13 December 2024

**DECISION**

**RACING VICTORIA**

**and**

**RUSSELL CLUNING**

**Date of hearing:** 2 December 2024

**Date of decision:** 2 December 2024

**Panel:** Judge Marilyn Harbison (Deputy Chairperson), Dr Andrew Gould and Mr Des Gleeson.

**Appearances:** Mr Gregory Buchhorn, instructed by Mr Marwan El-Asmar, appeared on behalf of the Stewards.

Mr Russell Cluning represented himself.

**Charges and particulars:**

**Charge One: AR 244**

AR 244 reads as follows:

AR 244 Administration of prohibited substance to affect race performance

 (1) A person must not:

1. administer; or
2. cause to be administered

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse for the purpose of affecting the performance or behaviour of the horse in a race, or of preventing it starting in a race.

If a person breaches subrule (1), a disqualification for a period of not less than 3 years must be imposed, unless there is a finding that a special circumstance exists, in which case that penalty may be reduced.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria and bound by the Rules of Racing.

1. You are, and were at all relevant times, the trainer of Cable Glow (the Horse).

1. On 11 June 2023, the Horse ran in Race 3, the Swan Hill Sire Drought Breaker Maiden, over 1600 metres (the Race) at the Swan Hill racecourse.

1. On or about 11 June 2023, you administered, or caused to be administered, to the Horse a prohibited substance, being alkalinising agents, for the purpose of affecting its performance or behaviour in the Race.

1. Alkalinising agents are a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing, subject to the threshold in Item 1 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing.

**Charge Two: AR 245 (Alternative to Charge One)**

AR 245 reads as follows:

AR 245 Administration of prohibited substance in sample taken from horse before/after running in race

(1) A person must not:

1. administer; or
2. cause to be administered

a prohibited substance on Prohibited List A and/or Prohibited List B to a horse which is detected in a sample taken from the horse prior to or following the running of a race.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria and bound by the Rules of Racing.

1. You are, and were at all relevant times, the trainer of Cable Glow (the Horse).

1. On 11 June 2023, the Horse ran in Race 3, the Swan Hill Sire Drought Breaker Maiden, over 1600 metres (the Race) at the Swan Hill racecourse.

1. On or about 11 June 2023, you administered, or caused to be administered, to the Horse a prohibited substance, being alkalinising agents, before running in the Race.

1. Alkalinising agents are a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing, subject to the threshold in Item 1 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing.

**Charge Three: AR 247 (Alternative to Charges One & Two)**

AR 247 reads as follows:

AR 247 Administration of Alkalinising Agents

(1) A person must not:

1. administer; or
2. cause to be administered,

(c) attempt to administer, or:

(d) be a party to the administration or attempted administration of, an alkalinising agent in any manner to a horse which is engaged to run in any race, official trial or jump-out:

1. at any time on the day of the scheduled race, official trial or jump-out and prior to the start of that event; and/or
2. at any time during the 1 clear day prior to 12.00am on the day of the scheduled race, official trial, or jump-out.

**Particulars of Charge**

* 1. You are, and were at all relevant times, a trainer licensed by Racing Victoria and bound by the Rules of Racing.

* 1. You are, and were at all relevant times, the trainer of Cable Glow (the Horse).

* 1. On 11 June 2023, the Horse ran in Race 3, the Swan Hill Hire Drought Breaker Maiden Handicap, over 1600 metres (the Race) at the Swan Hill racecourse.

* 1. On or about 11 June 2023, you administered to the Horse an alkalinising agent, being bi-carbonate soda.

* 1. Alkalinising agents are prohibited from being administered to a horse at any time on the day of the race or at any time on the clear day prior to the race day.

**Charge Four: AR 240 (Alternative to Charges One, Two & Three)**

AR 240 (2) reads as follows:

AR 240 Prohibited substance in sample taken from horse at race meeting

(2) Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.

**Particulars of Charge**

1. You are, and were at all relevant times, a trainer licensed by Racing Victoria and bound by the Rules of Racing.

1. You are, and were at all relevant times, the trainer of Cable Glow (the Horse).

1. On 11 June 2023, the Horse was brought to the Swan Hill racecourse and ran in Race 3, the Swan Hill Hire Drought Breaker Maiden, over 1600 metres (the Race).

1. On 11 June 2023, prior to the Race, a blood sample (V679391) was taken from the Horse (the Sample).

1. An analysis of the Sample detected the presence of an alkalinising agent.
2. Alkalinising agents are a prohibited substance pursuant to Division 1 of Part 2 of Schedule 1 of the Australian Rules of Racing, subject to the threshold in Item 1 of Division 3 of Part 2 of Schedule 1 of the Australian Rules of Racing.

**Pleas:** Not Guilty to Charges 1 and 2.

Guilty to Charge 3.

 Charge 4 was withdrawn.

