# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

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| CITATION: | *Scott v Queensland Racing Integrity Commission (No 2)* [2018] QCAT 301 |
| PARTIES: | **RACHEL LEIGH SCOTT**<br>(applicant)<br>**v**<br>**QUEENSLAND RACING INTEGRITY COMMISSION**<br>(respondent) |
| APPLICATION NO/S: | OCR252-16 |
| MATTER TYPE: | Occupational regulation matters |
| DELIVERED ON: | 3 September 2018 |
| HEARING DATE: | 13 and 14 August 2018 |
| HEARD AT: | Brisbane |
| DECISION OF: | Member Gordon |
| ORDERS: | **1. By consent, the application for review is treated as amended without reservice, so as to be an application for a review only in respect of penalty.**<br>**2. The decision of the Queensland Racing Integrity Commission is set aside as to penalty.**<br>**3. Rachel Leigh Scott shall be suspended for 3 months starting on 18 September 2018 and the following conditions apply:-**<br>**(a) while suspended Ms Scott may not nominate horses to race or start horses trained by her in races; but**<br>**(b) she may care for, i.e. feed, water, groom and exercise her horses, during the period of suspension.**<br>**4. Rachel Leigh Scott shall pay a fine of $6,000 by 18 September 2018.**<br>**5. The parties have liberty to apply as to the date when the suspension is to start.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – Harness Racing Trainers – where admitted failure to present a horse free of prohibited substances – where urine sample was above the permitted |

level of cobalt – where the cause of this was found to be a build up of cobalt levels over time – where it was due to carelessness in the feeding and supplement regime – whether this was a mitigating factor – whether the appropriate penalty was disqualification or some lesser penalty

*Australian Harness Racing Rules,* r 188A, r 190, r 259
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20
*Racing Act* 2002 (Qld), Chapter 4, Part 4
*Racing Integrity Act* 2016 (Qld)

*Abbott v Racing Queensland Limited* [2012] QCAT 230
*Demmler v Harness Racing Victoria Racing Appeals and Disciplinary Board* [2017] VCAT 600
*Dixon v Racing Queensland Limited* [2012] QCAT 331
*Doughty v Racing Queensland Limited* [2012] QCAT 678
*Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236
*Hudson v Queensland Racing* [2008] QRAT 8
*Kavanagh v Racing Victoria Limited (No 2) (Review and Regulation)* [2018] VCAT 291
*Lambourn v Racing Queensland Limited* [2011] QCAT 488
*Manzelmann v Racing Queensland Limited* [2013] QCAT 45
*Morrisey v Queensland Racing Integrity Commission* [2018] QCAT 161
*Neale William Scott v Queensland Racing Integrity Commission* (unreported 20 December 2016)
*Non Raceday Inquiry RIU v G R Dixon* 10 April 2018
*Non Raceday Inquiry RIU v G Richardson and G Parker* 13 July 2017
*Queensland Police Service v Compton (No 2)* [2011] QCATA 246
*Queensland Racing Integrity Commission v Gilroy* [2016] QCATA 146
*RVL Stewards v Peter Moody* (Racing Appeals and Disciplinary Board – penalty 17 March 2016
*Ryan v Queensland Racing* [2006] QRAT 6
*Smith v Racing Queensland Limited* [2013] QCAT 23
*Tim Cook t/as Tim Cook Racing v Racing Queensland Ltd* [2012] QCAT 239
*Wallace v Queensland Racing* [2007] QDC 168
*Webb v Racing Queensland Limited* [2011] QCAT 44
*Weeks v Queensland Racing Integrity Commission* [2017] QCAT 345

APPEARANCES & REPRESENTATION:

Applicant: J E Murdoch QC, instructed by O'Connor Ruddy & Garrett Solicitors

Respondent: R J Anderson QC, instructed by Landers & Rogers Lawyers

**REASONS FOR DECISION**

[1] On 2 April 2016 the applicant Rachel Scott as an A Grade trainer under a licence issued by the respondent, Queensland Racing Integrity Commission (QRIC), presented NOLONGA YOUR CHOICE to a harness race at Redcliffe.

[2] A pre-race urine sample from the horse was found on analysis to have a cobalt level of 280ųg/L.[1] This was in breach of Rule 190 of the Australian Harness Racing Rules which requires that a horse be presented for a race free of prohibited substances. Rules 188 and 188A govern what are prohibited substances and the permitted levels. The rule which then applied, provided that cobalt at a concentration at or below 200ųg/L in urine is not a prohibited substance.[2]

[3] A breach of Rule 190 is a strict liability offence.[3]

[4] Ms Scott pleaded not guilty to the charge but was found guilty by the stewards.[4] The stewards disqualified her for 15 months. She sought an internal review of the guilty finding and of the penalty, but both were confirmed in the internal review.

[5] She then sought an external review in the tribunal. Although her application to the tribunal was for a review about the finding of guilt as well as the finding of penalty, at the hearing the tribunal was only asked to review the question of penalty, it being then admitted that there had been a breach of Rule 190. The application for review was amended by consent so that it was limited to penalty.

[6] Ms Scott has not served any period of disqualification, because it was stayed at all times pending firstly the internal review and secondly the tribunal's final decision.

[7] On the question of penalty, for Ms Scott it was said that in the particular circumstances of this case, she should not be disqualified but that a lessor penalty should be substituted. On behalf of the QRIC it was submitted that disqualification was appropriate and the period of 15 months was not out of line, but that in the particular circumstances of the case a 12 months' disqualification would equally be within range.

