NEW SOUTH WALES

HARNESS RACING

APPEAL PANEL

APPEAL PANEL MEMBERS
D KANE
B SKINNER
J MURPHY

RESERVED DECISION

30 SEPTEMBER 2024

APPELLANT JACK TRAINOR

RESPONDENT HRNSW

AUSTRALIAN HARNESS RACING RULES

190(1)

DECISION

1. **The decision of the Appeals Panel is that the appeal is dismissed. The Appellant is disqualified for a period of 10 months.**
2. **The appeal deposit is forfeited.**

HARNESS RACING NEW SOUTH WALES APPEALS PANEL

Jack Trainor
Appellant

Harness Racing New South Wales
Respondent

Determination

Background and the Notice of Appeal

1 Jack Trainor (**Appellant**) is a licensed harness racing trainer. As of 10 July 2024, the Appellant had trained 1,173 starters in harness racing races. Of those starters, the Appellant has trained 259 winners and a further 319 placegetters.

2 On 12 July 2024, the Appellant lodged with Harness Racing New South Wales (**Respondent**) a **Notice of Appeal** dated that same date.

3 That Notice of Appeal is lodged in respect of a **Decision** made by the Respondent's **Stewards**. That Stewards' Decision was delivered on 10 July 2024 and, it would seem, the Decision was notified to the Appellant on that day.

4 Pursuant to **section 34B(1)(a)** of the *Harness Racing New South Wales Act 2009* (NSW) (**Act**) and **rule 181B(a)** of the *Local Rules of Harness Racing New South Wales* (effective 8 March 2023; **Local Rules**), a decision to *disqualify* a person is appealable to the Harness Racing New South Wales Appeals Panel (**Appeals Panel**).

5 **Rule 181C(2)** required that the Notice of Appeal be lodged within two days of the Appellant being notified of the Stewards' Decision. Noting the date of the Stewards' Decision, the Notice of Appeal was lodged within time.

6 By reference to the Notice of Appeal:

(a) The Appellant does not appeal against the Stewards' Decision, insofar as it relates to the question of the Appellant's guilt.

(b) The Appellant did not seek a stay of the Stewards' Decision or its effect, and no stay of the Decision was granted.

(c) The Appellant's appeal is an appeal confined to the question of the severity of the sanctions imposed by the Stewards.

The Decision and the Disqualification

7 As to the question of severity, the substantive order made by the Stewards, set out within the Decision, was to *disqualify* the Appellant for a period of 10 months, commencing on 10 July 2024 and therefore ending on 9 May 2025 (**Disqualification**).

8 The Decision and the Disqualification together concern a proved breach, by the Appellant, of **rule 190** of the Australian Harness Racing Rules (**Australian Rules**).

9 Specifically, on 23 March 2021, the Appellant presented to race, in a harness racing race conducted in New South Wales, a horse trained by him, named Chubby Checker.

10 The horse raced on 23 March 2021 at Tabcorp Park, Menangle, in a race named the Evekare Assisted Living Pace (**Race**). Chubby Checker won the Race, and following the Race, a urine sample (**Sample**) was taken from the horse and analysed by the Australian Racing Forensic Laboratory (**ARFL**).

11 That Sample was subsequently reported by the ARFL, on 22 April 2021, to have present in it the substance Levamisole.

12 It was not in dispute before the Stewards or in these proceedings before the Appeals Panel that Levamisole is designated as a prohibited substance under the Australian Rules and the Local Rules.

13 The Decision concerns a determination by the Stewards that the Appellant contravened **rule 190** of the Australian Rules. **Rule 190** of the Australian Rules is imperative to the integrity of the sport of harness racing, and well-known to all licensed persons.

14 **Rule 190(1)** provides that *a horse shall be presented for a race free of prohibited substances*. **Rule 190(2)** then says that *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*. Next, **rule 190(4)** says that *an offence under sub-rule (2) is committed regardless of the circumstances in which the prohibited substance came to be present on, or in the horse*.

