IN THE RACING APPEALS TRIBUNAL

HARNESS RACING NEW SOUTH WALES
Appellant

v

ANTHONY SCHEMBRI
Respondent

REASONS FOR DETERMINATION

Date of hearing: **30 April 2024**

Date of determination: **22 May 2024**

APPEARANCES: **Mr O Jones for the Appellant**

Mr D Sheales for the Respondent

ORDERS

1. **The Appeal is upheld.**
2. **The decision of the New South Wales Racing Appeals Panel to impose a fine of $12,500.00 on the Respondent is quashed.**
3. **In lieu thereof, and in respect of each of the 4 breaches of Rule 190(2) of the Australian Harness Racing Rules to which the Respondent pleaded guilty, the Respondent is disqualified for a period of 5 months and 26 days.**
4. **The periods of disqualification imposed by order [3] are to be served concurrently, and will commence on 29 May 2024.**
5. **Any appeal deposit is to be refunded.**

INTRODUCTION

1. By a Notice of Appeal filed on 16 February 2024,[1] Harness Racing New South Wales (the Appellant) has appealed against a determination of the NSW Harness Racing Appeal Panel (the Panel) made on 12 February 2024 in respect of charges brought against Anthony Schembri (the Respondent). On that occasion, the Panel quashed a period of disqualification of 7 months imposed by Stewards for the Appellant's breaches of Rule 190(2) of the *Australian Harness Racing Rules* (the Rules) and imposed, in lieu thereof, a fine of $12,500.00.

2. The hearing of the appeal took place on 30 April 2024, at which time counsel for each party made oral submissions. Judgment was then reserved.

3. For the purposes of the hearing, I was provided with an Appeal Book (AB) containing all relevant material, as well as a separate folder of authorities upon some of which reliance was placed by one or other party.

THE PROCEDURAL HISTORY

4. The procedural history of the matter is not in dispute. I draw the following summary of that history from the contents of the penalty decision at first instance.[2]

5. On 11 October 2023, the Appellant commenced an enquiry in relation to the results of analytical testing conducted on:

    (i) a pre-race blood sample taken from the horse "*On Wheels"* prior to a race at Broken Hill on 29 January 2022;

    (ii) a post-race blood sample taken from the horse "*Keayang Balboa"* following its win in a race at Broken Hill on 29 January 2022;

[1] AB 1

[2] AB 202 and following.

(iii) a post-race blood sample taken from the horse *"Keayang Balboa"* following its win in a race at Broken Hill on 5 February 2022; and

(iv) a post-race urine sample taken from the horse *"Keayang Balboa"* following its win in a race at Broken Hill on 26 March 2022.

6. Dobesilate*,* which is a prohibited substance, was detected in each of the samples in [5] above.

7. The Respondent was charged with four breaches of r 190(2) of the Rules. Rule 190 is (in part) in the following terms:

> ***190 Prohibited substances***
> *(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.*
>
> ...

8. The Respondent pleaded guilty to each of the 4 charges. In respect of each charge, the Stewards imposed a disqualification of 7 months, with such periods of disqualification being ordered to be served concurrently.[3]

9. The Respondent appealed against that determination to the Panel. As I have previously noted, the Panel upheld that appeal, set aside the penalties imposed by the Stewards, and imposed, in lieu thereof, a fine of $12,500.00. That fine was not expressed to be imposed by reference to any particular breach and was seemingly intended to cover the entirety of the Respondent's offending.

10. The Appellant now appeals against the Panel's determination.

[3] AB 208.

THE NOTICES ISSUED BY THE APPELLANT

11. It is appropriate at this point to turn to three notices issued by the Appellant to industry participants which are relevant to the issues in this appeal.

12. The first, headed *"Notice to Industry – Domestic Septic Sewer Systems",* was issued by the Appellant on 12 June 2018 and was in the following terms:[4]

> *Harness Racing New South Wales has dealt with a number of prohibited substance matters involving substances that are contained within human prescription medications and the transfer of those substances through domestic septic sewer systems.*
>
> *Trainers are warned* ***that horses should not be exposed to water from septic sewer systems*** *and* ***horses should also be prevented from grazing in areas where water irrigation or overflow is provided*** *from septic sewer systems.*
>
> *The ingestion by horses of grass and/or plants exposed to water from septic sewer systems* ***may lead to the detection of prohibited substances in race day samples*** (emphasis added in each case).

13. The second, headed *"Notice to Industry – Human Prescription Medication",* was issued by the Appellant on 12 June 2018 and was in the following terms:[5]

> *Trainers and stable employees are warned that appropriate steps must be taken to* ***ensure that horses are not contaminated with human prescription medications by any means including during the feeding and handling of horses or through human excretion within the stable environment.***
>
> *Harness Racing New South Wales Stewards would expect that any trainer or stable employee required to take prescription medication would at a minimum regularly wash their hands especially after handling the medication, wear gloves, utilise appropriate toilet facilities within the stable environment.*
>
> *Failure to ensure that appropriate steps are taken may result in prohibited substances being detected in race day samples* (emphasis added).

14. The third, headed *"Stable Contamination",* was issued by the Appellant on 6 September 2018 and was in the following terms:[6]

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[4] AB 702.
[5] AB 703.
[6] AB 704.

Contamination from the stable environment can lead to an inadvertent breach of the prohibited substance rules. Harness Racing New South Wales has previously supplied advice regarding possible sources of contamination which may need to be addressed in the stable environment.

The following recommendations are intended to complement that advice:

Horses administered prohibited substances should be treated in a separate stable reserved for that purpose.

Trainers should ensure that prohibited substances in the form of powders are carefully and appropriately handled to avoid any potential for the powdery residue to contaminate the horse's environment.

Gloves should always be worn when mixing medicated feeds or when administering medications and discarded before preparing another feed. Gloves should also be worn if medication has been applied to the hands of the person mixing the feed.

Prohibited substances administered in the form of gels, pastes or creams all have the potential to accumulate in the hair or skin of the horse and act as a substantial reservoir of the prohibited substance. The prohibited substance may then be slowly absorbed by the horse and be excreted in the urine.

15. I will return to the significance of the first two of those notices later in these reasons.

THE CIRCUMSTANCES OF THE OFFENDING

16. I have been provided with a copy of the transcript of an interview conducted between the Stewards and the Respondent on 11 October 2023. [7] By reference to the account given by the Respondent on that occasion, the circumstances of the offending were as follows.