**DECISION**

1. On 19 November 2024 we found Mr Russell Cluning guilty of one charge of administering a prohibited substance to his horse, Cable Glow, on or about 11 June 2023.
2. We do not propose to repeat all the circumstances of this administration, as they were fully ventilated in our reasons for decision. We declared ourselves to be comfortably satisfied that he administered an alkalizing agent in excess of the threshold of 36mmol/L to the horse on 10 June 2023.
3. We now consider the penalty to be imposed on Mr Cluning in respect of this charge.
4. The Stewards submit that we should view the circumstances of charge 2 as a serious example of administration. Counsel for the Stewards pointed out that this charge requires a deliberate act to be performed, in contrast with the offence of presentation. Counsel submitted that we should note the scientific evidence that achieving the level of TCO2 which we found in this case would require the administration of a very large quantity of bicarbonate of soda to the horse.
5. It was further submitted that we should note the evidence that Mr Cluning was aware of the effect of the administration of bicarbonate of soda and thus was aware that it might improve race performance.
6. Further, it was submitted that the timing of the feed was aggravating as it must have occurred on the day of the race, or if we were not satisfied of that, it must have been on the day before and with a significantly large feed of bicarbonate of soda administered to the horse.
7. Further the Stewards submitted that there was no evidence of remorse or insight demonstrated by Mr Cluning and that his account of how the administration occurred was implausible and not consistent with the scientific evidence.
8. We do not accept that this case is properly described as a serious example of administration. We have found no evidence suggesting a deliberate act for the purpose of improving race performance. This is a case in which the substance administered was subject to a threshold. Certainly, the bicarbonate of soda was intentionally administered by Mr Cluning, but that does not mean that he would not have had nefarious intentions in doing so. We consider it just as likely that Mr Cluning grossly miscalculated the effect on the horse of feeding it a very large amount of feed containing bicarbonate of soda on the day before the race. He said in evidence that he gave a very large feed because he was embarking on an overnight drive with the horse to the race location and the horse would not have an opportunity to eat before the race. We were not persuaded that his evidence about this was untruthful.
9. We also do not accept that there is no evidence of remorse or insight. Mr Cluning pleaded guilty from the outset to charge 3. He has consistently described his action in feeding the horse bicarbonate of soda on the day before the race as a mistake. The real contest in this case has been whether the scientific evidence conclusively proved that the alkaline levels were over the threshold, and whether he fed the bicarbonate of soda for the purpose of affecting the horse’s performance in the race.
10. Mr Cluning has a prior offence for administration. This offence occurred on 17 August 2022. As in this case, the substance involved was subject to a threshold and his feeding of the horse breached the threshold. He administered cobalt in a supplement which he fed to his horse, and which was commonly used around that time. He pleaded guilty to that charge and was suspended for three months.
11. We accept the fact that Mr Cluning has been previously charged and convicted of an administration offence means that he should have been much more careful on this occasion. We also accept that the fact that this is a second offence must be taken into account in sentencing today.
12. We accept the Stewards’ submission that the purpose of the rule is to safeguard integrity in racing and to protect the betting public by ensuring, as far as possible, a level playing field and a drug free industry. We also accept that a principal part of our sentencing process is the need for general deterrence – that is, the need to deter others who may through mistake or otherwise administer prohibited substances to the horses under their care. We were referred to several cases of administration where a significant period of disqualification was ordered. We accept also the need for consistency in sentencing.
13. We consider there are some significant mitigating factors in this case.
14. Firstly, the reading in this case appears to be lower than most of the other cases to which we were referred.
15. Secondly, apart from the previous administration charge, Mr Cluning has been a participant in the industry for almost 20 years without fault.
16. Thirdly, Mr Cluning has taken on a very significant role within the industry in rehoming and retraining horses. He is the director of a successful forestry business and treats his involvement in racing as a hobby. He and his wife own a large property, which he uses to agist the horses in his care and horses used by his wife in show jumping and dressage.
17. Over the last 10 years, he has become concerned about the large numbers of racehorses which have come to the end of their racing careers. He has taken large numbers of these horses on to his property to care for them. He has rehomed approximately 50 of them, after training them to ensure that they are safe to be rehomed. As we understand it, he is not paid for his efforts.
18. In our view, this is a significant contribution to the industry. It demonstrates that Mr Cluning is committed to the welfare of horses. We take this contribution into account as a significant mitigating factor.
19. Having considered all the matters put to us on the charge of administering a prohibited substance in excess of the threshold, the penalty which we impose on charge 2 is a period of disqualification for 5 months, commencing immediately.
20. We note that charge 1 is dismissed, and that charges 3 and 4 have been withdrawn by the Stewards.
21. Cable Glow is disqualified from Race 3 at Swan Hill on 11 June 2023 and the finishing order is amended accordingly.

Mark Howard

Registrar, Victorian Racing Tribunal