RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED PENALTY DECISION

20 APRIL 2023

APPELLANT NATHAN TOWNSEND

RESPONDENT HARNESS RACING NSW

CROSS APPEAL BY HARNESS RACING NSW

AUSTRALIAN HARNESS RACING RULE 190 (1) and (3)

SEVERITY APPEAL

DECISION:

1. **Appeal dismissed, cross appeal partially upheld**
2. **Disqualification of 8 months from 22 December 2022**
3. **Appeal deposit forfeited**

Introduction

1. The appellant, Nathan Townsend, licensed trainer and driver, appeals against the decision of the Appeals Panel of Racing NSW of 20 February 2023 to uphold an appeal and to impose upon him a period of suspension of his licence for 12 months dated from 22 December 2022.

2. The Appeal Panel decision was to uphold a severity appeal by the appellant from the Stewards of Harness Racing NSW ("the respondent") of 22 December 2022 to impose upon him a period of disqualification of 12 months.

3. The Stewards had charged the appellant with a breach of Rule 190, which relevantly was in the following terms:

> "190(1) a horse shall be presented for a race free of prohibited substances.
> (3) If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub-rule (1), the trainer of the horse and the person left in charge is each guilty of an offence."
>
> The Stewards particularised that breach as follows:
>
> "That you, Mr Nathan Townsend, were a person left in charge of the horse Good Cop, a horse which was presented to race at Parkes on Monday, 4 October 2021, with a prohibited substance in its system, namely, modafinil and/or modafinil acid as reported by two laboratories approved by Harness Racing NSW."

4. The Stewards commenced their inquiry on 13 July 2022 into presentations by the appellant's father Mr Stan Townsend and in the course of that inquiry commenced an inquiry into the presentation charged against the appellant. Once charged the appellant sought an adjournment for legal advice, which was granted, and he subsequently by email indicated a plea of guilty on 27 July 2022 and subsequently made submissions on penalty to the Stewards, which led to their decision of 22 December 2022. On 27 July 2022 at their inquiry the Stewards accepted the plea of guilty by Mr Stan Townsend for his three presentations and imposed upon him in each matter a fine of $1,000. Mr Stan Townsend did not appeal.

5. The Appeal Panel conducted its hearing on 9 February 2023 having refused the appellant a stay of the Stewards decision on 23 January 2023. By his appeal to this Tribunal the appellant did not seek a stay and, accordingly, he was disqualified from 22 December 2022 until he was suspended on 20 February 2023 and he remains suspended.

6. The respondent cross-appealed against the decision of the Appeal Panel and by that cross-appeal sought that the decision of the Stewards be reinstated.

7. Accordingly, the respondent seeks that the Tribunal impose a period of disqualification of 12 months and the appellant seeks that there be a suspension for a period determined to end on the date of the decision of the Tribunal. That is, the appellant seeks that the appeal against the decision of the Appeal Panel be upheld, but that the period of suspension effectively be calculated from 22 December 2022 until the determination of this appeal.

8. The appellant had initially sought before the Tribunal that a fine be imposed, but at the hearing of the appeal conceded that the suspension that was now sought would be an appropriate penalty.

9. This being a severity appeal only the necessity to examine the evidence in greater detail falls away.

10. The principal pieces of evidence before the Tribunal are: the Stewards transcript of 13 July 2022; various emails from the appellant making an admission of the breach of the rule and submissions on penalty to the Stewards; notices to industry; the material lodged on the stay application to the Appeal Panel, which added various submissions and annexures; and the stay decision of the Appeal Panel; three references; the Stewards decision; the transcript of the hearing before the Appeal Panel and its decision; a bank statement of the appellant; and, as usual, the various certificates and reports establishing the presence of the subject drug.

11. The appellant by his plea of guilty does not dispute that he has breached the rule, nor that the particulars set out against him have been established.

The drugs

12.There is no dispute that modafinil and modafinil acid are prohibited substances.

13. Dr Wainscott, regulatory vet for the respondent, gave evidence to the Stewards.

14. He stated that modafinil is a prohibited substance, but there is doubt as to whether modafinil acid is a prohibited substance. That is because there is no evidence it is pharmacologically active.

15. He described modafinil as an ingredient in a number of registered products and used as a mild sensorial nervous stimulant as it promotes wakefulness.

