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21 November 2008

Edward Rennell
General Manager
Harness Racing New Zealand
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CHRISTCHURCH

Dear Edward

RE: INTEGRITY – SUSPENSION OF HORSES AND PERSONS SUBJECT TO AN ENQUIRY

Proposed new rules

At its meeting on Thursday 13 November 2008 the NZSBA Executive unanimously resolved that the association recommends to the HRNZ Executive, clubs and kindred bodies, that HRNZ takes urgent steps to adopt in the NZ Harness Racing Rules an equivalent provision to Australian Harness Racing Rules 183 and 183A that read:

Action pending outcome

183. Pending the outcome of an inquiry, investigation or objection, or where a person has been charged with an offence, the stewards may direct one or more of the following -

- (a) that a horse shall not be nominated for or compete in a race;
- (b) that a driver shall not drive or otherwise take part in a race;
- (c) that the horses of certain connections shall not be nominated for or start in a race;
- (d) that a licence or any other type of authority or permission be suspended.

183A. Upon receipt of a certificate in accordance with Rule 191(1) which establishes prima facie evidence of the presence of a prohibited substance, the Stewards may determine that the horse which is the subject of the certificate shall not be nominated for or compete in any race until the outcome of an inquiry or investigation by the Stewards into the presence of the prohibited substance. *(new Rule 183A - AHRC approved 11th March 2005) (Rule 183A amended - HRA approved 25th August 2008).*

This Rule should be available to the JCA to exercise in appropriate occasions.

Proposed new practice – automatic suspension pending hearing

The NZSBA position is that the JCA must have these powers pending the final resolution of any enquiry. When:

- a person is charged with a serious offence (i.e. a matter not disposed of on race night);
or
- a horse returns a certified positive test

the JCA should immediately consider suspending all persons charged and ban the horse from racing until the matter under investigation is finally resolved. This should be the norm rather than the exception.

This should be the industry standard, documented in a protocol by the JCA and publicly notified to the industry.

Just to be clear NZSBA advocates that a horse should be suspended pending resolution of a positive drug test. Owners are not neutral observers. It is not unfair to them to suspend the horse once a positive certificate has been issued. While they may have played no part whatsoever in the accidental or deliberate event that resulted in a positive drug test they can be strongly influential in how the licence-holder deals with the situation. The trainers are the owners' agents in training the horse. The trainer is the owners' representative.

Charge the horse as well as the licence holder in drug cases?

We propose that in drug cases HRNZ should charge the horse as well as the trainer. At the present time only the trainer is charged, with disqualification being part of the penalty imposed on the trainer if the charged is upheld. The disposition of the race outcome is left hanging for months and months when the outcome is inevitable.

If the charges were separate, and given the virtual strict liability of the drug rules, the matter concerning the horse could be disposed of very quickly.

Analysis

Integrity in the racing industry (i.e. conducting racing on the track according to fairly administered rules with horses racing on natural ability) is the foundation principle for wagering on racing in New Zealand. The punter's dollar is the primary source of all economic opportunities for owners, trainers, breeders, drivers, farriers, stable-hands, transport operators, ground staff etc. The person wagering on our industry relies on our rules and their enforcement. There are also safety and animal welfare issues involved: racing a horse on medication that masks pain risks the horse suffering further and potential catastrophic injury, which in a race could have dire consequences.

We believe that HRNZ has the power to make the proposed rule. The proposed rule, if challenged, will be judged on whether it is justified under s. 29(2) of the Act. Even though it gives the Stewards and the JCA a wide discretion it is not ambiguous.

Our code has a legal obligation to ensure integrity across the board. A rule providing for the possibility of an immediate suspension of a licensed person, and or a drugged horse, will contribute to the fabric of the system of deterrence.

This rule if adopted does not infringe the rights of any individual. All those affected, including the owners of a suspended horse, have (a) the right of appeal and (b) they can always apply to

the High Court for a stay of the suspension. The Australian harness Rule 183 has been reviewed by the Western Australian Court of Appeal and in particular the circumstances under which the court may grant a stay of the suspension imposed by the stewards (or JCA in our case). While there is no guarantee that an NZ court will decide the matter the same way the court's decision is instructive:

"59 The special circumstances found by the primary Judge in this case appear to have been that Harper [the licence holder suspended pending the outcome of an enquiry] derives his livelihood from his licensed activities and that his livelihood would necessarily be jeopardised if he was unable to continue with them. The Stewards were aware of Harper's position in this respect and had formed the opinion, as a specialist body empowered by statute to regulate the harness racing industry (in *Evan v Winterbottom* (1945) 47 WALR 79 at 85 Stewards were described by Dwyer J as "functionaries of a very special character appointed for their knowledge of racing"), that the need to preserve the integrity, or public image, of that industry outweighed any financial hardship on his part. In my respectful opinion no basis was shown for upsetting that specialist body's exercise of discretion to make an interim order of this kind. Nothing had been put up which demonstrated that they had overlooked a relevant consideration, or taken into account any irrelevant consideration, or that their exercise of discretion had otherwise miscarried. "

John Zucal, Rwwa Chairman of Stewards & Ors v Harper [2005] WASCA 76 (15 April 2005)

In other words the bar is quite high to overturn a steward's suspension. The power to suspend will therefore be an effective tool in the campaign for higher standards of integrity.

JCA to resist adjournment of hearing

In parallel with this action HRNZ should be urging the JCA to seek to continue all hearings rather than consenting to adjournments when threatened with a review hearing in the High Court, as appears to be the case in recent years.

We have asked our representative on the HRNZ executive Peter Smith to take this matter up with the chair of the JCA.

NZSBA is willing to work with HRNZ, and its lawyers, to address these matters. In recent weeks I have had unsolicited offers of financial and other assistance to ensure that this issue is addressed with the best possible legal assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John W S Mooney' with a stylized flourish at the end.

John W S Mooney
Chairman