



**APPEAL of MICHAEL McDUFF: AR 137A**

**Appeal Committee: Mr John Stewart (Chairman), Mr James McNally and Mr Brett Dixon**

**Date of Hearing: 23 September 2011**

**REASONS FOR DECISION**

Jockey McDuff rode "Birchley" when it finished second in the 2YO Plate at Fannie Bay on 16 July 2011.

Stewards found him guilty of excessive use of the whip in breach of AR 137A(3). Particulars of the charge were that he had used the whip on the horse, a 2-year-old, on 30 or so occasions in the straight. They ordered that he forfeit his riding fee and percentage.

Jockey McDuff appealed against the finding of guilt and the severity of the penalty. His grounds of appeal were essentially that the Stewards had failed to apply the correct standard set down by Rule 137A of the Australian Rules of Racing.

Rule 137A provides:

**AR.137A. (1)**

- (a) Only padded whips of a design and specifications approved by a panel appointed by the Australian Racing Board may be carried in races, official trials or jump-outs.
  - (b) Every such whip must be in a satisfactory condition and must not be modified in any way.
  - (c) The Stewards may confiscate any whip which in their opinion is not in a satisfactory condition or has been modified.
  - (d) Any rider who has been found guilty of a breach of this subrule may be penalised. Provided that the master and/or other person who is in charge of an apprentice jockey at the relevant time may also be penalised unless he satisfies the Stewards that he took all proper care to ensure the apprentice complied with the rule.
- (2) Only whips of a design and specifications approved by a panel appointed by the Australian Racing Board may be carried in trackwork.
- (3) The Stewards may penalise any rider who in a race, official trial, jump-out or trackwork, or elsewhere uses his whip in an excessive, unnecessary or improper manner.
- (4) Without affecting the generality of subrule (3) of this rule, the Stewards may penalise any rider who in a race, official trial or jump-out uses his whip - [amended 1.8.09]

- (a) forward of his horse's shoulder or in the vicinity of its head; or
  - (b) using an action that raises his arm above shoulder height; or
  - (c) when his horse is out of contention; or
  - (d) when his horse is showing no response; or
  - (e) after passing the winning post; or
  - (f) causing injury to his horse; or
  - (g) when his horse is clearly winning ; or
  - (h) has no reasonable prospect of improving or losing its position, or
  - (i) in such manner that the seam of the flap is the point of contact with the horse, unless the rider satisfies the Stewards that this was neither deliberate nor reckless.
- (5) (a) In a race, official trial or jump-out prior to the 100 metre mark;
- (i) The whip shall not be used in a forchhand manner in consecutive strides
  - (ii) The whip shall not be used in a forehand manner more than on 5 occasions
  - (iii) The rider may at his discretion use the whip with a slapping motion down the shoulder, with the whip hand remaining on the reins, or alternatively in a backhand manner.
- (b) In the final 100 metres of a race, official trial or jump-out a rider may, subject to the other requirements of this rule, use his whip at his discretion.
- (6) *[subrule rescinded 26.9.09]*
- (7) (a) Any trainer, owner or authorised agent must not give instructions to a rider regarding the use of the whip which, if carried out, might result in a breach of this rule.
- (b) No person may offer inducements to a rider, to use the whip in such a way that, if carried out, might result in a breach of this rule.
- (8) Any person who fails to comply with any provisions of this rule is guilty of an offence.
- [Rule replaced 1.8.09]*
- (9) An owner or his authorised representative, trainer, rider or Steward may lodge an objection against the placing of a horse where the rider during the race contravenes AR.137A (3) or (5).
- [subrule added 1.8.09][subrule replaced 26.9.09]*

Both parties were represented by legal practitioners; Jockey McDuff by Mr Gerald Clarke, and the Stewards by Mr David De Silva.

Argument in the appeal was directed towards the operation of sub-rules (3), (4) and (5). A copy of the transcript of the Stewards inquiry was tendered. We were assisted by viewing film of the race. A small amount of additional evidence was allowed by consent.