16.Dr Wainscott was not aware of any other positive swabs with these substances.

17. He stated that no specific work had been done on the effect of the substance on a horse, but said that as it is a mild stimulant of the nervous system to promote wakefulness he would expect similar effects in the horse, that is, a mild stimulation of the nervous system.

18. He stated, therefore, that modafinil was a prohibited substance and that modafinil acid is a metabolite of modafinil.

19. In relation to the penalty guidelines Dr Wainscott determined that it should be classified as class 2. As it did not have an accepted therapeutic use in the horse he said it was not a class 3. He stated that as it has an effect on the central nervous system as a stimulant it could be classified as class 1, however, because of its mild nature he would classify it as class 2.

20. During the part of the Stewards inquiry relating to Mr Stan Townsend and after he had set out the scenario of the appellant urinating in the stables and having taken the subject substance Dr Wainscott stated that the scenario outlined by Mr Stan Townsend is a plausible one to explain how the horse could have come up with a positive reading.

21. Dr Wainscott confirmed that the substance is not available as a registered veterinary product, nor is it contained in any registered veterinary product. He said it was an S4 prescription-only medicine.

The Facts

22. As stated, a brief consideration of the facts is only necessary.

23. In submissions for the respondent various parts of the evidence of the appellant before the Stewards, in correspondence and before the Appeal Panel were raised. In particular, they related to: remorse; cavalier attitude; tailoring his evidence on sleep apnoea; his actual use of the drug; his father's involvement; his income; his actual farm work; his evidence on his prior TCO2 positive.

24. The appellant's father and the appellant are both licensed trainers. The evidence establishes that the appellant had assisted his father about the operation of his father's business and also conducted his own training business.

25. The appellant has had a lifetime involvement with the industry and is now aged 37 and, indeed, his ancestors also had been involved in the industry for a long time.

26. He first obtained a driver's licence at age 16 and stated he had had some 200 winners.

27. He was first licensed as a trainer in 2016 and stated he had had 70 winners. The evidence for the respondent establishes that he has the following training history: 2016, five starters; not licensed 31 August 2017 to 15 January 2020; 2021 training year, four starters; 2022 training year, 46 starters; income from harness racing in that period $10,648.

28. The appellant also has been a harness racing horse owner.

29. Mr Stan Townsend injured himself on 28 September 2021 and the appellant stepped in and took over the subject horse and presented it to race on 4 October 2021. As noted, he had, however, been assisting his father about his father's stables and exercising his own licence for some time.

30. The Townsend family has a property of some 5,000 "acres", which the evidence establishes carries sheep and farming. There appear to be five separate titles for the subject property and the appellant has been working as a farmhand on some of those blocks. At the end of the day the appellant's evidence about his work and his income from it is unclear. He told the Appeal Panel that he was not paid for the work he did on the farm and that, essentially, he lived a subsistence existence being provided with accommodation and food from the property. He stated he received no income for his farm work.

31. The appellant had told the Stewards that his income was from his farm work and harness racing. That income, therefore, to the Tribunal's assessment would appear to be only $10,648 since 2016.

32. The appellant had been working late at night using a tractor on the subject property and it appears that he fell asleep and the tractor crashed. He was not injured.

33. As a result of falling asleep the appellant, having had discussions with various miners at his local hotel, was told about the drug modafinil.

34. On 12 August 2019 the appellant purchased a packet of those tablets on the internet from an overseas provider and paid $279.83 for them.

35. Again the appellant's evidence is unclear about the times at which he consumed the drug. He stated that he only took it when carrying out harvesting work. The times at which he carried out that work and the number of tablets he took while engaging in that work is uncertain. It may be that he took one tablet or half a tablet. It may be that he consumed all of those tablets or not all of them. There is only evidence before the Tribunal of one purchase as described and,

therefore, it is unclear to the Tribunal whether his evidence on his consumption was true or false or simply uncertain.

36. The appellant was not aware that the subject drug was a Schedule 4 prescription-only drug. He had consulted no doctor in respect of his consumption of it nor any veterinarian in respect of his consumption of it when about horses. He did not consult anyone other than the miners in the hotel as to his use of the drug. It is quite apparent his only awareness of it was that it would keep him awake whilst he drove a tractor.