[8] In conducting this external review, the tribunal must hear and decide the review by a fresh hearing on the merits to produce the correct and preferable decision.[5]

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1 That is, micrograms per litre of urine.

2 Rule 188A(2)(k). The permitted level was reduced to 100ųg/L from 1 November 2016.

3 Rule 190(4) says that the offence is committed 'regardless of the circumstances in which the prohibited substance came to be present in or on the horse'.

4 24 November 2016.

5 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20.

**The feeding and supplement regime**

[9] The feeding regime and supplements given to the horse were known. In this particular case, expert evidence has been adduced which enables me to find what caused the urine sample to exceed the permitted level of cobalt. In turn, I have been able to reach a view on Ms Scott's degree of blameworthiness – a relevant factor when considering penalty.

[10] Ms Scott herself decided the feeding regime for the horse and either mixed it herself or relied on others to do so. What was fed to the horse appears from Ms Scott's evidence, which I accept.[6] The horse was given:-

(a) a mix of corn, oats, Lucerne chaff and wheaten chaff morning and night;

(b) one cup of sunflower oil daily morning and night;

(c) one to two scoops of Olsson's 007 Mineral Block crushed and mixed in each feed daily; since each scoop was between 25 and 35g, the amount offered to the horse could have been between 25g and 70g of Olsson's a day.[7]

[11] This feeding regime was given to the horse for the 12 months leading up to the race and the taking of the urine sample.

[12] In addition to the above, from time to time the horse would be given supplements intravenously. Two days before the race and the taking of the urine sample, the feeding regime was stopped. On that day, the horse was given an intravenous drip of 20ml of Vitamin C, 20ml of VAM, 20ml of Vitamin B complex and 20ml of Amino Forte in 1 litre of Darrow's solution.[8]

[13] The horse was probably deprived of water from about midday of the day of the race. Later that day, shortly after 4.30pm, the urine sample was taken. The test result returned 280ųg/L of cobalt in the urine, and the result from the reserve sample was 284ųg/L.

[14] As the matter approached the hearing, a further test was carried out on the sample which allowed for average specific gravity. This was done at the request of those acting for Ms Scott – they considered this to be relevant bearing in mind the horse had been deprived of water prior to the urine sample being collected and so substances in its urine could have been more concentrated. Adjusting for average specific gravity produced a reading of 219ųg/L.

[15] At the time of the feeding regime, every kilogram of Olsson's 007 Mineral Block contained 400mg of cobalt. These means that every 30g of Olsson's contained some 12mg of cobalt. On the feeding regime as described therefore, the horse could have

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6 Affidavit of Ms Scott sworn on 9 November 2016 (as confirmed in her affidavit sworn on 20 March 2018), affidavit sworn on 23 July 2018, and her oral evidence.

7 The scoop used was given to the tribunal and marked Exhibit 4 - it was agreed between the parties that that scoop would measure between 25g and 35g of Olsson's.

8 Affidavit sworn on 9 November 2016, paragraph 8.

been fed up to 28mg of cobalt a day.[9] It is to be noted in passing that this product no longer contains cobalt.

[16] VAM contains 150ųg/ml of cobalt and so the 20ml of VAM given intravenously two days before the race would have given the horse 3mg of cobalt on that day. I heard that an intravenous dose of cobalt would pass directly into the system and would immediately be distributed around the body. Thus it is a much more effective administration of a substance than if it had been taken orally.[10]

**The cause of the elevated cobalt**

[17] The main evidence on this issue was from two experts, Professor Colin Chapman for Ms Scott and Professor Paul Mills for QRIC. They are both experts in the field of veterinary pharmacology. They gave their opinions in a number of reports, in a joint report in an experts conclave, and also at the hearing.[11] From this evidence I can quite readily find as a fact what caused the elevated cobalt reading from the sample taken on 2 April 2016.

[18] Here, the daily administration of Olsson's 007 Mineral Block caused cobalt to build up in the horse's system and saturate it. On 31 March 2016 the level of cobalt in the horse was much higher than normal. On that day the administration of VAM boosted the cobalt level even higher so that two days later the amount of cobalt in the urine was over the permitted level.

[19] Both experts formed their opinions based on the feeding history explained by Ms Scott. Professor Chapman was of the opinion that the overwhelming likelihood from that history was a build up of high levels of cobalt and the cobalt boost from the VAM. Although Professor Mills thought that there could be another explanation for the elevated cobalt reading, he accepted that high levels of cobalt administered to a horse could build up in the horse's system. He did not dispute that the VAM would have been an added boost.

[20] Professor Chapman's opinion was supported by a third expert called on Ms Scott's behalf, Mr Ross Wenzel, a scientist who works in this field. He had conducted some recent experiments which confirmed that cobalt fed to a horse at high levels could build up and take time to be excreted.

[21] Although Professor Mills was of the opinion that cobalt in a saturated system would have been excreted from the horse very quickly, and for this reason doubted the view that the regular Olsson's and the VAM was responsible for the reading two days later on 2 April 2016, this seems to be belied by the test results on the samples taken from the horse in the weeks after 2 April, which showed the cobalt remaining in the system for some time.[12] It must be accepted that the post 2 April 2016 test results must be regarded with some circumspection because although Olsson's was not given to the horse after 20 April 2016 it may have continued to be given VAM. However, Mr

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[9] From two scoops of Olsson's of 35gs each.

[10] The expert evidence was that the level of absorption from oral feed was about one-fifth of that if given intravenously, although there would be many factors which affected the level of absorption.

[11] In the joint report which resulted from the conclave, the experts asked that their own reports also be considered by the tribunal.

