APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER JOANNE HARDY

Appeal Panel:	**Mr R. Beasley SC, Presiding Member; Mr C. Tuck; Mr P. Santucci**
Appearances:	**Appellant: Mr D Cleverley, Solicitor** **Stewards: Mr M. Van Gestel, Chairman of Stewards**
Dates of Hearing	**Written submissions only**
Date of Orders and Reasons:	**10 October 2022**
Rules involved:	**AR 229(1)(a) – Improper Action** **AR 232(i) – Giving false or misleading evidence**
Outcome:	**Appeal against severity of penalty allowed: Total penalty varied from 10-month disqualification to 5-month disqualification**

REASONS FOR DECISION ON PENALTY APPEAL

The Panel

Introduction

1. On 11 January 2022, Licensed Trainer Ms Joanne Hardy ("the Appellant") was found by the Stewards to have breached AR 229(1)(a) and AR 232(i) of the Australian Rules of Racing ("the Rules"). Those Rules and the particulars of both charges, are as follows:

> "***Division 4 – Corruption, dishonesty and misleading behaviour***
>
> ***AR 229 Corruption, dishonesty and misleading behaviour***
>
> *(1) A person must not:*
>
> (a) *engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing; …*"

"The details of the charge being that you, a licensed trainer Ms Joanne Hardy did commit an improper action in connection with racing due to the following matters:

1. You are a licensed trainer with Racing NSW.

2. Pursuant to LR78, you are at all times responsible for the administration and conduct of your stable and for the care, control and supervision of the horses in your stable.

3. On 28 April 2021, when the registered trainer of Happy Winner, you did have the gelding inspected by Racing NSW veterinary permit holder Dr David Johnson and became aware that it had an injury to the off fore superficial digital flexor tendon.

4. In the days subsequent Dr David Johnson delivered a veterinary report to your stable premises advising the rehabilitation program and recovery period required by Happy Winner to have a fair prognosis of recovery from the injury to its off fore superficial digital flexor tendon. Such rehabilitation program and recovery period taking between six to nine months.

5. In late June 2021, approximately two months after becoming aware of the injury to the off fore superficial digital flexor tendon of Happy Winner and being delivered the rehabilitation program and recovery period required for Happy Winner to have a fair prognosis of recovery from that injury, you did advertise Happy Winner for sale in the Inglis 2021 June (Late) Online Sale, failing to disclose the injury to its off fore superficial digital flexor tendon and declared that the gelding was "ready to start training again" and "would pass any vet check". Such declaration/s were made without seeking any veterinary advice or veterinary assessment of Happy Winner to ascertain if that was accurate and contrary to the recovery period required and / or the rehabilitation program required for Happy Winner to have a fair prognosis of recovery from that injury.

6. After successfully selling Happy Winner in the Inglis 2021 June (Late) Online sale, you did fail to advise the purchaser of Happy Winner, licensed trainer Mr Brett Robb, of the injury to the off fore superficial digital flexor tendon of Happy Winner and / or the recovery period required and / or the rehabilitation program required for Happy Winner to have a fair prognosis of recovery from that injury.

7. Such failure/s and / or declaration/s compromising the care and welfare afforded to Happy Winner after it left your care by contributing to Mr Brett Robb re-entering Happy Winner into a work program in early July 2021, without any knowledge of the injury to its off fore superficial digital flexor tendon and contrary to the recovery period required and / or rehabilitation program required for Happy Winner to have a fair prognosis of recovery from that injury.

8. Such failure/s and / or declaration/s compromising the care and welfare afforded to Happy Winner after it left your care as whilst completing pace work at Dubbo racecourse on Friday 6 August 2021, contrary to the recovery period required and / or the rehabilitation program required for Happy Winner to have a fair prognosis of recovery from the injury to its off fore superficial digital flexor tendon, Happy Winner ruptured its near fore superficial digital flexor tendon and suffered severe swelling and probable rupture to its off fore superficial digital flexor tendon.

Happy Winner was euthanised on Wednesday 18 August 2021 as a result of the injuries incurred and the poor prognosis of a satisfactory recovery.

9. It was an improper action to not disclose the injury to the off fore superficial digital flexor tendon of Happy Winner and / or the rehabilitation program required and / or the recovery period required for Happy Winner to have a fair prognosis of recovery from such injury in the advertisement for Happy Winner's sale in the Inglis 2021 June (Late) Online Sale.

10. Further, and in the alternative, it was an improper action to declare in the Inglis 2021 June (Late) Online Sale advertisement that Happy Winner was "ready to start training again" and / or "would pass any vet check" without seeking any veterinary assessment or advice if that was accurate and contrary to the rehabilitation program required and / or recovery period required for Happy Winner to have a fair prognosis of recovery from an injury to its off fore superficial digital flexor tendon.

11. Further, and in the alternative, it was an improper action to not disclose to licensed trainer Mr Brett Robb, the purchaser of Happy Winner from the Inglis 2021 June (Late) Online Sale, the injury to the off fore superficial digital flexor tendon of Happy Winner and / or the rehabilitation program required and / or the recovery period required for Happy Winner to have a fair prognosis of recovery from such injury."

"Charge 2

AR 232 Failure to observe processes and directions of PRAs or Stewards

(a) ...

(i) A person must not give any evidence at any interview, investigation, inquiry, hearing and/or appeal which is false or misleading."

"The details of the charge being that you, licensed trainer Ms Joanne Hardy did provide the following false and/or misleading evidence to NRRA Chief steward Mr Mark Holloway in email correspondence dated 8 September 2021 when questioned as to whether Happy Winner suffered any injury, or had any soundness issue, whilst in your care.

"Happy Winner had no soundness issue whilst in my care".

"I had the tendon scanned on April 28th by Dr David Johnson to be sure, and it revealed an old healed tendon injury".

Such evidence being false and/or misleading as a scan of the off fore superficial digital flexor tendon of Happy Winner whilst in your care on 28 April 2021 by Racing NSW veterinary permit holder Dr David Johnson revealed it did have an injury to its off-fore tendon in the form of a core lesion involving approximately 25% of the tendon for 15cm of the tendon. Such injury requiring a recovery period and rehabilitation program to allow a fair prognosis of recovery."

2. For the finding of breach of AR 229(1)(a), the Stewards disqualified the Appellant for 8 months. For the breach of AR 232(i), a 2-month disqualification was imposed, to be served cumulatively to the 8-month disqualification, bringing the total penalty to a 10-month disqualification. On 12 January 2022, the Appellant lodged an appeal against the findings of breach, and against the severity imposed upon her. On the same day she was granted a stay until further order.

3. The appeal challenging the Stewards findings of breach of the Rules was heard by the Panel on 27 and 28 April 2022. On 13 September 2022 the Panel published reasons for decision dismissing that appeal, and confirming the Stewards findings of breach of the Rules. The stay granted on 12 January 2022 was set aside. For a full understanding of these Penalty reasons, they should be read together with the Panel's reasons on the breach appeal of 13 September.

4. Also on 13 September 2022, the Panel made orders for the lodging of written submissions in relation to the Appellant's penalty against the severity of the penalty imposed upon her for the breaches of the Rules. The Stewards provided their submission to the Panel on 20 September 2022 (**Stewards Submissions**). The Appellant's submissions (**AS**) were lodged on 4 October 2022.

Principles relevant to penalties

5. In their submissions, the Stewards have referred to the Panel's decision in the *Appeal of Callow* (3 May 2017) which comprehensively summarises the relevant objectives for the impositions of penalties for breaches of the Rules (Stewards' Submissions at [8]). In short, the purpose of imposing penalties for breaches of the Rules is entirely protective in nature, not punitive. Proper enforcement of the Rules and the imposition of penalties for breach is one of the means by which racing upholds its integrity, and sends a message to the public that offending conduct will not be tolerated.

Stewards' Submissions

6. The Stewards unsurprisingly submit that the appeal should be dismissed. As to the breach of AR229(1), they point to the Panel's findings that the improper actions relate

to false statements in advertising for the sale of a horse relating to a recent injury to a tendon. They note that the improper actions created a risk to the horse's welfare: Stewards' Submissions at [11]. They submit this is a matter that can impact on racing's "social license." Reliance was placed in the Panel's decision in *The Appeal of John McLachlan* (7/10/21), which is discussed further below.