Referring to the film Stewards argued that earlier in the race Jockey McDuff had been using the whip in a backhand manner. From about the 150 metre mark he changed over to a forehand action. He applied the whip using a forehand action every second stride from the 150 metres to the 100 metres mark (4 or 5 times) and then every stride in the last 100 metres (another 12 or 15 times). Including the backhand use prior to the 150 metres point, Stewards counted about 30 strikes with the whip from the top of the straight (about 340 metres out) to the finish.

At the Stewards' inquiry Jockey McDuff sought to justify his use of the whip: "I was trying to win the race – trying very hard to win the race and I'm sure the spectators could see that I was trying very hard to win the race, the public, and if I get beat by two lengths and I don't try as hard, what do you say then?"

The Chairman of Stewards Mr Lane asked: “Well, you don’t have to hit them every stride in the forehand manner or the backhand manner to be trying, do you?”

Jockey McDuff gave this evidence: “At first I didn’t hit him every stride backhand, I didn’t. I hit him.....about six times continuous backhand, and then I went every second or third stride again, backhand and then I went forehand, 150 out, I give him three hits, forehand from the 150 to the 50 and then I hit 15 times from the 100 metres to the winning post and got beat a half a neck.”

When asked by Mr Lane to count how many times, whether backhand or forehand, he hit the horse in the straight Jockey McDuff replied: “Twenty-nine all the way down the straight.”

Jockey McDuff argued that liberal use of the whip on 2-year-olds was tolerated in the Golden Slipper. Stewards rejected that argument as irrelevant.

Mr Lane asked Jockey McDuff: “How many times have we discussed what the Stewards’ view is in relation to the use of the whip?” Jockey McDuff didn’t respond to the question.

At the appeal Mr Lane informed us that Stewards don’t distinguish between forehand and backhand use in determining whether the use of the whip is excessive. He said that riders (including Jockey McDuff) have repeatedly been given this information. Stewards usually suggest that riders should keep these practical guidelines in mind: namely, use the whip sparingly prior to entering the straight; confine the use to backhand prior to the last 100 metres so that they do not run the risk of infringing sub-rule (5)(a); keep within an upper limit of 20 strikes whether forehand or backhand and whether the horse is in contention or otherwise.

Before presenting our reasons we will summarize the arguments of both parties at the appeal.

Mr Clarke argued that:

- a) The maximum *generalia specialibus non derogant* should be invoked, so that sub-rule (3) does not apply to cases falling within sub-rule (5).
- b) Stewards do not have discretion to determine what use of the whip is excessive.
- c) Alternatively, in exercising their discretion they must take into account the specific provisions of the Rules.
- d) Stewards in the Northern Territory have no right to implement policies in conflict with the Australian Rules of Racing.

- e) "Birchley" was in contention so Jockey McDuff was required to give it every opportunity to win.
- f) The jockey was entitled to use his discretion in the last 100 metres (sub-rule 5(b)).

In point (e) of his argument Mr Clarke submitted that the jockey's obligations under sub-rule AR.135 (b) are relevant. The sub-rule provides: "(b) The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field."

The Stewards advanced these arguments through Mr De Silva:

- a) Sub-rule (4) specifically preserves the Stewards' power to apply sub-rule (3).
- b) Sub-rule (5)(b) is expressly subject to the other requirements of "this rule" which should be interpreted as including the requirements of sub-rule (3).
- c) The Stewards' have the power under sub-rule (3) to ascertain what is excessive use of the whip.
- d) The Stewards' decision to penalise a rider under sub-rule (3) should be respected on appeal.
- e) It is relevant that "Birchley" was a 2-year-old.

In making point (d) Stewards sought to rely on the decision of the Racing Penalties Appeal Tribunal (WA) in the *Appeal of Clint Kenneth Harvey* (02.02.11). When dealing with an appeal involving AR 137(a) the Tribunal observed: "As has been stated in these types of appeal many times before the introductory provision in the rule contains the significant phrase '*in the opinion of the Stewards*'. The proper application of Rule 137(a) requires any appellant involved in challenging a riding conviction to satisfy the Tribunal that the decision of the Stewards which is under review was so unreasonable that it could not have been made by any Stewards acting reasonably in relation to the relevant information which was before the Stewards in question."