[12] These readings are listed in exhibit 2.

Wenzel's test results show that excretion of cobalt is slow after a high level of saturation and this tends to confirm the view about this taken by Professor Chapman.

**Blameworthiness in the light of this cause**

[22] It is said on Ms Scott's behalf that in the light of the cause of the elevated cobalt readings as I have found, Ms Scott applied a legitimate feeding and supplement regime and unwittingly and not recklessly exceeded the cobalt permitted level.

[23] In support of this it was pointed out that:-

(a) Olsson's 007 Mineral Block has a statement in capital letters:

'THIS PRODUCT DOES NOT CONTAIN RESTRICTED ANIMAL MATERIAL'

The description of the product says that it is 'an essential mineral and trace element supplement providing race, show and working horses extra vigour, stamina, muscle and bone strength'.

(b) There was no warning that the cobalt in this product could build up in the horse's system.

(c) The amount of Olsson's administered to the horse was no more than the manufacturer's recommendations.[13]

(d) Olsson's and VAM were equine mineral and vitamin supplements which were readily available, and which were purchased over the counter from reputable manufacturers and suppliers on the racecourse.

(e) There was no administration of cobalt other than in normal feed and supplements.

(f) There had been no warning that there was a danger this horse was close to the cobalt permitted level as a result of a build up of cobalt in the system. In particular, one test carried out by the Controlling Body two weeks before the race showed that the horse had a urine reading of 85.9ųg/L which was much higher than normal and Ms Scott was not informed of this. Had she been informed of this, she could have held back on the supplements.[14]

[24] Against this, it was said on behalf of QRIC that:-

(a) Ms Scott knew that the supplements she was feeding the horse contained cobalt.

(b) She was aware of the strict liability rule for substances and knew that it was a significant issue in the industry.

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[13] This is calculated from the feeding instructions which say that a 2Kg block should last a single horse about three weeks, a dose of 95mg per day. This can be compared with the maximum given in the actual feeding regime of 70mg per day.

[14] The experts are agreed that the normal levels of cobalt to be found in a horse's urine is between 0ųg/L and 20ųg/L.

(c) Her feeding regime did not adhere to strict industry protocols nor was carefully devised so as to ensure compliance with the rules of racing.

(d) There was no welfare or medical need to give the horse any extra cobalt at all, since there is sufficient in normal feed.

(e) Olsson's 007 Mineral Block was not intended to be crushed and mixed with feed – it was a lick and should have been used as such.

(f) Ms Scott should have obtained advice about the feeding regime and the supplements from a veterinarian. She should have done so bearing in mind she had no particular expertise, training or guidelines to work from.

(g) Ms Scott could have had urine tests carried out on the horse to see if there was any danger of exceeding the permitted level for cobalt and for that matter, any other substances.

(h) Ms Scott acted in an uninformed way and without a safety net. She took the risk of breaching the rules.

(i) Ms Scott should accept responsibility for her actions, has failed to do so and therefore should face a stricter penalty.[15]

[25] On the issue whether it was prudent to crush and mix the Olsson's instead of leaving it as a lick, Ms Scott preferred to crush it, scoop it and mix it with the feed. She found this more economical because horses were wasting the blocks. She also recognised that she was able in this way to control the amount consumed by the horse. Although this method of administering the Olsson's was criticised at the hearing, to my mind it was a sensible method because the amount of the substance offered to the horse could be monitored.

[26] There is insufficient evidence for me to find one way or the other whether the feeding regime was a legitimate one in the sense that it followed standard procedures or 'strict industry protocols'. However, I am satisfied from Ms Scott's evidence that she believed this to be the case. I am satisfied she believed her feeding and supplement regime was normal for a racehorse. I am satisfied she was not trying to go close to the permitted level of cobalt; she had no idea how close to the permitted level of cobalt her feeding regime was putting the horse; she had no idea that what she was feeding the horse could cause a build up of cobalt to the extent that the horse became saturated with it.

[27] On the issue about whether Ms Scott should have sought advice from a veterinarian, she took advice from her husband who is also a trainer, and from others from time to time, but it is true that she did not obtain advice from a veterinarian about her feeding regime.

[28] It is also true that she did not obtain her own test results from urine samples from the horse.

[29] Ms Scott should have been aware that appropriate levels of cobalt existed naturally in feed, and that there was no need to give a horse any further cobalt. She was aware

[15] This is a reference to Ms Scott's failure to plead guilty to the charge.

that the supplements she fed the horse did contain cobalt, and therefore she should have been aware that there was some risk that the horse would exceed the permitted level of that substance. She had no expertise, training or guidelines to call on. Yet there were severe penalties if a horse were presented for a race with an elevated level of cobalt. In those circumstances, it would have been prudent to obtain veterinary advice or to conduct tests from time to time rather than leaving matters to chance.

[30] Ms Scott was therefore careless in her feed and supplement regime, and was not free from blame. I will need to come back to this factor when considering the correct level of penalty.

**Deterrence and relevance of effect of the prohibited substance**

[31] Where the racing rules make it an offence to present a horse to a race with an excess of a prohibited substance, in circumstances when such substances can be given privately, then it will be necessary for the penalty for such an offence to act as a general deterrent against this happening. The principle is that the penalty will deter those responsible for their husbandry from deliberately attempting to present a horse for a race close to the permitted levels of prohibited substances.

[32] In the context of this decision on penalty, the general deterrent effect of the penalty should encourage such care in the feeding and supplement regime of the horse as will avoid breaching the rules.