17. At the relevant time the Respondent suffered from haemorrhoids, for which he applied topical treatments.[8] Those treatments included a cream known as *Doxiproct,*[9] as well as a product called *Anusol.*[10] There is no dispute that *Doxiproct* contains the prohibited substance Dobesilate which was found in the

[7] Commencing at AB 146.
[8] AB 145.27 – AB 145.46.
[9] AB 146.35.
[10] AB 146.39.

samples which were analysed. A photograph of the packaging in which the *Doxiproct* was provided to the Respondent forms part of the evidence in the appeal.[11] The packaging includes the words "*Calcium dobesilate monohydrate"* along with other writing in a foreign language.

18. The Respondent explained that he had been using *"all these creams"* since his original diagnosis.[12] He said, in particular, that he had been using *Doxiproct* for more than 12 months, and that his wife had purchased it *"from the markets"*[13] at Broken Hill. When asked whether he had ever made any enquiries in relation to the product, the Respondent said:[14]

> *No. Why – why not? My wife got it and they told her what it was for. She said "Try this" so I wouldn't be in pain. It's like (inaudible). It's just like when you've got a headache, you take a Panadol and you take a different stronger Panadol to relieve the pain.*

19. When asked if it concerned him that his wife had obtained the product from a market as opposed to a chemist, the Respondent said:[15]

> *No. Because she goes to the markets all the time when she could. ... She brought it and she said, "use this", so that's what I done.*

20. The Respondent was then asked:[16]

CHAIRMAN:	*... How did you apply the Doxiproct?*
RESPONDENT:	*I put it on my finger and when my haemorrhoid was coming out of my rear end, I wiped it and put it inside my hole. That's how the doctor told me do to it, with the other stuff, Anusol, whatever you pronounce it.*
CHAIRMAN:	*Thank you.*
RESPONDENT:	*So I done it the same.*

[11] AB 483.
[12] AB 147.24 – AB 147.25
[13] AB 147.34 – AB 149.2.
[14] AB 148.26 – AB 148.29.
[15] AB 148.34 – AB 148.35.
[16] Commencing at AB 151.13.

CHAIRMAN:	*And would you use both products at the same time or one or the other?*
RESPONDENT:	*No, I was using the other one and it didn't seem to help me a bit , so I used the other one, and the other one seemed to relieve the pain, so that's when I used it.*
CHAIRMAN:	*Okay. Thank you. And after you'd applied the product Doxiproct, did you wash your hands?*
RESPONDENT:	*Oh, wipe it. Some – all depends where I was. If I – I used to carry it with me for when I was in pain, I done it. I used it at home and I used it down where ever I was out to with it.*
CHAIRMAN:	*Okay. And again, once you'd applied the product, did you clean your hands?*
RESPONDENT:	*I can't remember. I probably did, or probably didn't. All depends where I was.*

21. The Respondent said that when he consulted his General Practitioner shortly after Stewards had visited his premises, he said nothing about using *Doxiproct*.[17] He was then questioned further about the practice of washing his hands after using it:[18]

CHAIRMAN:	*So that wasn't a practice you always adopted Mr Schembri?*
RESPONDENT:	*No, but after all of this has happened, that's what I've done. When I use the cream I go wash my hands.*
CHAIRMAN:	*You don't wash your hands?*
RESPONDENT:	*Well, I didn't, but I do now.*
CHAIRMAN:	*Sorry, I thought you said ---*
RESPONDENT:	*All depends where I am – where I am, when I use it. If I got water, I'll wash my hands. If I haven't got water, I won't wash my hands.*
CHAIRMAN:	*Right. I think earlier you said you probably did or you probably didn't.*
RESPONDENT:	*Yeah, it all depends where I am.*
CHAIRMAN:	*All right.*
RESPONDENT:	*I'm not in the same spot all the time.*

[17] AB 155.10 – AB 155.28.
[18] Commencing at AB 155.41.

22. Bearing in mind what the Respondent had said about his use of *Doxiproct,* there was evidence of the presence of a "Portaloo" on the Respondent's property, the contents of which would be emptied by the Respondent on the grass where his horses, including *On Wheels* and *Keayang* Balboa, would graze (and thus eat the grass).[19] The Respondent's evidence in relation to this issue included the following:[20]

CHAIRMAN:	*... Why would you empty the tank from the Portaloo on that grass where you allowed the horses to pick if it was coming from that Portaloo?*
RESPONDENT:	*How did I know it was coming from the Portaloo? I put the fertiliser from the toilet through the hose on the lawn to let it run because it's good fertiliser. Like a lot of other people do.*
	...
CHAIRMAN:	*So the contents from the tank in the toilet would run through a hose on to the grass, is that what you're saying?*
RESPONDENT:	*That's right. Yep.*
CHAIRMAN:	*And why would you allow it to run onto that grass?*
RESPONDENT:	*To help the lawn grow. And I use effluent water to water the lawn too. I've got a tank behind my little truck, I fill it up. From the racecourse. And effluent water is all dirty sewerage water.*
CHAIRMAN:	*Why would you allow that water to go on that grass where the horses pick when –*
RESPONDENT:	*Well, how did I know this was gonna happen?*
CHAIRMAN:	*Did you use that Portaloo Mr Schembri?*
RESPONDENT:	*Yeah, of course I do, when I need to go to the toilet, I use it. That's why I bought it.*
CHAIRMAN:	*And you take medication, don't you, other than using the haemorrhoid creams?*
RESPONDENT:	*Yes, I take a lot of medication.*
CHAIRMAN:	*Did you turn your mind to the fact that that medication on that grass could cause an issue with the horses?*
RESPONDENT:	*I didn't know then, but I know now.*

[19] AB 156.17 – AB 157.26.
[20] Commencing at AB 157.40.

CHAIRMAN:	*So you'd never turned your mind to that?*
RESPONDENT:	*No.*
CHAIRMAN:	*And did you turn your mind to the fact that if you had the haemorrhoid cream on your body and you went to the toilet, that that cream may also end up in that portaloo?*
RESPONDENT:	*Exactly. Correct.*
CHAIRMAN:	*Did you turn your mind to that as well?*
RESPONDENT:	*No. No I did not*
CHAIRMAN:	*Why didn't you do that?*
RESPONDENT:	*Well, how do I know it's gonna do stuff like that? How did I know it's gonna give my horses contamination to get a positive swab for haemorrhoid cream?*

23. The evidence then turned to the notices to which I have previously referred. After the terms of each notice were read to him[21], the Respondent gave the following evidence:[22]

CHAIRMAN:	*You weren't aware of those notices, Mr Schembri?*
RESPONDENT:	*I told you earlier Mr Prentice, I can't read and write and I'm not a person to sit there to try to read a document like that. So, I didn't – I was not aware of it.*
CHAIRMAN:	*Thank you. As a trainer and having the responsibility for the horses in your stable, how do you stay up to date with information that's published by Harness Racing New South Wales?*
RESPONDENT:	*I don't.*
CHAIRMAN:	*And why is that?*
RESPONDENT:	*Well, I can't read and write and I don't follow all that stuff. I don't have internet, nothing like that.*
CHAIRMAN:	*And nobody could help you do that?*
RESPONDENT:	*No. I don't ask no one.*
CHAIRMAN:	*And why don't you ask someone to help you with it?*
RESPONDENT:	*What for?*
CHAIRMAN:	*So that you can stay up to date with information that's published.*
RESPONDENT:	*Well, I didn't know it was needed to be required.*

[21] AB 159.10 – AB 160.39.
[22] Commencing at AB 160.41.