7. As to the Charge under AR 232(i), the Stewards note that the misleading statements made to the Stewards concern how the horse's injury was described, and they rely on a number of decisions of this Panel and the Racing Appeals Tribunal which provide support for the submission that breaches of this rule generally result in disqualification.

Appellant's submissions

8. For the appellant, the following matters are amongst those raised in mitigation, and in support of an ultimate submission that the total penalty the Panel should impose is *"a small fine or...[a] one month [disqualification]"* [AS 52]:

   (a) The Appellant had no intent to cause Happy Winner harm.

   (b) The Panel was not satisfied that the tendon injury the horse was diagnosed with while in the Appellant's care was causative of the later catastrophic injuries that resulted in him being euthanised.

   (c) The Appellant has had a long and relatively blemish-free involvement in training. During her time associated with racing she has made a significant contribution to the industry, examples of which are set out at AS [26].

   (d) She has demonstrated through her professional career that she is a person of high integrity, who cares about the well being and welfare of horses.

   (e) A ten-month disqualification would be ruinous to her financially, and jeopardise the prospects of a return to the industry. It would have flow on impacts to employees, agents, and suppliers. It would have an obvious detrimental impact on her young children, and on her elderly father, who are financially dependent on her.

Resolution

9. The improper action of how Happy Winner was advertised for sale is in our view an objectively serious breach of AR 229(1)(a). The evidence does not support a finding that the improper action found by the Panel was the cause of the catastrophic injury that

the horse later suffered leading to it being euthanised, but it exposed the horse to a risk of injury it should not have been. The advertisement placed by the Appellant the subject to the charge created a misleading impression of the horse's fitness and readiness for training, and in circumstances where a recent and significant injury diagnosed while in the Appellant's care was not mentioned.

10. As to the charge under 232(i), while such breaches are always serious for the reasons outlined in the *Appeal of Poidevin* (RAT, 8/5/2018) – that is, they are destructive of the trust necessary between licensed person and those empowered and obligated to enforce the Rules on behalf of the industry as a whole – it is relevant to penalty again that the misleading conduct related to a matter concerning a horse's welfare.

11. As outlined above, the primary purpose of the imposition of penalties for breaches of the Rules is to protect the integrity and image of Racing. There is no aspect of punishment. Given this purpose, there are limitations on the Panel in relation to how much influence personal circumstances can have on a determination of penalty. We readily accept the dire financial consequences a lengthy disqualification is likely to have on the Appellant, but dire financial consequences are faced by many licensed persons in circumstances where they are disqualified. However, this does not mean that the Panel should treat in a meaningless or flippant way the submission made as to the financial consequences of a long disqualification. It is a matter we have taken into account.

12. Further, we accept the submissions made for the Appellant as to her contribution to racing, the care she has shown to horses, and her good character – these submissions are made good by the many character references tendered on her behalf, which are from people involved in the racing industry who have had long associations with the Appellant. While penalties must protect the sport, they must also be appropriate and fair. The long years of service to racing, and the evidence of good character – and contribution to horse welfare – must in our view be taken into account by us in a real way in order to achieve an outcome on penalty that is just. In our view, the 8-month disqualification imposed for the breach of AR 229(1)(a), while in the range of rational penalties that could be imposed here, is in our view at the high end, and longer than we consider appropriate.

13. In reaching this view, we have not discounted the importance of imposing a penalty that protects the image and integrity of racing. We have also given consideration to *McLachlan*, but we consider the facts of that offending (where a base 12-month disqualification was imposed) to be, in general and with one exception, more aggravating than those here. While there was a similar lack of intent to harm in *McLachlan* as we have found here, there are a few relevant differences.

14. First, the Appellant's conduct occurred in the course of a sale of a horse which exposed the horse to a risk during its ongoing training and preparation by a subsequent owner. By comparison in *McLachlan* the conduct involved ignoring signs of lameness and starting the horse in a jump out in the same week. The conduct in *McLachlan* clearly put the horse in more direct risk of an immediate injury.

15. Second, the injury suffered by the horse in the *McLachlan* appeal was catastrophic, and in that Panel's view clearly connected to the lameness which should have resulted in an examination by a vet rather than engagement in a jump out. As mentioned above, while the Appellant's improper actions here posed a risk to Happy Winner, no finding is made that the risk materialised.

16. Third, and in this respect more serious than *McLachlan,* the Appellant's conduct affected other licenced persons and participants in racing, namely the new owner and trainer. Those persons were then left to address the horses needs, obtain veterinary services, and through no fault of their own have been required to participate in Stewards investigations and provide evidence relevant to the charges.

17. Taking into account all relevant matters, but having particular regard to both the need to protect the sport, but to also fashion a penalty that reflects the long and positive contribution the Appellant has made to racing, we consider the appropriate penalty is a disqualification of 4 months.

18. We have no hesitation in dismissing the appeal against the severity of penalty imposed for the breach of AR 232(i). Given the circumstances of the breach, and having regard to penalties imposed on others for breaches of this rule, a penalty of a 2-month

disqualification is arguably at the lower end of the scale for this breach. We nevertheless take the view that it is the appropriate penalty here. However, both breaches are closely connected. They involve much the same misleading nature as to the horse's soundness. The misleading aspect of the advertisement relevant to Charge 1, and the email to the Stewards the subject of Charge 2 are in our view not just similar, but more demonstrative of a level of carelessness and lack of provision of important facts than they are to a deliberate plan to be deceitful. Given this, and the connectedness between Charges 1 and 2, we consider one month of the penalty for Charge 2 should be served concurrently to the penalty imposed for Charge 1.

Orders:

(1) Appeal in relation to severity of penalty imposed for breach of AR 229(1)(a) allowed.

(2) Penalty of an 8-month disqualification for the breach of AR229(1)(a) set aside, and in lieu thereof a penalty of 4 months is imposed.

(3) Appeal in relation to penalty imposed for breach of AR 232(i) dismissed.

(4) Penalty of a 2-month disqualification for the breach of AR 232(i) is confirmed, save that one month of this penalty is to be served concurrently with the penalty imposed for the breach of AR 229(1)(a).

(5) Total penalty imposed is a 5-month disqualification. That penalty commenced on 13 September 2022, and expires on 13 February 2023, on which day the Appellant may reapply for her license.

(6) Appeal deposit forfeited.

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APPEAL OF LICENSED TRAINER JOANNE HARDY

Appeal Panel:	**Mr R. Beasley SC, Presiding Member; Mr C. Tuck; Mr P. Santucci**
Appearances:	**Appellant: Ms V. Heath, Barrister, instructed by HNT Legal** **Stewards: Mr M. Van Gestel, Chairman of Stewards**
Dates of Hearing	**27 and 28 April 2022**
Date of Orders and Reasons:	**13 September 2022**
Rules involved:	**AR 229(1)(a) – Improper Action** **AR 232(i) – Giving false or misleading evidence**
Outcome:	**Appeal against findings of breach of Rules dismissed**

REASONS FOR DECISION

Mr R Beasley SC, Presiding Member

Introduction

1. On 11 January 2022, Licensed Trainer, Ms Joanne Hardy ("the Appellant") was found by the Stewards to have breached AR 229(1)(a) and AR 232(i) of the Australian Rules of Racing ("the Rules"). Those Rules and the particulars of both charges, are as follows:

> "***Division 4 – Corruption, dishonesty and misleading behaviour***
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> *(1) A person must not:*
>
> (a) *engage in any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing; …*"

"The details of the charge being that you, a licensed trainer Ms Joanne Hardy did commit an improper action in connection with racing due to the following matters:

1. You are a licensed trainer with Racing NSW.

2. Pursuant to LR78, you are at all times responsible for the administration and conduct of your stable and for the care, control and supervision of the horses in your stable.

3. On 28 April 2021, when the registered trainer of Happy Winner, you did have the gelding inspected by Racing NSW veterinary permit holder Dr David Johnson and became aware that it had an injury to the off fore superficial digital flexor tendon.

4. In the days subsequent Dr David Johnson delivered a veterinary report to your stable premises advising the rehabilitation program and recovery period required by Happy Winner to have a fair prognosis of recovery from the injury to its off fore superficial digital flexor tendon. Such rehabilitation program and recovery period taking between six to nine months.

