IN THE RACING APPEALS TRIBUNAL

HARNESS RACING NEW SOUTH WALES
Applicant

v

JACK CALLAGHAN
Respondent

REASONS FOR DETERMINATION

DATE OF ORDERS: **30 July 2024**

ORDERS:

1. The application by Harness Racing New South Wales for an extension of time pursuant to cl 10(7) of the *Racing Appeals Tribunal Regulation 2015* (NSW) is refused.
2. The appeal is dismissed.
3. The appeal deposit is forfeited.

INTRODUCTION

1. On 4 June 2024, Harness Racing New South Wales (the Applicant) filed a Notice of Appeal with the Appeals Secretary arising out of a charge which had been brought against Jack Callaghan (the Respondent) for a breach of rule 149(2) of the *Australian Harness Racing Rules* (the Rules).

2. In short, Stewards had found the Respondent guilty of that breach and had imposed a suspension. The Respondent appealed to the New South Wales Harness Racing Appeal Panel (the Panel) who upheld his appeal. The Applicant then lodged a Notice of Appeal although, for the reasons discussed further below, there appears to be some confusion as to the decision against which the Applicant actually seeks to appeal.

3. The circumstances outlined above give rise to two issues for determination, namely:

    (i) whether this Tribunal has jurisdiction to determine the Applicant's appeal;

    (ii) if so, whether an order should be made pursuant to cl 10(7) of the *Racing Appeals Tribunal Regulation 2015* (the Regulation) extending the time in which to file the Notice of Appeal (it being conceded by the Applicant that the Notice was filed outside of the prescribed period).

4. For the purposes of determining those issues, I have been provided with:

    (i) the Notice of Appeal;

    (ii) submissions of the Applicant dated 18 June 2024;

    (iii) submissions of the Respondent dated 28 June 2024;

    (iv) submissions of the Applicant in reply dated 1 July 2024;

    (v) submissions of the Applicant dated 10 July 2024;

    (vi) submissions of the Respondent dated 12 July 2024;

(vii) correspondence which has passed between the Appeals Secretary and the parties.

5. The submissions in (v) and (vi) go to the issue of jurisdiction. Those in (ii), (iii) and (iv) go to the issue of whether an extension of time should be granted.

FACTUAL BACKGROUND

The Respondent's alleged offending

6. Following his drive on *Coral Stride* in Race 4 at Newcastle on 8 March 2024, the Respondent was the subject of a Stewards' inquiry. That inquiry commenced on 8 March 2024 and resumed on 6 May 2024, following which the Respondent was charged with a breach of r 149(2) of the Rules which states:

> *A person shall not drive in a manner which, in the opinion of the stewards, is unacceptable.*

7. The Stewards found the Respondent guilty of that breach, and imposed a suspension of 6 weeks, to commence at midnight on 7 May 2024.

The Respondent's appeal to the Panel and the Notice of Appeal to this Tribunal

8. The Respondent lodged an appeal to the Panel, which was successful. The material before me establishes the following:

(i) the hearing of the Respondent's appeal to the Panel took place on 17 May 2024;

(ii) at the conclusion of the hearing on 17 May 2024, the Panel decided that the Respondent's appeal should be upheld;

(iii) the Panel notified the parties of the decision in (ii) at the conclusion of the hearing;

(iv) at the time of notifying the parties of its decision, the Panel did not provide its reasons;

(v) the Applicant filed a Notice of Appeal to this Tribunal with the Appeals Secretary on 4 June 2024;

(vi) the Panel published its reasons on 6 June 2024, two days after the Applicant's Notice of Appeal was filed;

(vii) the Panel's reasons were distributed by the Appeals Secretary to a number of persons, including the Applicant's Solicitor, on 6 June 2024.

THE LEGISLATIVE SCHEME

9. It is appropriate at this point to set out a number of relevant aspects of the legislative scheme governing appeals to this Tribunal.

10. The *Racing and Gambling Legislation Amendment Act 2022* (NSW) (the amending Act) came into force on 16 December 2022. Schedule 3 amended the *Harness Racing Act 2009* (NSW) (the HR Act) by the introduction of Part 5A (ss 34A and following). A consequence of that amendment was the creation of the Panel.

