IN THE RACING APPEALS TRIBUNAL

CAMERON ROSS
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing: **14 March 2024**

Date of determination: **22 April 2024**

Appearances: **Mr D Sheales for the Appellant**

Mr P Silver for the Respondent

Determination:

1. **The Appeal is dismissed.**

2. **The penalties imposed by the Appeal Panel of Harness Racing New South Wales on 3 October 2023 are confirmed.**

3. **In respect of each of the presentation offence and the administration offence, the Appellant is disqualified for a period of 7 months, such penalties to be served concurrently.**

4. **The order made by the Tribunal on 24 October 2023 is vacated.**

5. **Noting that a period of 2½ months of the disqualification has been served to date, the balance of the disqualification, namely 4½ months, will commence at midnight on 23 April 2024.**

6. **The deposit is forfeited.**

INTRODUCTION

1. Following an investigation conducted by Harness Racing New South Wales (the Respondent) arising from the participation of *Machs Legacy* (the horse) at a race meeting conducted at Newcastle on 10 February 2023, Cameron Ross (the Appellant) was charged with three offences contrary to the *Harness Racing Rules* (the Rules).

2. The first offence (the presentation offence) was contrary to r 190 of the Rules which provides (in part) as follows:

> ***Presentation free of prohibited substances***
> *190 (1) A horse shall be presented for a race free of prohibited substances.*
> *(2) If a horse is presented for a race otherwise than in accordance with sub-rule (1) the trainer of the horse is guilty of an offence.*
> *(3) ...*
> *(4) An offence under sub-rule (2) or sub-rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*

3. The particulars of the presentation offence were as follows:[1]

> *That the Appellant, being the licenced trainer of Machs Legacy, did present that horse to race at Newcastle on Friday 10th February 2023 not free of a prohibited substance, namely Dexamethasone, as reported by two laboratories approved by [the Respondent].*

4. The second offence (the administration offence) was contrary to rr 196A(1) and (2) of the Rules which are in the following terms:

> ***Administering substances***
> *196A(1) A person shall not administer or cause to be administered to a horse any prohibited substance*
> *(i) ...*
> *(ii) which is detected in any sample taken from such horse prior to or following the running of any race.*
> *(2) A person who fails to comply with sub-rule (1) is guilty of an offence.*

5. The particulars of the administration offence were as follows:[2]

[1] AB 178.
[2] AB 179.

That [the Appellant] did administer a prohibited substance, namely Dexamethasone, to the horse Machs Legacy which was detected in a urine sample taken from that horse following its win in race 5 at Newcastle on Friday 10th February 2023.

6. The third offence (the logbook offence) was contrary to rr 190B(5) and (6) of the Rules which are in the following terms:

> ***Log Book***
> *190B (5) A trainer shall retain possession of a log book for a period of two years.*
> *(6) A trainer who fails to comply with the provisions of sub-rule .. (5) is guilty of an offence.*

7. The particulars of the logbook offence were as follows:[3]

> *That [the Appellant] being a licenced trainer did fail to retain possession of a log book for a period of two (2) years.*

8. The Appellant pleaded guilty to each offence, following which the Respondent imposed the following penalties:

    (i) for the presentation offence – disqualification for a period of 7 months to be served concurrently with the penalty imposed for the administration offence;

    (ii) for the administration offence – disqualification for a period of 10 months and 2 weeks, to commence on 12 July 2023;

    (iii) for the logbook offence – a fine of $500.00.

9. The Appellant lodged an appeal to the Appeal Panel of Harness Racing New South Wales (the Appeal Panel) against the penalties imposed in respect of the presentation offence and the administration offence.

10. On 3 October 2023 the Appeal Panel upheld that appeal, and reduced the penalty for the administration offence to one of a disqualification of 7 months.[4] The effect

[3] AB 179.
[4] AB 243 at [24].

of that order was to impose a total period of disqualification of 7 months, of which the Appellant has served a period of 2½ months.

11. On 9 October 2023 the Appellant lodged an appeal to the Tribunal against the penalty imposed[5]. That appeal was heard on 14 March 2024, at which time judgment was reserved.

THE FACTS

The Notice issued by the Respondent

12. On 14 September 2018, the Appellant issued a Notice[6] (the Notice) to industry participants which was in the following terms:

> *Trainers are reminded of their obligation to present horses to race free of prohibited substances and the absolute liability for trainers who are found to have breached Australian Harness Racing Rule (**AHRR**) 190(1).*
>
> ***DETECTION TIMES AND WITHDRAWAL TIMES***
>
> *Following the administration of a therapeutic substance, a **detection time** is the first point in time at which a Laboratory cannot detect the substance or its metabolites in the urine or plasma of an animal.*
>
> *Because of variability in both the animal and the therapeutic substance, detection times may vary. For example, in the case of joint injections, the withdrawal period will depend on both the corticosteroid used as well as the joint(s) injected.*
>
> *It is therefore necessary for a veterinarian to add a safety margin to a detection time in order to arrive at a **withdrawal time**. This is the time at which a veterinarian recommends that it can be reasonably assumed that the horse will be free of the therapeutic substance or its metabolites.*
>
> ***Detection times** are contained in various industry publications and provide veterinarians a guide for recommending a withdrawal time. In Australia, the Rural Industries Research and Development Corporation (RIRDC) have published a list of **detection times** for a number of commonly used therapeutic substances (The Pharmacokinetics of Equine Medications ...). The European Horseracing Scientific Liaison Committee (EHSLC) have also published a similar list.*
>
> *It is important to understand the difference between the terms **detection time** and **withdrawal time**. A detection time is NOT the same as a withdrawal time.*

[5] AB 1.
[6] AB 185.

ADMINISTERING THERAPEUTIC SUBSTANCES

Prior to the administration of any therapeutic substance it is important for trainers to obtain advice from their veterinarian regarding the withdrawal time for that therapeutic substance which is specific to the circumstances in which it is being administered.