[33] The importance of the general deterrent in disciplinary cases was emphasised in *Queensland Police Service v Compton (No 2)* [2011] QCATA 246, where the Appeal Tribunal, having set out the mitigating factors considered by the member at first instance, said:-[16]

> But balanced against these factors were, as the learned Member also recognised, the requirements of deterrence, the purpose of disciplinary proceedings, the protection of the public, the maintenance of proper standards and the necessity for community confidence in the police service. Any sanction had to reflect appropriate disapproval.
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> The personal factors of a case are to be considered as relevant, but do not prevail over the protective disciplinary requirements: Focusing solely upon the…personal and mitigating factors necessarily involves an impermissible inversion that excludes the disciplinary process and the role of this Tribunal.

[34] A similar thing was said by DCJ McGill in *Wallace v Queensland Racing* [2007] QDC 168 when considering AR178 which is the equivalent rule for thoroughbred racing:[17]

> It was submitted that the evidence did not disclose any moral blameworthiness on the part of the appellant, and that in those circumstances no consideration of deterrence arose. I do not accept that submission; in my opinion the evident purpose of rule AR 178 … is to provide very strong incentives for trainers and others who are responsible for the wellbeing of a horse to take great care to ensure that the horse when presented for racing will be unaffected by prohibited substances.

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16 At [25] and [26], footnotes omitted.

17 At [63].

[35] The penalty will be a reflection of the level of deterrence required. That level will depend on a number of factors, such as prevalence in the industry, the seriousness of the mischief which is to be deterred and the ease of its detection.

[36] In this case, of particular relevance to the level of deterrence required is the question whether the particular substance is generally thought to be performance enhancing, and whether it can be toxic. This is because if it is generally believed that higher than normal levels of cobalt can enhance the performance of a horse, then those responsible for feeding and supplement regimes of racehorses may be tempted to seek to increase the amount of cobalt to achieve that result. And they should be deterred from doing so by the appropriate level of penalty. And it is for the protection of the horse to try to deter high levels of substances which may be dangerous.

[37] The principle of general deterrence is consistent with the aims of the Act:-[18]

> (a) To maintain public confidence in the racing of animals in Queensland for which betting is lawful; and
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> (b) To ensure the integrity of all persons involved with racing or betting under this Act or the Racing Act;
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> (c) To safeguard the welfare of all animals involved in racing under this Act or the Racing Act.

[38] In the case of cobalt and greyhounds it appears to be accepted that elevated levels of cobalt are performance enhancing and can be dangerous to the animal concerned. In *Queensland Racing Integrity Commission v Gilroy* [2016] QCATA 146 which was such a case, Justice Thomas cited with approval these observations made in the Victorian case of *David Crawford v Stewards of Greyhound Racing Victoria*[19]:-

> The Board is guided by the principles of specific deterrence, general deterrence and the upholding of the good name of the industry by creating a level playing field … On the topic of general deterrence a message needs to be sent to the trainers that the cobalt threshold must not be breached as it is not satisfactory that performance enhancing substances are used especially those which may impact on the welfare of greyhounds. Public confidence in the industry will also exist if prohibited free substance racing is ensured.

[39] It is also accepted that an elevated carbon dioxide level in the horse is performance enhancing and there have been a number of cases involving $TCO_2$ (total carbon dioxide) where disqualification has been the result. In *Tim Cook t/as Tim Cook Racing v Racing Queensland Ltd* [2012] QCAT 239 and *Lambourn v Racing Queensland Limited* [2011] QCAT 488, the trainers followed a feeding and treatment regime with an intended purpose to increase the $TCO_2$ levels. They were disqualified for 7½ months and 5 months respectively. In *Abbott v Racing Queensland Limited* [2012] QCAT 230, it was suggested to the tribunal by the Controlling Body, and accepted, that disqualification for 6 months was the 'norm' for a first offence in such cases.

[40] Knowledge of the effect of cobalt on a horse does not seem to be as advanced. It was suggested in final submissions for QRIC that cobalt 'was linked to performance

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18 At the time of the offences section 4(1) of the *Racing Act* 2002 (Qld), now in section 3(1) of the *Racing Integrity Act* 2016 (Qld).

19 Racing Appeals.

enhancement'. However, on behalf of Ms Scott it was said that it had not been shown that cobalt may be performance enhancing in horses. Reliance was placed on a decision by Vice-President Judge Hempel in *Demmler v Harness Racing Victoria Racing Appeals and Disciplinary Board* [2017] VCAT 600 where on the evidence before her, Judge Hempel found that cobalt had not been shown to be performance enhancing in horses, although at the time of the offence it was generally thought to be so.[20]

[41] Before me on this question, the experts left the matter open in their joint report. Professor Mills has however, expressed the view in a paper that cobalt would enhance performance in horses, because this had been shown to happen in other mammals.[21] He also directly stated his opinion on this issue in his evidence filed with the tribunal.[22] Dr Karen Caldwell from the Racing Science Centre expressed the same view in her certificate of 18 April 2016 which she exhibited to her affidavit before the tribunal.[23] Professor Chapman on the other hand, points out that the only published work on horses showed that there was no increase in red blood cells after administration of cobalt, which is how cobalt is said to enhance performance. So there is a difference of expert opinion on the matter.[24]

[42] As recognised by Judge Hempel in *Demmler*, for the purposes of considering the level of penalty required to meet the need for a general deterrent, it is the general perception about this issue which is important rather than whether there is any scientific proof that cobalt can enhance performance of horses. Irrespective therefore of the question whether an elevated level of cobalt is performance enhancing in a horse, I am entitled to take into account the evidence before me of the perception about this in the industry.