11. Prior to the amending Act, s 15B of the *Racing Appeals Tribunal Act 1983* (NSW) (the RAT Act) was in the following terms:

> ***15B Appeals to Tribunal relating to Harness Racing***
>
> *(1) Any person who is aggrieved by any of the following decisions may, in accordance with the Regulations, appeal against the decision to the Tribunal:*
>
> *(a) a decision of a harness racing club (within the meaning of the Harness Racing Act 2009);*
>
> *(b) a decision of a steward of HRNSW.*
>
> *(2) Any of the following persons or bodies that are aggrieved by a decision of HRNSW may, in accordance with the regulations, appeal against the decision to the Tribunal –*
>
> *(a) any person;*
>
> *(b) a harness racing club (within the meaning of the Harness Racing Act 2009).*

12. Schedule 4 of the amending Act removed that provision and inserted the present s 15B into the RAT Act which is in the following terms

15B Appeals to Tribunal relating to Harness Racing

(1) A person who is aggrieved by any of the following decisions may, in accordance with the regulations, appeal against the decision to the Tribunal:

(a) a decision of the Appeal Panel on an appeal under the Harness Racing Act 2009;

(b) a decision for which an appeal is properly made to the Appeal Panel under the Harness Racing Act 2009 if the Appeal Panel:
(i) neglects or refuses to hear the appeal; or
(ii) fails to make a decision on the appeal,

(c) a decision of HRNSW.

(2) HRNSW may, in accordance with the Regulations, appeal to the Tribunal against a decision referred to in subsection (1)(a) or (b).

13. However, the amending Act did not amend cl 9 of the Regulation, which remained (and remains) in the following terms:

9 Decisions from which an appeal lies to Tribunal

(1) An appeal may be made to the Tribunal under section 15A or 15B of the Act only in respect of a decision—

(a) to disqualify or warn off a person, or
(b) to cancel the registration of, or to refuse to register, a person, or
(c) to cancel the registration of, or to refuse to register—

(i) a greyhound (including registration of a greyhound as a sire and registration of a litter of greyhounds), or
(ii) a harness racing horse, or

(c1) to cancel the registration of, or to refuse to register—

(i) a greyhound racing club, or
(ii) a greyhound trial track, or

(c2) to impose a condition on the registration under the Greyhound Racing Act 2017 of any person, greyhound, greyhound racing club or greyhound trial track, or
(d) to fine a person an amount of $200 or more, or
(e) to disqualify a greyhound, if the disqualification is made in conjunction with the imposition of a penalty on the appellant or any other person, or
(f) to disqualify any horse from participating in harness racing, if the disqualification is made in conjunction with the imposition of a penalty on the appellant or any other person, or
(g) to suspend any licence, right or privilege granted under the rules, or
(g1) to suspend the registration under the Greyhound Racing Act 2017 of any person, greyhound, greyhound racing club or greyhound trial track, or
(h) to reduce in grade a driver for a period of 4 weeks or more, or

> *(i) to place an endorsement on the registration certificate of a greyhound for marring or failing to pursue the lure, that gives rise to a suspension of the greyhound for a period of more than 4 weeks, or*
> *(j) relating to the application or operation of a provision of the code of practice deeming greyhound housing areas used before the commencement of the code of practice to comply with the code of practice.*
> *(2) Expressions used in this clause have the meanings given to them in the rules and, in the case of greyhound racing, in the Greyhound Racing Act 2017*
> (emphasis added).

14. Clause 10 of the Regulation governs the procedure to be followed on appeals to this Tribunal. Cl 10(1) imposes a limitation period within which an appeal is to be commenced and is in the following terms:

> ***10 Procedure for appeals***
> *(1) An appeal under section 15A or 15B of the Act is to be initiated by lodging a written notice of appeal with the Secretary* ***within 7 days of the date on which the appellant is notified of the decision appealed against*** (emphasis added).

15. Cl 10(4) governs the filing of grounds of appeal by providing that if the decision appealed against was made as a result of a hearing on inquiry, the Appellant is to lodge a written notice of the grounds of appeal within 7 days of receiving a transcript of the evidence taken at the hearing or inquiry.

16. 10(7) confers a discretion on this Tribunal to extend the time in which to commence an appeal, in the following terms:

> *(7) The Tribunal may, on written application of the appellant being lodged with the Secretary, extend the time—*
>
> *(a) for lodging a notice of appeal under subclause (1), or*
> *(b) for lodging a notice of the grounds of appeal under subclause (4),*
>
> *or both,* ***if satisfied that special or exceptional circumstances exist that justify the extension*** (emphasis added).

