NEW SOUTH WALES
HARNESS RACING
APPEAL PANEL

APPEAL PANEL MEMBERS

W Haylen KC
B Skinner
D Kane

DETERMINATION

24 August 2026

APPELLANTS SAM HEWITT & EDWARD ABBEY
RESPONDENT HRNSW

APPLICATION TO WITHDRAW APPEALS
& COSTS APPLICATION

HARNESS RACING NEW SOUTH WALES APPEALS PANEL

Samuel Hewitt and Edward Abbey
Appellants

Harness Racing New South Wales
Respondent

Determination

Introduction

1. Samuel Hewitt and Edward Abbey (together the **Appellants**) each lodged an appeal to this Panel on 20 March 2026. Neither appeal has been heard. Each appellant now seeks leave to withdraw his appeal under **rule 181C(8)** of the Local Rules of Harness Racing New South Wales (**NSWLR**) and the Australian Harness Racing Rules (**AHHR**; AHHR and NSWLR together the **Rules**), and Harness Racing New South Wales (**HRNSW**) seeks its costs as a condition of that leave.

2. The Panel has determined both applications on the papers; no party having sought an oral hearing. The Panel met on 21 August 2026 to deliberate and to settle these reasons.

3. The material before the Panel is:

   (a) The Notice of Appeal of Mr Hewitt dated 20 March 2026;

   (b) The Notice of Appeal of Mr Abbey dated 20 March 2026;

   (c) The letter from McGirr & Associates to HRNSW dated 10 June 2026;

   (d) HRNSW's outline of submissions dated 12 June 2026 (**RS**);

   (e) The Appellants' outline of written submissions dated 29 June 2026 (**AS**), together with the affidavit of Justin Philip Drew sworn 29 June 2026 and the file note annexed to it as **JPD-1**; and

   (f) HRNSW's outline of submissions in reply dated 9 July 2026 (**Reply**).

4. For the reasons which follow, the Panel grants leave to each appellant to withdraw his appeal, and does so on the condition that the Appellants pay HRNSW's costs, fixed in the sum of $5,000 in total, on account of costs thrown away after 12 May 2026. The Panel makes no order against the Appellants' legal representatives because it has no power to do so. Regardless, the Panel places on record its comments as to the conduct of the proceedings and the consequences that flow.

Background

5. The following chronology is not controversial:

   (a) On 20 March 2026, Mr Hewitt appealed against the decision of the Stewards to charge him and to find the charge proven against him. On the same day, Mr Abbey appealed against the decision of the Stewards to disqualify the horse Ark Sea. Both decisions arose out of one prohibited substance matter concerning that horse, involving a positive test to synephrine.

   (b) By emails dated 23 and 25 March 2026, Carl Ryman advised the Secretary of the Panel that McGirr & Associates were retained for both Appellants.

   (c) By emails dated 23 and 28 April 2026, the Appeal Coordinator, Diane Lobb, wrote to the Appellants' solicitors seeking confirmation that 11 June 2026 was a suitable hearing date. Neither email was answered.

   (d) On 2 May 2026, Code Sports published an article headed "'*A $400k stain': Owner hits out after Ark Sea's disqualification for positive synephrine test*", in which Paul McGirr of McGirr &

Associates was quoted at length criticising the strict liability provisions of the Rules and saying that he was "*writing to Harness Racing New South Wales*" to seek a public statement exonerating his client. There is no record of that correspondence having been issued.

(e) On 12 May 2026 at about 11.44am, Ms Lobb telephoned Justin Drew, an employed solicitor of McGirr & Associates, following up her email of 28 April 2026. Mr Drew's file note records that he "*notified DL that the Ark Sea appeals would not be pursued and they were both to be withdrawn*". His affidavit, **JPD-1**, puts it a little differently at [7]: "*I informed her that we were instructed to withdraw the appeals and a hearing date would not be required*".

(f) No application for leave to withdraw was made at that time or at any other relevant time.

(g) On 22 May 2026, Ms Lobb emailed the parties advising that the appeals were listed for hearing on 11 June 2026.

(h) On 29 May 2026, Ms Lobb emailed directions for the filing of submissions.