[43] On the available evidence I have come to the conclusion that the perception in the industry is that an elevated level of cobalt is performance enhancing in a horse. The evidence I have relied on is firstly from the stewards, who certainly proceeded on the basis that feeding cobalt to horses could enhance their performance,[25] and the reviewer in the QRIC internal review.[26] I think these are valuable indicators of the general view in the industry. Ms Scott herself told me that she was aware of concerns about cobalt. Then there was a paper attached to one of Professor Chapman's reports, two of whose authors he describes as 'internationally recognised experts in the use and misuse of drugs in racehorses', which tracks the use, knowledge and regulation of cobalt administered in the equine racing industry.[27] The information in the paper supports the conclusion that I have reached on this issue.

[44] On the question of toxicity, there is no doubt from the expert evidence that high levels of cobalt can be dangerous to a horse.[28] It is not suggested however, that the level of

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20 [49].

21 Page 10 of his paper 'Cobalt and the Horse' February 2015.

22 Report of 12 October 2017 attached as exhibit PM1 to his affidavit of 22 May 2018.

23 Made on 24 January 2018.

24 Report of 28 March 2018, page 6.

25 The stewards relied on the paper from Professor Mills, and also evidence given at the enquiry by Dr Caldwell.

26 Page 5.

27 *Cobalt use and regulation in horseracing: a review* by K. Brewer, G.A Maylin, C.K. Fenger and T. Tobin: Comparative Exercise Physiology, 2016, 12(1): 1:10.

28 Issue 8 in the joint report.

cobalt found in NOLONGA YOUR CHOICE either at the time of the sample or at any time before, was dangerous.

[45] From the above analysis, it is right that I take into account the need for a general deterrent against intentionally, recklessly or carelessly administering cobalt to a horse such that it could approach the permitted level.

**The importance and degrees of blameworthiness**

[46] How far a person prosecuted under the racing rules is blameworthy is an important consideration on the question of penalty. Attempts have been made in the cases to categorise the degrees of blameworthiness. For example McGill DCJ in *Wallace v Queensland Racing* [2007] QDC 168, [69], identified a category of case where the tribunal accepted the trainer's explanation showing no blameworthiness: this may be appropriate for more lenient treatment. Then there was the 'ordinary case' where there was no explanation for the elevated reading and therefore no indication whether or not there was any blameworthiness of the trainer. Then there was another category of case where an explanation showed some moral blameworthiness on the part of the trainer, which would justify a more severe penalty.

[47] Ms Scott's case does not come within any of Judge McGill's stated categories. She has provided an explanation for the elevated reading which I have accepted. The explanation indicates that she was careless. This is therefore an additional category of blameworthiness which may apply in these types of cases.

[48] Adding an additional category to allow for a case such as Ms Scott's means that the categories may now be stated as:-

A. No blameworthiness at all.

B. Carelessness.

C. No credible explanation, so no indication about blameworthiness one way or the other.

D. Moral blameworthiness shown.

[49] It seems to me that category B cases could encompass varying degrees of carelessness – mild, moderate or serious (equivalent to gross negligence or recklessness). The appropriate penalty would vary accordingly.

[50] Category C cases might ultimately spill into category D in circumstances when it was right to infer moral blameworthiness from the absence of a credible explanation for the elevated reading.

**Some authorities in the various categories and various prohibited substances**

[51] I now turn to the available authorities. These will assist to determine the correct penalty having regard to the need to achieve consistency which is a statutory aim of the tribunal,[29] and which has been recognised as being necessary as a matter of fairness and natural justice.[30] There are a number of relevant Queensland cases, but

[29] An aim of the QCAT Act section 3(d).

[30] *Abbott v Racing Queensland Limited* [2012] QCAT 230.

since the Harness Racing Rules have effect in the whole of Australia decisions from other States and Territories may be taken into account including the decisions of stewards.[31]

[52] First there are a series of cases which fall into category A, that is where the trainer was blameless. These have been dealt with more leniently even in some cases to the extent of there being no penalty whatsoever.

[53] In *Ryan v Queensland Racing* [2006] QRAT 6, the test returned positive for dexamethasone. This had been caused by the administration of a common substance to treat a problem on veterinary advice. The trainer followed the guidelines for the administration of the substance and so had done her best. Having considered the need for general and specific deterrence and the particular circumstances of the case a fine of $2,000 was imposed.

[54] In *Hudson v Queensland Racing* [2008] QRAT 8, the test returned positive for isoxsuprine. It was found that a family member had administered the drug to the horse to embarrass the trainer. A fine of $2,000 was imposed.

[55] *Dixon v Racing Queensland Ltd* [2012] QCAT 331 was a $TCO_2$ case. The feed contained bicarbonate but it did not say so on the label. The trainer was not to blame and so no penalty was imposed.

[56] In *Smith v Racing Queensland Limited* [2013] QCAT 23, the test sample was found to contain caffeine. This was likely to have come from medication which a veterinarian had advised should be administered to the horse. Caffeine was not in the list of ingredients for the medication. The result was that the trainer had committed an offence despite her best efforts. She was fined $4,000.

[57] Then there are cases where there is some degree of blame such as carelessness (category B).

[58] In *Doughty v Racing Queensland Limited* [2012] QCAT 678, the trainer presented a horse testing positive for lsoxsuprine. It was found that this had been caused by cross contamination in the stable, the substance having been given to another horse. In the circumstances the trainer was not without blame because measures should have been taken to avoid the cross contamination. The correct penalty was not disqualification but a fine, set at $4,000 bearing in mind the trainer's unblemished record over 15 years.