37. There is substantial evidence about the appellant's statement he suffered from sleep apnoea. Again it is uncertain to the Tribunal whether he was not telling the truth, was telling the truth or simply could not recall what the circumstances were regarding his self-diagnosed opinion of sleep apnoea. He initially stated that he had consulted a doctor, then could not find any records of it, then could not remember having done it, then stated he had been to a medical centre but could not find any record of him having consulted anyone at the medical centre about it. He left his evidence on the basis it was a self-diagnosis.

38. The relevance of sleep apnoea to the issues to be determined remains elusive.

39. The appellant says that the evidence is irrelevant and the respondent only now raises it to indicate the inconsistencies in the appellant's evidence, which, as stated, are difficult to discern.

40. On the issue of sleep apnoea he provided the medical report from what he said was a doctor at the medical clinic where he may have talked about sleep apnoea. He provided a report under the hand of Dr Adam Smith of 14 March 2022 where the appellant had stated to Dr Smith, "He started taking modafinil when doing night shifts on tractors to keep himself alert in 2019." Dr Smith did state he had suggested to the appellant he get a sleep study done so that they could rule out sleep apnoea.

41. Accordingly, the appellant, was consuming a non-prescribed drug and, knowing that he was doing so, did so in circumstances where, for a considerable period of time, he had been urinating about the stable area where the subject horse was kept. Indeed, other horses also were kept there.

42. The appellant knew that the subject horses picked at the grass about the area where he urinated.

43. Accordingly, the Tribunal has facts which establish that a licensed trainer improperly taking a drug that could only be prescribed by a doctor and knowing that he was doing so is urinating about the stables where he operated knowing that horses were picking at the grass about the area where he had urinated.

44. The respondent had published Notices to Industry.

45. The first of those notices is dated 12 June 2018 and entitled “Human Prescription Medications”. Trainers were cautioned to ensure that horses were not contaminated with human prescription medications through feeding, handling or through human excretion within the stable environment and various advice was given as to how to avoid contamination.

46. The second notice is dated 6 September 2018 and is entitled “Stable Contamination”. Caution was given about stable environment contamination leading to breaches. Advice was given to trainers and others how to avoid that contamination.

47. The appellant did not read notices to industry. The appellant was ignorant of those notices to industry.

48. The appellant was not aware that other trainers and other licensed persons had been dealt with by the Stewards and various tribunals in a number of jurisdictions for contamination by urinating about stable areas. He had failed to keep himself informed of disciplinary decisions such that he might have avoided husbandry failures.

49. The case has been run on the basis that it is accepted and agreed as a fact that the prohibited substance in the subject horse came as a result of the contamination of the stable environment caused by the appellant urinating in that stable environment at a time when he was consuming the subject drug.

50. The appellant has given evidence that he has stopped taking the subject drug, stopped urinating about the stable area and fenced off the stable area so that horses cannot pick about it.

51. The appellant has expressed on a number of occasions his remorse for his wrongful conduct.

52. The appellant has given additional subjective facts.

53. He has been married for nine years and has children aged five and eight. His wife was previously a licensed stablehand.

54. Much to the appellant’s credit he gave detailed evidence of the assistance provided to others during recent floods. In particular, at his own cost, and with others, he attended at other towns some distance away and, without being asked to do so, assisted people in cleaning up their houses and in other ways.

55. The appellant also gave evidence of assisting at Parkes Raceway on a voluntary basis on various working bees.

56. The Tribunal repeats its mantra that those who make mistakes and are liable to some form of penalty are entitled to have taken into account assistance they have provided to others in the community.

57. The appellant has called in aid referees.

58. Pat Jones on 3 February 2023 stated he had been associated with the industry all his life, having had various licences and is currently a B-grade trainer with a good record. He has known the appellant for all his life and the appellant has driven his horses and always been reliable and honest. He is aware of the charge. He considers the appellant honest, trustworthy and reliable, a good all-round person. Mr Jones refers to the assistance provided to him and others in the recent floods.

59. The next is undated by Bernie Hewitt, who is a trainer and driver in the industry for over 45 years. He currently holds an A-grade trainer's licence. He is aware of the charge. He has known the family for over 30 years and refers to the appellant having assisted him during droughts by providing him various items. He considers him as well presented and well conducted, a genuine "open guy" and ready to talk to everybody. He describes him as a good, hard-working "guy".