(i) On 5 June 2026 HRNSW's solicitors filed and served submissions on the appeals. None of those communications was answered by the Appellants' solicitors.

(j) At 3.21pm on 10 June 2026, the eve of the hearing, McGirr & Associates wrote asserting that "*the appeals lodge[d] 20 March 2026 by Messrs Hewitt and Abbey are withdrawn with immediate effect*". The letter sought no leave and referred to no rule. It is not clear whether the relevant provisions of the NSWLR were considered.

(k) The hearing listed for 11 June 2026 did not proceed.

(l) Three members of the Panel had by then read into the matter and reserved the day for the hearing of the Appellants' appeals.

(m) Directions were then made for submissions on the withdrawal and on costs, which were filed on 12 June, 29 June and 9 July 2026.

Leave to withdraw

6. **NSWLR 181C(8)** provides:

> *No appeal commenced under section 34B of the Act may be withdrawn except with leave of the Appeal Panel. In granting leave to withdraw an appeal, the Appeal Panel may impose such terms and conditions as it thinks fit, including as to the payment of the costs of the appeal by one party to another.*

7. Two things follow from that text, and neither has been grasped by the Appellants' solicitors.

8. First, an appeal to this Panel is not withdrawn by a party announcing that it is withdrawn. Leave is constitutive, not confirmatory. Until leave is granted the appeal remains on foot, the Panel remains seized of it, and the parties remain obliged to prepare for it.

9. The proposition that appeals may be "*withdrawn with immediate effect*" by letter, as McGirr & Associates asserted on 10 June 2026 in this matter concerning the Appellants, is simply wrong.

10. Second, the requirement is not an administrative formality. It exists so that the Panel, and not the party who commenced the appeal, controls the disposal of proceedings which consume the Panel's time and the regulator's resources, and which bear upon public confidence in the integrity of the sport. The second sentence of the rule, which permits the Panel to impose terms including as to costs, would be rendered pointless if a party could pre-empt it by declaring the appeal at an end.

11. That said, there is no utility in refusing leave. The Appellants do not wish to prosecute their appeals and the Panel will not compel them to do so. Leave will be granted to each appellant. The question is the terms upon which it is granted.

The power to award costs

12. The costs power is a creature of the Rules rather than of the **Act**. Part 5A of the *Harness Racing Act 2009* (NSW) says nothing about costs: **s 34D(1)(e)** permits the Panel to "*make another order in relation*

to the disposal of the appeal as the Appeal Panel thinks appropriate", and **s 34J** permits the rules to provide for appeals. The power to award costs is found in NSWLR **181C(8)** and NSWLR **181F(e)**.

13. The Panel accepts the Appellants' submission at AS [16] that the power is discretionary and that costs do not follow the event as of course in this jurisdiction. The Panel does not understand HRNSW to have contended otherwise.

14. The Panel also accepts, as AS [17(f)] submits, that these are specialist disciplinary appeal proceedings and not ordinary civil litigation. That consideration cuts both ways. It means that costs are not automatic. It also means that the Panel is neither equipped for, nor obliged to embark upon, an exercise resembling a taxation. Where a lump sum is to be fixed, the Panel may and should proceed on a broad-brush basis so as to avoid the further expense of assessment, provided that the sum arrived at is logical, fair and reasonable.

Should any costs order be made?

15. The real question is whose conduct caused HRNSW to incur costs which, in the event, were thrown away.

16. (**The 12 May telephone call**) The Panel accepts Mr Drew's evidence that the call occurred and that he told Ms Lobb the appeals would not be pursued. His affidavit is unchallenged. The Panel does not accept, however, that the call bears the weight the Appellants place upon it, for four reasons:

    (a) The call did not withdraw the appeals and could not have done so. On the Appellants' own file note the appeals "*were both to be withdrawn*", which is an expression of future intention. No leave was sought, then or at any time before 10 June 2026.

    (b) The Appeal Coordinator is not the respondent. She is an officer of this Panel, not a conduit between the parties. Notice to her is not notice to HRNSW, and it was HRNSW which was incurring the costs.