CHAIRMAN:	*Mr Schembri, do you own a business in Broken Hill?*
RRSPONDENT:	*Yes.*
CHAIRMAN:	*How do you complete all your business documents?*
RESPONDENT:	*The same way my father did when he was alive. My father come from Malta, couldn't read and write, come to this country with no money, all right, and he just done everything like that, and I'm the same way. Like I said, I left school earlier. All right? And that's how we done it. That's why we've got an accountant to do our paperwork.*
CHAIRMAN:	*Thank you. So you have people assist you with that?*
RESPONDENT:	*Yes.*
CHAIRMAN:	*So why don't you have people assist you with the running of your stable?*
RESPONDENT:	*What for? It's only a hobby. I don't make money out of harness racing. It's only a hobby like my father had. And that's the only way I do it.*

24. The Respondent was then questioned further about emptying the contents of the Portaloo on to the grass through a hose:[23]

CHAIRMAN:	*..... And that's what empties the contents of the tank into the grass is it?*
RESPONDENT:	*That's right. Because I've got chemicals in the tank and when you use it, the chemicals break everything down and it's only like water what comes out of the hose.*
CHAIRMAN:	*Okay. And do those chemicals present any risk to the horses?*
RESPONDENT:	*I don't know.*
CHAIRMAN:	*You don't know?*
RESPONDENT:	*That's why I don't do it no more.*

25. Bearing in mind this evidence, the Respondent's case[24] (which for the purposes of the appeal the Appellant was prepared to accept)[25] was that the following circumstances, when combined, constituted the most likely explanation for the detection of the prohibited substance in the horses:

[23] AB 162.39 – AB 163.6
[24] Written submissions at AB 13 [1] – [3].
[25] Written submissions at AB 6 [15]-[16].

(i) the Respondent had been using *Doxiproct* to treat his haemorrhoids;

(ii) *Doxiproct* contained Dobesilate;

(iii) the Respondent had used the Portaloo on his property;

(iv) given that he had used the Portaloo, its contents were likely to contain traces of Dobesilate;

(v) when the Portaloo needed to be emptied, the Respondent would use a hose to drain its contents onto the grass adjacent to the horses' stables;

(vi) *On Wheels* and *Keayang Balboa* picked at the grass onto which the contents of the Portaloo had been drained, and thus ingested traces of Dobesilate.

26. When the evidence is viewed as a whole, that is a plausible explanation which I am prepared to accept. It is generally supported by expert evidence given in the inquiry by Dr Wainscott.[26]

THE NATURE OF DOBESILATE

27. In light of some of the submissions of the parties, it is necessary to address the nature of Dobesilate, and the class of prohibited substance in to which it falls by reference to the Penalty Guidelines issued by the Appellant (the Guidelines).

28. The evidence before me includes a report from Dr Martin Wainscott, the Regulatory Veterinarian of the Appellant, which states the following:[27]

> *Dobesilate acts to protect the integrity of blood vessels by decreasing leakage from and fragility of small vessels, thereby improving blood flow. Substances having these properties are referred to as vasotropic or vasoprotective agents.*
>
> *Dobesilate is a prohibited substance under Australian Harness Racing rule 188A(1)(a) in that it is a substance capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of*

[26] AB 180.38 – AB 180.43.
[27] AB 555.

the following mammalian body systems: the cardiovascular system. Vasotropic agents are not specifically mentioned under rule 188A(1)(b, but the rule is not limited to the categories listed.

A search of the Therapeutic Administration (TGA) and Australian Pesticides and Veterinary Medicines Authority (APVMA) databases show that there are no substances containing Dobesilate registered for use in Australia in either human or veterinary fields.

Even though the substance is not a registered human medication, under Harness Racing NSW Penalty Guidelines it could still be considered a Class 2 substance. It has been shown to have a therapeutic effect by improving lameness in horses exhibiting navicular pain.

29. Dr Wainscott gave evidence before the inquiry.[28] When asked about the effect of Dobesilate on the performance of a horse, he said:[29]

> *There's very, very little information on the effect of dobesilate on a horse. There is only one study that showed that it could have a therapeutic effect of improving lameness in horses exhibiting navicular pain. There was just one study, a pilot study. It didn't have any control horses in the study. And I'm not aware of any other studies that have been done on the horse.*

30. When asked, by reference to the Guidelines, to express a view as to the particular category or classification of prohibited substance in to which Dobesilate would fall, Dr Wainscott said:[30]

> *It's neither a registered medication in Australia for veterinary use, with an accepted therapeutic use in the racing horse, and it's not a registered human preparation prescribed by a veterinarian. So it can't be included in class 3. And the nature of the substance is such that it wouldn't be included in the class 1 substances. So it would fit into a class 2 substance.*

31. When cross-examined, Dr Wainscott agreed that navicular disease was degenerative in nature,[31] and is a disease for which there is no known cure.[32] He expressed the view that it was possible for a horse to continue racing with

[28] Commencing at AB 179.
[29] AB 180.15 – AB 180.20.
[30] AB 180.26 – AB 180.31.
[31] AB 181.31 – AB 181.34.
[3232] AB182.46.

navicular disease,[33] and agreed that an inspection of *Keayang Balboa* would have disclosed whether it was suffering from it.[34]

32. It should be noted at this point that the Penalty Guidelines issued by the Appellant divide prohibited substances into three classes as follows:

> ***Class 1***
> *Class 1 includes, but is not limited to, central nervous systems stimulants and depressants, narcotic analgesics, synthetic EPO derivatives, including polyethylene glycolated – epoetin beta (PEG-EPO), ITPP, AICAR, snake venom, snail venom, other animal venom and all substances specifically referred to in AHRR 190A (2) Out of Competition Testing and any other substance not registered for use in equines and/or Humans.*
>
> *Generally speaking, Class 1 prohibited substances:*
> - *have no generally accepted use in the racing horse; and/or*
> - *pose a significant risk to the welfare of the horse; and/or*
> - *pose a significant risk to the integrity of the harness racing industry.*
>
> *...*
>
> ***Class 2***
> *Class 2 includes substances that pose a risk to the welfare of a horse or a risk to the integrity of the harness racing industry. Australian registered human medications with an accepted therapeutic use in the racing horse, and not prescribed by a registered veterinarian, may also be included in this class.*
>
> *Class 2 prohibited substances include, but are not limited to the following:*
> *TCO2*
> *SARMs*
> *SERMs (eg Tamoxifen)*
>
> ***Class 3***
> *Class 3 includes those medications registered in Australia for veterinary use which have an accepted therapeutic use in the racing horse. Australian registered human preparations with an accepted therapeutic use in the racing horse and prescribed by a registered veterinarian may also be included in Class 3.*

[33] AB 181.39 – AB 181.41.
[34] AB 182.29 – AB 182.35.