Having carefully considered all arguments this is our decision:

1. This is an exceptionally difficult appeal. It directs attention to two worthwhile but competing objectives that followers of the sport are very familiar with. One of these is to protect the horse from unnecessary punishment; the other is to safeguard the interests of connections and investors by ensuring that the horse does its best.
2. The tension between these objectives directly impacts on decisions a jockey must make when riding in a race. As has been observed the use of the whip is limited but on the other hand the jockey is expected to secure the best result for his or her mount.

3. On 19 March 2009 the Australian Racing Board announced what were described as sweeping changes to the whip rules. These changes included the introduction of padded whips and limits on the circumstances in which, and the way in which, the whip is used. The effective date for these changes was 1 August 2009. Later that year the limits were relaxed somewhat. After a further period of review on 18 March 2010 the Australian Racing Board determined that no alteration would be made to the current controls. As befits the consideration of such important questions involving competing interests the Australian Racing Board mentioned at the time that its Integrity and Welfare Subcommittee had considered submissions from bodies representing jockeys, owners, stewards and animal welfare advocates.
4. For the purpose of this analysis we are mainly concerned with sub-rule 137A (5) which was one of the amendments introduced in 2009.

Sub-rule (5) states:

“In a race, official trial or jump-out prior to the 100 metre mark;

(i) The whip shall not be used in a forehand manner in consecutive strides

(ii) The whip shall not be used in a forehand manner more than on 5 occasions

(iii) The rider may at his discretion use the whip with a slapping motion down the shoulder, with the whip hand remaining on the reins, or alternatively in a backhand manner.

(b) In the final 100 metres of a race, official trial or jump-out a rider may, subject to the other requirements of this rule, use his whip at his discretion”.

5. It is clear that the fundamental purpose of AR 137A is to limit the use of the whip. Sub-rules (4) and (5) prohibit specific methods of application of the whip or its use in specific circumstances. It was argued on behalf of Jockey McDuff that, if those specific provisions are complied with, there is no room for a finding of excessive use. Further, that the discretion preserved for the jockey in sub-rules 5(a)(iii) and 5(b) leaves either no room for the Stewards to make a finding under sub-rule (3) or, if there is room, the extent of the Stewards’ powers is uncertain.
6. The ordinary dictionary definition of “discretion” is freedom or authority to make judgment as one sees fit. It is significant that before AR 137A was amended in 2009, there were no specific restrictions on the hand or arm action when using the whip or on the number of times the whip may be applied using a particular action. By implication those decisions were left to the discretion of riders but subject always to the Stewards’ power to punish excessive, unnecessary or improper use of the whip. That power – now expressed in sub-rule (3) - has been in place for many years.
7. It follows that, insofar as the scope for choosing with what action and how many times to apply the whip, the riders did not have complete freedom of choice. Aside from observing certain restrictions already in the rule (eg when a horse is out of contention)