    (c) **Rule 22.6** of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) obliged Mr Drew to inform HRNSW promptly of the substance of an ex parte communication with this Panel. There is no evidence that he did so. **Rule 22.8** obliged the Appellants' solicitors to inform HRNSW as soon as they had reasonable grounds to believe that there would be an application to vacate or adjourn the hearing. There is no evidence that he did so. Those apparent failures are the reason HRNSW knew nothing of the 12 May call until 29 June 2026, and they are unanswered in the Appellants' material.

    (d) After 12 May 2026, the Appellants' solicitors received the listing email of 22 May, the directions of 29 May, and HRNSW's submissions of 5 June. Each made plain that the appeals were proceeding to a hearing on 11 June 2026. If, as AS contends, the Appellants believed the appeals were at an end, that belief cannot have survived those communications. Nothing was said until 3.21pm on the eve of the hearing.

17. (**The deployment of the 12 May call**) Something further must be said. The effect of the Appellants' reliance on that call is to cast the Appeal Coordinator as the author of the wasted costs, on the strength of an oral, ex parte conversation which she initiated only because the Appellants' solicitors were not answering her emails. Ms Lobb is not a party. She has no standing in these proceedings, no representation and no means of answering what has been said about her, and she will read it in the course of performing her administrative functions for the Panel. That was an inappropriate course. The Panel deprecates it, and it has not advanced the Appellants' position.

18. (**The Code Sports article**) The Panel gives this little weight on the question of costs. The Appellants are right to submit (AS [40]) that public criticism of a regulatory framework is not a basis for a costs order; licensed persons and their lawyers are entitled to say publicly that they consider the Rules to be wrong, and robustly if they deem appropriate within the ethical confines of their profession. The article is relevant only to this modest extent, in that it establishes that on 2 May 2026 Mr McGirr was engaged, informed and willing to communicate at length about this matter in the press at the very time he was not

answering the Panel's Coordinator, and that the letter he told the press he was writing to HRNSW was never written.

19. The Panel's conclusion is that a costs order is warranted. But its measure is the costs thrown away, and that requires the Panel to identify a date.

The costs thrown away || 12 May 2026

20. HRNSW sought its costs of both appeals at large. The Panel will not go so far. Up to 12 May 2026 these were live proceedings which the Appellants had chosen to commence and were maintaining. HRNSW's costs of responding to them in that period were the ordinary costs of a contested appeal. They were not thrown away; they were incurred because the Appellants exercised a right of appeal they were entitled to exercise. An appellant who brings and then abandons an appeal is not, without more, to be ordered to pay everything the regulator has spent upon it from the day the appeal was lodged.

21. From 12 May 2026 the position is different, and it is the Appellants' own case which makes it so. On their evidence, by that date they had instructed their solicitors to withdraw. Had NSWLR **181C(8)** been addressed then, by an application for leave, and had the notice to HRNSW which **rule 22.6** in any event required been given, nothing that followed would have been necessary. There would have been no directions, no submissions filed on 5 June 2026, no preparation for a contested hearing, no reading in by three members and no hearing day set aside and lost.

22. There is an irony in the Appellants' position. They advance the 12 May call in order to resist a costs order. But the fact that they had by then decided not to proceed is precisely what makes the costs incurred afterwards wasted costs. Their difficulty is not that the decision was made too late; it is that the decision was not communicated to the party that mattered, nor acted upon in the manner the Rules require.

23. HRNSW submits (Reply [14]) that it was not unreasonable for it to continue to incur costs while the appeals remained on foot. That is correct, and no criticism is made of HRNSW or of its solicitors. But the question on an application of this kind is not only whether the receiving party acted reasonably. It is who should bear costs which reasonable conduct by the other side would have rendered wholly unnecessary. The answer here is the Appellants.

Quantum

24. HRNSW claims to have incurred costs "*in the order of $10,240*" on both appeals, with a further $300 estimated in relation to the withdrawal application, and seeks $5,000 against each appellant.