It is recommended that Trainers ask their Veterinarian to provide a ***withdrawal time*** *using the "clear day" terminology. The introduction section of the Harness Racing NSW Log Book contains the definition of a "clear day".*

Harness Racing NSW provides an elective testing service for a number of long acting substances that may have unpredictable detection times.

The circumstances of the offending and the return of the positive sample

13. At the material time, the Appellant was licenced with the Respondent as a trainer. The horse, of which the Appellant was the trainer, competed in (and won) a race at a meeting conducted at Newcastle on 10 February 2023, and was then subject to the supply of a urine sample. Upon analysis of the sample a prohibited substance, namely Dexamethasone, was detected.[7]

The supply of Dexamethasone to the Appellant

14. Dr Argyle, of Wollondilly Equine, provided the following statement dated 10 July 2023 confirming the supply of Dexamethasone to the Appellant:[8]

> *Our practice supplied [the Appellant] with Dexamethasone on 5 December 2022 and 11 August 2022 owing to the fact that some of the horses (Brevity, Machs Legacy and Back in Twenty) in the stables were showing signs of inflammatory airway disease. The drug was to be used in a nebuliser to reduce airway inflammation with a withhold period of at least 72 hours.*
>
> *The instructions provided were to nebulise the horses with saline after the cessation of Dexamethasone up to 1 clear day prior to racing.*

THE INVESTIGATION

The Appellant's interview

15. The Appellant was interviewed on 10 February 2023 by Paul Criddle of Racing and Wagering Western Australia (the Appellant having moved to Perth

[7] AB 103-104; AB 106.
[8] AB 136.

during the intervening period). In the course of that interview, the Appellant said the following in answer to questions put to him by Mr Criddle:[9]

Appellant:	*I reckon I might have nebulised her with dex, but that's something that happens all the time.*
Criddle:	*And do you know when that would have been?*
Appellant:	*Well, if it was Friday, I would have given it to her on the Tuesday.*
Criddle:	*That's a normal thing?*
Appellant:	*That's a normal thing, yeah. It's 72 hours before. If they race Saturday, they get it on the Wednesday. If they race Friday, they would get it on a Tuesday.*
Criddle:	*72 hours before. So, that's the advice you got from a vet?*
Appellant:	*Correct.*
Criddle:	*Yep.*
Appellant:	*It used to be – used to be one less day but they've extended it now to 72. I think it used to be 48, 72 I'm assuming.*
Criddle:	*So you wouldn't do it within 72 hours generally?*
Appellant:	*No.*
Criddle:	*In a nebuliser? How much in the nebuliser do you normally use?*
Appellant:	*One ml. With just a solution. Like a saline solution. After they've track worked.*
Criddle:	*And do you have any evidence of giving the nebuliser? Do you record that in your medical book?*
Appellant:	*Um, I reckon my medical books are packed up somewhere maybe in boxes.*
Criddle:	*At home?*
Appellant:	*From the shift. Yeah, at the stables or at home, but I can try and dig it up and try and find it. It's just a, you know, like, I think you guys have got the same, folder with just this bit in it.*
Criddle:	*Yeah.*
Appellant:	*So, I had one over there, obviously.*
Criddle:	*Yeah.*
Appellant:	*I'd have to try and dig it up to find it.*
Criddle:	*So, you do have one, there is one here?*
Appellant:	*Ah, I assume so. It would be in the box. I haven't used one since I've been here.*

[9] AB 119.17 – AB 122.14.

Criddle: *Would you normally record nebulisers?*

Appellant: *Not really. But I would put everything else in there, but I couldn't – I wouldn't be able to remember if I put that in or not. I wouldn't know. Like I said, I'd have to look back and see.*

Criddle: *But do you normally do that, or is that just something you do and then –*

Appellant: *I normally just nebulise them and, yeah, don't write it in. Sometimes it's just saline water and sometimes its dex, sometimes it's whatever. But I don't – I wouldn't – thinking back, I probably wouldn't have wrote it in there.*

Criddle: *Yeah.*

Appellant: *But I would have wrote – if I injected them with something I'd write that in. But –*

Criddle: *Yeah.*

Appellant: *-- probably not the nebuliser.*

Criddle: *Okay.*

Appellant: *Not on a regular basis, anyway. Like, not if it's just a –*

Criddle: *So, does this horse regularly get nebulised? Is it a regular thing or did it have an issue?*

Appellant: *No really. Yeah I think it was just more that she was – hadn't raced for a little while. She had a hard hit-out on the Tuesday, thinking back, and then she would have just had that leading up to the race on Friday night.*

Criddle: *Okay.*

Appellant: *She wouldn't have it every week religiously, but –*

Criddle: *Okay.*

Appellant: *-- she would have had it before this race and she would have had it obviously before this race.*

Criddle: *So, from your memory, this may have been --*

Appellant: *Mm-hmm.*

Criddle: *-- nebulised on the Tuesday morning?*

Appellant: *Ah yeah, it would have been before lunchtime on Tuesday.*

Criddle: *Before lunchtime.*

Appellant: *So I would be tipping about 10 o'clock maybe.*

Criddle: *Okay.*

Appellant: *Between 8 and 10. I would have had her track worked by then because the track shuts at Menangle at 9.30.*

Criddle: *Okay.*

Appellant: *So it would have been before then.*

Criddle: *And maybe 1 ml? One ml is the regular dose?*
Appellant: *It would have been 1 ml, yes.*

Criddle: *It's always 1 ml?*
Appellant: *Yep. In probably, I don't know, probably would be 5 to 10 mls of saline water, depending on how big the cup is.*

Criddle: *Yeah.*
Appellant: *Like, just whatever's left over after that.*

Criddle: *Okay.*
Appellant: *It wouldn't be any more than 1 ml of dex though.*

16. In terms of veterinary advice, the Appellant said:[10]

Criddle: *Okay. And you've got a regular vet over there that you –*
Appellant: *Ah, Andrew Argyle.*

Criddle: *And he gave you the – he gives you all your advice on withdrawal times –*
Appellant: *Correct.*

Criddle: *-- in these cases?*
Appellant: *And he would have supplied the dex and …*

The Inquiry held by the Respondent

17. The Respondent held an Inquiry on 12 July 2023 at which the Appellant appeared, represented by Mr Morris, Solicitor.[11] Amongst those present at that Inquiry was Dr Annie Knox, the Assistant Regulatory Veterinarian for the Respondent.