33. With these matters in mind, Dr Wainscott agreed that the only real effect of Dobesilate was to ameliorate a negative aspect of navicular disease.[35] He was then asked:[36]

COUNSEL:	*Now, you seen, because it's not category 3 – it's not class 3 and it's not class 1. And so, as I understand your logic, because it's not class 3 and it's not class 1, it must be class 2, is that your logic?*
DR WAINSCOTT:	*Yes. It's not serious enough to be classified in class 1, it can't be classified in class 3 because it's not a registered a registered veterinary medicine or a registered human product that's got an accepted place in treating a horse for a condition. So, yes, it's a ---*
COUNSEL:	*By a process of elimination, you say it's a class 2.*
DR WAINSCOTT:	*Exactly. Exactly. A process of elimination, yeah.*

34. Dr Wainscott agreed that he had excluded Dobesilate from classes 1 and 3 because it did not meet the criteria for either.[37] When cross-examined about class 2 substances, Dr Wainscott agreed that Dobesilate is *"not going to pose a risk to the welfare [of a horse]"*.[38] He was then asked:[39]

COUNSEL:	*All right. Now the next thing is a risk to the integrity of the harness racing industry. Well, because the only possible effect it has is as described, it does not pose a risk to the integrity of the harness racing industry. You'd have to agree with that point wouldn't you?*
DR WAINSCOTT:	*Not necessarily. In the one study ---*
COUNSEL:	*Tell me how it does.*
DR WAINSCOTT:	*Well, if you'd let me –*
COUNSEL:	*No problem.*
DR WAINSCOTT:	*--- continue. In the one study that was done, which I'm sure you're familiar with ---*
COUNSEL:	*Which one's that?*

[35] AB 183.30 – AB 183.37.
[36] AB 184.10 – AB 184.21.
[37] AB 184.23 – AB 184.34.
[38] AB 185.14.
[39] AB 185.16 – AB 185.45.

DR WAINSCOTT: *--- they gave a treatment course to 11 horses, of which 10 showed a reduction in lameness, and it was suggested by the authors that it was worthy of further work being done. As far as I'm aware, no other trials have been conducted. But they were of the opinion that, you know, the lameness improvement was such that it was worthy of further investigation. The fact that the lameness did improve whilst those horses were under treatment shows that it could affect the integrity of the racing industry*

COUNSEL: *How?*
DR WAINSCOTT: *Well, by allowing a horse that would otherwise not be racing to race without lameness.*

35. The study to which Dr Wainscott had referred in his evidence had been conducted by a Dr Curl, the Regulatory Veterinarian for Racing New South Wales.[40] Dr Wainscott agreed that in that study, Dr Curl had concluded that there were "*encouraging signs that [dobesilate might have a therapeutic effect for navicular disease in horses] but it was impossible for the experts conducting the trial to be certain of this or to draw anything like a firm conclusion"* [41]. Dr Wainscott also agreed[42] that the *"evidence wasn't strong enough to be certain"* of any therapeutic effect of Dobesilate. He also accepted that the available evidence fell short of being able to conclusively establish that Dobesilate had the pharmacological potential to materially alter the performance of a horse.[43]

36. The cross-examination then continued:[44]

COUNSEL: *.... In his evidence, Dr Curl agreed that the scientific research and evidence fell well short of allowing any conclusion to be drawn, even on the balance of probabilities, that calcium dobesilate had any therapeutic benefit to horses. Do you agree with that proposition, yes or no?*
DR WAINSCOTT: *Yes, you can't conclude that it would have an effect.*

COUNSEL: *Yes.*
DR WAINSCOTT: *It might.*

[40] AB 186.30 – AB 186.33.
[41] AB 186.37 – AB 186.39
[42] AB 187.27.
[43] AB 188.9.
[44] AB 188.40 – AB 190.18.

COUNSEL:	*You can't allow for any conclusion – "it might" – "might" – "might" – "might" can be anything. I'm putting a specific proposition to you. In his evidence, Dr Curl agreed that scientific research and evidence fell well short of allowing any conclusion to be drawn, even on the balance of probabilities, that calcium dobesilate had any therapeutic benefit to the horse. You either agree with it or you don't?*
DR WAINSCOTT:	*I agree.*
COUNSEL:	*Thank you. So if we can't draw any conclusions to any standard of therapeutic benefit to the horse, that conclusion underpins any suggested conclusion of a risk to the integrity of harness racing, as you've just told us, you would agree with that?*
DR WAINSCOTT:	*Based on the information we've got, yes.*
COUNSEL:	*So therefore there's no basis for finding it's a risk to the integrity of the harness racing industry, correct?*
DR WAINSCOTT:	*Not in those terms, no.*
	...
COUNSEL:	*So in fact the substance does not fit within class 2 either, does it?*
DR WAINSCOTT:	*Not in the – no, not in those terms, no.*

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

37. Counsel for the Appellant submitted that in determining the appropriate penalty for the offending, I should have particular regard to the necessity for both general and specific deterrence.[45] In terms of the need for specific deterrence, counsel submitted that the offending was the consequence of *"gross negligence, ignorance and carelessness"* on the part of the Respondent,[46] and that such a conclusion was supported by the following evidence:[47]

    (i) the *Doxiproct* was purchased from an unknown stall at a market;

    (ii) the Respondent made no enquiries at all about the nature of that product;

[45] Written submissions at AB 4 [6].
[46] Written submissions at AB 6 [17].
[47] Written submissions at AB 7 [a] to [h].