17. Against that background, I turn to the first of the issues before me, namely that of jurisdiction.

JURISDICTION

Submissions of the Applicant

18. The Applicant relies upon cl 9(1)(g) of the Regulation as encompassing the decision in respect of which it seeks to appeal. The Applicant's overarching submission is that the word *"decision"* as it is used in cl 9(1)(g) should be construed as encompassing a decision of the Stewards, including one that has been the subject of an appeal to the Panel.[1] In the present case, at least in its submissions, the Applicant identifies the decision against which it seeks to appeal as being the decision of the Stewards to suspend the Respondent.

19. In support of that position, the submissions of the Applicant canvassed the relevant legislative history,[2] the salient aspects of which I have set out above. In that respect, the Applicant emphasised that at the time of the creation of the Panel by the amending Act, and the insertion of a new s 15B into the RAT Act, no amendment was made to cl 9 of the Regulation. It was submitted by the Applicant that the absence of such an amendment reflected an intention on the part of the Parliament to include, in the term "decision" as it is used in cl 9(1)(g) of the Regulation, a decision of the Stewards.[3]

20. The Applicant summarised its position as follows:[4]

    (i) cl 9 was not amended by the amending Act which established the Panel;
    (ii) it followed that cl 9 was drafted by reference to "decisions" of Stewards, not by reference to decisions of the Panel which did not exist prior to the amending Act;
    (iii) the absence of any amendment to cl 9 was indicative of an intention on the part of the Parliament to continue to include, in the definition

[1] Submissions at [3].
[2] Submissions at [4] and following.
[3] Submissions at [12].
[4] Submissions at [20].

of the term "decision" as that term is used in cl 9(1)(g), a decision of the Stewards;

(iv) any alternative construction of cl 9 would give rise to an arbitrary limitation being placed on this Tribunal's jurisdiction which was inconsistent with the RAT Act and the HR Act;

(v) the Regulation should not be construed in a manner which limits the jurisdiction conferred on this Tribunal under s 15B of the Act.

21. In support of that position, the Applicant relied upon the decision in *Vasili v Racing New South Wales*.[5] That decision says nothing specifically about cl 9(1)(g) of the Regulation.

Submissions of the Respondent

22. The Respondent submitted that the position advanced by the Applicant was *"replete with error"* [6], reflected by the fact that:

(i) the original decision was a decision of a racing authority (i.e. a decision by Stewards);[7]

(ii) when the Panel was created by the amending Act, the decisions in respect of which a right of appeal to this Tribunal was conferred on the Applicant were clearly defined;[8]

(iii) the position in (ii) above had been conceded by the Applicant in its submissions;[9]

(iv) the decision in *Vasili* was irrelevant;[10]

(v) the Applicant's submissions were "bizarre";[11]

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[5] [2018] NSWSC 451.
[6] Submissions at [15].
[7] Submissions at [15](a).
[8] Submissions at [15](b).
[9] Submissions at [15](b).
[10] Submissions at [16].
[11] Submissions at [17].

(vi) the proposed appeal was, as a consequence of all of these factors, incompetent and should be dismissed for want of jurisdiction.[12]

CONSIDERATION

23. The position put by the Applicant is encapsulated in the following proposition which it advanced in submissions:[13]

> *The decision against which the Applicant seeks to appeal is a decision under cl 9(1)(g) [of the Regulation] to suspend any licence, right or privilege granted under the rules.*

24. The Applicant has identified the decision against which it seeks to appeal as the *"decision of HRNSW Stewards at first instance",*[14] that is, the decision to impose a suspension on the Respondent, which was reversed by the Panel.

25. In my view, there are a number of difficulties stemming from that position.

26. To begin with, fundamental to the Applicant's position is the proposition that on a proper construction of cl 9 of the Regulation, *"decision"* means a decision of the Stewards. The term *"decision"* is said by the Applicant to include a decision that has been *"appealed to [the Panel] and upheld by the Panel on Appeal".*[15] The fundamental flaw in that proposition is that in the present case, the decision of the Stewards was not upheld by the Panel at all. It was the Respondent's appeal that was upheld by the Panel. The decision of the Stewards was reversed.