[59] In *Webb v Racing Queensland Limited* [2011] QCAT 44, the horse was presented with flunixin in one race and ibuprofen and flunixin in a second race. It was shown that the horse had probably been interfered with by a third party – something for which the trainer had to accept some responsibility because of lack of security at the premises. The trainer was therefore not completely blameless.[32] The penalty in that case was $15,000 for each of the two presentations of the horse.

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31 *Queensland Racing Integrity Commission v Gilroy* [2016] QCATA 146, where Justice D G Thomas as President of the tribunal relied on a number of comparable cases around Australia. In *Lambourn v Racing Queensland Limited* [2011] QCAT 488 however, it was said that comparables from other jurisdictions should not cause a departure from previous decisions in Queensland, [4].

32 Paragraphs [21] (Member Oliver) and [10] (Member Stilgoe).

[60] *Dixon* (a $TCO_2$ case referred to above where there was no blame and no penalty) can be contrasted with *Manzelmann v Racing Queensland Limited* [2013] QCAT 45, where the elevated $TCO_2$ level arose from a post race drink given when the trainer was unaware that the horse was required for a swab because his daughter who was a stable hand had failed to inform him. Although the trainer was blameless, he had to take responsibility for his daughter's error.

[61] Cases in category C where there is no acceptable explanation for the elevated readings and D where there is moral blameworthiness have been dealt with more severely.

[62] Turning to the cobalt cases, in Victoria there is *RVL Stewards v Peter Moody* (Racing Appeals and Disciplinary Board - penalty 17 March 2016). In that case the horse was found with cobalt of 360ųg/l to 410ųg/l of urine which arose from a high level of carelessness in relation to the operation of the stables, in particular in relation to the administration of cobalt, as well as general feeding, supplementation and injection procedures.[33] The trainer was suspended for 12 months of which 6 months was suspended.

[63] In *Demmler v Harness Racing Victoria Racing Appeals and Disciplinary Board* [2017] VCAT 600, the cobalt level was between 350ųg/l and 372ųg/l. It was found that cobalt had not been given to the horse inadvertently or innocently, and was therefore a serious breach and there was a need for a general deterrent. It was held that the appropriate penalty was a suspension for 12 months (with 2 months already served), disqualification in the personal circumstances of the trainer not being warranted.

[64] In *Non Raceday Inquiry RIU v G Richardson and G Parker* 13 July 2017 in New Zealand, the horse was presented with a cobalt level of 198ųg/l in urine when the permitted level was 100ųg/l.[34] It was found that supplements were administered to the horse in the manner and quantities recommended by a veterinarian. Commenting that it was uncertain whether cobalt could be performance enhancing for horses, but that there had been a great deal of publicity about cobalt both in New Zealand and in Australia in recent years and that the trainers would have been aware that 'cobalt was very much *on the radar*', the Judicial Committee considered that the starting point for the offence was a fine of somewhere between $10,000 and $12,000. In the circumstances this was discounted down to $6,000 for the mitigating factors.

[65] In *Non Raceday Inquiry RIU v G R Dixon* 10 April 2018, after reviewing previous decisions the Judicial Committee stated that the starting point for a cobalt first offence was a fine of $8,000 in New Zealand.

[66] In *Kavanagh v Racing Victoria Limited (No 2) (Review and Regulation)* [2018] VCAT 291, two trainers were involved: Kavanagh and O'Brien. They presented horses with cobalt levels of between 588ųg/l and 690ųg/l (Kavanagh) and 300ųg/l and 590ųg/l (O'Brien). The horses concerned were given intravenous drips containing cobalt on the direction of a veterinarian. The trainers and their employees were unaware of the administration of the prohibited substance, had not promoted its use and had no reason to suspect that it was being administered. They were blameless. A fine of a 'moderate amount' was imposed of $4,000 on Kavanagh and of $2,000 for each of the offences

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[33] Findings on liability page 11, line 300.

[34] The report says mg/l but this must be a mistake.

in which O'Brien was the trainer. When considering penalty, Justice Greg Garde AO RFD, President pointed out that the veterinarian concerned had been disqualified for five years and that this had given a clear and compelling message to future wrongdoers.[35]

[67] Three short reports of penalties imposed in cobalt cases have also been cited to me. One concerned *Ross Graham* where the Harness Racing Victoria Racing Appeals and Disciplinary Board on 10 August 2017 suspended the trainer for 15 months, where the horse was found to have 298ųg/l when the permitted level was 200ųg/l. Another was *Darren Cole* where the same Board suspended the trainer for 12 months where the horse was found to have 184ųg/l when the permitted level was 100ųg/l. It is noted that in that case, on behalf of the stewards it was conceded that cobalt was not performance enhancing and it was submitted for the trainer that this should reduce the penalty. This issue was not it seems, resolved by the Board. Then there is *John Pointon* where Queensland stewards suspended the trainer for 6 months when the cobalt level was 131ųg/l (the permitted level 100ųg/l) which had not arisen from feed or water contamination.

[68] It has been pointed out that in New South Wales there are penalty guidelines for prohibited substances and there are no such guidelines in Queensland.[36] Penalties in cobalt cases are much higher in New South Wales, ranging from 14 months to 10 years disqualification with 2-3 years disqualification appearing to be the norm.[37]

[69] There have been several cobalt cases in Queensland. In *Neale William Scott v Queensland Racing Integrity Commission* (unreported 20 December 2016) an excess of cobalt was found in a horse presented for a race, the trainer was disqualified for 9 months followed by 9 months' suspension wholly suspended.