15 **Rule 190** of the Australian Rules is, in effect, an absolute liability provision. What that means is that it is unnecessary for the Stewards to prove intention, recklessness, negligence or knowledge on the part of the trainer referred to in **rules 190(2) and rule 190(4)**, and hence the Appellant.

16 If the converse were true and it instead *was* necessary for the Stewards to prove intention et cetera, the operation of **rule 190** and the prohibited substances regime under the Australian Rules and Local Rules would become unworkable, and it is likely that the public's confidence in the integrity of the sport of harness racing would be eroded.

17 As distinct from the elements required to prove that a trainer, such as the Appellant, has breached **rules 190(1), 190(2) and 190(4)**, the circumstances by which the horse presents to a race with a prohibited substance inter alia in its system can have relevance to the question of the appropriate sanction.

Appeal Proceedings

18 The proceedings before the Appeals Panel proceeded by way of an oral hearing, conducted on 19 September 2024. In the proceedings before the Appeals Panel:

(a) With the leave of the Appeals Panel, each of the Appellant and Respondent was legally represented for the duration of the hearing.

(b) The evidence material put before the Appeals Panel comprised:

(i) The Notice of Appeal and the appeal documents filed by the Appellant.

(ii) A bundle of 45 exhibits gathered as part of the Stewards' inquiry (**Inquiry**) that led, ultimately, to the Decision and the Disqualification.

(iii) The Respondent's written submissions dated 18 September 2024.

(c) Despite the opportunity being open to him, and notwithstanding the notation on the Notice of Appeal to the effect that the Appellant's legal representative would make written submissions on the Appellant's behalf in the week after the lodgement of the Notice of Appeal, the Appellant did not:

(i) Submit any further, or new evidence in the appeal proceedings before the Appeals Panel.

(ii) Submit, or rely on any written submissions in support of his appeal.

(iii) Seek to cross-examine, in the appeal proceedings, any person who gave evidence before the Stewards.

19 The proceedings before the Appeals Panel proceeded, in the first part, by oral submissions made on the Appellant's behalf. Concisely summarised, the position taken on appeal by the

Appellant was that the Disqualification, of 10 months' duration, was too severe in the circumstances, and that the Appeals Panel should uphold the Appellant's appeal and, in substitution, impose a sanction in the form of either a warning to the Appellant or a *period out of the sport of harness racing* of not more than three months.

20 As to that *period out of the sport of harness racing*, it also was submitted on the Appellant's behalf that the sanction should be imposed in the form of a suspension and not a disqualification, and then perhaps also a suspension just as to the Appellant's licensed right to operate as a harness racing trainer, as distinct from his licensed right to operate as a harness racing driver. The thrust of this submission was that a *period out of the sport* constructed on this basis would allow the Appellant to continue to operate as a harness racing driver, and accordingly earn the fruits of that labour, given that income derived from harness racing activities constitute the main source of the Appellant's income.

21 At this juncture, something must be said about the appropriate *type* of sanction to be imposed, in cases involving a contravention of **rule 190** of the Australian Rules. To that end, it is the longstanding jurisprudence of this Appeals Panel and other appellate jurisdictions such as the Racing Appeals Tribunal, that the appropriate sanction to be imposed for breaches of **rule 190** is a sanction in the form of disqualification. There is no proper basis advanced by the Appellant, for the Appeals Panel to consider deviating from that course, and accordingly the Appeals Panel determines in these proceedings that the appropriate sanction in the form of disqualification.

22 As to the second argument advanced by the Appellant, that the Appellant should somehow be permitted to continue unhindered as a harness racing driver even while he is unable to continue as a harness racing trainer, the Appeals Panel rejects this idea. To allow the Appellant to continue as a harness racing driver while he is suspended from activities as a harness racing trainer would only serve to undermine the principles of general deterrence and specific deterrence. Also the public's confidence in the integrity of the sport of harness racing would likely be diminished to a material extent, if it were the case that suspended trainers, who were suspended for breaches of harness racing's anti-doping rules, were nonetheless permitted to undertake licensed activities as harness racing drivers.