60. On 6 February 2023 Mr Jason Turnbull, who owns racing stables with a number of horses and is a trainer and driver, and a person associated with the industry all his life, says he has known the appellant for over 20 years and driven for him. He is aware of the charge. He finds him a likeable person and gets on well with him, and says he is an honest, good person and always helpful around the track.

61. References by licensed persons are given substantial weight.

62. The appellant has a prior where he was disqualified for 18 months in relation to a TCO2 offence, which dated from 10 July 2014. The Tribunal again states that a person with a prior cannot expect to be treated as leniently as a person without a prior.

63. The appellant's limited time in the industry as a licensed person means there is no discount for longevity.

64. The respondent has seized on what it says is inconsistent evidence by the appellant on the material that the Tribunal found against him in respect of that 2014 matter as against what he has said during the course of this matter in relation to how that TCO2 positive occurred.

65. The inconsistency is said to be in the source of the positive. He told the Appeal Panel that the bicarbonate came to be in the water fed to the horses and there was a mix-up. He had previously said and been found in the decision against him that it was a mix-up in the feeds.

66. With the passage of time and absent other matters, the Tribunal does not find that, if there is any inconsistency, and there appears to be, that that is not a material factor on an assessment subjectively of the appellant.

67. The various inconsistencies to which reference has been made do not cause the Tribunal to come to the conclusion that the remorse expressed by the appellant, as submitted by the respondent, should be disregarded on the basis that he is prepared to change his evidence to suit circumstances.

68. The appellant was also said in submissions to have adopted a cavalier attitude towards the Stewards in the submission he made on penalty.

69. The Tribunal has considered that submission and, alone for the fact he was an unrepresented person, does not come to a conclusion that he has sought to be cavalier in the way in which he chose to express his beliefs as to the circumstances of the breach.

70. His submission of 27 July 2022 contained his plea of guilty, the fact he was only filling in to help his dad, that he was only in charge of the horse for a couple of days and things have been tough. His next email said that “you guys work her out let me know how I get on.” He continued that he was not the trainer, he had only taken care of the horse for a few days, it was a contamination case because it was in the soil (to paraphrase the email).

71. As stated, that material is not found to cause a reduction for any remorse that he has expressed.

Parity Cases

72. It is trite to say that every decision maker, having to consider whether other cases provide guidance, always express the mantra that few cases are ever alike and often, accordingly, parity cases are of no assistance.

73. However, it is important to ensure uniformity of decision making that cases said to provide a parity consideration are analysed to see whether they can be of any assistance. If nothing else, they are likely to provide a range of penalties suitable to various types of conduct.

74. Each party relies upon a number of cases.

75. The respondent particularly relies upon the RAT NSW decision of Locke of 15 March 2019.

76. Locke was a licensed stablehand who was taking a prescribed medication and in the habit of urinating about the stable area. He was in charge of the horse at its presentation and it was trained by Aiken. The source of the contamination was both urination and grey water. The drug was a class 2. Locke had no priors. A starting point disqualification of six months was determined appropriate for a person failing to comply with husbandry practices, but the Tribunal determined that there be disqualification of 19 weeks.

77. The related case is Aiken, who was the absent trainer for the subject horse, unaware of Locke's conduct and he was fined $400.

78. The respondent also put in the Tribunal decision of Farrugia 28 January 2021, but only in relation to the determination made in that case that the various terms of a disqualification which flow from rule 259 were to be varied by not imposing some of the conditions on the facts and circumstances of that case. That is, there is a precedent for removing terms of disqualification.

79. The Tribunal notes that in submissions the appellant did not invite the Tribunal to exercise a similar power to that in Farrugia. The gravamen of that submission was on the basis that a disqualification is so serious a matter that it must be reserved for appropriate cases and it would not be appropriate if a disqualification was to be imposed on the basis that certain of its implications would not follow.

80. Accordingly, the Tribunal will not further consider the removal of any limitations on a disqualification, if a disqualification is found to be appropriate, despite the fact that the respondent invited the Tribunal to give consideration to that.