[70] Then in *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236, although it was expressly found that the administration of cobalt arose from a lack of care and was not deliberate, it was also found that the substances or preparations must have been administered to the horse at levels collectively in excess of the manufacturers' recommendation and/or much closer to the race than the 48 hours alleged by the trainer.[38] After a review of the authorities cited, which included two penalties imposed by stewards in Queensland, one in New South Wales and one in Western Australia, it was concluded that a starting point of 12 months' disqualification was appropriate. The actual period imposed was lengthened by a number of aggravating factors.

[71] In *Weeks v Queensland Racing Integrity Commission* [2017] QCAT 345, a horse was presented for racing with a cobalt level tested at 366ųg/l and 400ųg/l when the permitted level was 200ųg/l. From the report it appears that there was no explanation offered for the elevated readings. The trainer was disqualified for 6 months followed by a suspension for 9 months with that period fully suspended.

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35 Paragraph 37.

36 Paragraph 21 of submissions presented to the tribunal in the case of *Neale William Scott.*

37 At least from those cases listed in a schedule presented to the tribunal in the case of *Neale William Scott.*

38 Paragraph [67].

[72] Then there is *Morrisey v Queensland Racing Integrity Commission* [2018] QCAT 161, where a horse was presented with cobalt levels over the permitted level. The trainer had been negligent in the limited extent of his inquiry into the contents of the product which he fed to the horse, but this did not amount to recklessness or a deliberate act.[39] It was therefore a category B case. The trainer was suspended for 9 months but that period of suspension was suspended after 5 months for a period of 12 months.

**Penalty considerations**

[73] When determining penalty, the need for general and personal deterrence and any aggravating factors must be balanced against the mitigating factors to try to achieve the correct penalty in all the circumstances. This has been described as 'meeting the competing demands of deterrence and mitigating circumstances'.[40] As mentioned above, another aim is consistency.

[74] Consistency is difficult to achieve perfectly because as can be seen from the analysis above, there are considerable variations in the penalties imposed where a horse is presented for a race with a prohibited substance above the permitted level. Sometimes the penalty seems to turn on the nature of the prohibited substance found in the horse – with those that are considered more serious for one reason or another including possible danger to the horse, like $TCO_2$ or cobalt, attracting higher penalties. Unfortunately, the reported decisions do not always indicate the seriousness of the particular substance found, or the effect that they can have on the horse.

[75] In other cases it is clear that the question of the level of blameworthiness has been paramount, even to the extent of completely overriding the need for a general deterrent, as in *Dixon*.

[76] For cobalt, QRIC say that the appropriate range of periods of disqualification should be between 12 and 15 months. But this would mean that presenting a horse over the permitted level for cobalt would be penalised 2 or 3 times as severely as presenting a horse over the permitted level for $TCO_2$. There has been no reason given as to why that should be the case. Both substances are, or at least are thought to be, performance enhancing and both are potentially dangerous to the horse at high levels. There is no evidence before me suggesting that there is any greater reason for general deterrence in the case of one or the other.

[77] There appear to be considerable differences in the penalties imposed for exceeding cobalt levels in Australia and in New Zealand. It is possible this is the result of uncertainty, as expressed in some of the authorities, about whether cobalt is performance enhancing. It seems however to be generally accepted that high levels of cobalt could be dangerous to a horse.

[78] It is right that I seek to follow the Queensland precedents in preference to others, and in the circumstances my starting point assuming a category C (no explanation) or D (moral blameworthiness) case for a first offence is between 6 months' disqualification (as in the $TCO_2$ cases) and 12 months' disqualification (as in *Hooper*), possibly with

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[39] Paragraph [21].

[40] *R v Osborne* [2014] QCA 291, [45].

a subsequent period of suspended suspension for a shorter disqualification period (as in *Neale William Scott* and *Weeks*).

[79] Here, there are mitigating circumstances which will reduce this penalty. I am satisfied that Ms Scott believed that her feeding and supplement regime was a legitimate and normal one for a racehorse. I am satisfied she was not trying to go close to the permitted level of cobalt; she had no idea how close to the permitted level of cobalt her feeding regime was putting the horse; she had no idea that what she was feeding the horse could cause a build up of cobalt to the extent that the horse became saturated with it.

[80] Ms Scott should have been aware that appropriate levels of cobalt existed naturally in feed, and that there was no need to give a horse any further cobalt. She was aware that the supplements she fed the horse did contain cobalt, and therefore she should have been aware that there was some risk that the horse would exceed the permitted level for that substance. She had no expertise, training or guidelines to call on. Yet there were severe penalties if a horse were presented for a race with an elevated level of cobalt. In those circumstances, it would have been prudent to obtain veterinary advice or to conduct tests from time to time rather than leaving matters to chance.

[81] She was therefore not blameless; she was careless about the feeding regime and the giving of supplements.

[82] On the issue whether Ms Scott should have pleaded guilty to the charge, and therefore ought to be dealt with more strictly, a review of the issues on substantiation demonstrate that there were legitimate issues to be dealt with. One by one they were addressed as the case progressed towards a hearing. Then I am told, about a week before the hearing they were abandoned.[41]

[83] The issues on the question of substantiation appeared from the application to review itself. This was lodged with the tribunal on 22 December 2016. One of the issues was the correct standard of proof – the civil standard of balance of probabilities, or the criminal standard of beyond reasonable doubt. This issue turned on whether the relevant rule had been amended properly.