23 In accordance with **rule 181F** of the Local Rules, the Appeals Panel may inter alia:

(a) Dismiss the Appellant's appeal.

(b) Confirm the Steward's Decision.

(c) Vary the Stewards' Decision.

(d) Make any other orders in relation to the disposal of this appeal, that the Appeals Panel thinks appropriate.

24 In these proceedings, the Appellant bears the onus of persuading the Appeals Panel that it should uphold the appeal to his advantage, and impose a sanction more favourable to him than the Disqualification.

25 To that end, the Appellant and his legal representative focused heavily, at the appeal hearing, on drawing the Appeals Panel's attention to numerous aspects of the Stewards' Inquiry and the transcript produced to the Appeals Panel in respect of that Inquiry. To that end, the Inquiry proceeded over a number of hearing days and from 2021 to 10 July 2024, with the Stewards conducting their Inquiry on 24 May 2023, 1 November 2023, 12 February 2024, 13 March 2024 and 12 June 2024.

26 The Appellant's position before the Appeals Panel was that, effectively, he is *blameless* in the context of his contravention of **rules 190(1), 190(2) and 190(4)** of the Australian Rules. This position was taken by the Appellant on the basis that the Appellant acquired Chubby Checker from a vendor in New Zealand in early 2021, in circumstances where it is suspected that, and indeed suggested that Chubby Checker's presentation the subject of the Disqualification was as a result of Chubby Checker being administered Levamisole in New Zealand in February 2021, before Chubby Checker was then transported to Australia.

27 The principles relating to the imposition of sanctions for breaches of **rules 190(1), 190(2) and 190(4)** of the Australian Rules and other similar rules are established in *McDonough v Harness Racing Victoria* [2002] VRAT and cases which have followed the reasoning set out in that judgment. Essentially, the decision in *McDonough* establishes three categories for consideration on penalty:

(a) Where there is *positive culpability* on the part of the trainer (**McDonough Category 1**).

(b) Where the decision-maker (i.e. the Appeals Panel) cannot determine where the substance came from, or where the decision-maker does not accept the explanation given by the trainer (**McDonough Category 2**).

(c) Where the trainer is not responsible for the administration of the substance or for the administration by others, and while technically guilty of the offence because it is an absolute liability offence, the trainer has no true moral culpabilities and accordingly is blameless (**McDonough Category 3**).

28 In the circumstances of the Appellant's case, plainly he is not blameless. While the material generated in the course of the Stewards' Inquiry is positively voluminous, nowhere in the evidence before the Stewards, and hence nowhere in the evidence before this Appeals Panel, is any evidence to prove how the horse came to be presented to compete in the Race, with Levamisole in its system. The Appellant might well suppose that Chubby Checker came to have

Levamisole in its system as a result of facts, matters and circumstances that occurred before Chubby Checker came into his care once it arrived in Australia. But there is no satisfactory proof as to how the horse came to have the substance it its system. For the avoidance of doubt, the Appeals Panel makes no findings as to how Levamisole came to be in Chubby Checker's system thus that it tested positive for the prohibited substance once the Sample was analysed by the ARFL.

29 Moreover and as to the question of blamelessness, there were steps that the Appellant could have taken to determine whether Chubby Checker had any prohibited substances in its system, upon Chubby Checker coming into the Appellant's care. Specifically, the evidence before the Tribunal was that the Appellant was on notice that the Respondent makes available to licensed trainers the option of having horses tested for prohibited substances, upon those horses coming into a trainer's care. The purpose of that program is to provide trainers with an avenue to avoid the exact situation that the Appellant finds himself in.

30 Notwithstanding the existence of, and operation of this testing regime, there was no evidence before the Tribunal that the Appellant took any steps to have Chubby Checker tested for prohibited substances, at any time before the Appellant presented the horse for the Race.

31 The Tribunal determines that the Appellant cannot prove that the circumstances of his case are consistent with McDonough Category 3.