18. The Appellant told the Inquiry that the horse was not in the habit of being regularly nebulised with Dexamethasone, but had been treated with it over a period leading up to the race, as a result of showing signs of airway disease.[12] The Appellant then said:[13]

> *… I was again advised on veterinary advice that if they have had a hard run, it's probably best practice to treat them for some airways disease after they've had a hard hit-out or if you think they've had a hard race, hence why she was done. She had raced Saturday prior the week before and gone quite well and then obviously*

[10] AB 123.30 – AB 123.41.
[11] AB 39 – AB 98.
[12] AB 50.20 – AB 50.27.
[13] AB 50.32 – AB 50.37.

had a hard hit-out on that Tuesday morning, and then obviously she was nebulised with the Dex.

19. The Appellant said[14] that he was acting on the advice of Dr Argyle when he administered the Dexamethasone, in the form of Dexapent,[15] to the horse on this occasion, and said that he did so in a quantity of 1 ml which was added to a nebuliser cup.[16]

20. However, the Appellant then said[17] that he had not received specific advice from Dr Argyle to treat the horse on a particular day, and that it was *"more a general maintenance thing ..... in preparation for the Friday"*. The Appellant confirmed[18] that when Dr Argyle had prescribed the Dexamethasone, he had recommended a dosage of 1 ml through a nebuliser.

The evidence of Dr Knox

21. Dr Knox explained[19] that Dexamethasone is a commonly used corticosteroid which is both potent and anti-inflammatory, and which can be administered via aerosol inhalation with the use of a nebuliser. She said that administration by that method avoids some of the normal side-effects of the substance, and simultaneously optimises the therapeutic effect on the horse's airways by delivering that effect more directly.

22. Dr Knox expressed the view[20] that it was *"possible to likely"* that the Dexamethasone which was administered in this case would have had an effect on the horse in the race, the obvious inference being that such effect was a positive one in terms of the horse's performance. Whilst Dr Knox said[21] that what had occurred in the present case was "*an acceptable use of the drug",* she

[14] AB 50.39 – AB 50.50
[15] AB 51.5.
[16] AB 51.27 – AB 51.32.
[17] AB 53.35 – AB 53.40.
[18] AB 54.10 – AB 54.14.
[19] AB 55.25 – AB 56.8.
[20] AB 56.24.
[21] AB 56.35.

emphasised the distinction which was to be drawn between the withdrawal time and the detection time. In this regard, Dr Knox said:[22]

> *My – there is the concern of, I think, detection time and withdrawal time may be used interchangeably in the – I don't know if those words exactly are used in the transcript, but a withdrawal time is referred to, the 72-hour period. And I'd just like to clarify that's a detection time for the drug, and a withdrawal time should be longer than that detection time.*

23. Those observations as to detection and withdrawal times are generally consistent with the contents of the Notice, the terms of which have been set out.

24. Dr Knox also made reference, in answer to questions put by the Chair of the Inquiry, about research into detection and withdrawal times:[23]

THE CHAIR:	*... You've heard evidence from Mr Ross, and again in the transcript it refers to that nebuliser, or the Dexapent being administered to Machs Legacy by way of nebuliser by 10 o'clock at the latest on the Tuesday ---*
DR KNOX:	*Mm-hmm.*
THE CHAIR:	*--- prior to racing on the Friday. In relation to that evidence that you've heard and the amount of Dexapent that was administered to the horse, is that consistent with the levels that were detected in the sample?*
DR KNOX:	*It isn't entirely consistent with the scientific evidence that we have. We only really have one study that directly looks at nebulised dexamethasone in relation to urine concentrations, and it's a relatively recent study.* *So, it was performed in Australia in 2019. And in that study, six standardbred horses received Dexapent via a nebuliser. It was given at a dose of 20 milligrams in 16 mls of saline. So, the actual amount of dexamethasone that they received was four times the amount of Machs Legacy.* *In that study, the clearance time in the urine samples varied from 24 to 96 hours. So, some variation is to be expected in samples that are given via nebuliser, because there's a lot of room for inconsistency. The fraction of dexamethasone that's inhaled via nebulizer and the fraction that's swallowed is completely unknown, and that can affect the overall systemic dose that the*

[22] AB 56.35 – AB 56.40.
[23] AB 56.42 – AB 58.22.

horse receives and the clearance time of the dexamethasone. So, there is some variation in those results.

However, They did find that in five of the six horses, the dexamethasone was cleared by 96 hours, and in one of those horses there was a urine concentration of 0.1 nanogram per ml at 96 hours.

In that study – I don't have the specific urine levels for each horse – but in the graph that they gave of the results, it seems that a urine level of about 1.4 nanograms per ml of dexamethasone seemed to occur at around the 24 to 32-hour post-administration point.

So, in short, I can say that the research that has been conducted does indicate that there can be dexamethasone present to 96 hours. We don't know beyond that because it hasn't been tested. However, it seems that the level of dexamethasone would be much lower than the level that has been found in this sample.

