NEW SOUTH WALES

HARNESS RACING

APPEAL PANEL

APPEAL PANEL MEMBERS
Hon W Haylen KC
D Kane
Dr C Suann BVSc

RESERVED DECISION

14 April 2025

APPELLANT NATHAN JACK

RESPONDENT HRNSW

AUSTRALIAN HARNESS RACING RULES

190(1), (2) & (4) x 2

DECISION

The Appeal Panel makes the following orders:

1. **The appeal by Mr Nathan Jack against penalty on both charges is dismissed;**
2. **The appeal fee is forfeited.**

HARNESS RACING NEW SOUTH WALES APPEALS PANEL

Nathan Jack
Appellant

Harness Racing New South Wales
Respondent

Determination

Background and the Notice of Appeal

1 Nathan Jack (**Appellant**) is a licensed harness racing trainer. On 31 December 2024, the Appellant lodged with Harness Racing New South Wales (**Respondent**) a **Notice of Appeal** dated that same date.

2 That Notice of Appeal is lodged in respect of a **Decision** made by the Respondent's **Stewards**. That Stewards' Decision was announced on 28 December 2024.

3 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**).

4 **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. It is unclear whether the Decision was notified to the Appellant on 28 December 2024 or after that date. The Respondent raised no issue at the hearing as to the timeliness of the Appellant's Notice of Appeal.

5 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 in any event it was clarified that no stay was in operation at the time of the hearing before the Appeals Panel on 1 April 2025.

(c) The Appellant's appeal is an appeal confined to the question of the severity of the sanctions imposed by the Stewards. In his Notice of Appeal, the Appellant pleads:

> ...
>
> 1. *The penalty was excessive.*
> 2. *Insufficient weight given to appellant's circumstances.*
> 3. *Stewards panel ignored factual aspects of the defendant's case.*
> 4. *Further particulars to be provided by legal counsel ...*

The Decision and the Penalty

6 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 9 months, commencing immediately on 28 December 2024 (**Penalty**). The Stewards imposed a 9-month period of disqualification for each offence, with such sanctions to be served *concurrently* on the basis that the Stewards determined that there was no intervening act between the first offending and the second offending, such so as to warrant an order that the two periods of disqualification be served *consecutively*.

7 The Decision and the Penalty together concern two proved breaches, by the Appellant, of **rule 190** of the Australian Harness Racing Rules (**Australian Rules**). Specifically:

a) On 7 July 2023, the Appellant presented to race, in a harness racing race conducted in New South Wales in Wagga, a horse trained by him, named SKINNYDIP NZ.

b) On 21 July 2023, the Appellant presented to race, in a harness racing race conducted in New South Wales in Wagga, a horse trained by him, named SKINNYDIP NZ.

8 In each instance, the prohibited substance detected in SKINNYDIP NZ's (**Horse**) system was Levamisole.

9 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.

10 The Decision concerns a determination by the Stewards that the Appellant twice 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.

11 **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.*

12 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.*

13 **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.

14 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.

15 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

16 The proceedings before the Appeals Panel proceeded by way of an oral hearing, conducted on 1 April 2025. 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 volume of 33 exhibits gathered as part of the Stewards' inquiry (**Inquiry**) that led, ultimately, to the Decision and the Penalty.

(iii) A report prepared by Dr Derek Major dated 24 February 2025 and relied on by the Appellant

(iv) A report prepared by Dr Martin Wainscott dated 24 March 2025 and its annexures, relied on by the Respondent.

(v) The Respondent's written submissions dated 31 March 2025.

17 The proceedings before the Appeals Panel proceeded by way of oral arguments made by the legal representatives of each party, together with the oral evidence and cross-examination of each of Drs Major and Wainscott.

18 The Appellant's position on appeal was that the Penalty, of 9 months' duration in relation to two separate periods of disqualification of that duration to be served concurrently, was too severe in the circumstances.

19 The Appellant did not submit that disqualification was not the appropriate type of sanction. To the contrary, counsel for the Appellant submitted that disqualification was the appropriate form of sanction, but that the duration of the disqualification should be 6 months as opposed to 9 months.

20 To this end the Appellant took the Appeals Panel to the decision of the Appeals Panel (differently comprised) in the matter of *Morris v Harness Racing New South Wales* (2 May 2024) (**Morris Decision**), in which case the licensed person received a sanction in the form of a 6-month disqualification for a single breach of the same provisions of the Australian Rules.

21 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.

22 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 Penalty.