32 The Tribunal determines also, for the avoidance of doubt, that the circumstances of the Appellant's case are not consistent with McDonough Category 1.

33 The Tribunal determines that the circumstances of the Appellant's case are consistent with McDonough Category 2.

34 That then leaves the question of whether the 10-month period of the Disqualification is "excessive", as pleaded by the Appellant in the Notice of Appeal.

35 In this regard, the Appellant's representative drew the Appeal Panel's attention to the decision of the Appeals Panel (differently constituted) in the case of *KerryAnn Morris v Harness Racing New South Wales* (2 May 2024) (**Morris Decision**).

36 On any view, the Morris Decision bears similarities to the circumstances of the Appellant's case. Both cases involved horses testing positive for Levamisole. Both cases concern horses purchased out of New Zealand. The relevant actors in New Zealand, in each case, are to a material extent, common.

37 The sanction handed down on appeal in the Morris Decision was a six-month disqualification. The Appellant submits that his period of disqualification should be no longer, and indeed shorter.

38 To that end, one of the distinguishing features of the Morris Decision is the extent to which KerryAnn Morris, the appellant in that matter, adduced evidence to the Appeals Panel that went to her positive subjective circumstances.

39 If one is to contrast that matter to these proceedings, the Appellant has not availed himself of the opportunity to adduce evidence of his positive subjective circumstances. Nor has the Appellant taken the opportunity to put before the Appeals Panel any evidentiary material attesting to the Appellant's character and personal circumstances. The only character reference put before the Appeals Panel is a letter dated 31 October 2023, signed by Blake Fitzpatrick.

40 The Appeals Panel takes due note of the positive words proffered by Mr Fitzpatrick, about the Appellant.

41 The Appeals Panel takes due note also, of the submissions made on the Appellant's behalf, regarding the effects of the Disqualification and the consequent loss of income suffered by the Appellant. It is no doubt a heavy burden for the Appellant to shoulder, to lose all income from harness racing for a period of 10 months.

42 The *Harness Racing New South Wales Penalty Guidelines* (**Penalty Guidelines**) operate as a guide as to sanctions that should be handed down for inter alia breaches of **rules 190(1), 190(2) and 190(4)** of the Australian Rules. Those Penalty Guidelines are to be read in conjunction with, and in light of precedent decisions including the Racing Appeals Tribunal's decision in *Scott Wade v Harness racing New South Wales* (**Wade Decision**).

43 The Wade Decision is authority for the point that the starting point for a breach of **rules 190(1), 190(2) and 190(4)** of the Australian Rules, that involves a Class 2 substance under the Penalty Guidelines, is a 15-month disqualification.

44 The Appeals Panel adopts this rationale as set out in the Wade Decision. The Appeals Panel notes also that the Appellant has not, apart from in the circumstances relevant to these proceedings and the Disqualification, been found guilty of any other breach of **rules 190(1), 190(2) and 190(4)** of the Australian Rules.

45 The Stewards granted the Appellant a 25 percent discount on sanction on account of the Appellant's plea of guilty. That discount equates to a reduction of 3.75 months. That is the appropriate percentage discount from the starting-point sanction, on account of a plea of guilty.

46 The Stewards then did, in effect, grant the Appellant a further discount of 1.25 months, or about 8.33 percent, on account of his "personal and financial subjectives".

47 There is no evidence before the Appeals Panel, upon which the Appeals Panel could rely (if it were so minded) to reduce the Appellant's sanction to any greater extent than the Stewards reduced the Disqualification from 15 months less 3.75 months.

48 In all of the circumstances and for the foregoing reasons, the Appeals Panel is not minded to disrupt the sanction of 10 months imposed by the Stewards on 10 July 2024.

49 Accordingly, the Appeals Panel dismisses the Appellant's appeal.

50 Any appeal fee paid by the Appellant is to be forfeited by him.

30 September 2024

Darren Kane (Convenor)
Jim Murphy
Brian Skinner