THE CHAIR: *Sorry, just to clarify that. So, the level that – so, If the dexamethasone was administered by way of Nebulizer by Mr. Ross at 10:00 am at the latest on Tuesday prior to racing on the Friday –*

DR KNOX: *Yep.*

THE CHAIR: *--- we would expect a lower level to be – or a lower level of dexamethasone to be found in the urine sample, is that correct?*

DR KNOX: *Yes, that's correct.*

THE CHAIR: *And is there an indication as to what level we could expect?*

DR KNOX: *From this evidence, we could expect a level between anything from below the limit of quantification to 0.1 nanograms per ml. And the results of this study indicate that the clearance time for dexamethasone that's administered by nebulization is fairly consistent with the clearance times that have been found for dexamethasone given IV or orally. In studies of dexamethasone given IV or orally the clearance time has been within 72 hours.*

THE CHAIR: *Thank you. In relation to the Australian Harness Racing Rules and you've referred to Rule 188A sub rule (3) in respect of international screening limits in relation to dexamethasone being a prohibited substance, could you advise under which aspect of Australian Harness Racing Rule 188A(1)?*

DR KNOX: *Yes. So, dexamethasone, it acts on a number of mammalian body systems as I referred to earlier and these include the respiratory system and the musculoskeletal system, most notably, in the racing horse. So, it can therefore be defined as a prohibited substance under Australian Harness Racing rule 188A(1)(a).*
And then further to that, It can be classified as a corticosteroid and an anti-inflammatory agent, so thereby complying as a prohibited substance according to the provisions of Rule 188A(1)(b).

25. When cross-examined Dr Knox was asked the following in relation to the research study to which she had referred in answer to the questions which had been put by the Chair:[24]

MR MORRIS:	*... First and foremost, Doctor, you said it was identified up to 96 hours. Was there any other tests conducted after 96 hours?*
DR KNOX:	*No. So, 96 hours was their final test point.*
MR MORRIS:	*And it was still identified at that point in time?*
DR KNOX:	*In one of the six horses, it was found at – it was detected at a level of 0.1 nanograms per ml at the 96 hours test point.*
MR MORRIS:	*And you would agree with me, would you not, that when you're looking at detection times, to determine the detection time, it's not the last time it was found, it's actually the first time the substance isn't found, is that correct?*
DR KNOX:	*That's correct.*
MR MORRIS:	*So, we don't actually know from that report what the detection time of dexamethasone is, do we?*
DR KNOX:	*That's correct.*
MR MORRIS:	*So it could be far greater than 96 hours?*
DR KNOX:	*That's correct.*
MR MORRIS:	*You identified in there that the 1 millimole per litre was found, I think you said between 32 and 48 hours, did I get that right?*
THE CHAIR:	*24 and 32.*
DR KNOX:	*Sorry, I'll run through those six horses, if that's – will probably clarify it best.*
MR MORRIS:	*Yes.*
DR KNOX:	*Yeah. Okay. So, one horse was clear within 24 hours. ... A further three horses were clear within 48 hours. Another horse was clear within 96 hours. ... And then the final horse still had the concentration of 0.1 nanogram per ml at 96 hours. ... And then all six horses, their levels drop to somewhere – it's in a graph, so it's hard to see – but it's below 0.2 nanograms per ml at the 24-hour post-administration point.*

26. Dr Knox explained[25] that the concentration of the urine from which the sample was taken was *"one of many variables"* which might affect detection and withdrawal times, and that the variables were greater in cases of Dexamethasone

[24] AB 60.4 – AB 61.13
[25] AB 62.11 – AB 62.15.

administered by a nebuliser. This, she explained,[26] was *"one of the reasons why an appropriate withdrawal period is imperative, why you wouldn't want to cut it close to detection time"*.

27. In the course of the evidence of Dr Knox, Dr Martin Wainscott, the Respondent's Regulatory Veterinarian who was also present at the Inquiry, clarified that detection time in the context of research study meant *"the time point at which the last horse in a particular study become clear or negative to the substance"*.[27] Dr Knox went on to explain that the published <u>*detection*</u> time of Dexamethasone was 3 days to 5 days,[28]and that the <u>*withdrawal*</u> time needed to be longer than 72 hours.[29]

28. Dr Knox reiterated[30] that there will always be variables in terms of the time over which a substance might be eliminated from an animal's system, leading to the necessity to allow a margin of safety when recommending withdrawal periods as opposed to detection times. Dr Knox explained that this was particularly so in cases where the Dexamethasone had been administered via a nebuliser, a method she described as "*quite … imprecise"*.[31] In confirming that there were multiple variables, the effect of which could not be precisely quantified, Dr Knox was asked:[32]

MR MORRIS:	*So what we can do is we definitely can't rule out the treatment of dexamethasone at 72 hours even though it was – I'll retract that. I'll go back. What we can't rule out is that the treatment by Mr Ross at 72 hours as advised resulted in the presentation at the races?*
DR KNOX:	*No, we can't rule that out.*

[26] AB 62.15.
[27] AB 63.13 – AB 63.15.
[28] AB 66.5 – AB 66.7.
[29] AB 67.33 – AB 67.34.
[30] AB 69.15 – AB 69.45
[31] AB 69.30.
[32] AB 70.33 – AB 70.38.

29. Dr Knox emphasised[33] that the letter from Dr Argyle did not constitute the *"prescribing label of the drug",* and did not amount to evidence that Dr Argyle had specified a withdrawal time of 72 hours. Specifically, Dr Knox said:[34]

> *[Dr Argyle is] just not specifying a withdrawal – a withholding period. He's saying at least 72 hours, which is correct, because 72 hours is the detection period and the withdrawal period is – should be at least the detection period, plus some.*
>
> *So, he is correct in what he is writing, but this is just a letter for the purpose of the appeal. He's not – he's not under any obligation to give a specific withdrawal period in a letter, in an email to us, but he is obliged to give that information on the prescribing label of the drug.*

30. Dr Knox was then cross-examined further:[35]

MR MORRIS:	*The fact of the matter is, is that you accept that Mr Ross wasn't quite given the correct information as to the withholding time of the dexamethasone?*
DR KNOX:	*Well, I still don't know what the prescribing information was on the prescription label, Going by that letter that's been emailed through, it's not incorrect. In saying that the withdrawal period is at least 72 hours, that's not incorrect.*
MR MORRIS:	*So, Ms Knox, if you were a treating veterinarian, in your professional opinion, you would have no issue saying to a trainer that they could give dexamethasone within – 72 hours out and that would be fine to do so?*
DR KNOX:	*No. That wouldn't be fine. I wouldn't say that because that's a detection period not a withdrawal time. ... But that's not what Dr Argyle said in that letter. .... There is no correct – no such thing as a correct withholding period. It's a judgment call.*

31. The cross-examination of Dr Knox then continued:[36]

MR MORRIS:	*.... But one [factual] issue I think of which is extremely relevant to the circumstances, is that, in your personal opinion, Mr Ross should have been told not to use dexamethasone within six days of the races, not three?*

[33] AB 72.10 – AB 72.45
[34] AB 72.37 – AB 72.45.
[35] AB 74.23 – AB 75.20.
[36] AB 75.25 – AB 75.42.