- riders had to act responsibly, having regard to the broad requirement to refrain from using the whip in an excessive, unnecessary or improper manner.
8. The amendments inserted some specifications into the broad requirements. But it must be remembered that racing is inherently dangerous and unpredictable. The whip assists riders to correct and control a wayward horse. So there are reasons for approaching regulation of the use of the whip with caution. In the end the sport will be better off when the reform of the whip rules is supported by all sectors.
  9. In our opinion, the true meaning of sub-rule (5)(b) is relatively easy to discern. The reference to “other requirements” is intended to ensure that the rider, whilst not subject to restrictions of the kind mentioned in sub-rule 5(a), still has to comply with requirements such as those contained in sub-rules (3) and (4). So the rider has a discretion whether to use the whip and, if so, whether forehand or backhand and how many times in the final 100 metres; but the use could be excessive, unnecessary or improper if it occurred in the circumstances described in sub-rule (4) or other circumstances relevant to the application of sub-rule (3).
  10. At first sight sub-rule 5(a)(iii) appears to be a tougher nut to crack. There is no reference to “other requirements” or, as in sub-rule (4), “the generality of subrule (3)”. However, it should be noted that sub-rule 5(a)(iii) deals with backhand use of the whip and is not subject to the specific limits (“consecutive strides” and “more than on 5 occasions”) that govern forehand use by means of sub-rules 5(a)(i) and 5(a)(ii). The expression “at his discretion” in sub-rule 5(a)(iii) means that when using the whip backhand the jockey is not necessarily subject to those limits. To that extent the jockey has a relatively wider discretion. But the discretion is not unlimited.
  11. To enforce Rule 137A properly, in our opinion it is necessary for the Stewards to distinguish between use with a forehand action and other use including use with a backhand action. It is apparent from the comparative treatment of both actions in sub-rule (5)(a) that a rider can expect more latitude when using the whip backhand rather than forehand. However, it would be absurd to suggest that a rider can legitimately use a backhand action to repeatedly whip a horse where the horse is not in contention and there is no apparent necessity to use the whip. Just because sub-rule 5(a) permits certain whip action (namely up to 5 occasions with the forehand or at the rider’s discretion with backhand) it does not follow that those opportunities can be exercised with impunity. Clearly, a rider is on safer ground when he or she complies with sub-rules (5)(a)(i) and 5(a)(ii). But whether the rider has used the whip lawfully may still be an open question.
  12. The limits on the use of the whip, whether forehand or backhand, are only partly covered by sub-rule (5). It is significant that the Rule does not provide that sub-rule (5) is to

apply notwithstanding anything contained in sub-rules (3) and (4). To the contrary and consistent with what we regard as the obvious intendment of Rule 137A, it is our view that the restrictions in sub-rules (3) and (4) must also be observed.

13. The maxim *generalia specialibus non derogant* means that, where there is conflict between general and specific provisions, the specific provisions prevail. The authorities dictate that this approach should only be used where there are two inconsistent provisions which cannot be reconciled as a matter of ordinary interpretation. Mr Clarke submitted that sub-rules (3) and (5) are inconsistent; therefore sub-rule (5) should prevail. For reasons which we have explained, we consider that these sub-rules can work together (with sub-rule (4)) to achieve the intended purpose of Rule 137A. Sub-rules (4) and (5) are both specific provisions. It is incorrect to suggest that the provisions are inconsistent when it is understood that sub-rule (4) provides examples that will assist the rider in exercising whatever discretion is available. And sub-rule (3) provides a mechanism for Stewards to deal with inappropriate whip use where the other parts of Rule 137A do not fully respond.
14. A charge under sub-rule (3) is not confined to conduct in breach of any of any of the requirements of sub-rule (4). When determining whether a rider has used the whip in an “excessive manner” as proscribed by sub-rule (3), it is proper to have regard to a wide range of factors including the age, nature, behaviour and performance of the rider’s horse - and other horses – in the race, the length and pattern of the race, the racing conditions on the day, the weather, the type of whip action used, the force and frequency with which it is applied, and the effect of the whip upon the horse. The list is not intended to be exhaustive. Suffice to say that a lot of factors can properly come to mind.
15. We do not agree that Stewards in the Northern Territory have made a policy in conflict with the Australian Rules. In their approach towards this matter the Stewards have upheld AR 137A. There is room for differences of opinion between stewards in different jurisdictions in relation to matters such as “excessive, unnecessary or improper” where the judgement call is to some extent subjective, and the scale of penalties merited by particular types of breach. Although consistency is a desirable objective, differences in application can properly exist due to the variation between jurisdictions in the circumstances in which racing is conducted.
16. For that reason and also because it is important that each case be treated on its merits we were not attracted to an argument based on the conduct of riders in the Golden Slipper. It was also suggested, rather faintly, that because of the configuration and racing surface of the track at Fannie Bay, jockeys might need to depend on the whip to a greater extent

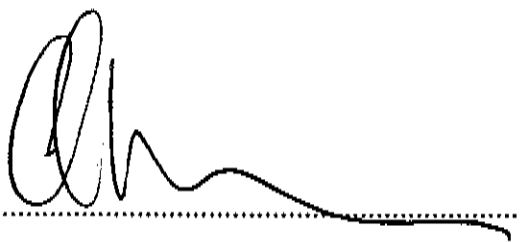
than at other tracks. We could see no value in that submission. Jockeys at all tracks are expected to comply with the rules.

