

**RACING APPEALS TRIBUNAL**

RAT 14/2018

DATE OF HEARING:           FRIDAY 14 SEPTEMBER 2018

TRIBUNAL:                   PRESIDENT: MR T ANDERSON, QC

IN ATTENDANCE:

MR J PETZER:                   CHIEF STEWARD, THOROUGHBRED  
RACING SA LTD

MR N O'SHEA:                   APPELLANT

MS ASHTON DOWNING           APPELLANT

IN THE MATTER of an Appeal by **MR NIKI O'SHEA** and **MS ASHTON DOWNING** against a decision of Thoroughbred Racing SA Ltd Stewards.

**APPELLANT O'SHEA:**

**BREACH OF RULES:**

<u>Rule of Racing</u>	<u>Particulars (abbreviated)</u>	<u>Penalty</u>
AR.175(aa)	Conduct intended to corrupt the outcome of a race - count 1	5 year disqualification
AR.175(aa)	Conduct intended to corrupt the outcome of a race – count 2	5 year disqualification
AR.64(G)(1)	Attempted to stomach tube horse on race day without Stewards permission – count 1	18 month disqualification
AR.64(G)(1)	Attempted to stomach tube horse on race day without Stewards permission– count 2	18 month disqualification
AR.178AA(1)	Attempted to administer alkalinising agent to horse on race day without Stewards permission– count 1	12 month disqualification

AR.178AA(1)	Attempted to administer alkalinising agent to horse on race day without Stewards permission– count 2	12 month disqualification
AR.178A(1)	Possession of a substance that could produce a prohibited substance in a horse without Stewards permission	6 month disqualification
AR.175(p)	Failing to comply with a requirement and direction to cooperate and answer questions at an inquiry	3 month disqualification

**TOTAL PENALTY: 5 year disqualification**

**APPELLANT DOWNING**

**BREACH OF RULES**

<u>Rule of Racing</u>	<u>Particulars (abbreviated)</u>	<u>Penalty</u>
AR.175(aa)	Conduct intended to corrupt the outcome of a race– count 1	2 year disqualification
AR.175(aa)	Conduct intended to corrupt the outcome of a race– count 2	2 year disqualification
AR.64(G)(1)	Party to an attempt to stomach tube horse on race day without Stewards permission– count 1	6 month disqualification
AR.64(G)(1)	Party to an attempted to stomach tube horse on race day without Stewards permission– count 2	6 month disqualification
AR.178AA(1)	Party to an attempt to administer alkalinising agent to horse on race day without Stewards permission– count 1	6 month disqualification
AR.178AA(1)	Party to an attempt to administer alkalinising agent to horse on race day without Stewards permission– count 2	6 month disqualification

**TOTAL PENALTY: 2 year disqualification**

## DETERMINATION

### INTRODUCTION

These are the reasons for my decision on 2 October 2018 in the appeals of Mr Niki O'Shea and Ms Ashton Downing after an initial hearing on 14 September 2018.

The Appellants are licensed co-trainers of racehorses and also live in a domestic relationship.

The Appellants appeal from decisions of the Stewards made on 19 July 2018. Those decisions were made following a number of interviews with both Appellants.

The following table identifies eight charges found proven against Mr O'Shea and the penalties imposed by the Stewards, resulting in a five-year disqualification.