81. It might be noted also that in Locke the Tribunal there referred to other precedent cases. A list of those cases was set out in paragraph 185. The facts are not set out but the penalties range from a fine of $750 through suspension to the maximum disqualification of six months. Those cases may only relate to the subject drug in Locke, it appears.

82. In any event, in paragraph 156 of Locke the decision of Carol of 2015 was noted as providing that a person with a prior, which is old, must nevertheless be considered less leniently than one without a prior

83. In paragraph 157 the case of Harpley of the Stewards of 9 July 2018 on a plea of guilty but recording no penalty on a conviction because the contamination was of a prescription medication found in the septic sewer system.

84. In paragraph 158 the Stewards decision of Davies of 19 August 2016 on the same facts and circumstances led to no penalty.

85. In paragraph 159 the case of the Victorian Stewards of Smerdon of 4 September 2013 with a trainer regularly urinating in his stables who was on heart medication led to no action.

86. It is noted that in paragraph 162 the Tribunal referred to the distinguishing of cases on the basis that while contamination or urination was involved, there was not a husbandry failure, as was seen in the Locke case.

87. The appellant called in aid a number of cases.

88. The Stewards decision of 29 August 2022 in Hancock where, on a plea of guilty, a fine of $1,500 was imposed where a stablehand Upton had been urinating in the stable area and producing a class 3 prohibited substance for a trainer on a plea of guilty with a 30-year-old record led to that $1,500 penalty. Hancock had no priors.

89. On the same date 29 August 2022 the Stewards dealt with the stablehand Upton and imposed a monetary penalty on him of $1,500.

90. The next matter is the 20 October 2021 Stewards decision in the matter of Sam Hewitt who pleaded guilty but determined no penalty because the contamination with the stable environment was beyond the control of the trainer. Hewitt had a prior in 2011 of a class 3 drug.

91. Reference was made to the recent decision of Schembri, which is a matter of a finding of a new drug but which is still subject to a Stewards inquiry. Absent any determination, the Tribunal finds no assistance from the submissions in respect of that matter.

92. The respondent also relies upon the 5 December 2022 Stewards decision in Lindsay. There a fine of $2,000 was imposed from a contamination within the stable environment of a class 2 with a trainer with no priors and a guilty plea. That was a trainer with 22 years' experience. That case appeared to involve the finding of medication taken by the trainer's wife in the domestic sewerage system.

93. The appellant relied upon the Victorian Racing Tribunal decision of 8 February 2021 in the matter of Monk. He was a trainer who pleaded guilty to a detection of prescribed blood pressure medication in circumstances where he had been urinating in the horse area and his conduct was found to be inadvertent, noting he had a 40-year history. A fine of $2,000 was imposed with $1,000 of that suspended.

94. The appellant also relied upon the ACT Tribunal decision in the matter of Reichstein of 12 November 2021 where the Tribunal upheld an appeal and imposed a fine of $500 as against a decision of the NSW Stewards to disqualify him for a period of three months.

95. Next is the Stewards decision of 28 March 2023 in the matter of Grives found guilty but no penalty imposed for contamination in the stable environment through the farrier.

96. Not referred to by the parties but noted in the bundle of materials is the 20 March 2023 decision of Ruggari, who pleaded guilty to an environmental contamination emanating from plants and no penalty was imposed.

97. Also in the bundle of material but not referred to by the parties is the 1 October 2021 stewards's decision of Cassell, who pleaded guilty to a drug resulting from environmental contamination but no penalty was imposed.

98. Also not referred to is the 1 October 2021 decision of Ison, who pleaded guilty but received no penalty as a result of environmental contamination.

Some Other Principles

99. The Tribunal notes its decision in the matter of Muscat in 2018 where it stated:

> *"*It seems to the Tribunal that any responsible trainer in this day and age, having regard to the frequency with which the Stewards and the industry and, indeed, this Tribunal has to deal with contamination caused by means other than improper administration, that husbandry practices must be acutely in the mind of any trainer."

100. The Tribunal also notes that for many years it has stated that hardship is an inevitable consequence of the loss of the privilege of a licence, but in appropriate facts and circumstances that may well be the outcome that arises.

101. That principle is not dissimilar to the principle that in certain cases the facts and circumstances when considered objectively are so serious that favourable subjective factors cannot lead to any discount.