25. The Panel accepts a good deal of the Appellants' criticism at AS [29]–[35]. No invoice, itemised bill, time record, fee note or affidavit of costs has been produced. Nothing identifies who performed the work, at what rate, on what date, on which appeal, or on which side of 12 May 2026. A Panel asked to fix a sum is entitled to material which permits it to assess that sum; and a party which withholds such material should not be surprised to recover less than it claims.

26. The Panel does not accept, however, that the consequence is that nothing can be fixed. The Panel knows what these appeals required because it gave the directions and read the material. There were two connected appeals arising from a single substratum of fact, conducted by one firm of solicitors on each side, with one set of submissions filed for both, listed for one hearing day. To award $5,000 twice over would over-compensate HRNSW for work which was in substance performed once. To award nothing would visit the whole of the waste upon HRNSW, which did nothing to cause it.

27. Doing the best it can on the material, and deliberately erring on the conservative side because the claim is unparticularised, the Panel fixes HRNSW's costs in the sum of $5,000 in total for both appeals. That sum represents the Panel's assessment of the costs reasonably incurred by HRNSW after 12 May 2026, being in substance the preparation and filing of its submissions of 5 June 2026, its preparation for the hearing listed on 11 June 2026, and its costs of the withdrawal application. It is less than half of the amount claimed. The reduction reflects both the confinement of the order to costs thrown away after 12 May 2026 and the absence of particularisation.

28. HRNSW's alternative applications are refused. The Panel will not order costs as agreed or assessed (Reply [27]): **NSWLR 181C(8)** contemplates that a grant of leave disposes of the proceedings, and a further contest about quantum in this jurisdiction would be disproportionate to the sums involved. Nor will the Panel make the special costs order foreshadowed at Reply [28]; the matters relied upon there have been taken into account in fixing the sum, and the Panel's real concern about them is addressed below.

29. The Appellants' liability is joint and several. The appeals were conducted as one, a single sum is fixed for both, and it would be artificial to apportion it. The Panel allows 28 days for payment rather than the 14 days which **NSWLR 256A(3)** prescribes for costs orders made by Stewards. It does so deliberately, for the reasons given at the end of this determination.

No order can be made against the Appellants' solicitors

30. HRNSW did not seek an order against McGirr & Associates. The Panel raised the question itself, and has considered it, because on the material the conduct which caused the waste was the conduct of the Appellants' legal representatives and not, so far as appears, of the Appellants themselves.

31. The Panel has concluded that it has no power to make such an order. The reasons are textual and structural.

32. Every provision which confers the costs power speaks of parties, or of the person penalised:

    (a) NSWLR **181C(8)** permits terms "*as to the payment of the costs of the appeal by one party to another*";

    (b) NSWLR **181F(e)** permits "*an order that one party is to pay the costs of another party, including but not limited to legal costs*"; and

    (c) NSWLR **256A(1)** permits an order "*as to the payment of costs by that person*", being the person upon whom the Stewards have determined to impose a penalty for a breach of, or offence under, the Rules; that is to say, the licensed person.

33. A solicitor acting for an appellant is not a party to the appeal, and is not the person upon whom a penalty has been imposed. The language of the Rules admits of no order against him or her.

34. This Panel is a creature of statute. It is constituted under **Part 5A** of the *Harness Racing Act 2009* (NSW), and its powers are those which the Act and the Rules confer upon it and no others. It has no inherent jurisdiction. Critically, it has none of the supervisory jurisdiction over solicitors as officers of the court upon which the wasted costs jurisdiction rests. Nor does it enjoy the statutory analogues of that jurisdiction available to courts in this State. Solicitors who appear before this Panel are not its officers.

35. It follows that the Panel's costs order may be made against the Appellants Mr Hewitt and Mr Abbey, being licensed persons subject to the Rules, and against nobody else.

What the Panel would have done

36. Because the point may well arise again, the Panel records what it would have done had the power existed. Had it been open to the Panel to order costs against McGirr & Associates rather than against their clients, the Panel would have given earnest consideration to doing so. It would first have given the firm, and Mr McGirr and Mr Drew, notice and a proper opportunity to be heard in their own right, which they have not had. Nothing in these reasons is intended as, or is, a disciplinary finding against either practitioner; the making of such findings is not the function of this Panel.