<u>Charge</u>	<u>Rule of Racing</u>	<u>Particulars (abbreviated)</u>	<u>Penalty</u>
1	AR.175(aa)	Conduct intended to corrupt the outcome of a race Attempt to administer solution via naso-gastric tube Strathalbyn Race 6 – 2 May 2018 Social Set	5 year disqualification Minimum mandatory penalty of 5 years
2	AR.175(aa)	Conduct intended to corrupt the outcome of a race Attempt to administer solution via naso-gastric tube Strathalbyn Race 7 – 2 May 2018 Allez Tara	5 year disqualification Minimum mandatory penalty of 5 years
3	AR.64(G)(1)	Attempted to stomach tube horse on race day Without Stewards permission Strathalbyn Race 6 – 2 May 2018 Social Set	18 month disqualification Minimum mandatory penalty of 12 months
4	AR.64(G)(1)	Attempted to stomach tube horse on race day Without Stewards permission Strathalbyn Race 7 – 2 May 2018 Allez Tara	18 month disqualification Minimum mandatory penalty of 12 months
5	AR.178AA(1)	Attempted to administer alkalinising agent to horse on race day Without Stewards permission Strathalbyn Race 6 – 2 May 2018 Social Set	12 month disqualification
6	AR.178AA(1)	Attempted to administer alkalinising agent to horse on race day Without Stewards permission Strathalbyn Race 7 – 2 May 2018	12 month disqualification

<b>Allez Tara</b>			
7	AR.178A(1)	Possession of a substance that could produce a prohibited substance in a horse without Stewards permission in vehicle used to convey horses to race meeting Strathalbyn - 2 May 2018	6 month disqualification
8	AR.175(p)	Failing to comply with a requirement and direction to cooperate and answer questions at an inquiry on 3 & 8 May 2018	3 month disqualification

The following table identifies six charges found proven against Ms Downing and the penalties imposed by the Stewards, resulting in a two-year disqualification.

<u>Charge</u>	<u>Rule of Racing</u>	<u>Particulars</u> (abbreviated)	<u>Penalty</u>
1	AR.175(aa)	Conduct intended to corrupt the outcome of a race Party to an attempt to administer solution via naso-gastric tube Strathalbyn Race 6 – 2 May 2018 Social Set	2 year disqualification Minimum mandatory penalty of 5 years
2	AR.175(aa)	Conduct intended to corrupt the outcome of a race Party to an attempt to administer solution via naso-gastric tube Strathalbyn Race 7 – 2 May 2018 Allez Tara	2 year disqualification Minimum mandatory penalty of 5 years
3	AR.64(G)(1)	Party to an attempt to stomach tube horse on race day Without Stewards permission Strathalbyn Race 6 – 2 May 2018 Social Set	6 month disqualification Minimum mandatory penalty of 12 months
4	AR.64(G)(1)	Party to an attempted to stomach tube horse on race day Without Stewards permission Strathalbyn Race 7 – 2 May 2018 Allez Tara	6 month disqualification Minimum mandatory penalty of 12 months
5	AR.178AA(1)	Party to an attempt to administer alkalinising agent to horse on race day Without Stewards permission Strathalbyn Race 6 – 2 May 2018 Social Set	6 month disqualification
6	AR.178AA(1)	Party to an attempt to administer alkalinising agent to horse on race day Without Stewards permission Strathalbyn Race 7 – 2 May 2018 Allez Tara	6 month disqualification

## **BACKGROUND**

The circumstances leading up to the disqualification are as follows.

On 2 May 2018, both Appellants were the trainers of two horses, Social Set and Allez Tara, which were entered in a race meeting at Strathalbyn on that day. They were transporting the horses in a two-horse float to the racecourse.

Stewards were following the vehicle and horse float driven by the Appellants when the vehicle, whilst travelling to Strathalbyn, detoured into Hahndorf and the Stewards followed them.

The Appellants entered a property in Hahndorf, later identified as being owned by Ms Downing's grandparents, and parked the vehicle and horse float near some stables.

The Stewards entered the property and observed what took place. They took video footage.

There is really no dispute on the facts of this matter.

In the appeal before the Tribunal, Mr Livesey QC appeared for the Stewards. Mr Culshaw appeared as counsel for Mr O'Shea, and Mr Andrew Ey appeared as counsel for Ms Downing.

Mr Livesey accepted a summary of facts set out in the written outline of the Appellant O'Shea. I will set out that summary hereunder.