27. Moreover, there is, to say the least, a degree of tension between the position which is now sought to be adopted by the Applicant, and that which it has previously adopted. For example, under the heading ***"Decision Appealed Against"*** in the Notice of Appeal, the following is stated:

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[12] Submissions at [18].
[13] At [2].
[14] Submissions at [3].
[15] Submissions at [3].

Decision of the NSWHR Appeal Panel to uphold the Appeal of Jack Callaghan .... on 17 May 2024.

28. There is no suggestion whatsoever in the terms of the Notice of Appeal that the proposed appeal is against a decision of the Stewards by reference to cl 9(1)(g) of the Regulation. The terms of the Notice are entirely contrary to the proposition that the Applicant seeks to appeal against that decision. On the basis of the terms of the Notice of Appeal, what the Applicant seeks to do is appeal against the decision of the Panel.

29. Consistent with its position as set out in the Notice of Appeal, the Applicant, in its submissions dated 18 June 2024[16] addressing the issue of special or exceptional circumstances justifying an extension of time in which to bring the appeal, made lengthy reference to the fact that it is the reasoning of the ***Panel*** which forms the basis of the proposed appeal. The proposition now advanced, namely that that the proposed appeal is one against a decision of the Stewards, is entirely inconsistent with the approach taken by the Applicant in those submissions.

30. Further, there is nothing in the reasons of the Panel which would indicate that the position taken by the Applicant on the hearing of the Respondent's appeal was consistent with taking issue with, or challenging, the decision of the Stewards. On the contrary, the reasons of the Panel[17] record that at the hearing, the Applicant's representative relied upon (inter alia):

    (i) the transcript of the inquiry;
    (ii) decisions of this Tribunal and the Racing Appeals Tribunal of Victoria; and
    (iii) the Respondent's career statistics.

31. It is apparent that the position taken by the Applicant before the Panel was one in which it sought to uphold the decision of the Stewards, not challenge it.

[16] Particularly at [17](b)(i) and (ii).
[17] At [9].

32. Finally, and leaving aside the fact that the matters to which I have referred tend to run contrary to the construction advanced by the Applicant, such a construction would mean that in circumstances where:

    (i) the Stewards made a decision to suspend a participant;
    (ii) that participant appealed to the Panel against that decision;
    (iii) the Applicant appeared before the Panel and supported the correctness of the Stewards' decision; and
    (iv) the Panel upheld the appeal and quashed the Stewards' decision,

    the Applicant could somehow bring an appeal against, or in other words challenge, the original decision of the Stewards. In my view, that is an outcome which the Parliament could not possibly have intended. Construing legislation in a manner which produces a patently unintended, or absurd, result, is to be avoided.[18]

33. However, and leaving aside my misgivings about the Applicant's position as it is now articulated, I have nevertheless come to the view that, subject to an extension of time, the legislative scheme discussed above confers jurisdiction on this Tribunal to hear and determine the Applicant's proposed appeal.

34. My reasons for coming to that view commence with reference to s 15B(2) of the RAT Act, upon which the Applicant relies as conferring the right of appeal to this Tribunal.[19] Section15B(2) confers a right of appeal on the Applicant against a decision referred to in subs. 15B(1)(a), namely, against *"a decision of the Appeal Panel on an appeal under the [HR Act]"*. As I read the submissions of the Respondent, no issue is taken with the proposition that the decision of the Panel in this case was one to which s 15B(1)(a) of the RAT Act applies. It follows, in my view, that s 15B(2) operates to confer, on the Applicant, a right of appeal to this Tribunal against the decision of the Panel. For the reasons I have already set out,

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[18] See for example *Footscray City College v Ruzicka* [2007] VSCA 136; (2007) 16 VR 498 at [16].
[19] Submissions at [15].

the Notice of Appeal filed by the Applicant states, in specific terms, that it is that decision which the Applicant seeks to challenge.

35. There is, however, an inconsistency between s 15B of the RAT Act and cl 9 of the Regulation. That inconsistency arises from the fact that although s 15B(2) of the RAT Act confers, on the Applicant, a right of appeal against a decision of the Panel, the Panel's decision in this case to uphold the Respondent's appeal does not fall within any of the provisions of cl 9 of the Regulation. Absent cl 9 being regarded, in the circumstances of this case, as having been impliedly repealed by introduction of the present s 15B of the RAT Act, the identified inconsistency would operate so as to preclude this Tribunal from exercising the jurisdiction which has been conferred upon it by s 15B.