DR KNOX: *No, I won't specify that. I could speculate a withdrawal – a withholding – sorry, a withdrawal time based on evidence that we have. But I'm not here to specify a withdrawal time for nebulised dexamethasone. Given that it's off-label, I'm not the treating veterinarian, and also research into that particular matter is in very early stages, so far we have a sample size of six, so I'm not in a place to give a withdrawal time.*

All I will say on the matter of the withdrawal time that has been given, we don't know what it is. We don't have the prescription label. We do have an email from Dr Argyle saying he recommended 72 hours, which is not incorrect, it's consistent with the detection times which have been supplied. I'm not sure how much further we can go on this point.

32. Ultimately, the evidence of Dr Knox was that the detection time of Dexamethasone was at least 96 hours,[37] but that in cases where it was administered intravenously (as opposed to by way of a nebuliser) she could confidently state a detection time of 72 hours, in light of the surrounding research.[38]

33. Dr Knox went on to say that assuming a detection time of at least 72 hours, the withdrawal period needed to be longer than that.[39] That said, as I have previously noted, she was unable to rule out the possibility that the substance was administered in the present case 72 hours prior to the time at which the horse was presented to compete.[40]

34. I should note that the study to which Dr Knox referred forms part of the evidence before me,[41] but in light of the evidence which I have set out it is not necessary to make any further reference to it.

THE DETERMINATION OF THE RESPONDENT

35. Following the Inquiry, the Respondent determined that the circumstances of the presence of the substance in the horse had not been *"appropriately explained"*[42] and imposed the penalties previously set out.

[37] AB 80.39
[38] AB 81.6 – 81.9.
[39] AB 67.25 – AB 67.34.
[40] AB 70.30 – AB 70.38.
[41] AB 137-141.
[42] AB 183.

THE PROCEEDINGS BEFORE THE NSW HARNESS RACING APPEALS PANEL

36. I have been provided with a transcript of the proceedings before the Appeal Panel[43] along with a copy of the Appeal Panel's determination.[44]

37. Whilst the Panel concluded[45] that the offences amounted to *"serious breaches of the rules"* deserving of a significant penalty, it ultimately upheld the appeal, to the extent of imposing a 7 month period of disqualification for the administration offence. The effect of that determination was that the Appellant was disqualified for a total period of 7 months.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

38. In written submissions, Counsel for the Appellant drew my attention to the Penalty Guidelines published by the Respondent (the Guidelines).[46] He pointed out[47] that in respect of a Class 3 substance such as Dexamethasone, the Guidelines[48] provide that in the case of a first presentation offence, a fine might be considered in circumstances where:

    (i) the substance was prescribed by a veterinarian;
    (ii) all details relating to treatment were recorded in the trainer's logbook;
    (iii) the trainer had complied with veterinary advice as to the withholding period for the substance;
    (iv) the trainer had complied with all relevant notices issued by the Respondent; and
    (v) the offence was the first presentation offence committed by the trainer in question.

[43] AB 198 – AB 237.
[44] AB 238 – 243.
[45] At [23]; AB 243.
[46] AB 244 and following.
[47] Submissions at [9].
[48] AB 262.

39. Whilst acknowledging that the Guidelines were not binding, the essence of counsel's submission[49] was that each of these circumstances was made out in the present case.

40. It was further submitted that, the Guidelines aside, the appropriate penalty was a "nominal fine".

41. Counsel for the Appellant expanded upon these propositions in oral submissions in the course of the hearing. In doing so, he emphasised the evidence given by Dr Knox[50] that she could not rule out the possibility that the substance was administered by the Appellant 72 hours prior to the race. It was submitted that, in circumstances where the appeal proceeded before me as a hearing *de novo,* I should find, as a fact, that the substance *was* administered by the Appellant at that time.[51]

42. Counsel for the Appellant further submitted[52] that there was a material, and important, distinction to be drawn between a penalty of suspension on the one hand, and a penalty of disqualification on the other, the latter constituting a far more serious penalty. He submitted[53] that it was "illogical" to suggest that the imposition of a disqualification was necessary to ensure that the harness racing industry was protected from the Appellant. He further submitted[54] that, properly analysed, the evidence established that the Appellant had simply *"listened to his vet",* and that in these circumstances this was not a case in which general or personal deterrence had any role to play in determining an appropriate penalty. Counsel also took me to a number of authorities which, he submitted, generally supported the propositions he had advanced on the Appellant's behalf.[55]

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[49] Submissions at [10].
[50] AB 70.30 – AB 70.38.
[51] T 9.13 – T 9.31.
[52] Commencing at T 12.18.
[53] T13.8 – T 13.15.
[54] T 13.34 – T 13.40.
[55] Commencing at T 18.12.

Submissions of the Respondent

43. In written submissions, counsel for the Respondent emphasised[56] that in determining the penalty for the offending in the present case, there was a fundamental need to preserve the integrity of harness racing by the imposition of a penalty for each of the offences which would satisfy the objective of general deterrence.

44. Counsel for the Respondent also placed considerable emphasis on the issue of the Notice and its contents. He submitted,[57] in particular, that the effect of the Notice was to unequivocally alert the Appellant to a number of factors, including the need to obtain professional advice when he was considering administering any therapeutic substance(s), and the accompanying need to administer such substance(s) with appropriate care. Counsel submitted[58] that there was no evidence that the Appellant had sought or received any advice as to the withdrawal time as had been recommended by the Notice, and that this was a circumstance which should be reflected in any penalty.