(iii) had the Respondent made such enquiries, he would have become aware that *Doxiproct* was not registered for human or animal use in Australia;

(iv) the Respondent was not in the habit of washing his hands after using *Doxiproct* to treat his haemorrhoids;

(v) the Respondent had stated that he often did not wash his hands after using the product;

(vi) the Respondent had deliberately discharged the contents of the Portaloo onto an area of grass on which he knew the two horses grazed;

(vii) the Respondent took other medications over and above *Doxiproct*;

(viii) the Respondent did not turn his mind to whether those other medications could cause issues for his horses if they were discharged onto an area on which they grazed; and

(ix) the Respondent did not turn his mind to whether the contents of the Portaloo (including the chemicals contained in the Portaloo which used to treat waste and which were also discharged) may have a harmful effect on the horses.

38. Counsel for the Appellant also relied on the three notices which had been issued to industry participants. He submitted, in particular, that the Respondent had taken no steps at all to keep up to date with the information disseminated by the Appellant in those notices.[48] He also pointed to the fact that such notices variously (but at the same time, specifically):[49]

(i) warned trainers that horses should not be exposed to water from septic sewer systems;

(ii) warned trainers that horses should be prevented from grazing in areas where water irrigation or overflow was provided from septic sewer systems, for the specific reason that such circumstances

[48] Written submissions at AB 8 [17](j).
[49] Written submissions at AB 7 – 8 [17](i) – (iv).

may lead to the detection of prohibited substances in race day samples;

(iii) warned trainers that appropriate steps needed to be taken so as to ensure that horses were not contaminated with human prescription medications by any means;

(iv) expressed an expectation that any trainer required to take prescription medication would, at a minimum, regularly wash their hands, especially after handling medication, and would utilise appropriate toilet facilities within the stable environment; and

(v) warned trainers that contamination from the stable environment, including through the use of creams and gels, can lead to an inadvertent breach of the prohibited substance rules.

39. It was submitted that when all of these circumstances were taken into account, this was not a case in which the Respondent was blameless, but was rather a case which involved positive culpability, and which was thus deserving of a significant penalty in the form of a disqualification.[50]

40. In terms of the Respondent's subjective case, counsel for the Appellant, whilst acknowledging the pleas of guilty, submitted that there were "limits" to the weight to be afforded to those pleas, in circumstances where, it was submitted, the Respondent could not have denied the offending.[51] Counsel further submitted that the weight to be given to Respondent's history in the industry necessarily had to be assessed by reference to the fact that his participation was in the nature of a "hobby". The effect of counsel's submission was that although that history was a matter to be taken into account in the Respondent's favour, the weight to be given to it was tempered by the fact that over 11 seasons the Respondent had 39 starters which had earned a total of $39,000.00 in prizemoney, circumstances which, it was submitted, were to be distinguished

[50] Written submissions at AB 9 [23].
[51] Written submissions at AB 9 [24] – [27].

from those of a participant who had engaged in full-time participation over a longer period.[52]

41. Counsel further submitted that I should conclude on the evidence that Dobesilate posed a risk to the integrity of the harness racing industry and was thus properly categorised as a Class 2 substance. In advancing that submission, counsel acknowledged the evidence of Dr Wainscott to which I have previously referred, and particularly Dr Wainscott's acceptance that it could not be definitively concluded that Dobesilate renders a therapeutic benefit to a horse, and was thus not a risk to the integrity of the industry in that sense. However, counsel submitted that it did not follow that Dobesilate was not a risk to the industry merely because it could not be established that it had a therapeutic or performance enhancing effect. Counsel submitted that I should conclude that Dobesilate posed a risk to the industry unless it could be shown that it had no such effect, and was thus benign.[53]

42. In oral submissions in respect of this issue, counsel affirmed his acceptance of the proposition that, on the evidence, Dobesilate was not a risk to the welfare of either horse, and thus did not pose a risk to the integrity of the harness racing industry in that sense.[54] However, counsel maintained the submission that Dobesilate nevertheless posed some risk by reason of the fact that it is, by definition, a prohibited substance.[55] Counsel submitted that whilst such a risk might not be significant, it would nevertheless be *"surprising for it to be prohibited, and for penalties to be imposed on people by presented horses with that substance in their system, if it was not a risk to the industry.*[56] In these circumstances, counsel submitted that for the purposes of the Guidelines, Dobesilate fell within a Class 2 substance.

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[52] AB 198-199; T 33.43 – T 34.14.
[53] Written submissions at AB 12 [39] – [42].
[54] T 21.39.
[55] T 22.6 – T 22.9.
[56] T 22.16 – T 22.19

43. By reference to the Guidelines, counsel pointed out that a first offence in respect of a prohibited substance falling within Class 2 may meet with a disqualification of 2 years. Whilst counsel made it clear that he was not suggesting that this should be the outcome in the present case, he nevertheless described the Guidelines as a *"useful check",* and submitted that there remained some utility to be drawn from them.[57] That said, counsel made it clear that he was not advancing the Appellant's appeal *"with great reliance on the Guidelines"* such that in his submission, and irrespective of the provisions of the Guidelines, this remained a case in which a significant period of disqualification was nevertheless required.

44. By reference to all of these factors, counsel submitted that in a disqualification of 7 months was appropriate.[58]

Submissions of the Respondent

45. Counsel for the Respondent took particular issue with the Appellant's categorisation of the level of culpability of the Respondent's offending, describing the Appellant's position as "*wholly misconceived"*.[59] In support of that submission, counsel referred me to a number of previous determinations, within this jurisdiction as well as others, in which fines had been imposed for what was submitted to be similar offending.[60] As I understood it, counsel submitted that those determinations supported the imposition of a fine in the present case. I have considered these matters further below.

46. Counsel for the Respondent also took issue with the proposition that Dobesilate should be regarded as a prohibited substance falling within Class 2 of the Guidelines, describing the Appellant's position in that respect as one which was *"wholly erroneous".*[61] Counsel emphasised, in particular, the evidence of Dr

[57] T 22.21 – T 23.24.
[58] Written submissions at AB 12 [43].
[59] Written submissions at AB 15 [6].
[60] Written submissions at AB 16 – 17 {7].
[61] Written submissions at AB 17 [8] – 10].