36. As a matter of common sense, that cannot possibly have been the Parliament's intention, and it is an outcome which is to be avoided.[20] Whilst every effort must be made to read competing provisions in a way which gives effect to both, the delegated legislation must give way if that is not possible.[21] That, in my view, is the only sensible conclusion which can be reached in the present case.

37. A Notice of Appeal having been filed by the Applicant in the terms I have previously cited, I am satisfied that this Tribunal is seized with jurisdiction to hear and determine an appeal by the Applicant against the decision of the Panel to uphold the Respondent's appeal.[22]

38. That position having been reached, and in circumstances where the Applicant accepts that it requires an extension of time, I turn to the issue of whether special or exceptional circumstances justifying such an extension have been established.

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[20] See for example *Australasian Jam Co Pty Limited v Federal Commissioner of Taxation* (1953) 88 CLR 21;
[21] See *Griffin v Resource Management and Planning Appeal Tribunal* (2010) 19 Tas R 424]; [2010] TASSC 8 at [15]-[16]; see also *Delegated Legislation in Australia* (D C Pearce and S Argument) (2023); *Statutory Interpretation in Australia (*D C Pearce), 10th Edition, [7.21]; *O'Connell v Nixon* (2007) 16 VR 440 at 446.
[22] See *Vasili* at [134].

SPECIAL OR EXCEPTIONAL CIRCUMSTANCES

The chronology of events

39. The events which are relevant to a determination of whether special or exceptional circumstances have been established, and the sequence in which such events occurred, are set out above,[23] to which the following further information should be added.

40. First, the Notice of Appeal filed by the Applicant on 4 June 2004 was unaccompanied by any application for an extension of time.

41. Secondly, the email under cover of which the Notice of Appeal was filed incorrectly cited cl 6 of the Regulation as the provision governing an extension of time.

42. Thirdly, immediately upon the Notice of Appeal being filed, the Respondent's Solicitor correctly pointed out that cl 10, not cl 6, was the operative provision, and submitted that nothing had been put by the Applicant to satisfy the Tribunal that there were special or exceptional circumstances.

43. Fourthly, and in light of the correspondence which had passed between the parties, I indicated that the question of an extension of time would be dealt with as a preliminary matter.

Special or exceptional circumstances – the general principles

44. I was provided by both parties with references to previous determinations of this Tribunal (differently constituted) in which consideration had been given to the meaning of the term *"special or exceptional circumstances."* Generally speaking, I agree with the approach previously taken by the Tribunal. However, it is convenient to gather, in the one determination, the principles which can be extracted from the various authorities in which the meaning of the term has

[23] At [8].

received judicial consideration. That approach will hopefully be of assistance in the event that the same issue arises in the future.

45. The term *"special or exceptional circumstances"* is one which is used from time to time in statutes and regulatory provisions to place limits upon the exercise of a power.[24] The Macquarie Dictionary defines the term *"special"* as:

> *...relating or peculiar to a particular person, thing, instance; having a particular function, purpose, of a distinct or particular character; being a particular one; extraordinary or exceptional.*

46. It defines the term *"exceptional"* as:

> *... forming an exception or unusual instance; unusual; extraordinary; exceptionally good, as of a performance or product; exceptionally skilled, talented or clever.*

47. With these matters in mind, the following general principles may be distilled from the authorities:

    1. the use of the word *"or"* in the term *"special* or *exceptional circumstances"* may be indicative of a deliberate differentiation between *"special"* on the one hand, and *"exceptional"* on the other;[25]

    2. that said, and in light of the above definitions, the distinction between *"special"* and *"exceptional"* may be more illusory than substantial;[26]

    3. the words *"special" and "exceptional"* are ordinary English words describing a circumstance which forms an exception which is out of the ordinary course, unusual, special or uncommon;[27]

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[24] *R v Young* [2006] NSWSC 1499 at [19].
[25] *R Brown* [2013] NSWCCA 178 at [22] per the Court (Rothman, Fullerton and Beech-Jones JJ);
[26] *R v Wright* (Supreme Court of NSW, Rothman J), 7 June 2005 unreported) cited in *Brown* (supra) at [23].
[27] *Harvey v Attorney-General Queensland* (2011) 229 A Crim R 186 at [24]; *R v Kelly* (2000) 1 QB 198 at 208; *R v Celeski* [2016] ACTSC 140 at [41].