1. O'Shea (and his training partner Ashton Downing ("Downing")) trained the horses at Morphetville.
2. On 2 May 2018, the horses were to race at Strathalbyn.

3. While the horses were en route to the Strathalbyn racecourse, O'Shea and Downing took the horses onto the property at 6 Boehm Drive, Hahndorf ("The Hahndorf property").
4. The Hahndorf property was owned by Ms Downing's grandparents. (Ms Downing's grandparents were also co-owners of one of the horses with Ms Downing.)
5. The horses were taken to the stables on the Hahndorf property, which are about 100 metres beyond the house that is on the property.
6. The stables were accessed down a driveway that goes beyond the house. The gate was open, and there was no other physical obstruction.
7. At the Hahndorf property, O'Shea was preparing items that were intended to administer an alkalisating agent to the horses via a stomach tube.
8. While O'Shea was doing this, the Stewards arrived at the stables.
9. One of the Stewards was the deputy chairman of Stewards, Mr Matt Santoro.
10. The Stewards seized and recorded various items.
11. The Stewards' attendance was captured by a video recording operated by the Stewards.
12. After announcing their appearance and conducting a search, one of the Stewards said, "Whose property is this?"

The undisputed facts from those set out above, and my own impression from viewing the video evidence presented at the Tribunal, show that Mr O'Shea had

prepared, after he arrived at the Hahndorf property, a solution in a bucket. This can clearly be seen on the video.

He had also produced a plastic or rubber tube and a funnel. The solution was an alkalinising agent.

These actions of Mr O'Shea were all filmed by the Stewards.

The horses remained in the float at the property while these actions by Mr O'Shea took place. Ms Downing was present while these actions were taking place but did not appear to be taking an active part. She was holding one of the horses.

Later, Mr O'Shea made admissions as to his intent to administer an alkalinising agent, contrary to the Rules of Racing.

In the interview with Stewards on 19 June 2018, Mr O'Shea admitted that he was about to treat the horse Social Set with the alkalinising mixture he had prepared. He admitted that his purpose in preparing the solution was to try and assist the horse.

In a further interview, on 12 July 2018, he described how he had made up the mixture, and following that interview he was formally charged with the offences. On this occasion, he did not seek to withdraw nor qualify in any way the earlier admissions he had made.

It is also noteworthy that, when the evidence was presented against him in the Stewards' inquiry, he made no challenge to the evidence relating to the sequence of events leading up to the laying of the charges.

Mr O'Shea's admissions cannot, of course, bind Ms Downing. His admissions were only in relation to the horse Social Set. He did not admit intending to treat Allez Tara.

The Stewards rejected Mr O'Shea's suggestion that his intentions were different for both horses. In my view, the Stewards were correct in rejecting his evidence on this matter and finding that the mixture was intended to be administered to both horses. The evidence is compelling for the reasons given by the Stewards.

As I have said, from the video footage and indeed accepted by the Stewards, it seems that Ms Downing was certainly not the main player in this series of events.

Nevertheless, she was present during the procedures. She was a co-trainer with Mr O'Shea, and they were also partners in their social relationship. She saw what was happening and did nothing to either remove herself from the area or indeed to counsel Mr O'Shea against what he was doing.

#### **ARGUMENTS ON APPEAL**

Both Appellants argued on the appeal that the evidence obtained by the Stewards was obtained unlawfully because the Stewards were trespassers on the property owned by Ms Downing's grandparents.

Counsel for both Appellants argued strongly in relation to the facts which they claim supported trespass by the Stewards onto the property, and they therefore argued that all the evidence obtained by that unlawful entry onto the property was inadmissible.

I am grateful to all counsel for their helpful analysis in relation to the alleged tort of trespass, but in my view this case turns on findings of fact, and the main question for this Tribunal in my opinion is whether, even if the evidence obtained by the Stewards was obtained unlawfully, it should nevertheless be admissible.

