

## OUT OF TIME APPLICATION DECISION

*Racing Integrity Act 2016, section 252AB(3)*

<b>Review application number</b>	RAP-59
<b>Applicant</b>	David Vandyke
<b>Panel</b>	Mr Kerry O'Brien (Chairperson)
<b>Code</b>	Thoroughbreds
<b>Rule</b>	Australian Rules of Racing Local Rule 68(1) <i>Further to the provisions of AR 181 if it is intended to withdraw a final acceptor from any race notice or withdrawal of the horse shall be given to the Racing Australia Service Centre not later than the time advertised in the approved program for the Racing Meeting and thereafter a horse shall not be withdrawn except by permission of the Stewards.</i>
<b>Penalty notice number</b>	PN-008897
<b>Decision date</b>	27 October 2023
<b>Decision</b>	In the opinion of the Chairperson it would be unjust to refuse to accept the application.
<b>Case references</b>	<i>Hunter Valley Development Pty Ltd v Cohen, Minister for Home Affairs and Environment</i> (1984) 3 FCA 344 <i>Avery .v. No 2 Public Service Appeal Board</i> (1973) 2 NZLR 86 at 92

## Reasons for Decision

- [1] This is an application brought pursuant to section 252AB(3) of the *Racing Integrity Act 2016* for an extension of time within which to make Application for the Review of a racing decision made on the 25th of September 2023.
- [2] The Applicant Mr David Vandyke is a licensed thoroughbred trainer who was on the 25th of September 2023 found guilty by stewards of an offence against LR68(1) which provides as follows:
- Further to the provisions of AR181, if it is intended to withdraw a final acceptor from any race, notice of withdrawal of the horse shall be given to the Racing Australia Service Centre not later than the time advertised in the approved program for the race meeting and thereafter a horse shall not be withdrawn except by permission of the stewards.*
- [3] The particulars of the charge levelled against the Applicant were that he, in race 8 at Ipswich on the 25th of September 2023, failed to scratch his runner Hollywood Park within the prescribed time subsequently costing an emergency a run in the race.
- [4] Mr Vandyke was fined the sum of \$500.00 for that offence and he is now seeking a review, not of the determination of guilt, but of the penalty imposed which he submits is excessive.
- [5] Section 252AB(2) of the Act provides that any application for the review by the Panel of a racing decision such as this must be made within 3 business days after the day on which the person is given notice of the decision.
- [6] Notice in this case was given on Monday the 25th of September 2023, and it follows that any Application for Review was required to be made before midnight on Thursday 28th September 2023.
- [7] Although section 252AB(2) uses mandatory language (“the application must be made within 3 business days”), section 252AB(3) allows the Chairperson to decide to accept an out of time application if the Chairperson is of the opinion that it would be unjust to refuse to accept that application.
- [8] The legislation provides no assistance as to how the Chairperson's discretion under this section is to be exercised so it may be assumed that it should be exercised according to well established legal principle.
- [9] In particular, it's necessary to consider matters such as whether there is any good reason to account for the delay and whether it is in the interest of justice to grant the extension. That will involve some assessment of the merits of the review itself.
- [10] In the *Hunter Valley Development Pty Ltd v Cohen*<sup>1</sup>, Justice Wilcox considered a number of non-exhaustive criteria which help a court to decide whether or not to exercise its discretion to grant an extension of time:
1. The court will not grant the application unless satisfied that it is appropriate to do so. The applicant must show “an acceptable explanation of the delay” and also that it is “fair and equitable in the circumstances” to extend the time limit.
  2. Whether any action has been taken by the applicant apart from the application to extend time.
  3. Whether extending time would cause any prejudice to the respondent.
  4. The mere absence of prejudice is not enough to justify the grant of an extension.

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<sup>1</sup> *Hunter Valley Development Pty Ltd v Cohen*, Minister for Home Affairs and Environment (1984) 3 FCA 344

5. The merits of the substantive case.

6. Considerations of fairness as between the applicant and other persons in a like position.

- [11] It is accepted that the onus is on the Applicant to prove that an extension of time should be granted. It is not for the Respondent to establish that the Applicant does not have a case for extension.
- [12] Against that legal framework I turn now to circumstances of this particular case.
- [13] The Application for Review was not lodged in this matter until Tuesday, 24 October 2023 some 17 days out of time, the 2nd of October 2023 being a public holiday during that period.
- [14] The circumstances of the offence itself were somewhat unusual. The Applicant's horse Hollywood Park had been a dual acceptor for races scheduled to be held in both Ipswich and Lismore on Thursday, 21st of September 2023. On the 19th of September, when the final fields for those meetings were released, the Applicant saw that Hollywood Park had drawn poorly at Ipswich and scratched his horse from that race, concentrating instead on the Lismore meeting.
- [15] As events transpired, however, on race day, the 21st of September 2023, the Ipswich meeting was abandoned due to the condition of the track and the Ipswich program was moved to a new date Monday 25 September 2023.
- [16] On the day of cancellation Racing Queensland (RQ) issued a communication advising that "In accordance with standard RQ (and industry agreed) policy the same race fields will be retained and scratchings reinstated.
- [17] This meant that Hollywood Park was reinstated for the rescheduled Monday meeting. The Applicant failed to scratch the horse for that Monday meeting in accordance with scratching deadlines for that meeting, thereby depriving an emergency runner an opportunity to participate in that race.
- [18] It is that failure which constitutes the breach of LR68(1) giving rise to the present proceedings.
- [19] For the purposes of this introductory application, it is not necessary that I make any detailed reference to the circumstances surrounding this matter. However, the material does indicate an industry notice was published on the Racing Queensland website advising of the postponed meeting and advising also that, in accordance with standard RQ policy, the same race fields will be retained and scratchings reinstated.
- [20] Another industry notice with similar messaging was published by Racing Australia on its website on 21 September 2023.
- [21] There is evidence also that information was communicated by email, sent to trainers following the postponed Ipswich meeting.
- [22] The Applicant accepts that he did receive communication advising that the meeting had been, rescheduled and that all scratches had been reinstated. However, being of the view that he was done with the Ipswich meeting following his earlier scratching of the horse for the original meeting, he did not take the time to read those messages.
- [23] He acknowledges that it is a common practice for rescheduled meetings to have scratchings reinstated.
- [24] In his Application for Review the Applicant contends that because of the extenuating circumstances that existed here, the penalty imposed was excessive.