45. In oral submissions, counsel emphasised what he submitted was the objective seriousness of both the presentation offence and the administration offence, and the need for the imposition, in each case, of a penalty commensurate with such seriousness.[59] In this respect, counsel relied upon what he submitted was the unchallenged evidence of Dr Knox,[60] namely that it was *"possible to likely"* that the Dexamethasone would have had some effect on the horse in the race. This, counsel submitted, emphasized the necessity to ensure that a level playing field was maintained amongst competitors in the harness racing industry, and to impose a penalty which reflected the fact that the protection of the integrity of the industry was paramount.[61]

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[56] Submissions at [34]; AB 19.
[57] Submissions at [39]; AB 20.
[58] Submissions at [45] and following, AB 22 and following.
[59] T 30.25 – T 30. 31.
[60] AB 56.24.
[61] T 34.42 – T 34.46.

46. Counsel for the Respondent invited me,[62] when considering penalty, to make a series of factual findings which, he ultimately submitted, supported the imposition of the penalty originally fixed by the Stewards. Finally, counsel submitted that, save for the Appellant's plea of guilty, this was a case which was largely bereft of evidence of a subjective case.[63] He submitted that in all of these circumstances, the appeal should be dismissed and that the penalty originally imposed by the Stewards was the appropriate one.[64]

CONSIDERATION

47. I have previously noted that the Appellant pleaded guilty to both the presentation offence and the administration offence. Counsel for the Appellant eschewed any suggestion that in advancing any of the submissions to which I have referred above, he was attempting in any way to traverse those pleas.[65] Accordingly, the sole issue I am required to determine is the appropriate penalty.

48. For the purposes of making that determination, I must make findings of fact in relation to the circumstances of the offending. It is common ground between the parties that this appeal proceeds before me by way of a hearing *de novo*. I am therefore not bound by any of the factual findings made previously, be it by the Stewards or the Appeal Panel. Counsel for the Appellant submitted that in these circumstances, I should find that the substance was administered by the Appellant 72 hours before the race.

49. In setting out my factual findings, it is appropriate to commence with the undisputed fact that on or about 14 September 2018, and thus some years prior to the commission of these offences, the Respondent issued the Notice to industry participants. Importantly, the Notice:

    (i) reminded trainers of their obligation to present horses to race, free of prohibited substances;

[62] Commencing at T 35.6
[63] Commencing at T 44.32.
[64] AB 48.26.
[65] T 8.32 – T 8.34.

(ii) emphasised the importance of the fundamental, and material, difference between a detection time and a withdrawal time;

(iii) explained that, in terms of the administration of a therapeutic substance:

(a) the detection time is the first point in time at which a Laboratory cannot detect the substance or its metabolites in the urine or plasma of an animal;

(b) the withdrawal time is the time at which a Veterinarian recommends that it can be reasonably assumed that the horse will be free of the therapeutic substance or its metabolites;

(iv) emphasised the necessity for a Veterinarian to add a safety margin to a detection time in order to arrive at the withdrawal time;

(v) emphasised the importance of trainers obtaining veterinary advice regarding the withdrawal time for any therapeutic substance which was to be administered; and

(vi) recommended that trainers ask their Veterinarian to provide a withdrawal time using the "clear day" terminology.

50. The Appellant did not contend that the Notice did not come to his attention. I am satisfied that it did, and that the Appellant was aware of its contents. I have addressed the significance of that awareness, and the Appellant's departure from the terms of the Notice, below.

51. It was the Appellant's evidence in answers to questions put by Mr Criddle that he "*reckoned*" that he *"might have nebulized [the horse] with Dex"*. Consistent with his plea of guilty to the administration offence, I am satisfied that the Appellant *did* administer Dexamethasone to the horse. Further, and consistent with other answers the Appellant gave to questions put by Mr Criddle, I am satisfied that the administration of Dexamethasone to the horse was, generally speaking, part of what might be described as the Appellant's normal husbandry practices at the time, at least in respect of any horse in his care who was suffering from inflammation of the airways.

52. On this particular occasion, and again on the basis of the Appellant's answers to questions put by Mr Criddle, I am satisfied that the Appellant mixed 1 ml of Dexamethasone, in the form of Dexapent, with a saline solution, and then administered that solution to the horse it by way of a nebuliser. The evidence does not enable me to reach a finding as to the quantity of saline solution with which the Dexamethasone was mixed. The Appellant's evidence was that the amount of the saline solution was between 5 and 10 mls. That evidence would seem to be little more than an educated guess.

53. It is apparent that at the time of being interviewed by Mr Criddle, the Appellant had moved interstate, as a consequence of which he was not able to locate and consult his log book to determine if he had made a record of the Dexamethasone being administered. However, he told Mr Criddle that he would *"not really"* record such matters normally, and I am satisfied on balance that he did not do so on this occasion. In light of that, the log book, even if it had been available, would seemingly have been of little or no assistance in determining when the substance was administered.

54. In this regard I should note that I have not taken the log book offence into account in making my determination. I accept that a log book is a most important document from the point of view of the regulation of the harness racing industry. However, the log book offence in the present case was dealt with by way of a fine which is not the subject of the present appeal. I am not satisfied that the log book offence aggravates, in any relevant sense, the offending with which I am dealing for the purposes of this appeal.

55. It will be apparent from what I have already said that a crucial issue in the present case is *when* the substance was administered. The primary evidence which goes to this issue comes from the Appellant. That evidence was based, to a not insignificant extent, upon the Appellant's evidence of his usual or general practice.

56. The guiding principle when assessing evidence of that kind is that the weight to be given to it, and the ultimate question of whether it should be accepted, will depend upon its nature and quality.[66] Applying that test, the Appellant's evidence as to when the substance was administered is in some respects inconsistent, and in other respects lacking in cogency. Overall, such evidence is best described as vague and imprecise, to the point where, in my view, little or no weight should be given to it.