Use of the Penalty Guidelines

102. The Tribunal has stated its approach to the penalty guidelines in Turnbull on 30 September 2022. They will be taken into account but are guidelines only.

103. This drug is arguably a class 1 prohibited substance and the appellant has a prior for a class 2 in 2014. As a second offence, therefore, he could face a 10-year disqualification.

104. However, this case has proceeded on the basis of Dr Wainscott's evidence that, for the reasons expressed by him, this prohibited substance and the facts and circumstances of this case it should be treated as a class 2. That means for a second offence a disqualification of not less than five years.

105. It has been the fact that the cases of contamination have either not led to a disqualification or if there is one a period much less than that specified in the guidelines. That enables a distinction between presentation within the various McDonough categories as against the ability of a trainer to establish that it was caused by contamination even though the trainer was not blameless – McDonough category 2.

106. Here the Stewards quite fairly did not have regard to the guideline by imposing a starting point of five years' disqualification but reduced that to 18 months. That is a substantial reduction.

107. It has not been suggested to the Tribunal by the respondent that it consider a starting point greater than 18 months. Of course, the appellant submits that there should be no disqualification let alone a disqualification with the starting point of 18 months.

108. Having regard to the determination made by the Stewards the Tribunal will not consider any disqualification, if appropriate, greater than 18 months as a starting point.

Submissions

109. The submissions made by the parties to the Tribunal were in recognition of the fact that detailed submissions were made to the Stewards and, in particular, to the Appeal Panel and, accordingly, brief submissions only were made to the Tribunal. The Tribunal has regard to those detailed submissions made to the Appeal Panel.

Respondent

110. The respondent pointed out that this was a second breach with a Schedule 4 prescription-only medication, which itself would provide a mild stimulation to a horse. Because the appellant himself was involved in the conduct it was said to be more important on objective seriousness.

111. His prior was noted and also a limited training history. His income was said to be nominal from harness racing at $10,648.

112. The remorse expressed was noted, but for the reasons outlined earlier it was submitted that that remorse should be disregarded. That evidence and the submissions on it is not repeated.

113. The respondent submitted that a suspension was not appropriate and pointed out the substantial leniency that the Stewards have taken into account.

114. It was accepted that this was a contamination case but again the nature of the drug, the circumstances, the ignorance of the notices to industry and the necessity for a strong deterrent message was emphasised, particularly the need for husbandry practices.

115. A lengthy dissertation on the precedent cases was adopted.

116. The respondent particularly emphasised that Locke was the only case that provided any guidance and each of the others could be disregarded on the basis that the differences were so great that parity could not be determined from the appellant's cases.

117. The Tribunal's hardship principles were adopted.

Appellant

118. The appellant again relied upon earlier submissions and noted the brief history of the matter, which does not require repetition. It was said that a disqualification does not flow from those facts.

119. Considerable emphasis was placed upon remorse, the irrelevance of sleep apnoea, the principles in *Kavanagh v Racing NSW* and that the prior is irrelevant.

120. It was acknowledged that the Tribunal's decisions meant that continuing to argue for no penalty would not be successful and, thus, the submission that there be a limited suspension was advanced.

121. It was said that the public perception in this case would not be one of a need for general deterrence but the public would be shocked that anyone in these circumstances could lose the privilege of a licence.

122. The impact of a disqualification has effectively been a banishment and all of its consequences were such that it was not appropriate to impose it in this case.

123. The list of cases on which the Stewards determined no penalty or a limited fine was emphasised.

124. In particular, the fact that no disqualifications were imposed on those various precedent cases was emphasised.

125. It was submitted that the interstate decisions of Monk and Reichstein should not be disregarded simply because they were interstate/inter-territory decisions.

126. It was emphasised that he was just helping his father out and that generally he gets no income from what he does upon the property and there is a need to be there because he lives with his parents.

Respondent in Reply

127. It was emphasised by the respondent that the appellant's cases did not involve a contamination by the trainer, nor did they have the similar facts and circumstances of the other conduct by the appellant.

128. It was emphasised that the appellant had been helping his father for some years, it was a Schedule 4 prescription drug and his use of it without prescription was serious, the nature of the substance itself, ignoring the notices to industry and his general husbandry practice failures were such that a protective order by way of disqualification was necessary.