[84] Then it was said that the test certification procedure was ‘materially flawed’ for various reasons. On that basis, as provided by the rules, the test certificates would not have evidentiary value.[42]

[85] One of the reasons why it was said that the certification procedure was materially flawed was that there was no sufficient agreement between QRIC and a testing facility used to produce the test certificates, as required by the provisions. It was also said that proof was required that the analysts who carried out the tests were approved by QRIC, and also that the testing facility was approved by QRIC. A further alleged flaw was that the second sample portion should have been tested by analysts from an independent laboratory and not from the same laboratory as the first test.

[86] In *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236, a decision delivered on 11 July 2017, Member Olding dealt with the standard of proof issue,

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[41] Final submissions on behalf of QRIC, paragraph 7.

[42] Rule 191(7).

deciding it was the civil standard.[43] Member Olding also rejected what appears to be a closely similar argument about the agreement between QRIC and the relevant testing facility.[44] The issue about independent testing was dealt with by QIRC conducting a new independent test.

[87] In Ms Scott's case, a suggestion was also made that tests results could be inaccurate if a sample was tested without adjusting for the specific gravity of the urine (USG). Ms Scott had for a long time sought access to the sample to have this tested.[45] This was ordered by Member Olding by order of 28 May 2018.[46] After the adjusted test results were still over the permitted level, this defence to the matter was abandoned.

[88] On the question of what had caused the elevated cobalt readings, the experts agreed at the conclave that they would be assisted by the test result of swabs taken at times leading up to the race in question.[47] This was extended to test results since then. These results were helpful on that question but were produced very close to the hearing and this was not the fault of Ms Scott or her representatives.[48]

[89] In the light of the above, overall I take the view that whilst it is the case that Ms Scott has no credit for pleading guilty, in the circumstances she should not be penalised for not doing so either. This is because she was justified in testing the case against her as she did.

[90] It is said that Ms Scott has shown no insight, and has not accepted responsibility for her actions – as shown by submissions made on her behalf that she is an innocent victim of what she seems to regard as a flawed system. In my view the question of insight and acceptance of responsibility, which are often important considerations in disciplinary matters, have little relevance in a case of strict liability once it is shown that the breach is accidental. Had it been shown, or properly inferred, that the breach was deliberate then of course insight and acceptance of responsibility would have the usual importance. But that is not the case here.

[91] On the question of personal deterrent, I am quite sure having heard from Ms Scott that the process she has been through, culminating in her appearance in the tribunal, has been most salutary. She has changed the feeding regime and I am confident that she now appreciates the care which needs to be taken to avoid another breach of the rules on similar grounds. In the circumstances there is no need to impose a penalty to achieve any further personal deterrence.

[92] Ms Scott's previous disciplinary history discloses that although Ms Scott has been a trainer since only 2013 there are two other offences to take into account.[49] They were both committed in 2016 but after the offence concerning NOLONGA YOUR CHOICE. They were both for administering medication on a race day prior to such horse running in race. The two offences were committed 3 days apart. They were

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43 Paragraphs [76] to [85].
44 Paragraphs [20] to [40].
45 Letter dated 6 September 2016 from Ms Scott's solicitors – exhibit 14 to the Stewards Enquiry. The letter also sought documentation about the agreement between the Controlling Body and the Racing Science Centre.
46 *Scott v Queensland Racing Integrity Commission (No 1)* [2018] QCAT
47 Issue 6 in the joint report.
48 They were available near the end of July 2018.
49 TAB 6 of the agreed bundle.

dealt with by fines of $4,000 each. It is right that these offences are regarded as aggravating factors.

[93] In my view the level of blameworthiness here, which I would call moderate carelessness, ought to reduce the period of disqualification to about one-third of that which would be imposed in a category C or D case. On this basis, the period of time in the range becomes about 3 months.

[94] It has been submitted on Ms Scott's behalf that suspension ought to be considered in her particular circumstances instead of disqualification because of the particularly deleterious effect of disqualification on her. The effects of disqualification can be seen from Rule 259. A disqualified person cannot associate with persons connected with the harness racing industry for purposes relating to that industry, cannot enter any premises used for the purpose of the harness racing industry and cannot enter a racecourse. Since Ms Scott lives at the training facility with her husband who is a licensed trainer, it is said that if disqualified she would have to leave home. Further if her husband took over care for her horses during the period of disqualification she would be unable to discuss with him matters of welfare for those horses.

[95] I have come to the conclusion that any directions attached to an order of disqualification so as to remove the additional effects on Ms Scott in her personal circumstances arising from the disqualification would be unwieldly and reduce the effect and value of any such order.

[96] In the circumstances, a period of suspension is more appropriate than disqualification and I am satisfied it will have the necessary general deterrent effect.

[97] I am asked to consider applying a condition to the suspension that:-

(a) while suspended Ms Scott could not nominate horses to race or start horses trained by her in races; but

(b) she could care for, i.e. feed, water, groom and exercise her horses during the period of suspension.

[98] In the circumstances these conditions make practical sense and I propose to adopt them.

[99] The above considerations do not account for the aggravating factor of the previous disciplinary history. The two previous offences concerned medication given close to a race only have relevance because they concern substances given to a horse, and seem to demonstrate further carelessness. I think it is appropriate to mark the fact of this previous disciplinary record by the imposition of an additional penalty for the current offence: a fine which is higher than the previous fines.

[100] Therefore I think the appropriate penalty in this case is suspension for a period of 3 months with the conditions suggested, and a fine of $6,000. I shall defer the commencement of the period of suspension for about 2 weeks from the date of the order. The parties have liberty to apply as to when the suspension is to start.