In the circumstances of this case, I do not consider it would be helpful to attempt to analyse the tort of trespass and decide whether a trespass was in fact committed. If



a trespass was committed, it was probably a trespass of a technical kind, but I do not have to decide that matter.

The Stewards were never asked to leave the property by either the owners of the property or by Mr O'Shea and Ms Downing. Mr Livesey made the point that no evidence was presented by the owners of any complaint by them about the entry onto the property by the Stewards.

In the circumstances outlined above, as I have said, I have not found it necessary to finally decide whether the Stewards were trespassing and whether they obtained the evidence unlawfully. I have proceeded on the basis that even if there was a trespass, the evidence obtained was nevertheless admissible.

In this regard, I have exercised my discretion in relation to the evidence admitted by the Stewards in their inquiry because of these important factors, amongst others:

1. The Tribunal is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit.
2. The Tribunal must act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal forms.
3. The intent of the Rules, in my view, is to enable the Stewards to take disciplinary action for the protection of the racing industry. The jurisdiction is clearly of a protective nature.
4. The evidence complained of is highly probative. The nature of any unlawful act (if there was one) does not affect the cogency of the evidence.
5. The evidence could have been, but was not, contested by contrary evidence from the Appellants.

6. There is no suggestion of any procedural unfairness, and indeed this was conceded by counsel for both Appellants.

7. Admissions were made by Mr O'Shea and were not sought to be withdrawn.

8. I have also taken into account the difficulties in obtaining evidence of this kind which may lead to disciplinary action by the Stewards. In my view, it is in the public interest in the circumstances of this case to admit the evidence.

I do not wish my comments to be taken as condoning the action of the Stewards as a precedent for such activities.

Each case will depend very much on its facts, and all of the matters set out above have to be considered in every case.

There may be circumstances where the unlawful entry onto a property will render evidence obtained inadmissible. That would especially be so when there has been a request by the owner or an agent of the owner for the Stewards to remove themselves from the property, and that request had been ignored.

In this matter, as I have said, I consider that it was in the public interest to admit the evidence, especially having regard to the lack of any protest by the owners or by Mr O'Shea and Ms Downing at the time the Stewards attended the property.

I have weighed the competing public requirements. That is, the need to convict people who breach the Rules as against the competing interest of the need to protect persons from unlawful or unfair treatment.

In this case, in my view, the scales come down in favour of the former.

It was further argued by counsel for the Appellants that the elements of the charges had not been properly made out.

The argument, as I understand it, is that because the Stewards moved in and confronted Mr O'Shea and Ms Downing whilst they were in possession of the bucket of solution and the tube and the funnel, the Stewards were premature in their actions and that no offence had actually been committed at that stage.

In my view, the very simple answer to this submission is that the main charges on which the Appellants were found guilty relate to conduct intended to corrupt the outcome of a race in an attempt to administer the solution via the nasogastric tube.

I consider therefore that, in all the circumstances, the evidence available amounted to showing an attempt, and clearly it was conduct intended to corrupt the outcome of a race.

Very briefly, the solution, if it had been administered, would likely have enhanced the performance of the horses to which it was administered, thereby corrupting the outcome of a race.

This was an attempt, and not merely some preliminary action prior to an attempt, as was argued by counsel for both Appellants.

There was also a ground of appeal suggesting a lack of procedural fairness by the Stewards. This ground was not pursued in the hearing before the Tribunal. It is, of course, as I have indicated, a relevant matter in the exercise of my discretion in admitting the evidence.

Therefore, for the reasons I have given, the appeals by both Appellants are dismissed.

## **PENALTIES**

I will now deal with the question of penalty. The charges relating to conduct intended to corrupt the outcome of a race stem from a breach of Rule AR.175(aa). A minimum mandatory disqualification period of five years is imposed on anyone found in breach of this section unless special circumstances are illustrated.

The Stewards considered in detail, and in my view considered all of the relevant matters, in deciding the question of whether there were special circumstances in either of these two cases.