57. Counsel for the Appellant urged me to accept the Appellant as a witness of truth. There is no reason not to find that when answering the questions put to him by Mr Criddle, and when giving evidence before the Inquiry, the Appellant was doing his best to tell the truth. No submission was put to me on behalf of the Respondent that I should find that the Appellant was, at any time, being deliberately untruthful. However, that does not lead to the conclusion that anything and everything said by the Appellant must be accepted. Truthfulness and reliability are separate and distinct concepts. Even a person who is doing his or her best to be truthful, may nevertheless give evidence which is unreliable. For the reasons set out below, the Appellant's evidence as to when he administered the Dexamethasone does not withstand close scrutiny.

58. To begin with, when interviewed by Mr Criddle the Appellant effectively sought to reconstruct the circumstances in which, and more specifically the time at which, the substance was administered, and made reference to what he *"would"* have done. In those respects, the Appellant variously said that:

    (i) if the race was held on a Friday, he *"would have"* administered the substance on the Tuesday of that same week;
    (ii) it was *"normal"* for him to do so *"72 hours before"*;
    (iii) he would not *"generally"* do it within 72 hours;
    (iv) the administration of the substance *"would have been before lunchtime on Tuesday"*;

[66] See *Phelan v Melbourne Health* [2019] VSCA 205 at [69];

(v) he would be *"tipping about 10 o'clock maybe";*

(vi) the administration of the substance would have been *"between 8 and 10";* and

(vii) the administration of the substance would have been *"before 9.30".*

59. It is apparent that the Appellant has little or no independent recollection at all of when the substance was administered. In the absence of any such recollection, he sought to engage in a reconstruction and rely upon what he asserted that he "normally" or "generally" did. The result is the evidence summarised at [58] above which, apart from lacking in precision, is contradictory in some respects.

60. Dr Knox told the Inquiry that, by reference to the graphs produced in the study to which she referred, a reading of the magnitude of that which was returned in the present case (i.e., 1.4 nanograms per ml of Dexamethasone) seemed to occur at around the 24-32 hour post administration point. She also said that if the Dexamethasone had been administered by the Appellant at 10.00 am on the Tuesday before the horse raced on the Friday, a lower level of Dexamethasone would be expected to have been found in the sample. According to Dr Knox, such level would have been anything from below the limit of quantification to 0.1 nanograms per ml.

61. In circumstances where the Appellant's evidence as to the time of administration was, for the reasons I have stated, generally unsatisfactory, the evidence given by Dr Knox is entirely at odds with the proposition that the Dexamethasone was administered by the Appellant 72 hours before the race.

62. Further, in light of the whole of the evidence, the concession made by Dr Knox that administration 72 hours before the race was not something that could be ruled out, is of no weight. That is another way of saying that administration of the substance 72 hours before the race was a possibility. Given the manner in which the Appellant's case has been put on this issue, the Appellant bears the onus of satisfying me that it is more probable than not that the substance was administered 72 hours before the race. The concession made by Dr Knox rises no

higher than a bare possibility, and the overall weight of her evidence tends completely against a finding that the Dexamethasone was administered at that time.

63. In all of these circumstances, and whilst the Appellant obviously administered the substance, the evidence does not allow me to make any finding as to when he did so. I am certainly not satisfied that it was administered 72 hours prior to the race.

64. The evidence does, however, permit other conclusions to be reached as to some of the circumstances surrounding the administration of the Dexamethasone by the Appellant.

65. I am satisfied that the Dexamethasone was prescribed by Dr Argyle. However, I am not able to reach a conclusion as to the terms of any advice that Dr Argyle may have provided to the Appellant at or about that time. This is so for a number of reasons.

66. To begin with, Dr Knox made reference in the course of her evidence to the fact that the prescribing label of the Dexamethasone had not been produced. As a consequence, what advice Dr Argyle gave the Appellant regarding the administration of the substance generally, and the withdrawal time in particular, cannot be established.

67. In the absence of the evidence of the contents of the prescribing label, which seemingly would not have been difficult to obtain, I am unable to accept the proposition advanced on behalf of the Appellant that he acted on the advice of Dr Argyle. That is for the simple reason that the primary evidence of what that advice actually was, has not been adduced. The onus was on the Appellant to adduce that evidence. The fact that Dr Argyle asserted in his statement that the *"drug was to be used ..... with a withhold period of at least 72 hours"* does not satisfy me that he gave that advice, or advice to that general effect, to the Appellant.

68. Moreover, the evidence given by the Appellant as to any advice he may have received from Dr Argyle is contradictory. In answer to questions put by Mr Criddle

when interviewed, the Appellant asserted, in effect, that he had received veterinary advice that he should administer the substance 72 hours before the event. However, the Appellant told the Inquiry that he had not received any specific advice from Dr Argyle to treat the horse on that particular Tuesday, and that it was more of a *"general maintenance thing"* (whatever that might mean). The evidence given by the Appellant that he had not received any specific evidence from Dr Argyle is entirely consistent with my assessment of the contents of Dr Argyle's letter.

69. The Notice unequivocally recommended that trainers ask their Veterinarian to provide advice as to a withdrawal time using the *"clear day"* terminology. There is no evidence that, having been aware of the Notice, the Appellant ever made that request of Dr Argyle, nor is there any evidence that the Appellant discussed with Dr Argyle the importance of the difference between the detection time and the withdrawal time. I am satisfied that the Appellant did not seek such advice, and did not have such a discussion. Those omissions represent, in each case, a significant departure from the terms of the Notice.

70. The significance of those omissions stems from previous observations by the Tribunal (differently constituted) regarding the obligation placed upon participants in the racing industry generally to appraise themselves, not only of the relevant rules, but of all of the publications issued by the relevant Regulator.[67] I respectfully agree with those observations, and would only add that there is a further obligation placed on participants, namely an obligation to act in accordance with such publications, of which the Notice was one. The Appellant's failure to do so in the present case does not aggravate his offending. It does, however, support the conclusion that any penalty imposed must serve to emphasise the Tribunal's observations to participants generally, and to the Appellant in particular. It follows that both general and specific deterrence are relevant considerations for the purposes of determining penalty.

[67] See *Trevor-Jones v Harness Racing New South Wales* (6 March 2023).