23 To that end, the Appellant's position before the Appeals Panel was that, effectively, he is *blameless* in the context of his contraventions 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 the Horse from a vendor in New Zealand in mid-2023, in circumstances where the Levamisole got into the Horse's system before it left New Zealand, or in any event before the Horse entered the Appellant's stables.

24 In this regard, the Appellant relied on the evidence of Dr Major set out in his report before the Appeals Panel, as well as his evidence given orally at the hearing. But that evidence does not rise to the required standard, so that the Appellant can rely on it to discharge his onus.

25 There was no cogent evidence before the Appeals Panel as to matters including, without necessary limitation, the husbandry practices and stabling practices relating to the care given to the Horse in New Zealand, how the horse was otherwise treated in New Zealand by veterinarians and other professional service providers; what the Horse was fed and administered in New Zealand; what other horses the Horse came into contact with in New Zealand and when; and the particulars of the transportation of the Horse to Australia.

26 Moreover, the evidence before the Stewards included evidence given by a witness named John Kennedy, a New Zealand sheep farmer who had the Horse before it was sent to Australia. Mr Kennedy denies that the Horse was administered or came into contact with Levamisole or any product containing it.

27 During the hearing, the parties' representatives notified the Appeals Panel that the parties agreed on the following as being facts:

(a) That the Horse was likely exposed to Levamisole on a single occasion.

(b) That the readings for Levamisole, taken from the analysis of the Horse's urine samples, were very low.

(c) That there is no explanation from the former owner and trainer of the Horse in New Zealand, as to exposure to Levamisole.

(d) The Horse arrived at the Appellant's stables on about 31 May 2023.

(e) The Appellant did not have any elective testing undertaken on the Horse once it came into his stables.

28 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**).

29 In the circumstances of the Appellant's case, plainly he is not blameless. 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.

30 The Appellant might well reckon the Horse came to have Levamisole in its system as a result of facts, matters and circumstances that occurred before it came into the Appellant's care once it arrived in Australia. But there is no satisfactory *proof* to any relevant standard as to how the horse came to have the substance it its system.

31 The Appeals Panel makes no findings as to how Levamisole came to be in The Horse's system thus that it twice tested positive for the prohibited substance once the samples were analysed.

32 Moreover and as to the question of blamelessness, there were steps that the Appellant could have taken to determine whether The Horse had any prohibited substances in its system, upon The Horse coming into the Appellant's care.

33 Specifically, the evidence before the Appeals Panel was that the Appellant, like all licensed persons, 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.

34 Notwithstanding the existence of, and operation of this testing regime, there was no evidence before the Appeals Panel that the Appellant took any steps to have The Horse tested for prohibited substances, at any time before the Appellant presented the horse for the Race.

35 The Appeals Panel determines that the Appellant cannot prove that the circumstances of his case are consistent with McDonough Category 3.

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

37 The Appeals Panel determines that the circumstances of the Appellant's case are consistent with McDonough Category 2.

38 That then leaves the question of whether the 9-month disqualifications being served concurrently constitutes an "excessive" penalty, as pleaded by the Appellant in the Notice of Appeal.

39 In this regard, the Appellant's representative drew the Appeal Panel's attention to the Morris Decision.

40 On any view, the Morris Decision bears some similarity 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.

41 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 the same.

42 But 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.

43 The Appellant here has not produced anything like the evidence relied on by Ms Morris as to her 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.

44 The Appeals Panel takes due note of the submissions made on the Appellant's behalf, regarding the effects of the Penalty 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 9 months, because the requirement to have to disperse all stabled horses so as to comply with the terms of the penalty

45 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**).

46 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.

47 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 Penalty, been found guilty of any other breach of **rules 190(1), 190(2) and 190(4)** of the Australian Rules.

48 The Stewards granted the Appellant a 25 percent discount on sanction on account of the Appellant's plea of guilty and the Appellant's cooperation. 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.

49 The Stewards then did, in effect, grant the Appellant a further discount of 2.25 months on account of his personal, financial and professional subjectives, including "financial sponsorship".

50 There is no evidence before the Appeals Panel, upon which the Appeals Panel reasonably could rely (if it were so minded) to reduce the Appellant's sanction to any greater extent than the Stewards did.

51 In all of the circumstances and for the foregoing reasons, the Appeals Panel is not minded to disrupt the sanction of two 9 month disqualifications served concurrently, imposed by the Stewards on 28 December 2024.

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

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

14 April 2025

The Hon. Wayne Haylen KC
Dr Craig Suann
Darren Kane