Their conclusion after considered reasoning was that in the case of Mr O'Shea, there were no special circumstances. In the case of Ms Downing, they did find special circumstances. I agree with the Stewards' conclusion in relation to both of these findings.

The end result is that Mr O'Shea was convicted of the main charge and disqualified for a period of five years.

After taking the special circumstances of Ms Downing into account and considering her conduct generally, the Stewards reduced the period of disqualification to two years. They had started at three years and reduced that to two after taking into account personal factors relating to Ms Downing.

As the tables set out earlier show, each of the Appellants was also disqualified in relation to all the other charges of which they were found guilty. The Stewards in the end made the periods of disqualification concurrent with a period of five years in Mr O'Shea's case and two years in Ms Downing's case.

Once again, I agree with the Stewards' reasoning in making the penalties in each case concurrent.

When I gave my decision, I indicated to the parties that I was considering whether it was possible for the Tribunal to suspend a portion of the disqualification period for each Appellant.

This met with stern resistance by the Stewards. All parties requested that they make submissions in writing, and I agreed to this. I've now had the benefit of considering those submissions.

My reason for raising this possibility was that I believed that the combined penalties of two trainers who not only train in partnership but live as partners in a domestic relationship was on the harsh side.

Mr Livesey contends that the issue is foreclosed by the fact that the Appellants have "effectively conceded penalty" in the hearing in the Tribunal. I do not accept that contention because I in fact raised this matter, and it was something new upon which I invited all parties to respond.

More importantly, however, Mr Livesey argued that a period of disqualification cannot be suspended by the Tribunal because of the wording of the Australian Rules of Racing (AR) AR.196(4).

I here set out the relevant parts of AR.196.

AR.196(1) reads, "Subject to subrule (2) of this Rule, any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so by qualification, suspension, reprimand, or fine not exceeding \$100,000. Provided that a disqualification or suspension may be supplemented by a fine."

AR.196(4) reads, "Any person or body authorised by the Rules to penalise any person may in respect of any penalty imposed on a person in relation to the

conduct of a person, other than a period of disqualification or a warning off, suspend the operation of that penalty either wholly or in part for a period not exceeding two years upon such terms and conditions as they see fit.”

Rule AR.196(5) reads, “Where a person is found guilty of a breach of any of the Rules listed below, a penalty of disqualification for a period of not less than the period specified for that Rule must be imposed unless there is a finding that a special circumstance exists whereupon the penalty may be reduced.”

Whilst I agree with the Stewards that there are no special circumstances in the case of Mr O’Shea, I do not agree that a disqualification cannot be suspended by the Tribunal in these circumstances.

Mr Livesey contends that the “plain reading” of AR.196(4) forecloses the argument.

It is important to note that the operative part of Rule AR.196(4) is “any person or body authorised by the Rules”.

These are important words, in my opinion.

The Tribunal is not a person or body authorised by the Rules.

The Rules, insofar as they relate to penalty, constantly refer to the principal racing authority. The definition of “principal racing authority” in the Rules nominates Thoroughbred Racing South Australia as the authority in South Australia. The Stewards are appointed by the principal racing authority and exercise their powers by way of delegation.

Both the Stewards and TRSA have power to deal with offences under the Rules.

In particular, Rule AR.175 enables the principal racing authority or the Stewards to penalise for a breach of AR.175(aa).

That power to disqualify is contained in AR.196(1), as previously set out.

Under its Constitution and pursuant to clause 11.1, the Tribunal has the power to hear and determine an appeal against a decision made under the rules of a controlling authority, quote, “11.1.1 disqualifying or suspending a person from participating in that code in any particular capacity.”

Clause 12 of the Tribunal Constitution enables the ‘Controlling Authorities’ to make rules in relation to various aspects of how the Tribunal should function, such as fixing time limits and prescribing other matters in relation to appeal procedures, but Clause 12.2 of the Tribunal Constitution states, “The Tribunal may, if satisfied that it is just and reasonable in the circumstances to do so, dispense with the requirement of the Rules.”