5. In late June 2021, approximately two months after becoming aware of the injury to the off fore superficial digital flexor tendon of Happy Winner and being delivered the rehabilitation program and recovery period required for Happy Winner to have a fair prognosis of recovery from that injury, you did advertise Happy Winner for sale in the Inglis 2021 June (Late) Online Sale, failing to disclose the injury to its off fore superficial digital flexor tendon and declared that the gelding was "ready to start training again" and "would pass any vet check". Such declaration/s were made without seeking any veterinary advice or veterinary assessment of Happy Winner to ascertain if that was accurate and contrary to the recovery period required and / or the rehabilitation program required for Happy Winner to have a fair prognosis of recovery from that injury.

6. After successfully selling Happy Winner in the Inglis 2021 June (Late) Online sale, you did fail to advise the purchaser of Happy Winner, licensed trainer Mr Brett Robb, of the injury to the off fore superficial digital flexor tendon of Happy Winner and / or the recovery period required and / or the rehabilitation program required for Happy Winner to have a fair prognosis of recovery from that injury.

7. Such failure/s and / or declaration/s compromising the care and welfare afforded to Happy Winner after it left your care by contributing to Mr Brett Robb re-entering Happy Winner into a work program in early July 2021, without any knowledge of the injury to its off fore superficial digital flexor tendon and contrary to the recovery period required and / or rehabilitation program required for Happy Winner to have a fair prognosis of recovery from that injury.

8. Such failure/s and / or declaration/s compromising the care and welfare afforded to Happy Winner after it left your care as whilst completing pace work at Dubbo racecourse on Friday 6 August 2021, contrary to the recovery period required and / or the rehabilitation program required for Happy Winner to have a fair prognosis of recovery from the injury to its off fore superficial digital flexor tendon, Happy Winner ruptured its near fore superficial digital flexor tendon and suffered severe swelling and probable rupture to its off fore superficial digital flexor tendon. Happy Winner was euthanised on Wednesday 18 August 2021 as a result of the injuries incurred and the poor prognosis of a satisfactory recovery.

9. It was an improper action to not disclose the injury to the off fore superficial digital flexor tendon of Happy Winner and / or the rehabilitation program required and / or the recovery period required for Happy Winner to have a fair prognosis of recovery from such injury in the advertisement for Happy Winner's sale in the Inglis 2021 June (Late) Online Sale.

10. Further, and in the alternative, it was an improper action to declare in the Inglis 2021 June (Late) Online Sale advertisement that Happy Winner was "ready to start training again" and / or "would pass any vet check" without seeking any veterinary assessment or advice if that was accurate and contrary to the rehabilitation program required and / or recovery period required for Happy Winner to have a fair prognosis of recovery from an injury to its off fore superficial digital flexor tendon.

11. Further, and in the alternative, it was an improper action to not disclose to licensed trainer Mr Brett Robb, the purchaser of Happy Winner from the Inglis 2021 June (Late) Online Sale, the injury to the off fore superficial digital flexor tendon of Happy Winner and / or the rehabilitation program required and / or the recovery period required for Happy Winner to have a fair prognosis of recovery from such injury."

"**Charge 2**

AR 232 Failure to observe processes and directions of PRAs or Stewards

(a) ...

(i) A person must not give any evidence at any interview, investigation, inquiry, hearing and/or appeal which is false or misleading."

"The details of the charge being that you, licensed trainer Ms Joanne Hardy did provide the following false and/or misleading evidence to NRRA Chief steward Mr Mark Holloway in email correspondence dated 8 September 2021 when questioned as to whether Happy Winner suffered any injury, or had any soundness issue, whilst in your care.

"Happy Winner had no soundness issue whilst in my care".

"I had the tendon scanned on April 28th by Dr David Johnson to be sure, and it revealed an old healed tendon injury".

Such evidence being false and/or misleading as a scan of the off fore superficial digital flexor tendon of Happy Winner whilst in your care on 28 April 2021 by Racing NSW veterinary permit holder Dr David Johnson revealed it did have an injury to its off fore tendon in the form of a core lesion involving approximately 25% of the tendon for 15cm of the tendon. Such injury requiring a recovery period and rehabilitation program to allow a fair prognosis of recovery."

2. For the finding of breach of AR 229(1)(a), the Stewards disqualified the Appellant for 8 months. For the breach of AR 232(i), a 2-month disqualification was imposed, to be served cumulatively to the 8-month disqualification. On 12 January 2022, the Appellant lodged an appeal against the findings of breach, and against the severity imposed upon her. On the same day she was granted a stay until further order.

3. The appeal was heard by the Panel on 27 and 28 April 2022. The Appellant was represented with leave by Ms V. Heath of Counsel. The Stewards were represented by Mr M. Van Gestel, the Chairman of Stewards. The hearing (and these reasons) address only the appeal against conviction, with the question of appeal against sentence to be deferred until after the Panel publishes its decision.

4. An Appeal Book was tendered by consent. It contained a transcript of the Stewards' Inquiry conducted on 26 November 2021 and 11 January 2022, as well as the Exhibits from that Inquiry. Also included was a transcript of interviews with various witnesses, including the Appellant.

5. The following persons also gave oral evidence at the Appeal hearing:

- Mr M. Holloway, the Chief Steward of the Northern Rivers Racing Association.
- Dr T. Koenig, the then Chief Veterinarian of Racing New South Wales.
- Mr Brett Robb, who purchased the horse 'Happy Winner' in late June 2021.
- The Appellant.
- Mr T. Hardy, the Appellant's Father.
- Dr D. Johnson, a veterinarian who performed an Ultrasound on Happy Winner and prepared a report on its right tendon injury dated 28 April 2021.

6. The evidence of the Appellant, Dr Johnson and Mr Hardy was supplemented by written statements. That material was objected to by the Stewards on the basis of late service. The Panel determined that the material should be admitted, and I have considered it

7. Additionally, the Appellant sought to tender a number of references or statements from individuals in the racing industry who were willing to attest to either the Appellant's reputation, or good character. That material was also objected to by the Stewards on the basis of late service. The Panel has determined that reference material should also be admitted, and I have considered it.

8. There has been some delay in producing these Reasons for Decision and the making of Orders. The Appellant was considerably late in lodging written submissions. There were some reasons for that which do not need to be further explored. Once received, the Appellant's written submissions and those of the Stewards were thorough and helpful.

9. **Background Facts:**

(a) The horse, Happy Winner, was purchased by the Appellant on about 17 March 2021 for $15,000, primarily on behalf of a Singapore-based proposed majority owner. That person appears to have reneged on the deal to buy the horse. As a consequence, the Appellant decided she needed to sell the horse.

Prior to this, shortly after the horse entered the stables (which occurred on 11 April 2021) the Appellant noticed a "thickening" on the horse's right foreleg. This was on 15 April 2021. The horse did not appear lame, but the Appellant nevertheless had him examined by Dr D. Johnson, who performed an ultrasound on 28 April 2021. Dr Johnson gave oral advice that the horse should be rested for some period of time. The Appellant accepted in cross examination that she was told "three to six months" (Appeal Transcript (**AT**) 127.6274-5), and submitted in written submissions that Dr Johnson advised "three months off or a three to six month rehabilitation period" (AS [51]).

(b) Dr Johnson prepared a written report of the same date: Exhibit 5. The key parts of that report are as follows:

(i) The injury diagnosed was: "a core lesion involving approximately 25% of the tendon for 15cm of tendon. There is evidence in ultrasound of an older tendon lesion and this new tear could be a recurrence of the old injury. This would be considered a moderate injury with a fair prognosis for recovery. The recovery period would take 6 to 9 months."

(ii) I note that in this respect Dr Johnson conceded that he had revised his recommended recovery period from three to sixth months (given orally at the time of examination), to a longer duration of six to nine months. I accept also that the time period of six to nine months recovery was only expressed by Dr Johnson in his written report.

(iii) The report contained an exercise program. Weeks 1 to 4 involved the horse being confined to its stable, with daily walks. Weeks 4 to 8 involved the horse being confined to its stable with longer walks (twice daily for 45 minutes). The horse could be "put in paddock for 3-6 months". From weeks 24 to 28 "trotting start off at 5 minutes and build up to 10 minutes twice daily". Weeks 29 to 32 involve further trotting and at week 33 a further scan was recommended to see if the tendon had healed with cantering building up to a slow gallop. "Normal work" was to resume at weeks 37 plus.

(c) Dr Johnson said he left the report on a desk at the Appellant's stables. This was a standard practice for documents between Dr Johnson and the Appellant. The Appellant says she did not receive it, and suggested it may have been lost by her father tidying up the stables. The Appellant's father (Mr Hardy) gave evidence that he did not see it, but that his usual practice was to take vet reports home and file them. Despite that practice Mr Hardy's evidence was that the Appellant did not ask Mr Hardy whether he had seen the report or filed it somewhere: AT 142.7008-7029.