17. On the other hand we do not accept Mr De Silva's submission that the proper application of sub-rule (3) requires an appellant to satisfy us that the decision of Stewards was so unreasonable that it could not have been made by any Stewards acting reasonably on the available information. The decision in the *Appeal of Clint Kenneth Harvey* concerned a rule conditioned by the opening words "in the opinion of the Stewards". Those words do not appear in sub-rule (3). Our task is to hear the appeal and give our decision as the justice of the case requires: NTR 25. Having said that, we will give due weight to the opinion of Stewards, being mindful of the experience and expertise they bring to matters such as this.
18. Because of the variety of circumstances it is unwise to set absolute limits on the number of times the whip can be used in a race. Stewards in Darwin have apparently decided on a rule of thumb that they will investigate the use of the whip when it is used more than 20 times. There is no need for us to comment on whether that guideline is appropriate. Different considerations come into play when Stewards are deciding whether to investigate a rider's conduct as opposed to deciding whether the rider is actually guilty of a breach of the rules. As mentioned above, a decision of the latter kind will depend on the circumstances of the individual case.
19. We realize that some riders may sometimes be in a quandary in deciding how much use of the whip will be tolerated. As mentioned, because of the wide range of variables we do not consider that there is any merit in setting absolute limits on the permissible use where discretion is available. Riders can take comfort in the knowledge that Rule 137A is directed towards responsible use of the whip, not total prohibition. If they can explain how their discretion has been exercised responsibly in the circumstances of the particular race, it will be hard for Stewards to satisfy a tribunal on appeal that the use of the whip is excessive.
20. We will say that, having observed the film, we agree with the Stewards' assessment that Jockey McDuff's use of the whip was clearly excessive. It is hard to imagine how any rider would ever be able to justify hitting a horse 30 times in the straight. True it is that "Birchley" was in contention but, as Mr Lane pointed out, in the same race the riders of other horses in contention were much more conservative in their use of the whip. After entering the straight, Jockey Haddon (riding the winner) applied the whip about 7 times and Jockey Denton (placed third) about 9 times. Quite properly, they may have exercised restraint knowing that they were riding young horses.



21. Mr Lanc told us that most local jockeys have adapted well to the requirements of Rule 137A as amended. It appears that Jockey McDuff has been slow to adapt. We concur with this view expressed by the Racing New South Wales Appeal Panel in the *Appeal of Michael Rodd* (20 April 2010): “.....there is a need overall to safeguard the integrity of racing. It is unfair if one party breaches the rules and the other does not”.
22. Jockey McDuff said he was influenced by his impression of the expectations of punters. It is true that some ill-informed followers of racing may consider it necessary for a rider to apply the whip 30 times in the straight. Those views should be dismissed. As Chairman of the Australian Racing Board, Mr Bob Bentley, said when announcing the amendments: “There are a lot of things that society condoned fifty years ago but which are now seen as unacceptable and this is one of them.”
23. Mr Clarke fairly conceded that if the appeal against the finding of guilt was unsuccessful, there would be no challenge to the penalty. This particular breach was Jockey McDuff’s sixth of 8 breaches of Rule 137A in 2011 alone. He is an experienced jockey and really should be making a better effort to comply with the rule.
24. The appeal is dismissed. The Stewards’ decision is confirmed. The deposit will be forfeited.

Dated: 27 October 2011.

A handwritten signature in black ink, appearing to read 'John Stewart', written over a horizontal dotted line.

John Stewart, Chairman