37. The matters which would have attracted that consideration are these:

    (a) NSWLR **181C(8)** has been persistently ignored. On this matter alone it was disregarded twice: on 12 May 2026, when a decision to withdraw was communicated to the Panel's Coordinator by telephone and to nobody else; and on 10 June 2026, when the appeals were asserted to be "*withdrawn with immediate effect*" by a letter which sought no leave, acknowledged no rule and offered no explanation for its timing. Practitioners who appear regularly before this Panel are expected to know its Rules and to comply with them.

(b) The Panel's Coordinator was left, for some seven weeks, holding the only notice that anybody had given that these appeals might be at an end; and lamentably she was then made the subject of evidence and submissions wrongly attributing the consequences to her.

(c) The apparent non-compliance with **rules 22.6 and 22.8** of the Solicitors' Conduct Rules is unanswered. Had **rule 22.6** been complied with on 12 May 2026, the costs which the Panel has fixed would in all probability never have been incurred by anybody.

(d) The delay until 3.21pm on the eve of the hearing remains unexplained, even now.

38. The Panel makes no referral and gives no direction in respect of those matters. Nothing in this decision prevents HRNSW, or any other person, from taking such steps in any other forum as they may be advised.

Who should discharge the costs order

39. There remains a matter which the Panel wishes to put beyond doubt, and it is the practical consequence of what is said above.

40. The costs order made today falls upon two licensed persons. If it is not paid, NSWLR **256A(3)** provides that a costs order is payable as a debt to the Controlling Body, and that failure to comply with the terms of payment, or to enter into a payment arrangement satisfactory to the Controlling Body, may lead to the person being placed on the Unpaid Forfeit List. Under AHRR **291–296**, and in particular AHRR **295**, a person on that List is subject to the same restrictions as a disqualified person. For a licensed person, that is a serious matter which reaches directly into a livelihood.

41. On the material before the Panel, the costs which have been thrown away were thrown away by reason of the conduct of the Appellants' legal representatives. There is nothing to suggest that either Mr Hewitt or Mr Abbey knew of the requirement in NSWLR **181C(8)**, or of the 12 May telephone call, or of the emails of 22 May, 29 May and 5 June 2026 which went unanswered, or that either of them made any decision to stay silent until the eve of the hearing. They engaged solicitors, as they were entitled to do, and the conduct of their appeals passed into those solicitors' hands.

42. In those circumstances the Panel apprehends that the Appellants' legal representatives will give due and careful consideration to whether they, and not their clients, should discharge this costs order. That is a matter for the firm and for its clients, and the Panel makes no order about it. But the Panel would regard it as an unsatisfactory outcome if two licensed persons were exposed to the consequences under NSWLR **256A(3) and AHRR 295** on account of a waste of costs which, on the material before the Panel, was not of their making.

43. The Panel has allowed 28 days for payment so that consideration may be given to that question, and so that each appellant may obtain advice upon it if necessary advice independent of the firm which has conducted his appeal. The Panel will direct that a copy of this decision be provided to each appellant personally.

Orders

44. The Panel orders and directs:

(a) Pursuant to NSWLR **181C(8)**, Samuel Hewitt has leave to withdraw the appeal lodged by him on 20 March 2026.

(b) Pursuant to NSWLR **181C(8)**, Edward Abbey has leave to withdraw the appeal lodged by him on 20 March 2026.

(c) As a condition of the leave granted by **orders (a) and (b)**, Mr Hewitt and Mr Abbey are jointly and severally to pay the costs of Harness Racing New South Wales of and incidental to both appeals, fixed in the sum of $5,000, within 28 days of the date of this decision.

(d) The application of Harness Racing New South Wales for costs is otherwise refused.

(e) The Panel makes no order in respect of the fees paid on the commencement of each appeal under NSWLR **181C(6)**.

(f) The Secretary of the Panel is to provide a copy of this decision to each of Mr Hewitt and Mr Abbey personally, and to their solicitors, within 7 days.

Dated 24 August 2026

Wayne Haylen KC
Brian Skinner
Darren Kane