(d) Dr Johnson also gave evidence that he gave another copy of the report to the Appellant at the Races, perhaps in mid-September 2021: AT 152.7467-.7470.

The Appellant does not recall this; but says if it happened she did not read the report prior to being questioned by Mr Holloway on 19 October 2021. She said she had not read the report when she first communicated to the Stewards about Happy Winner after the horse's death, which was by email on 8 September 2021, and that she first read the report when questioned by Mr Holloway at the Grafton Racecourse on 19 October 2021: AT 107.5286-108.5335.

(e) On about 23 June 2021, the Appellant advertised the horse for sale. The advertisement relevantly stated:

> "He has been spelling for 3 months and is ready to start training again for his new connections. Owners only want to race city class horses so have decided to move him on. Clean winded and would pass any vet check." (Exhibit 4) (**the Advertisement**).

(f) The horse was purchased by Mr B. Robb for $8,000 on or about 30 June 2021. The horse left the Appellant's stables on 6 July 2021 (13 days after the advertisement), and Mr Robb lodged a Stable Return on 20 July 2021.

(g) From the time of the ultrasound scan (28 April 2021) until the horse left the Appellant's stables on 6 July 2021, the horse was restricted to its box and walking: Exhibit 10, T-4.168-.196.

(h) Prior to its sale, there was a telephone conversation between the Appellant and Mr Robb. What was said during that call about Happy Winner is disputed.

(i) Happy Winner was in work with Mr Robb for about 4 weeks. He had done "slow work" at first during this period: Exhibit 11, T-1.40. On about 6 August 2021 Mr Robb increased the horse's pace of work and told Stewards the following:

> " That's when I sort of increased the work and give him a bit of pace work and yeah, that's all I did, I got him into a bit of pace work around the track and yeah he got to – he done about 300 metres of pace work and he was looking for a way out, you know, he was just sort of hanging on the one reign, but still felt, you know, very sound and everything like that, and then when I got to the dash it would

> have been about the 700 metres, 750 metres, and he just went, like he all of a sudden just slowed right down and he had gone in behind and I thought: oh, he's broken down behind or he's done something in back." (Exhibit 11, T-1.43-50).

(j) The horse soon had significant swelling in both front legs. On 9 August 2021 it was examined by Dr D. Crosby, Veterinarian. He prepared a report for Mr Robb of 9 August 2021 which relevantly stated as follows:

> "Examination revealed a horse that had difficulty walking and was unable to trot freely. The horse has two severely damaged superficial digital flexor tendons. There is a high probability that these tendons are ruptured. It is my opinion that this horse will not be able to be retired to the paddock and will be in chronic pain. As such, I am recommending that this horse be euthanised on humane grounds." (Exhibit 8).

(k) A further report from Dr Crosby stated as follows:

> "Horse 4/5 lame. Can barely walk. Two front STF tendons damaged. L rupture. R very swollen, possibly ruptured. It is my opinion this horse be euthanised." (Exhibit 7).

The horse was euthanised on 18 August 2021.

(l) On 25 August 2021 Mr Holloway sent an email to the Appellant, advising her that Happy Winner had suffered a catastrophic injury at track work and had been euthanised. The email relevantly also contained the following:

> "Can you please provide me with the veterinary and treatment history for Happy Winner whilst it was in your care? Further, please advise the following:
>
> (1) Did Happy Winner come into your Stable with any pre-existing injury or soundness issue?
>
> (2) Did Happy Winner suffer any injury, or have any soundness issue, whilst in your care?
>
> (3) The reason the gelding was moved on from your stable without having a start in a race or official trial?" (Exhibit 1, page 3).

(m) When he had received no response by 7 April 2021, Mr Holloway sent a follow-up email.

(n) On 8 September 2021, the Appellant sent an email (which is the subject of Charge 2) to Mr Holloway which, relevantly, contained the following:

> "1. When Happy Winner arrived at my Stable, I had no knowledge of any soundness issue or injury
>
> 2. Happy Winner had no soundness issues whilst in my care. In week 6, I noticed a slight thickening of the right fore flexor tendon. It was not painful and he was not lame. I suspected it was bruising from a bump or knock, as Happy Winner had only trot and cantered in the days prior. I had the tendon scanned on 28 April 2021 by Dr David Johnson to be sure, and it revealed an old healed tendon injury. Happy Winner was not treated with any anti-inflammatory medication for this injury and was never lame.
>
> 3. Happy Winner never raced or trialled whilst in my stable as one of the owners with the majority ownership never paid for their share. The ID card and transfer of ownership was never released by Inglis. On 23 May Happy Winner went to our spelling property as I did not want to continue running up a bill to a bad debtor." (Exhibit 1, page 1).

(o) On 19 October 2021, the Appellant was interviewed by Mr Holloway at the Grafton Racecourse, on a Race Day: Exhibit 10. The answers she gave during the course of that interview are the subject of submissions from both the Stewards and the Appellant. Of significance are the following questions and answers:

(i) Having been taken through Dr Johnson's report of 28 April 2021, and the Advertisement, the following exchange took place:

Chairman: The horse wasn't ready to start training again, was it?

J Hardy: No, it wasn't, no, that's incorrect, I should not have written that, now that I read that, but at the time – yeah.

Chairman: And forget about misleading the purchasers or potential purchasers, did you not have a responsibility to Happy

Winner to ensure that he was going to recover from this injury?

J. Hardy: Yes, yes, I would have done, yeah.

Chairman: Do you think you fulfilled that responsibility?

J Hardy: No, in hindsight, no, I haven't." (Exhibit 10, T-8.386-.399.

(ii) It would appear the Appellant agreed she did not tell the new owners about the tendon injury diagnosed on 28 April 2021 from this exchange:

Chairman: But you didn't tell them that the horse had a torn tendon?

J Hardy: I didn't go into too many details." (Exhibit 10, T-8.360-.362.

(iii) The Appellant agreed she had been given Dr Johnson's report on about the date it bears:

Chairman: But he has given you his report at the time?

J Hardy: Yes, he emailed this repot in the days later, yeah, and I had a quick read through the report. It's just a standard – what I consider a standard rehabilitation, a very conservative standard rehabilitation program for a horse, and I just popped that there and left the horse in the stable, and he was happy. He wasn't lame," (Exhibit 10, T-11.511-.518).

(iv) The Appellant agreed that the horse was advertised as a "racing proposition" and was sold when it should still have been in a paddock: Exhibit 10, T-12.582-.596.

(v) The Appellant appeared to agree that the way she had advertised the horse was not acceptable:

Chairman: Tell me, do you think that it is acceptable of a licensed trainer who has a responsibility to a horse's welfare? Do you think that is acceptable?

J Hardy: No, it's probably not. When I said to spell him for 3 months, like I said, I probably didn't put as much time into

this as I should have. I said we scanned the tendon in April, so I went, April, May, June, he's been out about 3 months, and I just quickly wrote, because I was late getting the ad in.

Chairman: But he needed another 3 to 6 months.

J. Hardy: Yes, and anyone that called me I said "the horse would benefit from": Exhibit 10, T-13.599-.610.

(vi) The Appellant appeared to agree that she could have at least prevented a risk of injury to Happy Winner:

Chairman: And the person who could have prevented that, and should have prevented that. I would suggest, is yourself.

J Hardy: Yes, possibly yes. (Exhibit 10, T-14.687-.691).

(vii) The Appellant appeared to agree that when the horse broke down and was euthanised in August, it should still have been in a paddock recovering: Exhibit 10, T-17.802-.806.

(viii) The Appellant agreed that she did not disclose the injury to the horse or the recovery program to the new purchaser: Exhibit 10, T-17.811-.821.

(p) The Stewards' Inquiry was conducted on 26 November 2021 and resumed on 11 January 2022, on which day the Appellant was found to be in breach of the Rules referred to above. The topics on which evidence was given before the Stewards on 26 November 2021 overlapped with matters on which evidence was adduced at the appeal hearing. It is unnecessary to summarise the evidence before the Stewards' Inquiry.