Wainscott which I have set out at length above, and embraced the conclusion reached by the Appeal Panel that Dobesilate is not a Class 2 prohibited substance.[62]

47. In oral submissions, counsel described the Appellant's position in relation to this issue as *"absurd",* and submitted that it was one which was indicative of the Guidelines constituting a *"wrecking ball"* which unreasonably and improperly interfered with the *"proper exercise of discretion"*.[63] Counsel went so far as to say that the Guidelines were reflective of the fact that regulators in the State of New South Wales exercising powers in various branches of the racing industry were *"proud of [the] greater penalties [they] imposed"*.[64] Leaving aside the somewhat hyperbolic terms in which these submissions were expressed, my understanding was that counsel's fundamental submission was that the Guidelines were not conclusive or binding in any sense, and that the penalty in this case was to be determined in the exercise of the broad-based discretion conferred under the *Racing Appeals Tribunal Act 1983* (NSW).[65] To the extent that the Guidelines made reference (expressly or inferentially) to the adoption of a "starting point" in terms of the assessment of penalty, the effect of counsel's submission appeared to be that such an approach had the capacity to impermissibly affect the exercise of discretion.[66] I must say that in light of the fact that the Guidelines are not binding on me, I find it somewhat difficult to understand how that could be so.

48. Counsel emphasised that in circumstances where there was no risk posed by the offending to the integrity of either horse, or to the harness racing industry generally, the culpability of the Respondent was properly regarded as low.[67] He

[62] See the reasons of the Panel at [19]-[20].
[63] T 26.8 – T 26.12.
[64] T 26.28 – T 26.46
[65] T 27.22 – T 27.28.
[66] T 31.25 – T 31.30.
[67] T 28.28 – T 28.47.

drew further support for that submission from what he submitted was the low level of Dobesilate which was detected.[68]

49. Counsel also emphasised a number of aspects of the Respondent's subjective case, including:

    (i) his essentially blemish free history in the industry over 25 years, (save for one instance in which a caution was administered);
    (ii) his good character;
    (iii) his substantial contribution to the industry; and
    (iv) the fact that he had addressed the principal issue giving rise to the offending by moving the location of the Portaloo.[69]

50. Having regard to these matters, counsel submitted that there was no warrant for any penalty to reflect a need for personal deterrence,[70] and that when the entirety of the circumstances of the case were considered, a fine remained the appropriate penalty.[71]

CONSIDERATION

51. In light of the submissions of the parties, it is appropriate to turn firstly to the class of prohibited substance into which Dobesilate may be said to fall by reference to the Guidelines. I should say at the outset that whilst that issue may not be entirely irrelevant, it needs to be emphasised that such classification is not determinative. The issue of classification, and its relationship to the Guidelines, has been given a degree of prominence in the present case that may not be entirely warranted, in circumstances where both parties accept that the Guidelines are not binding on me, and the ultimate determination of penalty is one for the exercise of my discretion. However, in deference to the submissions

[68] T 29.1 – T 29.11.
[69] Written submissions at AB 17 – 18 at [11].
[70] T 31.45.
[71] T 32.18.

which have been advanced, the issue should be addressed. In order to properly do so, some background is required.

52. The Appellant is constituted by s 4 of the *Harness Racing Act 2009* (NSW) (the HR Act). Its functions include the control, supervision and regulation of harness racing in New South Wales,[72] and the initiation, development and implementation of policies which are considered to be conducive to the promotion, strategic development and welfare of the harness racing industry.[73] It is a *"controlling body"* within the definition of that term in the Dictionary to the Rules, namely *"an organisation which, by .... law is or is deemed to be in control of Harness Racing in a State or Territory"*.

53. The Respondent was charged with, and pleaded guilty to, four contraventions of r 190(2) of the Rules. Rule 190(2) creates an offence of presenting a horse for a race otherwise than in accordance with sub-rule (1) (i.e., otherwise than free of a prohibited substance). The Respondent's pleas of guilty accepted that in each case, the horse was presented other than free of a prohibited substance. Inherent in such pleas was an acceptance of the fact that Dobesilate is a prohibited substance.

54. The Appellant's exercise of the power conferred by r 188 to determine that Dobesilate is a prohibited substance did not call for the Appellant to specify a particular class or category into which Dobesilate might fall. Similarly, r 190(2) makes no reference to the classification of prohibited substances. The relevance (such as it might be) of classification comes about as a consequence of the Guidelines. The Guidelines have no legislative or similar basis. They are seemingly promulgated by the Appellant pursuant to the powers conferred under the HR Act for a number of purposes. They come with the following preamble:

[72] Section 9(2)(a).
[73] Section 9(2)(c).

> *This document is a guideline for Harness Racing New South Wales (HRNSW)Stewards to consider in relation to assessing any penalties to apply for offences under the Australian Harness Racing Rules (AHRR). HRNSW Stewards will consider the evidence presented in each case and will have regard to all relevant matters when determining an appropriate penalty to be imposed in a particular case.*
>
> *These guidelines also serve to inform participants in the harness racing industry regarding the approach generally to be taken to the imposition of penalties for breaches of the AHRR.*

55. The Guidelines go on to enumerate the matters which will be taken into account by Stewards in assessing penalty for particular types of offences, including those relating to the detection of prohibited substances.

56. At this point, three matters require emphasis.

57. The first, is that the Guidelines represent, in a general sense, an encapsulation of those factors that one might expect would be taken into account by any person(s) or organisation having the power to impose a penalty for a regulatory offence. Such factors mirror those taken into account, both at common law and pursuant to statute, when assessing penalties for the commission of criminal offences.

58. The second, is that the Guidelines are just that: a guide.

59. Thirdly this Tribunal is constituted under s 5 of the *Racing Appeals Tribunal Act 1983* (NSW). In a matter of the present kind, s 17A of that Act confers a broad-based discretion on the Tribunal in terms of (inter alia) the determination of penalty. It follows that the Guidelines are not binding on me sitting as the Tribunal, and do not constitute some form of straitjacket into which a penalty must fit.

60. The Guidelines have assumed some prominence in the present case because they suggest penalties according to firstly, the class into which a prohibited

substance may fall, and secondly, whether it is the participant's first or subsequent offence. Considerable time was devoted in the course of submissions to the question of the class of prohibited substance into which Dobesilate might be said to fall by reference to the Guidelines.

61. Whatever the answer to that question might be, it remains the case that:

    (i) rule 190(2), under which the Respondent was charged, and for the Respondent's breach of which I am required to assess a penalty, requires only that the substance in question be prohibited;

    (ii) rule 190(2) makes no reference to a "class" of substance at all; and

    (iii) the Guidelines, which are the catalyst of this issue, are not binding on me.

62. In those circumstances, how the Guidelines might view where Dobesilate falls in terms of a class of substance, whilst not entirely irrelevant, seems to me to be something of a secondary issue. That said, and accepting that it has some limited relevance in terms of the application of a consistent approach to these matters, my conclusions in relation to it are as follows.

63. A Class 2 substance is defined in the Guidelines as including substances which:

    (i) pose a *risk* to the welfare of a horse;
    (ii) pose a *risk* to the integrity of the industry

64. Used in that context, the term *"risk"* connotes a *possibility* that something (in this case, a Class 2 prohibited substance) *might* adversely affect either a horse, or the integrity and objectives of the harness racing industry.