4. whilst the words *"special" or "exceptional"* do not mean *"unprecedented or very rare",* in order to be special or exceptional, the circumstances relied upon must fall outside what is usual or ordinary;[28]

5. special or exceptional circumstances may be established by the coincidence or combination of a number of factors; [29]

6. the approach to determinising whether special or exceptional circumstances are made out must be a flexible one, and a conclusion reached by reference to the individual circumstances of the case;[30]

7. delay is a relevant factor in determining whether circumstances are special or exceptional;[31]

8. special or exceptional circumstances may include events which would render compliance with the relevant period (in this case, 7 days) unfair or inappropriate,[32] and may also include events which are outside reasonable anticipation or expectation;[33]

9. although it will enable a decision maker to understand why a time limitation was not complied with, merely explaining a delay, or a failure to comply with a limitation period, will not, at least of itself, constitute a special circumstance justifying an extension of time.[34]

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[28] *R v Watson* [2017] ACTSC 311 at [42]; *Harvey* (supra) at [42]; *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545; *Celeski* (supra) at [42].
[29] *R v Young* (supra) at [20]; *Brown* at [27]; *Grant v R* [2024] NSWCCA 30 at [30]; see also *Watson* at [16] and the authorities cited therein.
[30] *R v Medich* [2010] NSWSC 1488; *R v Pirini* Supreme Court of New South Wales (McClellan CJ at CL), 8 September 2009 unreported; *R v Chehab* (Court of Criminal Appeal New South Wales (Latham, Fullerton, Adamson JJ) unreported; *Grant* at [30] citing *R v Khayat (No. 11)* [2019] NSWSC 1320 at [14].
[31] *Beadle v D-G of Social Security* (1985) 60 ALR 225; [1985] FCA 234 at 674.
[32] *Beadle* (supra) at 674.
[33] *R v Steggall* [2005] VSCA 278 at [27], cited with approval in *Burlock v Wellington Street Investments Pty Limited* [2009] VSC 565.
[34] *Connelly v MMI Workers Compensation (Vic) Limited and ors.* [2002] VSC 247.

Submissions of the Applicant

48. The submissions of the Applicant centred on the proposition that special circumstances had been established on the basis of a combination of factors which may be summarised as follows:

    (i) the fact that an order was made by the Panel upholding the appeal immediately upon the finalisation of the hearing, absent reasons;
    (ii) the subsequent delay in the publication of reasons by the Panel;
    (iii) the fact that the Applicant required the reasons for the purpose of formulating its position in respect of an appeal;
    (iv) the minimal period of the delay in filing the Notice of Appeal;
    (v) the fact that such delay was, in part, brought about by a misapprehension of the relevant provisions of the Regulation;
    (vi) the fact that immediate steps were taken to attempt to remedy the issue, and make the necessary application, once that error was realised;
    (vii) the fact that the decision of the Panel gave rise to a risk of race fixing, absent which it was unlikely that any appeal would have been brought.

Submissions of the Respondent

49. The submissions of the Respondent may be summarised as follows:

    (i) the terms of cl 10(1) are such that the relevant limitation period commenced from the date on which the Applicant was notified of the decision, not the date on which the Applicant received the reasons for that decision;
    (ii) the chronology of relevant events was at odds with the proposition that the Applicant required the reasons in order to formulate its position on the appeal;

(iii) the relevant time limit was, or at least ought to have been, well known to the Applicant, given its position as the Regulator of the Harness Racing industry;

(iv) assertions in relation to race fixing were entirely irrelevant, given the nature of the charge against the Respondent and the issue before the Panel on the appeal;

(v) the delay in the filing of the Notice of Appeal was properly regarded as substantial;

(vi) allowing the appeal would result in significant prejudice to the Respondent.

Submissions of the Applicant in reply

50. In reply, the Applicant submitted that:

(i) the Respondent's submissions as to the issue of race fixing were misconceived and not on point;

(ii) the nature of the prejudice relied upon by the Respondent was not of a kind which was in any way relevant, such that no real prejudice would be visited upon the Respondent if an extension of time were granted;

(iii) the requirement to comply with a time limit of 7 days in which to lodge the Notice of Appeal was, in the circumstances of this case, unfair and inappropriate, given that the reasons of the Panel were not delivered until 20 days following its decision;

(iv) questions of unfairness aside, the circumstances in (iii) should be regarded as unusual.