Further Appellant Evidence and Appellant's Submissions

10. The Appellant submits that the oral advice she received from Dr Johnson was that it was a re-occurrence of an old injury, it was mild to moderate in severity with a good to fair prognosis and the horse required "three months off or a three to six month rehabilitation period": AS [51]. Day zero of the injury should be considered at the day that the leg injury was noticed (15 April 2021) not the date of the ultrasound: AS [55].

11. The Appellant claims that she did not receive Dr Johnson's written report until sometime after the Stewards had made contact with her: AS [64]. She agrees she may have been provided with a copy of the report by Dr Johnson in about mid-September 2021, but did not read it prior to being interviewed by Mr Holloway on 19 October 2021.

12. The Appellant submits that she made a "mistake" when she said to Mr Holloway on 19 October 2021 that she had read the report at about the time it was written: AS [76]. It is submitted by the Appellant that the circumstances of the interview she had with Mr Holloway on 19 October 2021 are the cause of her "mistake". She was anxious, did not have her reading glasses, and was shocked and confused by being confronted with allegations. It is submitted that the interview was confrontational and an ambush. In response to a submission by Racing New South Wales that the audio recording of the 19 October interview does not show that Ms Hardy was being intimidated, the following submission is made:

> "That submission misunderstands the power relationship between a licensed person and a Stewards Committee: it also misunderstands the socialisation of women to be agreeable and compliant when confronted by men, especially men in positions of power, and to assume they must be in the wrong." AS [83].

13. An observation can be made about this submission now. As a generalisation, it might well be a reasonable proposition to advance. However, there was no evidence to suggest that the Appellant, specifically, is the kind of person who assumes she must be wrong, whether she is being "confronted" by a man or a woman in a position of power. She struck me as an intelligent person, who was not easily overwhelmed.

14. Having heard audio of the interview, in my view the tone of Mr Holloway during the course of it was firm, but civil, and in my view appropriate for a Steward investigating the serious matter that he was. I accept, however, that the interview was conducted in circumstances where the Appellant was under some time pressure – she was due to saddle a horse for the first race, and the interview concluded very shortly before she had to leave to attend to those duties.

15. Whether or not Mr Holloway's approach could properly be described as "adversarial" (AS [86]) or inquisitorial, there was nothing in the approach that he took, in my view, that was deceptive, "tricky" or unfair. There was, from some of the questions, a sense that Mr Holloway had the view that, at least prima facie, the Appellant had acted improperly in relation to the Advertisement, and what was or was not said to the new owner. However, the Appellant was not in any obvious way deprived of an opportunity of disagreement, or setting out her construction of the facts.

16. The Appellant submits that Happy Winner did have the 3 months rest program orally recommended by Dr Johnson. That is, the horse had box rest with daily walking from 15 April 2021 to 23 May 2021, and from then was in a small yard with exercise until transported to Mr Robb on 6 July 2021, which is effectively a 3-month period of rest with light exercise: AS [106]-[108].

17. It is also submitted that the Appellant relied on the advice of her experienced Farrier, prior to placing the advertisement on 23 June 2021, that the horse's leg looked fine and that the horse would "benefit from light training": AS [111].

18. As to the Advertisement, the Appellant submits that there was nothing misleading or inaccurate about the phrase "he has been spelling for 3 months". As to "ready to start training again" the submission is made that this was a reasonably held opinion by the Appellant: AS [118]-[128]. Similarly, the words "passing any vet check" are both the Appellant's opinion and accurate in the sense that the horse would not have failed a vet check: AS [130]-[138].

19. Detailed submissions are made on the Appellant's behalf that a finding could not be properly made on the evidence that the injury diagnosed on 28 April 2021 caused the bilateral tendon ruptures that led to the horse being euthanised in August 2021. It is convenient to state here that I agree with this submission. It is clear from the evidence of Dr Koenig that a horse resuming pace work or training prior to the end of an appropriate recovery period would have put additional risk on the horse re-injuring his right tendon, but the evidence falls short of enabling me to be comfortably satisfied that, even accepting that the horse resumed a form of training or pace work prior to

when it should have, that the rupture of both tendons could be found on the balance of probabilities to have been caused either by the injury diagnosed on 28 April 2021, or by returning to a form of pace work too soon.

20. As to generally not disclosing the April 2021 tendon injury either in the Advertisement or to Mr Robb, the submission is made that there was no obligation on the Appellant to do that, nor any industry practice supporting such disclosure: see, e.g., AS [216]-[222].

21. In relation to Charge 2, as to the allegation that she misled the Stewards in her 8 September 2021 email stating that "Happy Winner had no soundness issues whilst in [her] care", it is submitted that the Appellant's understanding of soundness was whether the horse was lame or not, and it was not. This was her honestly held view: AS [237]. This answer should also be considered, it is submitted, in the context of then immediately informing the Stewards that Dr Johnson had scanned the tendon after the Appellant had noticed the lump, and that it revealed an "old healed tendon injury".

22. Failure to inform the Stewards that the tendon injury may have been a new tear, or a recurrence of the old injury was the result of the Appellant acting from memory, not an intent to give either false evidence or to mislead the Stewards. The submission is also made that the Stewards were clearly not misled as they were always going to obtain Dr Johnson's report: AS [252]-[253].

Stewards' Submissions

23. The Stewards' submissions are detailed. With no disrespect intended however, they can be summarised briefly. This is because, unsurprisingly, they are set firmly within what was said and recommended by Dr Johnson in his written report of 28 April 2021, the text of the Advertisement placed by the Appellant on 23 June 2021, and in particular the evidence given by the Appellant when interviewed by Mr Holloway on 19 October 2021. In respect of charge 2, the submissions largely address the words the Appellant chose to use in her email of 8 September 2021.

24. As to the interview with Mr Holloway, the submission is made by the Stewards that the finding should be made that the Appellant had read the report of Dr Johnson at or about the time it was written. The Stewards submit that the Appellant was not "tricked or

coerced" into the answer that she had read that report: Stewards' submissions at [24]. The Stewards submit that the Panel should reject the assertion of the Appellant that "Mr Holloway was being quite aggressive and very intimidating and I was quite flustered."

25. Following from what I found above at [13]-[14] regarding this interview, at least from the tone adopted by Mr Holloway it would be unfair to describe him as either being aggressive or "very intimidating". The Appellant might have been to a degree "flustered," although if she was, I would not conclude from that that she was incapable of accurately or coherently answering the questions that were being put to her. She was of course under time pressure as mentioned above.

26. Also unsurprisingly, the Stewards submit that the relevant text of the Advertisement, and the failure to tell Mr Robb that the horse had suffered a tendon injury, were sufficiently serious conduct that they should be considered "improper actions" under the Rule. They also point to the fact that Mr Robb gave evidence that had he been told of the injury he would not have placed the horse back into work until such time as he had a vet inspect the horse and had given him more time "if that's what a vet recommended": Stewards' submissions at [57], referring to (AT)75.3685.

27. The Stewards also make the submission that if it is found by the Panel that the Appellant did not receive or read Dr Johnson's 28 April 2021 report until after she had placed the Advertisement, or until she was interviewed by Mr Holloway on 18 October, a finding should be made that Dr Johnson advised her that the horse needed a 3 to 6 months recovery period.

28. As to Charge 2, the Stewards submit that the horse was clearly not sound, given its tendon injury, it was misleading of the Appellant to say it had "no soundness issues". It was also misleading or false for the Appellant to state in the 8 September 2021 email to Mr Holloway that the ultrasound performed by Dr Johnson had only revealed an "old" injury. He had clearly advised the Appellant in writing, and probably orally, that there was a "new tear" to the tendon, and a significant one at that.

Resolution: Charge 1

Burden and Standard of Proof

29. The burden of proof is on the Stewards, and I accept the submissions made on behalf of the Appellant concerning both the standard and quality of proof: see AS [16]-[26]. The Panel needs to be comfortably satisfied of the matters that would establish breach of the Rules. The Stewards do not submit otherwise.

Improper Action

30. I also accept the submissions made on behalf of the Appellant concerning how the words "improper action" should be interpreted in AR 229(1)(a). The improper action must be of a serious nature and the word "improper" in the Rule should be construed in the context of the other words used, namely "dishonest, corrupt, fraudulent and dishonourable." Something that is properly considered to be inappropriate in some minor way, or in a relatively minor way not in accordance with accepted standards, should not necessarily be held to be either an improper practice or an improper action within the meaning of the Rule.

Key Findings of Fact

31. I do not accept the submission that the Appellant made a "mistake" when she told Mr Holloway that she had read Dr Johnson's report when interviewed on 19 October 2021.