- [25] I come now to the consideration of the relevant issues so far as today's application is concerned, dealing first with the matter of delay.
- [26] The Applicant was clearly aware of his right of appeal and of the time limits associated with that appeal, he was informed of those matters on the 25th of September 2023, if indeed he was not already aware of them.
- [27] The application is concerned only with the question of penalty as the Applicant accepts his guilt of the offence charged.
- [28] On the 27th of September 2023, within time, the Trainers Association contacted Racing Queensland and the Queensland Racing Integrity Commission (QRIC) by email, seeking to have the penalty reviewed, there appears to be power for that to occur in AR16(e).
- [29] QRIC responded to that request on the 28th of September 2023 advising that following the postponement of the Ipswich meeting, all trainers were advised of the rescheduled meeting and of the reinstatement of scratchings. QRIC in that letter under the hand of Chief Steward, Mr Adams, suggested that if Mr Vandyke is aggrieved with the decision, he should exercise his right of appeal.
- [30] The Trainers Association, however, continued its efforts to have the penalty overturned internally. On the 29th of September 2023, the CEO of Racing Queensland responded advising of his personal opinion that the fine should have been waived in the situation.
- [31] On the same day, Mr Adams advised the Trainers Association that he considered that that the Stewards panel decision was based on the facts at hand and was consistent with penalty guidelines. He also noted that the Stewards had attempted to contact Mr Vandyke prior to scratchings to help a trainer and their connections to ensure that they did not miss a run, but we're not able to do so. He again expressed the view that there was no basis to overturn the decision of the Stewards Panel made on the 25th of September 2023.
- [32] On the 3rd of October 2023, the Deputy Commissioner of QRIC contacted the Trainers Association, advising that neither her nor the Commissioner, considered they had the power to reverse the Stewards decision even they wished to and that the appropriate course was by way of appeal.
- [33] On the 16th of October 2023, the Trainers Association indicated to QRIC that they acknowledge their only option now seems to be the Racing Appeals Panel and, given that the three day period expired, seeking that QRIC would not oppose an extension of time.
- [34] I refer to these matters in summary form, but it does seem clear that Mr Vandyke although probably kept abreast of developments, was content to leave the matter in the hands of the Trainers Association, particularly through Mr. Partington.
- [35] The principal reason for the delay is the fact that there were ongoing discussions between the Trainers Association and Racing Queensland and/or QRIC during which time efforts were being made to resolve the matter without the necessity of an application to this Panel.
- [36] The delay in my assessment cannot be attributed to any deliberate or even careless neglect on Mr Vandyke's part. If there was any tardiness it was on the part of those on whom he had placed reliance.

- [37] Tribunals in matters such as these have a wide discretion and should have regard to the whole history of a matter including the conduct of the parties and the nature of the litigation involved in deciding whether the justice of the case requires an extension.<sup>2</sup>
- [38] The delay in this case, is one of 17 days. Although that is not an insignificant delay It is by no means, in my view, an unduly lengthy delay, given what was transpiring during that period. Importantly no prejudice to the Respondent is suggested or identified if the extension were to be granted.
- [39] As far as the issue of merits is concerned the fine imposed on the Applicant was one of \$500.00.
- [40] One matter of particular concern is that the Stewards may have taken the view that, in accordance with the new penalty guidelines, no lesser penalty than \$500.00 could be imposed for the offence.
- [41] I need not here express any concluded view on the correctness of that approach. That would be a matter for ultimate determination by the Panel, however It would appear to be arguable at least, that properly construed the guidelines do permit of a lesser penalty. I express no concluded view in that regard, but I make that observation because it may be that there is an arguable case here in relation to the question of penalty.
- [42] Weighing all of these matters I am satisfied that in the circumstances of this case, it would be unjust to refuse to accept the application. The application will therefore be accepted and will be listed for hearing.

[racingappealspanel.qld.gov.au](http://racingappealspanel.qld.gov.au)

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<sup>2</sup> *Avery .v. No 2 Public Service Appeal Board* (1973) 2 NZLR 86 at 92