65. I am, obviously, mindful of the evidence given by Dr Wainscott. Whilst I would not necessarily embrace approaching questions of classification by adopting a

process of elimination, I am nevertheless satisfied that Dobesilate should, having regard to the terms of the Guidelines, be regarded as a Class 2 prohibited substance. I have reached that conclusion for the following reasons.

66. First, Dr Wainscott expressed the opinions that Dobesilate:

    (i) acts to improve blood flow in a horse;
    (ii) is capable of causing an effect on the cardiovascular system; and
    (iii) has been shown to have a therapeutic effect by improving lameness in horses exhibiting navicular pain.

67. In cross-examination Dr Wainscott accepted that the evidence to support these propositions was limited, and that a *definitive* conclusion could not be reached that Dobesilate carried any therapeutic benefit to horses. However, he remained of the view that the research was sufficient to support the proposition that Dobesilate *might* have the effect(s) to which he referred. Although his use of the word "might" was the subject of some criticism in the course of questioning, it is completely consistent with the use of the term *"risk"* in defining Class 2 prohibited substances. It is not necessary, in order to conclude that a substance falls within Class 2, to reach a definitive conclusion that the substance *will* adversely affect the welfare of a horse, or that it *will* adversely affect the integrity of the industry. It is sufficient, given the terms of what falls within Class 2 (and specifically, the use of the word "risk"), to establish that it *might* do so. On a fair reading of the evidence, Dr Wainscott's ultimate acceptance of the proposition that Dobesilate does not fall within a Class 2 substance was predicated on an incorrect assumption, which was inherent in the questions put to him, that it was necessary for a definitive conclusion to be drawn. That is entirely inconsistent with the terms of the Guidelines generally, and the use of the word *"risk"* in particular.

68. Moreover, Dobesilate is a prohibited substance because the Appellant has exercised the power of determination conferred on it by r 188 of the Rules. It can be reasonably assumed that in exercising that power the Appellant did not do

so capriciously, and acted upon some evidence which satisfied those responsible that Dobesilate posed a risk of the kind to which I have referred. That Dobesilate poses such risks is thus axiomatic.

69. I turn to the issue of an assessment of the Respondent's level of culpability. In that regard, the notices issued by the Appellant provide an appropriate starting point.

70. In a recent decision of *Ross v Harness Racing New South Wales*[74] I confirmed previous comments of this Tribunal (differently constituted) regarding the obligations of industry participants in respect of such notices. I observed, in particular, that there is an obligation placed on participants to appraise themselves of the content of all of the publications issued by the relevant Regulator, and to act in accordance with them. Those obligations are not reduced in the case of the Respondent by reason of the fact that he is unable to read or write, nor are they reduced by the fact that he participates in the industry as a hobby rather than as a full-time trainer. The Respondent's admission in evidence that he simply made no attempt at all to appraise himself of announcements by the Appellant represents a significant departure from what is reasonably expected of all participants. The significance of those failures on the part of the Respondent is heightened by the fact that two of the notices addressed some of the very circumstances which bear directly upon his offending. Moreover, they did so in the specific context of the danger of the detection of prohibited substances which might ensue in the event that the warnings which were given, and the cautions which were expressed, were not heeded and acted upon.

71. The first notice cautioned against exposing horses to water from septic sewer systems through which ingredients of human prescription medications could

[74] A decision of 22 April 2024 at [70], citing the decision in *Trevor-Jones v Harness Racing New South Wales* of 6 March 2023.

pass. It also warned industry participants against allowing horses to graze in areas where there was such water overflow. Given the evidence to which I have referred, this is not a case in which the Respondent simply *allowed* those circumstances to arise. Rather, it is a case in which actually *facilitated* the very circumstances against which participants were warned by applying *Doxiproct,* using the Portaloo, and then emptying the contents of the tank directly on to the area where he knew that the horses grazed. That conduct demonstrates a troubling degree of negligence, and an even more troubling degree of indifference as to the possible consequences of such actions.

72. The second notice, whilst effectively repeating the warnings contained in the first, went further. It specifically warned participants against contamination by *"human prescription medications … through human excretion within the stable environment"* and expressed an expectation that any participant taking medication would, at a minimum, *"regularly wash their hands especially after handling the medication"*. On the Respondent's evidence, he had no practice of washing his hands after using *Doxiproct* at all. The effect of his evidence was that sometimes he did, and sometimes he didn't.

73. Against that background, parts of the Respondent's evidence tend to reflect something of a reluctance to accept responsibility for what occurred. For example, when asked why he allowed the water from the Portaloo to drain on to the area where the horses grazed, the Respondent replied:

> *Well, how did I know this was gonna happen?*

74. Similarly, when asked why it was that he did not turn his mind to the possibility of *Doxiproct* ending up in the Portaloo, the Respondent replied:

> *Well, how do I know it's gonna do stuff like that? How did I know it's gonna give my horses contamination to get a positive swab for haemorrhoid cream?*

75. The answer all of the questions posed by the Respondent in these passages of evidence lies generally in the facts I have set out, and specifically in the acts and omissions on his part that I have identified. Making due allowance for the fact that the Respondent's evidence was to the effect that he has changed his ways in these respects, I am nevertheless satisfied that there remains a need for any penalty reflect the need for personal deterrence.

76. Further in my view, there is an even greater need for any penalty imposed to carry with it a significant element of general deterrence. Industry participants must clearly understand that irrespective of the extent to which they are involved, they have a number of obligations which remain for such time as their participation in the industry might be on foot. Those obligations include, fundamentally, appraising themselves of publications issued by the Appellant, and acting in accordance with them. In this case, the Respondent made not even the slightest attempt to meet those obligations. His conduct in that respect represents a substantial departure from that which is reasonably expected.

77. As a general proposition, offending of this nature has been recognised as falling into one of three categories which are broadly defined as follows:[75]

    (i) where, through investigation, admission or other direct evidence, the relevant regulator can establish a positive culpability against the participant;
    (ii) where, at the conclusion of evidence, the Tribunal is left in a position of having no real idea as to how the prohibited substance came to be in the horse's system;
    (iii) where the participant provides an explanation which the Tribunal accepts and which demonstrates that the participant has no culpability at all.

[75] See generally *McDonough,* a decision of the Victorian Racing Appeals Tribunal delivered on 24 June 2008.

78. Whilst this is not a case in which the Respondent was responsible for directly administering the prohibited substance, in light of the conclusions I have reached[76] it is nevertheless a case of positive culpability. For all of the reasons I have expressed, I am unable to accept the submission that such culpability is low. On the contrary, in my view it is substantial.