129. The leniency extended to him by the stewards was emphasised.

130. It was particularly emphasised of the frequency with which trainers and licensed persons are found to be urinating about the stable area and leading to positive presentation matters was such that the message of general deterrence must be greater.

Determination

131. The Tribunal first determines objective seriousness having regard to the need to promote the public interest by the deterrence of others but not to impose a penalty that is greater than that necessary to achieve that objective. Totality, parity and course of conduct are analytical tools to assist in that exercise. The issue of the cost of doing business does not arise for consideration on the facts of this case.

132. The facts and circumstances of this case indicate that the adoption of the penalty guidelines starting point is not appropriate.

133. That is determined because that is consistent with prior contamination generally cases and was not the approach adopted by the Stewards, nor referred to by the Appeal Panel.

134. That penalty guidelines starting point for a second breach would be 10 years. That is manifestly excessive on the facts and circumstances.

135. The key facts of this case relevant to the aspects of deterrence are: the prohibited substance came to be present in the appellant as a result of him obtaining it unlawfully or illegally on the internet from an overseas provider; it was a Schedule 4 prescribed drug and that makes the possession and consumption of it more serious; the appellant did not read the notices to industry and remained entirely uninformed of the gravity of the practice of urinating about the stable area; the appellant had not had regard to prior determinations of the stewards and tribunals on the issue of contamination about stables, although this is not a major factor on objection seriousness; it was the appellant himself who urinated about the stables; it was the appellant himself who presented the horse to race; the appellant had made no inquiries about any risk of him consuming the substance whilst he was handling horses and, in particular, did not speak to a doctor or veterinarian about any possible side effects which may have an impact upon a horse he was handling.

136. Consistent with the guideline approach the objective seriousness is elevated by reason of the fact that the appellant has a prior presentation for a prohibited substance. That makes the extent of the need for special deterrence elevated. It means that others who consider this conduct on an objective seriousness basis would consider that he should not be dealt with as leniently as those who do not have prior positive presentations.

137. The Tribunal again emphasises, as it did in Muscat, the necessity for trainers about to present a horse to race to ensure that their husbandry practices are at the highest standards. Here the appellant's could not be considered to be of any standard based upon his conduct of urinating about his stables at a time when he knew he had consumed a substance.

138. The appellant cannot be assessed as blameless but the Tribunal does accept the explanation for the positive. It is, therefore, under the McDonough principles that his conduct is in category 2 and, accordingly, a penalty appropriate to the facts and circumstances which would not have a starting point on that approach of a fine or no penalty.

139. These facts and circumstances, particularly with a prior, necessitate a substantial message of special deterrence.

140. That message is reduced by the remorse expressed by the appellant, his understanding of his wrong conduct and the steps taken to prevent that conduct recurring, namely, no longer urinating about the stables, cessation of the use of the subject substance and the erection of a fence to prevent horses picking about the stable area (to the extent that could now be a relevant issue).

141. On the issue of general deterrence, each of the above summarised failures of the appellant warrant that all other trainers be clearly on notice of the consequences of such failures and, in addition, the general public, whether betting or otherwise, will note the view which is taken about the seriousness of such conduct as it has such an impact upon the integrity of the industry.

142. It is necessary to decide whether the facts and circumstances of this are so serious that no discount should be given to subjective circumstances. The Tribunal determines that that would not be consistent with precedent nor justified on these facts and circumstances.

143. The Tribunal is not persuaded on the facts available to it that the appellant's work as a farmhand on his parents' property is of such weight that it should justify the removal of an appropriate penalty and the imposition of some lesser penalty which would enable him to continue his farm work. The evidence is simply insufficient.

144. At best the Tribunal accepts that he works as a farmhand on his parents' property and that it is possible that parts of the property upon which he engages in that work may correspond with the training facilities of his father and himself. But the evidence touching upon five separate titles and some 5,000 "acres" as against an area farmed of some 700 hectares is as clear as the evidence is and does not go to indicate the precise locations on the property where he would be precluded from engaging in that work.

145. In any event, the Tribunal notes the appellant's evidence that he is not paid for that farm work and has a subsistence-style living. That very much reduces the importance of the farm work. To the extent there may be collateral issues for the family in the operation of the farm, that is a matter for the family and does not cause the Tribunal to come to a conclusion that an appropriate penalty should not be imposed.