<u>CONSIDERATION</u>

51. For the reasons that follow, I am not persuaded that special or exceptional circumstances have been made out so as to justify an extension of time being granted under cl 10(7) of the Regulation.

52. First, and bearing in mind that a determination under cl 10(7) is one to be made according to the individual circumstances of the case, the terms of cl 10(1) of the Regulation are plain. They require the lodgement of a written Notice of appeal within 7 days of the date of *notification of the decision*. That requirement says nothing about the provision of the reasons for the decision, an issue upon which the Applicant placed considerable emphasis.

53. Secondly, the requirement imposed by cl 10(1) must have been known, or at least ought to have been known, to the Applicant, given its position as the Regulator.

54. Thirdly, I am unable to accept the submission of the Applicant that the delay in the filing of the Notice of Appeal is properly regarded as minimal. Necessarily, the extent of any delay must be assessed having regard to (inter alia) the applicable limitation period. In the present case, the Applicant was notified of the Panel's decision on 17 May 2024. The Notice of Appeal was not filed until 4 June, some 18 days later, in circumstances where the prescribed period is 7 days.

55. Fourthly, the practice of a Court or Tribunal making a determination, with an accompanying indication that the reasons for that determination will follow at some later time, is not uncommon. It is one which is often adopted by Courts and Tribunals at various levels. In any event, the mere fact that such a course was taken by the Panel did not prevent the Applicant from lodging a Notice of Appeal within the stipulated period of 7 days.

56. Fifthly, the Applicant did not require the reasons for the purpose of lodging a Notice of Appeal. Cl 10 of the Regulation did not require the grounds of appeal to be filed with the Notice. On the contrary, cl 10(4) facilitates the filing of grounds of appeal within 7 days of receipt of the transcript of the evidence. There was absolutely nothing preventing the Applicant from filing a Notice of Appeal in accordance with the time limit imposed by cl 10(1), and subsequently filing grounds of appeal in accordance with cl 10(4). It follows that even accepting that there was a delay in the publication of the Panel's reasons, the requirement to file

a Notice of Appeal within 7 days of being informed of the Panel's decision was not productive of any unfairness to the Applicant.

57. Sixthly, and leaving aside the time limits imposed by cl 10(1) and 10(4), I am unable to accept the position advanced by the Applicant that it required the reasons of the Panel in order to file a Notice of Appeal. Such a proposition is fundamentally at odds with the objective fact that the Notice was filed *before* the Panel's reasons were published.

58. Seventhly, it would appear that the foundation for the necessity to seek an extension of time in this case stems (at least partly) from an error in the interpretation of the Regulation. Even if it were accepted that this goes some way to explaining the circumstances which have arisen, it does not, in my view, constitute a factor which, either of itself or in combination with other factors, amounts to a special or exceptional circumstance.

59. Eighthly, I am unpersuaded that the issue of race fixing which was raised in submissions is of any real significance. The simple fact is that, irrespective of the basis of any appeal, and on the objective facts, the Applicant did not require the reasons in order to file a Notice of Appeal. As I have pointed out, and whatever issue(s) the Applicant wished to agitate on any appeal, it was open to the Applicant to file the Notice of Appeal within time, and file the grounds of appeal within 7 days of a transcript becoming available.

60. Finally, I accept the submission of the Applicant that if an extension of time were granted no prejudice (in any relevant sense) would be visited upon the Respondent. Even accepting that to be relevant to the question of whether an extension of time should be granted, it is certainly not determinative. In the circumstances of this case, it does not alter my conclusion that the Applicant has failed to persuade me that special or exceptional circumstances justifying an extension of time have been established. For the reasons I have given, the

relevant circumstances weigh heavily against the exercise of the discretion in favour of granting an extension of time.

ORDERS

61. I make the following orders:

1. The application by Harness Racing New South Wales for an extension of time pursuant to cl 10(7) of the *Racing Appeals Tribunal Regulation 2015* (NSW) is refused.
2. The appeal is dismissed.
3. The appeal deposit is forfeited.

THE HONOURABLE G J BELLEW SC

30 July 2024