32. She was of course mistaken that it was emailed to her, but I do not accept that she did not receive and read the report on or about the date it bears. The report was left on a desk in the Appellant's stables. I accept that from time to time things go missing, but it is probable that the report was left in an envelope with the horse's name on it. The Appellant might describe the thickening on the horse's leg as minor, but it was sufficiently serious for her to engaged veterinary care, and have the leg scanned. She would have been expecting a report. If she had not received the report on or about 28 April 2021 and read it, there is no reason why, in my view, she would not have told Mr Holloway this. I do not accept that the circumstances of the interview on 19 October 2021 in any way prevented the Appellant from telling Mr Holloway that she had not received Dr Johnson's report or had not read it, if that was the case. Instead, she said she had received it and read it. I do not accept that she gave that answer by "mistake."

33. Although mistaken about the manner that the report was provided to her, it was the Appellant who had volunteered the words "in the days later." She said she had a "quick read through the report." I am unable to accept that she would say this to Mr Holloway if she had not read the report. She also, in the same part of the transcript (Exhibit 10, T-11.514-.518) says that she took action in relation to what she said was a "very conservative standard rehabilitation program" – she left the horse in the stable. Accepting that the Appellant was under some time pressure when interviewed by Mr Holloway, and even accepting that she may have felt flustered, I am of the view that she answered his question truthfully; that is, she received the report "in the days later" and had a "quick read through" – noting that the report is only one page in length and so could be read quickly by anyone.

34. As to the words being used by the Appellant in the Advertisement, I make these findings:

(i) It was not accurate to say that the horse had been "spelling for 3 months". Even if it was said that the horse commenced spelling on 15 April 2021, by 23 June barely two months had passed. Further, I do not accept the submission that when drafting the Advertisement the Appellant was in some way forecasting out to the approximate time when a new owner would have the horse. The Advertisement gives the impression that the horse has been spelling for 3 months as at the date of drafting or publication. That was not accurate.

(ii) At the date the Advertisement was placed the horse was not "ready to start training again." The Appellant would have known from Dr Johnson's report the recovery program he had recommended. Orally, he may have said 3-6 months. The horse was not ready to start training on this time frame on 23 June 2021. Further, based on Dr Johnson's report, on his recommendation the horse was only to start trotting for 5 minutes building up to 10 minutes twice daily in weeks 24-28. Week 24 would be mid-October. The horse was not to start trotting at 15 minutes building to 20 minutes until weeks 29-32. The recommendation was then made to have the horse re-scanned to see if the tendon had healed in weeks 33-36. "Normal work" was not to resume until week 37 plus. Dr Johnson's

recovery program therefore could not be said to be recommending the horse was "ready to start training" anywhere near as early as 23 June 2021.

(iii) As to "would pass any vet check," I also consider these words to be misleading. It might be correct to suggest that the horse would have passed a vet check if that vet had not been informed of the tendon injury that occurred in mid-April 2021. If a vet was informed of that new tear that occurred in mid-April 2021, it is likely not to have passed a vet check. A vet informed of the diagnosis of Dr Johnson made on 28 April 2021, and of his recovery program, would in fact say that the horse should still be on a recovery program and probably still in a paddock. That claim is also misleading in my view.

Conversation with Mr Robb

35. The Appellant says that she told Mr Robb the horse would benefit from another three months in a paddock. Mr Robb denies he was told this. I accept Mr Robb's evidence. If he was told by the Appellant that the horse would benefit from a further three months in a paddock, I am of the view that either one of two things would have happened:

(a) He would not have bought the horse; or

(b) It would have prompted the question from him, "why?"

Causation

36. The Appellant's conduct created a risk of recurrence of the right tendon injury in my view. This is based on Dr Koenig's evidence. Happy Winner suffered bilateral catastrophic tendon injuries. As mentioned previously, there is insufficient evidence to support a finding that the actions of the Appellant, the injury this horse suffered in mid-April 2021, or its early return to "pacework" was causative of the bilateral tendon injuries. They may have been, but such a finding is not open on the evidence.

Particulars and "Improper Action"

37. It is necessary to consider whether the facts as I have found them are consistent with the particulars of the charge, and whether in any event they should be considered "improper actions" within the meaning of AR 229(1)(a).

38. Particular 5 to Charge 1 makes reference to the Advertisement and the statements that the horse was "ready to start training again" and "would pass any vet check". It is stated that these declarations were *"made without seeking any veterinary advice or veterinary assessment of Happy Winner to ascertain if that was accurate and contrary to the recovery period required and/or the rehabilitation program required Happy Winner to have a fair prognosis of recovery from that injury."* I am not certain that the statements made in the Advertisement were made "without seeking any veterinary advice or veterinary assessment of Happy Winner." The advice and the assessment had been made – by Dr Johnson back on 28 April 2021. The real point is that the Advertisement contains statements that are contrary to Dr Johnson's diagnosis and recovery advice. In any event, criticism is made by the Appellant of the phrase in the particular "a fair prognosis of recovery from that injury": see Appellant's Summary Table re Particulars at page 57 of the AS. The submission is made that Dr Johnson's recommendation was not made for the horse to have a fair prognosis of recovery from the injury but "rather to maximise the less than probable chance that tendon injury would not re-occur."

39. In my view at least that criticism of the Particulars is misplaced. Dr Johnson's 28 April 2021 report states that the injuries suffered by the horse "would be considered a moderate injury with a fair prognosis for recovery". The report then goes on to advise of a "recovery period" of 6-9 months, and then provides further details on that. The aspect of the Particulars criticised by the Appellant in my view are a sufficiently accurate reflection of Dr Johnson's report.

40. In Particular 6 it is alleged that the Appellant failed to advise Mr Robb of the injury the horse suffered in April 2021. The Appellant did not so advise Mr Robb.

41. In Particular 7 it is alleged that the Appellant compromised the care and welfare of Happy Winner by not telling Mr Robb of its injury, leading to him re-entering Happy Winner into a work program in early July 2021. In my view the horse's care and welfare was compromised by Mr Robb not being informed of the injury.

42. Particular 8 seems to be seeking to draw a causative connection between what is asserted as the improper actions of the Appellant and the injuries suffered by the horse

on 6 August 2021, and the horse being euthanised. It is fair to say that this particular is not clearly drafted, and in any event I do not consider it has been made out on the evidence.

43. In Particular 9 it is alleged that it was an improper action not to disclose the April 2021 injury in the Advertisement placed on 23 June 2021. In Particular 10 it is alleged that it was an improper action to use the terms "ready to start training again" and "would pass any vet check" in the Advertisement "without seeking any veterinary assessment or advice if that was accurate and contrary to the rehabilitation program required and/or recovery period required for Happy Winner to have a fair prognosis of recovery". In Particular 11 it is alleged that it was an improper action not to advise Mr Robb of the injury the horse suffered in mid-April 2021.

44. It is convenient to make findings about the improper actions alleged in Particulars 10 and 11 before dealing with Particular 9. For the reasons I have expressed above at [33] the statements "ready to start training and "would pass any vet check" created a wholly misleading picture about Happy Winner's fitness. The horse had suffered a recent new tear to its right tendon in mid-April 2021. This was a significant injury. The Appellant knew of the recovery program recommended by Dr Johnson in his report. As of 23 June, Happy Winner was not "ready to start training". Dr Johnson's advice was that the horse should only resume trotting in week 24; that is, mid-October. As also set out above, the words "would pass any vet check" were also prone to mislead. The horse would only pass a vet check if a vet doing the checking had not been informed of Dr Johnson's diagnosis of a significant right tendon injury and of his rehabilitation program.

45. As to Particular 11, I find that Mr Robb should have been told about the horse's tendon injury. That injury was not a historical or old injury. It was a significant new tear that occurred relatively close to the time when the horse was advertised for sale and when the horse should have still been in the first third of a recovery program. Not telling Mr Robb about the injury risked compromising the horse's health and welfare.

46. In my view, the misleading nature of the advertisement and the failure to tell Mr Robb about the relatively recent tendon injury, are sufficiently serious actions by the

Appellant that they should be considered "improper actions" as that term should be interpreted in the Rule.