71. Given all of those factors, I am unable to accept the submission advanced on behalf of the Appellant that this is a matter which could appropriately be dealt with by way of the imposition of a fine.

72. More specifically, I am unable to accept counsel's submission that such a disposition (at least in the case of the presentation offence) is warranted by reference to, and application of, the Guidelines.[68] To begin with, it is essential to bear in mind that the Guidelines are just that – a guide. They are not binding on me in terms of the assessment of penalty.

73. Moreover, the terms of the guideline applicable to a presentation offence provides that a fine ***might*** be ***considered*** where a series of requirements are satisfied by a person in the Appellant's position. The guideline does not *mandate* the consideration, much less the imposition, of a fine in any case.

74. In any event, in the present case three of the pre-requisites to consideration of a fine for the presentation offence are not made out. First, the evidence does not establish that all details in relation to the treatment were recorded in the Appellant's log book. The log book is not available and is not in evidence. Moreover, the Appellant's evidence to Mr Criddle was to the effect that, in all probability, he did not record the administration of the Dexamethasone in his log book. Secondly, I am not satisfied that the Appellant complied with relevant veterinary advice as to the applicable withholding time. The primary evidence of that advice has not been adduced. Thirdly, I am satisfied that the Appellant did not act in accordance with the Notice.

75. I was provided with a number of authorities by the Respondent, which I have considered. To the extent that any of those authorities were relied upon, by either party, for so-called "comparable" purposes in determining penalty, I need only state the obvious, namely that what is sought in terms of consistency in the

[68] AB 262.

determination of penalty is consistency in the application of relevant principles, and not numerical equivalence.[69]

76. In terms of the Appellant's subjective case, the submissions originally made on his behalf by Mr Morris form part of the evidence before me[70] and I have taken them into account. I have had regard to the plea of guilty, and am satisfied that such plea carries with it some expression of remorse. I am unable, for the reasons I have outlined, to accept Mr Morris' submissions that this is a case in which the Appellant *"made all inquiries possible"*[71] and had *"done (sic) all of the steps of (sic) which were available to him to ensure that the horse was presented without the presence of a prohibited substance"*.[72] Clearly, given the terms of the Notice and the other evidence to which I have referred, the Appellant did not make all possible enquiries, and did not take all steps available to him so as to ensure that no presentation offence was committed. Similarly, for the reasons I have set out, I am unable to accept the proposition that the Appellant *"followed the advice"* of a Veterinarian.[73]

77. The Appellant's history as a participant in the Harness Racing Industry is before me.[74] Whilst he has come under notice for previous breaches of the Rules, the majority of those matters were clearly at the lower end of the scale of seriousness. His history does not allow a finding of good character to be made, but equally it does not aggravate the offending.

78. A fundamental consideration in any case involving the determination of penalties for presentation and administration offences is the need to protect and maintain the integrity of, and public confidence in, the harness racing industry. That is for the simple reason that such offences have the capacity to erode such integrity and public confidence. For the reasons I have previously expressed, I consider that

[69] See generally *Hili v R* [2010] HCA 45; (2010) 242 CLR 520.
[70] AB 173 – 176.
[71] AB 175.20.
[72] AB 175.29 – AB 175.33.
[73] AB 175.20.
[74] AB 186 – AB 187.

both general and specific deterrence are relevant in the present case. I am also mindful of comments repeatedly made by the Tribunal as to the relevance of the necessity to maintain a level playing field in terms of competition in the harness racing industry. That requirement was not met in this case. In fact, it was subverted as a consequence of the offending.

79. The imposition of a period of disqualification in cases of this kind should generally be regarded as more likely than not, although suggested "authoritative" statements to the effect that a disqualification will be mandated in each and every case should be approached with caution. Statements of that kind have a tendency to overlook the obvious, and important, fact, namely that each case must depend, and be adjudicated, upon its own facts.

80. That said, I am satisfied in the present case that a disqualification is appropriate. For the reasons I have stated, particularly those stemming from the Notice and the Appellant's failure to act in accordance with it, I regard the Appellant's culpability as high. The Notice made it clear that the administration of a substance of this kind was to be carried out with great care and attention to detail. On the evidence, the Appellant exhibited neither, to the point where he acted recklessly.

81. Counsel for the Respondent submitted that I should conclude that the penalties imposed by the Stewards at first instance should be reinstated. Given that the Appeal has proceeded as a hearing *de novo,* that course is open to me. However, aside from any other consideration, taking that course would, as a matter of procedural fairness, require me to act in accordance with the decision in *Parker v Director of Public Prosecutions*.[75]

82. I am unable to accept counsel's submission that I should adopt that course. I consider, taking into account all relevant factors in the fresh exercise of the discretion, that a disqualification of 7 months for each offence is appropriate.

[75] (1992) 28 NSWLR 282.

83. In circumstances where both offences arose out of identical circumstances, and in the absence of any countervailing considerations, the penalties should be served wholly concurrently. In my view, a total disqualification of 7 months reflects the entirety of the offending. The Appeal Panel noted[76] that at the time of the conclusion of the proceedings before it, the Appellant had served a period of 2½ months of the 7 month disqualification which had been imposed, leaving a balance of the disqualification period of 4½ months. I accept that to be the case, and will make orders accordingly.

84. Finally, it is noted that a stay was ordered by the Tribunal on 24 October 2023. That stay should now be vacated so as to facilitate the balance of the disqualification being served.

ORDERS

85. For the reasons given, I make the following orders:

1. The appeal is dismissed.
2. The penalties imposed by the Appeal Panel of Harness Racing NSW on 3 October 2023 are confirmed.
3. In respect of each of the presentation offence and the administration offence, the Appellant is disqualified for a period of 7 months, such penalties to be served concurrently.
4. The order made by the Tribunal on 24 October 2023 is vacated.
5. Noting that a period of 2½ months of the disqualification has been served to date, the balance of the disqualification, namely 4½ months, will commence at midnight on 23 April 2024.
6. The deposit is forfeited.

THE HONOURABLE G J BELLEW SC

22 April 2022

[76] At [24]