

# **NEW SOUTH WALES HARNESS RACING APPEAL PANEL**

**APPEAL PANEL MEMBERS  
Hon. W Haylen KC  
D Loewenthal  
C Edwards**

**TUESDAY 31 OCTOBER 2023**

**APPELLANT OLIVIA FRISBY**

**RESPONDENT HRNSW**

**AUSTRALIAN HARNESS RACING RULES  
149(2)**

## **DECISION**

- 1. The appeal against the decision of the Stewards is upheld.**
- 2. The findings of breach of AHRR 149(2) and the penalty of 4 weeks suspension are set aside.**
- 3. The Appeal fee is to be repaid to Ms Frisby.**

1. On 18 October 2023 HRNSW Stewards completed an inquiry into the tactics adopted by driver Ms Olivia Frisby when driving Exclusive Dancer in race 5 over 2140m at West Wyalong on 13 October 2023. After taking evidence the Stewards required her to answer a charge under AHRR 149 part (2): "A person shall not drive in a manner which in the opinion of the Stewards is unacceptable." The particulars of the charge were, that as the driver of Exclusive Dancer in race 5 at West Wyalong on 13 October 2023, she drove, in the opinion of the stewards, unacceptably when racing around the home turn on the first occasion approaching the 1700 metres when in the running line position, a one-out, one-back position, she failed to drive in a competitive manner and urge her horse Exclusive Dancer forward to maintain its position in the 1-1 position whilst Warraderry was racing to your outside as that runner was able to progress forward, and stablemate to Exclusive Dancer, and shift inwards and obtain the position in advance of Exclusive Dancer and subsequently placed Exclusive Dancer in a one-out, two-back trail, and at that point it was unacceptable in the opinion of the stewards that you failed to drive in a competitive manner to maintain your position.
2. Ms Frisby immediately pleaded guilty to that charge. The Stewards then began the penalty process, acknowledging that Harness Racing NSW Penalty Guidelines had a starting point of a ten week suspension. A two week deduction was allowed in acknowledgement of her early plea. The Stewards noted that she had never before been charged under this rule and had 484 drives while being only in her fourth year as a driver. This was acknowledged as an exceptional record for an A Grade Driver, and a further reduction of four weeks was allowed. The Stewards settled on a final penalty of suspension of her licence for a period of 4 weeks.
3. During the penalty process the Stewards stated that they had to be highly mindful that a stablemate horse, Warraderry, had subsequently found its position in advance of her horse. It was stated that her degree of culpability sat "in a rather high standard" as the stablemate obtained a position in advance of her horse. It was emphasised that Rule 149 (2) was there to enhance confidence in the betting public that drivers drive in a competitive manner throughout when driving their horses.
4. Ms Frisby filed an appeal to this Panel, challenging both the finding of guilt under rule 149(2) and the severity of the suspension. HRNSW placed her on notice that if she failed to overturn the guilty finding, she would lose the benefit of the two week period allowed for the early guilty plea. At the commencement of the hearing of the Appeal Ms Frisby's advocate, Mr Morris, acknowledged that risk but confirmed the intention to argue that both aspects of the findings be overturned.
5. The transcript of the proceedings before the Stewards was in evidence on this Appeal. Some time was spent in identifying significant runners in the race and those who were in leading positions and some who had unsuccessfully challenged for the lead. There was a suggestion that Ms Frisby had not taken advantage of the driver of Baxter Red unsuccessfully challenging for the lead and taking a hold on that horse. It was also put that Ms Frisby had restrained her horse and allowed room for stablemate Warraderry to shift into a running line position and subsequently obtaining the 1-1 position that her horse had occupied coming into the turn. Ms Frisby, on a number of occasions, rejected the suggestion that she had taken a hold on her horse, thus allowing Warraderry to take up the 1-1 position. Ms Frisby said that she did not want her horse "to take the chair", and that her horse had done enough work to get to her position. She did not want to hunt the horse up as she did not want to get stuck behind the leader. Exclusive Dancer had won the previous

week in a lower grade race over 1600m where he was pulled out at the 600m to go past all the field.

6. These matters were not at the forefront of the Stewards case on Appeal. The Stewards accepted that the significant issue was protection of the punting public and ensuring that Ms Frisby took every opportunity to promote her horse during the race. It was a bad look that she had given up the 1-1 position to her stablemate and was not able to maintain a forward position. It was submitted that she did not show vigour at that stage of the race where Warraderry took the 1-1 position.
7. Submissions made on behalf of Ms Frisby argued that the focus on the protection of the public was unwarranted in this case. This horse had previously won at a mile but was stepping up to 2140m in this race and in a higher class. If she had required more work from the horse at the stage of coming around the turn it was likely that the horse would be beaten by an even bigger margin. This was a mile horse and Ms Frisby was very experienced and had made a decision not to hunt the horse up at the time Warraderry moved around and into the 1-1 position. It was also pointed out that Exclusive Dancer had started at odds of 51 to 1, while Warraderry started at odds of \$71 to 1.
8. The Stewards drew attention to a decision of the Racing Appeals Tribunal NSW in the case of Driver Ms Panella (15 March 2012) and the application of AHRR 149(2). In that case the Tribunal considered the nature of this rule and canvassed a number of approaches adopted by Racing Tribunals in applying its provisions. It has been accepted that Stewards exercising the power provided by the rule, are qualified and experienced. This provision is one of many duties the rules require of Stewards that ensure that all participants are doing their best on behalf of everyone associated with the industry. The Victorian Tribunal in the case of Mifsud stated that the rule was not intended to penalise what might be described as mere errors of judgement or split-second mistakes. In the New South Wales case of Honan, the Judge stated that the rule does not seek to punish a mere error of judgement during the race on the part of the driver and that the driver's conduct must be culpable in the sense that objectively it is found to be blameworthy. Lastly, the Tribunal referred to the decision of the Board in the case of McMullen and the following quote: "That sort of culpable action that is required to amount to a breach of this rule might be such that in normal circumstances a reasonable and knowledgeable harness racing spectator might be expected to exclaim with words to the effect, 'What on earth is he doing?' or, 'My goodness, look at that', or some such explanation."
9. In this case the Stewards were activated by the possibility that the public might be deeply concerned at Ms Frisby's drive and a perceived advantage being allowed to a stablemate. It is difficult to accept that possibility when both horses started at \$51 and \$71. Those odds suggest that the betting community had very little interest in these two runners. An informed punting public would be aware of the form of Warradeery and that Exclusive Dancer was up in class and facing a significantly longer race from its last start. It is understandable that Ms Frisby might be careful in the early stages of the race when her horse was being asked to be competitive over an additional 540m. Clearly Exclusive Dancer did not run out the 2140m of the race and was weakening on the line to just miss out on 4<sup>th</sup> place. Ms Frisby was considered to be an exceptional driver with a good record. When all the circumstances are considered it cannot be concluded that her drive in this race, or in the time from the first turn into the straight was "unacceptable".

10. Having regard to these findings, the Appeal is upheld. The findings of breach of AHRR 149(2) and the penalty of 4 weeks suspension are set aside. The Appeal fee is to be repaid to Ms Frisby.

Hon Wayne Haylen KC – Principal Member

Mr D Loewenthal – Panel Member

Mr C Edwards – Panel Member

1 November 2023