47. The advertisement was prone to seriously mislead potential buyers as to the health of the horse in respect to the claims that the horse was "ready to start training again" and "would pass any vet check." It gave the impression of a fit and injury-free horse that was ready to resume "training." That was not the case. The misleading nature of the advertisement put the horse at risk. It could have put the horse at risk of a premature return to training, which in fact occurred. Equally, in my view Mr Robb needed to be told by the Appellant of the injury that occurred in mid-April 2021 and of the recovery program recommended by Dr Johnson. To not tell Mr Robb this was a sufficiently serious action as to constitute a "improper action" within the meaning of the Rule. It again subjected the horse to risk of injury. In my view, the admissions made by the Appellant in her 19 October 2021 interview with Mr Holloway referred to at [9(o)] above are an indication that at least during the course of that interview, she recognised she should at least not have drafted the advertisement in the manner that she did and that this placed the horse at risk. Particulars 10 and 11 are therefore made out.

48. As to Particular 9, I would not go as far as to find that all injuries suffered by horses need to be disclosed when they are advertised for sale. Historical injuries that horses have seemingly recovered from, for example, would not have to be disclosed in an Advertisement. If a horse has recovered from an old injury, or could in general not be said to be either misleading, or an "improper action," to advertise it for sale without mentioning that old injury. The difference here is that the Appellant placed the Advertisement only about 8 weeks after the horse had suffered a significant new tendon injury to its right foreleg. This was a 15cm tear involving 25% of the tendon. Her vet had outlined a recovery program of 37 weeks. To not disclose that injury, at least in the context of also making claims as to the horse's readiness to resume training and that it would pass a vet check was also, in my view, an "improper action" within the meaning of the Rule. Particular 9 is also made out.

49. Accordingly, Particulars 9, 10 and 11 are made out and the Appeal in relation to the finding of breach AR 229(1)(a) should be dismissed.

Charge 2

50. To claim that Happy Winner "had no soundness issues whilst in my care" is in my view both wrong and misleading. Happy Winner had suffered a new tendon injury whilst in the Appellant's care. The tear was 15cm in length and involved 25% of the tendon. In my view, as a matter of obviousness such an injury involves a "soundness issue." It does not matter if the horse's gait is apparently unaffected. To say that a horse that has suffered a significant tendon injury has no soundness issues is, in my view, nonsensical at best. I say that with all due respect to the Appellant's claim that her understanding of soundness relates to whether a horse is lame or not. I will return to that shortly.

51. The Appellant's nonsensical claim made in her 8 September 2021 email to Mr Holloway does need to be considered in context. In the email the Appellant also raised the tendon injury, but describes it as an "old, healed tendon injury." It was also false and misleading in my view to describe the injury as an "old injury." The Appellant well knew that the horse had suffered a new tear to its tendon. It might have been a recurrence of a similar injury that had occurred in the past, but it was clearly a new injury.

52. AR 231(i) is apt, in my view, to catch evidence which is misleading, even if there is no intent to mislead. However, I consider that the Rule was not intended by its drafters to catch evidence that could be viewed as misleading but was the result of what is found to be an entirely honest mistake. I do not consider that the Rule would have been drafted to catch persons who, whilst they might provide the Stewards with inaccurate evidence, had made what is found to be an honest mistake. However, want of care for the truth, or some kind of recklessness or carelessness whether or not evidence is misleading, would be conduct caught by the Rule. That kind of evidence can be distinguished from inaccuracies made by honest and genuine mistakes.

53. As stated above, I am comfortably satisfied that the Appellant received and read Dr Johnson's report on or about the date it bears. I have also given consideration as to the Appellant's own view about "soundness." I have also considered the Appellant's views about what "soundness" is in the context of her also advising the Stewards that the scan performed by Dr Johnson had "revealed an old, healed tendon injury."

54. It is possible that the Appellant drafted the 8 September 2021 email to Mr Holloway without re-reading Dr Johnson's report. However, if she did not re-read it or refer to it, she should have. She certainly had time to, having first been contacted by Mr Holloway two weeks before responding to him. Insufficient care was given by the Appellant, in my view, to the response that she gave to Mr Holloway in the 8 September 2021 email. She was economical, at best, with the full facts. Licensed persons should be held to high standards when providing evidence or information to Stewards about any matters, and certainly about welfare issues. Mr Holloway was enquiring about the death of a horse that had recently left the Appellant's stables who he had informed her had suffered "catastrophic injury." That should have prompted a timely and accurate response from the Appellant. Instead, her email response is in its totality misleading, and does not contain accurate facts. It is not to the point that, ultimately, the Stewards were not misled, or no longer misled, after they obtained Dr Johnson's report. A horse that has suffered a significant new tendon tear cannot reasonably be described as having no soundness issues. The scan did not merely reveal an old injury. It revealed a significant new tear as outlined in Dr Johnson's report. The misleading nature of the email is sufficient for me to be comfortably satisfied the Appellant has breached AR 232(i). The appeal in relation to the finding of breach for AR 232(i) should be dismissed.

Orders and Stay

55. The orders the Panel makes are set out at the end of these reasons. There are two further matters to comment on. First, as the Appeals against breach have been dismissed, it is appropriate that the stay granted on 12 January 2022 is lifted. The penalty to be imposed is highly likely to involve disqualification or suspension of some duration. Further, since drafting the reasons outlined above, I have read the reasons drafted by Mr Santucci, with which I agree.

Mr Tuck:

56. I agree with the findings and reasons of the Presiding Member outlined above, and those of Mr Santucci below. I also agree with the Orders outlined below.

Mr Santucci:

57. I have had the advantage of reading in draft the reasons of the Presiding Member. I agree with the findings and reasons of the Presiding Member outlined above. I also agree with the Orders outlined below.

58. Given the relative seriousness of the charges and their likely impact on the Appellant, I consider it appropriate to record separately that I have been persuaded to the relevant standard that the charges have been made out. Having weighed the material closely and reviewed the detailed submissions of Mr Van Gestel Chairman of Stewards, and Ms Heath for the Appellant I have reached the same conclusions as the Presiding Member.

59. In light of the detailed findings set out by the Presiding Member, I can express my reasons briefly, and address a few particular issues raised by this appeal.

60. The first issue is the pleaded case the Appellant had to meet. Ms Heath made the case for the Appellant, both at the hearing and in written submissions (AS[37] *f*), that a failure by the Stewards to make out each particular of each charge would require the Panel to uphold the Appeal, and dismiss the charges. I cannot agree. Nothing in the *Thoroughbred Racing Act 1996* (NSW), being the statutory foundation of this Panel's jurisdiction, suggests that such a strict approach should be taken. In particular, section 43(3) of the Act emphasises that the Panel is not required to act in a formal manner, and is to make its decision on the "real merits" of the case unconstrained by earlier precedent.

61. Accordingly, although the Stewards have not succeeded in establishing the Appellant's conduct caused the catastrophic injury that led to the horse being euthanised (as is implied in Particular 8 of Charge 1), I consider the Stewards have proved sufficient factual matters to uphold each charge.

62. The second issue is the Appellant's reputation and character. Significant evidence and written submissions were devoted to establishing the good reputation and character of the Appellant, including her honest dealings with respect to horses. The Panel was

invited to give that character evidence considerable weight. That material was admitted over objection and considered. But ultimately I did not find it particularly useful in light of the cogency of the evidence otherwise consistent with the charges being made out in the facts of this specific case.

63. As to those facts, I consider some of the salient matters below.

64. The Appellant found herself in a predicament. The Appellant had purchased a horse from an auction, she later discovered the existence of a significant old injury (in addition to the new injury). The original investors in the horse appear to have withdrawn their support and the Appellant was left with the financial responsibility to complete the sale with Inglis.

65. Having found herself in that situation, the charges in this case arise from what the Appellant chose to do next. After unsuccessfully looking for replacement owners the Appellant decided she may "*need to sell the horse to recoup the purchase price in order to pay Inglis*": Supplementary Statement [12]. In those circumstances the Appellant relisted the horse for sale online.

66. Even accepting that the Appellant was a trainer of good reputation and character within the industry, I was persuaded that the Appellant chose to be economical with the truth in respect of the advertisement (Charge 1) motivated by a desire to say what she could to on-sell the horse. Similarly, I was persuaded the 8 September email (Charge 2) was misleading.

67. The third and related issue is whether the conduct in respect of Charge 1 could be characterised as sufficiently dishonest, improper, or dishonourable to fall within AR 229. Ms Heath submitted that the Panel should not so conclude. Ms Heath advanced that the impropriety ought not be sustained on hindsight reasoning, and required proof of a serious breach with elements of dishonest intention or proof of a lack of reasonably held belief that the conduct was legitimate (AS[36]).