The Rules of the Racing Appeals Tribunal are also informative in relation to the wide powers intended to be given to the Tribunal. The Constitution appointing the Tribunal sets out the principles upon which a decision is made in clause 14 as follows:

14.1 the Tribunal must act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal forms.

Clause 15.4 states, “Subject to each of the provisions of this clause, may make further or other order as the case requires.”

The Tribunal, as can be seen, operates in a quasi-criminal jurisdiction. It has inherent powers to achieve a just result. If it does not agree with the Stewards, it must interfere.

It is a body independent of the Principal Racing Authority and the Stewards.

I compare this situation to that faced by judges in criminal courts imposing penalties.

A judge may impose a term of imprisonment of say five years but, considering all the circumstances of the case, suspend some or all of that period.

Courts of Appeal have time and time again said that it is not a “soft option” to give a suspended sentence.

The fact is that the person sentenced to five years imprisonment in the example I have given has that penalty hanging over his or her head during the period of any suspension of that sentence.

The sentence of imprisonment in that case remains at five years no matter whether some or all of that five years is suspended.

Likewise, here, in my view, the penalty imposed by the Stewards of five years’ disqualification remains, whatever part is suspended.

In Mr O’Shea’s case, if part of his disqualification is suspended, he still has a five-year disqualification hanging over his head.

Mr O’Shea would be required to enter into an agreement to be of good behaviour and not reoffend in a significant way during his 5 year disqualification, including that portion that is suspended.

If he reoffends during any part of his disqualification, then he will serve the full 5 year period of disqualification.

If the TRSA Stewards are of the view that any breach of the Rules of Racing during the period of suspended disqualification are significant and warrant revocation of the suspension, they are required to refer the matter to the Tribunal for a decision.



It is my view that, in this case, the penalties of five years disqualification for Mr O'Shea and the two years disqualification for Ms Downing are harsh given the life circumstances that exist in their case and in relation to their training partnership.

Mr O'Shea has been in the racing industry since a teenager and has been a jockey and trainer all his life. He has no other skills. There will be undue financial hardship, in my view, the longer the disqualification continues.

That is not to say that this is not such an important matter that a lengthy period of disqualification should be imposed. I agree that there should be such a lengthy period.

In my view, acting in equity and good conscience, the correct result is, for Mr O'Shea, a disqualification of five years with two years of that suspended.

That is still a very significant penalty, showing the gravity of his offending.

In the case of Ms Downing, the Tribunal is at liberty to disagree with the reduction which was made because of the special circumstances found by the Stewards. As I have said earlier, I agree that there were special circumstances in her case. The Stewards used a starting point of three years in considering the disqualification and then, after the application of a discount for the personal factors relating to Ms Downing, reduced that three-year starting period by a further period of 12 months to get to the two years finally imposed.

Mr Ey urged that I could find the Stewards in error and impose a suspension in lieu of the disqualification. In my view, the conduct of Ms Downing is too serious for a suspension. However, I consider that a disqualification of two years, in all the circumstances I have outlined, is too harsh.

I agree with the finding of special circumstances, but I would reduce the five-year period of disqualification to two years as a starting point. I would then apply a further discount, reducing that period to 12 months' disqualification.

Given her role in the incident, Ms Downing would be free to recommence training in 12 months. I consider that to be a just penalty. It is still a significant penalty, despite her lesser role in the offending.

In relation to Mr O'Shea, to be clear, for a period of five years, he is disqualified, which bans him from all racing activities during that time. If he agrees to a bond to be of good behaviour for a period of five years, then I will reduce his total ban from racing activities to one of three years after which he may resume training.

Any significant transgression by him during his five year disqualification, whether it be in the three year actual disqualification or the two year bond period, will automatically require him to serve the full five years disqualification plus any additional penalty for the transgression.

I order the refund of the applicable portion of the bond.