146. The Tribunal does not accept the submissions for the respondent that the appellant has forfeited a right to a reduction for remorse, or some part of it, because of the identified issues where it is said he set out to mislead the Stewards and the Appeal Panel. Those issues were identified and summarised earlier.

147. The Tribunal is more satisfied to find a reflection of his character on the issue of remorse by reason of his community work.

148. The work done to assist others in the course of the floods, which is corroborated by a referee, is of such a commendable nature that it causes the Tribunal to make a favourable finding in respect of him. As the Tribunal often expresses, those who fall to be considered for some form of discipline who have

assisted others in the community on a voluntary basis are entitled to have that taken into account in their favour.

149. Of course, also in that category is his voluntary work at Parkes.

150. He is also entitled to the usual 25% reduction for his plea of guilty and cooperation with the Stewards and others.

151. The Tribunal again takes into account in his favour the contents of the various references, which are all favourable.

152. The appellant argues most strongly that a fine would have been appropriate but for the final submissions made to the Tribunal to the effect that a suspension equivalent to time served is the appropriate outcome.

153. The Tribunal does not find by a consideration of parity cases that that is an appropriate outcome in this matter.

154. On parity the Tribunal agrees that contamination cases invariably lead to a fine. That outcome is reinforced on a plea of guilty, remorse and changes in husbandry practices.

155. But none of the parity cases to which the Tribunal has been taken by the appellant contain the facts and circumstances of this case.

156. Repeating again those facts and circumstances as they distinguish the parity cases they are: the acquisition of the drug; ignorance and non-application of the notices to industry; he was the cause of the contamination; he was the presenter; sewer systems had nothing to do with it.

157. The Tribunal again distinguishes the two interstate/territory cases of Monk and Reichstein. In particular, neither of those jurisdictions have the current, or longstanding, approach to disciplinary outcomes that apply in NSW. Neither has the penalty guidelines as a starting point, and whilst they are not applied in this case, they clearly distinguish penalty outcomes in this jurisdiction from others.

158. No criticism of the determinations made in Victoria and the ACT are given in such a comment.

159. Accordingly, Monk, which has the closest similarity of the various parity cases relied upon by the appellant to these facts, is not applied. For the same reasons Reichstein is not applied.

160. The closest case is Locke and in this matter the facts and circumstances are more serious than Locke. The distinguishing on Locke is: not prescribed

medication; trainer; a prior; no grey water or sewerage system relevance. The similarities in Locke are: urination in stable area; class 2.

161. The Tribunal noting that Locke had a starting point of six months' disqualification means that the Tribunal considers a starting point greater than that is appropriate on these facts and circumstances.

162. Accordingly, the Tribunal does not accept the submissions for the appellant that a suspension is appropriate.

163. In view of the fact that in Locke there was a six months' starting point means that whether this was to be a suspension or a disqualification, time served to date does not reach six months and, accordingly, is rejected.

164. The Tribunal determines that the facts and circumstances of this case require a deterrence message in the public interest of a starting point of 12 months' disqualification.

165. As against that starting point there will be a discount of 25% for the plea of guilty and 15% for the other subjective factors. While the Tribunal will now in cases seek to avoid mathematical formulae, the facts and circumstances of this case justify an expression of the totality of the subjective discounts in the fashion just outlined.

166. That means a discount of 40% from the starting point of 12 months, and that discount is four months.

167. The Tribunal determines that there be a period of disqualification of eight months to commence on 22 December 2022.

168. As the period of disqualification is more serious than the 12 months' suspension imposed by the Appeal Panel, the Tribunal dismisses the severity appeal of the appellant.

169. In this matter the respondent sought in the nature of a cross-appeal the penalty considered appropriate by the Stewards. That cross-appeal has been successful in part in that a disqualification was imposed but not in whole because the period of disqualification is eight months and not 12 months. In that sense the cross-appeal has been partially successful.

170. The Tribunal invited the parties to make submissions on the appeal deposit and it was an agreed situation that the Tribunal will determine the refund or otherwise of the appeal deposit based upon its determination.

171. The principal issue on the question whether the appeal deposit should be refunded is that the appellant has not been successful.

172. The Tribunal orders the appeal deposit forfeited.