79. In terms of the Respondent's subjective case, he is entitled to a discount to reflect his pleas of guilty. Whilst it may well be, given the absolute liability which attaches to this offending, that the Respondent had little practical alternative other than to plead guilty, that observation could be made in the vast majority of, if not all, cases of this kind. It has not, to my knowledge, ever been the view of the Tribunal that the discount attributable to a plea of guilty in such should be tempered by the strength of the case against the participant. For these reasons, there is no warrant to reduce the discount from the accepted 25% which is generally applied.

80. The Respondent's history of participation in the industry extends over a long period, during which he has incurred only one caution.[77] The fact that such history has been earned in circumstances where his participation has been on a part-time basis is a factor which must have some effect on the weight to be attached to it as a mitigating factor. However, it remains a matter upon which the Respondent is entitled to rely and I have taken it into account in his favour.

81. The determination of any penalty is one made in the exercise of instinctive synthesis. It is primarily for that reason that reasonable minds can often differ as to what penalty might be appropriate in a given set of circumstances. However in my view, the present offending must meet with a period of disqualification. There are two primary reasons which underly that conclusion.

[76] Particularly at [70] above.
[77] AB 708.

The first, is that for the reasons I have expressed the Respondent's culpability is high. In my view, there would be a displacement between that conclusion and the imposition of a fine, however substantial such a fine might be. The second, is that there is a strong need for both personal and general deterrence. In my view, the imposition of a fine would fail to satisfy those requirements.

82. As I have noted, I was referred by both parties to a number of previous determinations of this Tribunal, as well as those of other Tribunals and decision makers. In particular, counsel for the Respondent referred me to decisions in *Turnbull,*[78] *Reichstein,*[79]*Kenna,*[80] *Cassell,*[81] *Ison,*[82] *Pizzuto,*[83] *Hewitt,*[84] *Hancock,*[85] *Turnbull*[86] and *Abbott*.[87] Many of those determinations were published in a form which provides little in the way of detail and for that reason, they are of limited assistance. For example, the decision of the Stewards in *Turnbull*[88] was published as part of an *Integrity Update and Information* issued by the Appellant. The summary of the case was expressed in a total of 6 lines. It said virtually nothing about the circumstances of the offending, or the subjective circumstances of the offender. Similar observations as to the brevity of detail can be made about the decision in *Hewitt* and (albeit to a different extent) about those in *Kenna, Cassell, Ison, Pizzuto and Hancock*. The Stewards are not, of course, obliged to give detailed reasons for their determinations. They give their reasons in a summary form, which they are entitled to do. However, those determinations are of limited assistance to the Tribunal, for the simple reason that they are largely bereft of any relevant detail.

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[78] Racing Appeals Tribunal NSW, 30 September 2022.
[79] Racing Appeals Tribunal ACT, 12 November 2021.
[80] HRNSW Stewards, 17 December 2020.
[81] HRNSW Stewards, 1 October 2021.
[82] HRNSW Stewards, 1 October 2021.
[83] HRNSW Stewards, 8 October 2021.
[84] HRNSW Stewards, 20 October 2021.
[85] HRNSW Stewards, 31 August 2022.
[86] HRNSW Stewards, 9 May 2023.
[87] HRNSW Stewards, 30 November 2023.
[88] Decision of 2 May 2023.

83. Moreover, and at the risk of stating the obvious, the mere fact that a party might be in a position to cite previous decisions in which the penalty for which they advocate has been imposed, does not establish some unifying principle that this will be the inevitable result in each and every case. The decision of this Tribunal in *Turnbull,* to which I was referred by counsel for the Respondent, provides a good example of such a circumstance. True it is that the Appellant in that case was fined as opposed to disqualified. However, the factual circumstances of that case were far removed from those that I am required to consider in this case. Moreover, it is evident from reading the reasons of the Tribunal that the findings which led to the determination that a fine should be imposed included the following:[89]

    (i) the Appellant acted in accordance with relevant notices which had been issued;
    (ii) the Appellant followed veterinary advice;
    (iii) the offending may have been due to "bad luck";
    (iv) the objective seriousness of the offending was to be based on a "few negative facts that were established";
    (v) the Appellant had taken most of the steps that were required of her by the regulator;
    (vi) the objective seriousness of the offending was low;
    (vii) the Appellant's conduct did "not justify a public interest deterrence message"; and
    (viii) any loss of licence would have resulted in a substantial financial impact being imposed on the Appellant.

84. Any further comment about the distinctions between those circumstances, and the circumstances of the present case, would be superfluous. The decision provides no support for the Respondent's position generally, or for the submission that the appropriate penalty is a fine in particular. Moreover, it demonstrates the danger of focussing upon the result, rather than analysing the

[89] At [276] and following.

circumstances of the offending, and the subjective case of the offender, in an effort to determine whether the decision can, in fact, provide some meaningful guidance as to an appropriate penalty in the case which is being considered.[90] Moreover, the fact that there are other determinations to which I was referred in which periods of disqualification *have* been imposed[91] simply confirms the obvious, namely that the circumstances of cases differ, and a determination of an appropriate penalty is to be made having regard to all of the circumstances of the particular case which is being considered.

CONCLUSION

85. In light of the findings I have made, this is a case in which a period of disqualification must be imposed. In the fresh exercise of the discretion, I have come to the view that a disqualification of 7 months is appropriate in respect of each breach of r 190(2). Such periods of disqualification, although they must be imposed separately, should be served concurrently. I am informed that the Respondent has effectively served periods disqualification totalling 34 days. That total period should be deducted from the 7 month period, leading to a total period of disqualification of 5 months and 26 days.

ORDERS

86. I make the following orders:

1. The Appeal is upheld.
2. The decision of the New South Wales Racing Appeals Panel to impose a fine of $12,500.00 on the Respondent is quashed.
3. In lieu thereof, and in respect of each of the 4 breaches of r 190(2) of the Australian Harness Racing Rules to which the Respondent pleaded guilty, the Respondent is disqualified for a period of 5 months and 26 days.

[90] See by way of contrast the decisions in *Waller* (10 February 2017) at [18]; [20]; *Portelli* (4 September 2020) at [12]; and *Green* (6 February 2017) at [17].
[91] See for example *McCarthy* (a decision of this Tribunal of 30 August 2023) and *Russo* (a decision of this Tribunal of 16 August 2023).

4. The periods of disqualification imposed by order [3] are to be served concurrently, and will commence on 29 May 2024.
5. Any appeal deposit is to be refunded.

THE HONOURABLE G J BELLEW SC

22 May 2024