Live baiting has been described as being reprehensible and barbaric. In our opinion, such behaviour and the disqualification arising from it could significantly prejudice the image and interests of the thoroughbred racing industry, to employ the wording used in Mr Moore’s letter of 28 November 2019.
4. Further, we are not persuaded by the legal submissions advanced on behalf of Mr McDonald. Arguments based upon the decision in *Clements* ignore the fact that any effect of that decision has been nullified by the amendment contained in Section 5F of the Racing Act 1958. We accept the submissions of the Stewards in this regard. We do not accept arguments based upon fundamental freedoms and individual rights. We do not accept broad arguments concerning the rights of the individual. As argued by RVL, a person who attends a race meeting is bound by the Rules of Racing and the Act. We also agree with them that the intended operation of the relevant Rules and Sections of the Act is clear. They operate in relation to a person in the situation of Mr McDonald. In short, we repeat that the charge has been made out. We find that the relevant provisions of the Act and the Rules apply to Mr McDonald and to his conduct.
5. We turn now to the question of penalty. We would refer to the matters set out in **F. FINDINGS AND OBSERVATIONS** above. At the risk of being repetitive, we would point out the following:
6. Mr McDonald is in very poor health, with advanced Parkinson’s disease. He has few enjoyments in life. Attending race meetings with friends or relatives is one of them.
7. There is no suggestion that, at any time over the last five and half years since the GRV disqualification, Mr McDonald has misbehaved in any way whilst attending a racecourse.
8. Further, there is no suggestion that he has done anything to draw attention to himself or to make himself conspicuous.
9. There is no suggestion that at any time there has been any complaint from any member of the racegoing public as to Mr McDonald’s presence on a racecourse.
10. There is no suggestion that at any time there has been any complaint from any racing official or licensed person concerning Mr McDonald’s presence on a racecourse.
11. There is no suggestion that, over the period between the date of commencement of his disqualification by GRADB (13 February 2015) and his alleged sighting by a Steward at Mornington racecourse in late October 2019, Mr McDonald’s presence on racecourses had even been noticed by Stewards, much less been the subject of complaint or enquiry. That is despite his frequent attendance at the races.
12. Interestingly, whilst Mr McDonald freely admits his frequent visits to racecourses, he denies that he went to the Mornington course when alleged. Given his volunteering the information that he had been in the habit of frequently attending other courses, a large question mark must hang over the accuracy of the alleged observation. That has no effect upon the finding of guilt, but has the potential to underline the fact that Mr McDonald has neither been conspicuous nor in any way a source of concern.
13. In summary, there is simply no evidence that, since 13 February 2015, Mr McDonald’s presence and behaviour on racecourses has attracted the attention of the public or, save for one occasion concerning which there is some doubt, the Stewards. Even on that occasion, there is no suggestion that he was misbehaving or doing anything that would attract adverse attention.
14. As stated, Mr McDonald has placed before us powerful references. That does not excuse or diminish the culpability of the GRV offence, but references such as that from Mr Alderson give us some idea of the esteem in which he is otherwise held and as to his reliability and the like. They also underline not just his health situation, but the importance which attaches to his visits to the races.

When all of the above is taken into account, it is our opinion that the appeal against penalty should be upheld.

We are of the opinion that, pursuant AR16(c)(iii)(B), Mr McDonald should be suspended, subject to the following within the meaning of “suspension” as defined in AR(2). However, such suspension should not extend to his right or privilege to enter racecourses and attend race meetings. Whilst rights such as ownership of horses are withdrawn, he is free to attend race meetings. That is the effect of the penalty which we seek to impose. We are also of the opinion that such qualified suspension should continue until 13 February 2025. He is permitted to enter racecourses and attend race meetings until that date, but is otherwise suspended.

If it is felt that this wording does not bring about the result which we intend, we shall hear submissions as to the appropriate wording. We repeat that our intention is that Mr McDonald be permitted to enter racecourses and attend meetings, but not otherwise enjoy privileges and activities of the type contained in the definition of “suspension” until 13 February 2025.

Mark Howard  
Registrar, Victorian Racing Tribunal

**RACING ACT 1958 - SECT 5F**

**Rules of Racing Victoria binding on certain persons**

    (1)     The Rules of Racing apply to and may be enforced against—

        (a)     a person who is the holder of a licence, registration, permit or other authority issued by [Racing Victoria](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#racing_victoria); or

        (b)     subject to subsection (2), a [relevant person](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#relevant_person).

    (2)     In relation to a [relevant person](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#relevant_person), the Rules of Racing must provide that, if there is to be an investigation or inquiry in relation to horse racing or wagering or both under the Rules of Racing in which the Rules of Racing may be applied to or enforced against a [relevant person](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#relevant_person)—

        (a)     the investigation or inquiry must be initiated by a [Steward](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#steward); and

        (b)     in [conducting](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#conduct) the investigation or inquiry, the [Steward](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#steward) must have reasonable [grounds](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s51.html#ground) to suspect the [relevant person](http://classic.austlii.edu.au/au/legis/vic/consol_act/ra195867/s3.html#relevant_person)—

              (i)     may have contravened the Rules of Racing; or

              (ii)     may be involved in a contravention of the Rules of Racing; or

              (iii)     may have knowledge or possession of information as to a contravention of the Rules of Racing—

because of—

              (iv)     the person's attendance at a race‑meeting of horse racing in Victoria; or

              (v)     the person's participation in an activity in connection with or involving horse racing in Victoria or wagering on horse racing in Victoria.