68. For completeness, I set out briefly the matters the led me to conclude the conduct of the Appellant was improper and dishonourable. I consider the conduct in placing the

advertisement was knowingly misleading with respect to sufficiently grave matters that failed to give adequate primacy to the welfare of the horse:

(a) The statement in the advertisement "*He has been spelling for 3 months and is ready to start training again for his new connections*". At the time this was advertised it was not true. The Appellant's answer to that allegation was that she had taken into account the (future) period of time required for selling and transport of the horse, and that there was "nothing wrong" with such an approach (AS [116]). That answer was unconvincing. But even if true, what was "wrong" with that approach was the decision to make a misleading statement in the course of selling a horse, for the sake of a commercial advantage, and in a manner that would compromise the best interests of the horse.

(b) Similarly, the inclusion of "*would pass any vet check*" was defended on the basis that the Appellant believed a standard or regular vet check may not catch this type of injury. Again that was consistent with the Appellant prioritising what she believed she could get away with, rather than the welfare of the horse. In any event, the use of the term "any" vet check must be taken to include a more comprehensive vet check that would include an ultrasound (ie the same type of vet check that discovered the injury). In the context of the racing industry, conveying those words in an advertisement in full knowledge of the new injury the horse had sustained was dishonourable.

(c) "*ready to start training*". First, I have been persuaded that the Appellant was in fact in receipt of the hard copy of Dr Johnson's report provided to her at the stable by Dr Johnson. The explanation that Mr Hardy's (the Appellant's father) may have misplaced it when tidying up did not ring true, especially in circumstances where Mr Hardy's evidence was that he would tidy up and file vet reports at home, and further that the Appellant never enquired with her father whether he had filed the report: AT 142.7008-7029. Next I accept Dr Johnson's evidence that he gave a second copy of the report to the Appellant before she was interviewed by the Stewards: AT 152.7467-.7470, and am satisfied she had read it and was familiar with the contents of the report during

that interview. I do not believe the Appellant's account that she had seen the report for the first time in the interview on 19 October 2021. The Appellant expressed no surprise or concern about the content of the report. To the contrary, her evidence on 19 October 2021 expressed a view that Dr Johnson's approach was conservative (see the evidence set out in paragraph 9(o) above). Finally, on this aspect of the advertisement, I find that the Appellant was told orally that the horse required three to sixth months recovery period. The Appellant's evidence as to what she was told appeared to vary slightly over time. On 26 November 2021 before the Stewards, the Appellant conceded that Dr Johnson's oral advice to her was expressed as a time range "At that time he advised me that the horse would need three to six months off": Stewards' Inquiry Transcript 26 November 2021 9.1429-1430. The Appellant's written account of what was said to her in her Supplementary Statement dated 27 April 2022 tendered to the Panel appeared to put that time period as a flat "three months": see [18] and [58]. In that respect, it appeared that the Appellant was presenting the shorter time frame as her case before the Panel. Mr Van Gestel cross-examined accordingly. It was then accepted by the Appellant in cross-examination that she was told "three to six months" (Appeal Transcript (**AT**) 127.6274-5). The Appellant's written submissions accepted that Dr Johnson advised "three months off or a three to six month rehabilitation period" (AS [51]). Dr Johnson's evidence was that his usual practice was to give a range of time for recovery: AT 150,7339; 151.7400-7415, although Dr Johnson did not have a recollection of the precise words used: see eg AT 150.7389. I am satisfied that Dr Johnson advised orally that the horse would require a recovery period of three to sixth month. Again on that basis, the advertisement was misleading, and I would find was contrary even to the oral advice given by Dr Johnson. At the time of advertisement the horse was not ready to start training. So much was known to the Appellant. Accordingly, the advertisement was deliberately misleading in that respect.

69. The fourth issue is the existence of both a new and old injury, that meant the Appellant's 8 September email was misleading in omitting reference to the new injury and suggestion there were no "soundness" issues.

70. The Panel was greatly assisted by the expert evidence of Dr Koenig who explained the method by which ultrasound was able to detect the difference between old previously healed soft tissue injuries and new such injuries. Dr Koenig explained that old injuries tended to show up whiter or brighter on the image at least in part reflecting the presence of type 3 collagens in the healed tissue. Newer injuries, Dr Koenig explained, tendered to show up darker or black or close to black (known as hypoechoic) as a result of the appearance of fluid and blood: AT 56.2722-2747

71. That evidence explains the scientific context for Dr Johnson's evidence that he identified a new injury "*because of it being black in colour and obviously a fresh lesion, not an old lesion":* AT 147.7220-7222.

72. The Appellant's 8 September email (the subject of Charge 2) stated: *"I noticed a slight thickening of the right for flexor tendon....I had the tendon scanned on April 28th by Dr David Johnson to be sure, and it revealed an old healed tendon injury"* (emphasis added).

73. In that light, the Appellant's email of 8 September was misleading in conveying that the only injury discovered by Dr Johnson was an old healed injury. It was also clearly a "soundness" issue. The Appellant's cross-examination of Mr Holloway was intended to demonstrate that he had not, in fact, been misled because the recipient would have assumed the fact that the ultrasound was undertaken implied the existence of a new injury AT:29. 1374-1398; see also AS[245].

74. First, I take the rule to impose an objective standard. The Stewards did not need to establish they were in fact misled. But second, even if that were a necessary inquiry, the answers given only demonstrated that Mr Holloway was in fact misled by the failure to refer to the existence of a new injury. In my view that was enough to make out the charge.

75. In reaching the above conclusions, it ought to be clear that the Panel is not concerned with whether the Appellant was simply driving a hard commercial bargain, or failed to live up to standards of fair dealing in the ordinary course of commerce. To the contrary, the jurisdiction to sanction conduct subject to the rules of racing applies to the Appellant

because she is engaged in not just any field of commerce, but is a person responsible for the "care" and custody of horses (LR78). That imposes upon any licenced person an obligation to put the welfare of the horse above solely commercial concerns. The improper element of the conduct charged was, as outlined above, that the Appellant's conduct was knowingly misleading, in respect of serious matters that subordinated the welfare of the horse.

76. Finally, as to whether the Appellant's conduct in respect of Charge 1 caused the later catastrophic injury to the horse on 25 August 2021. Again the Panel received detailed and helpful evidence in that respect from Dr Koenig and Dr Johnson concerning the risk of contralateral injuries. In lay terms, and at risk of oversimplification, it was explained that an injury to one leg of a horse may cause a later injury to the corresponding leg on the opposite side.

77. Given the seriousness of that allegation, however, I have found myself unable to be comfortably satisfied on the basis of the evidence before me that the Appellant's conduct was the cause of the catastrophic injury and led to the horse being euthanised. That is at least in part because no evidence of an ultrasound after the injury, or post-mortem examination of the tendons was available to the Panel (and to the Appellant). That is not intended as a criticism. There may be many reasons why those procedures were not performed. But in those circumstances, the evidence necessary to make out that element of the particulars would have been in the hands of the Stewards to procure, and in the absence of that evidence it is not a matter upon which I would be prepared to impute blame to the Appellant.

78. Nonetheless, for the sake of completion in case it is relevant to penalty, I am satisfied that the Appellant's conduct placed the horse at an increased risk of injury. That is because the advertisement referred to the horse being ready for training, and led to a risk it would be reintroduced to pace work in the context of a training programme far before the horse's 'new' injury was ready for such work.

79. I agree with the orders proposed.

Orders:

(1) Appeal in relation to the findings of breach of AR 229(1)(a) is dismissed.

(2) Finding of breach of AR 229(1)(a) confirmed.

(3) Appeal in relation to finding of breach of AR 232(i) dismissed.

(4) Finding of breach of AR 232(i) confirmed.

(5) The stay granted on 12 January 2022 is revoked. Pursuant to AR 283(7), the imposition of the disqualification imposed by the Stewards is deferred for a period of 7 days from the date of these reasons (AR 283(8) should be noted).

(6) The Stewards are to file any written submissions in relation to the Severity of Penalty appeal on or before 5:00 pm 20 September 2022.

(7) The Appellant is to file any written submissions in relation to the Penalty appeal on or before 27 September 2022.

(8) In the event that either party seeks an oral hearing in relation to the Penalty appeal, they should set out in writing why an oral hearing is necessary by 5:00 pm 20 September 2022. Such submissions are not to exceed 2 pages.