RACING APPEALS TRIBUNAL

NORMAN LOY
Appellant

RACING NEW SOUTH WALES
Respondent

DETERMINATION

21 MARCH 2022

Background

1. The Appellant, Norman Loy (**Mr Loy**) has been a licensed trainer with Racing New South Wales (**RNSW**) for over 20 years.

2. On 14 August 2021, Mr Loy posted to his personal Facebook account two comments concerning the then Premier of New South Wales, the Hon. Gladys Berejiklian as follows:

   "*You are the biggest fucking moron Gladys Berefucklien. How can you lockdown an entire state you stupid fucking mole."*

   "all i can say is you tip turkey looking gonzo fuckhead should concentrate on your area and leave regional NSW out of your sewer another 2 weeks lockdown please don't forget her when you vote next."

   (**Conduct**)

3. Following an inquiry undertaken on 3 September 2021, RNSW Stewards charged Mr Loy with a breach of the Australian Rules of Racing (**AR**) AR 228(a). That rule is in the following terms:

   > **AR 228 Conduct detrimental to the interests of racing**
   >
   > A person must not engage in:
   >
   > (a) conduct prejudicial to the image, interests, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere.

4. The Stewards particularised the charge as follows[1]:

   > *"… Mr Loy, you are a licensed trainer with Racing NSW and on two recent occasions, on dates unknown, you did publish on social media platform Facebook two highly inappropriate comments in respect of a person who holds a high public office, such conduct being prejudicial to the image and/or interests of racing.*" (**Charge**).

[1] Transcript of Steward's Inquiry, 3 September 2021, p 10

5. Mr Loy pleaded not guilty to the Charge.

6. The Stewards found Mr Loy guilty of the Charge and imposed a disqualification of three months commencing on 3 September 2021 and to expire on 3 December 2021.

7. That decision was appealed to the Appeal Panel of RNSW (**Appeal Panel**).

8. On 6 October 2021, the Appeal Panel dismissed the appeal against the finding that Mr Loy had breached AR 228(a) and made directions for the appeal against severity of penalty to be determined on the papers subsequent to the lodgment of written submissions by the parties (**Liability Decision**).

9. On 14 October 2021, the Appeal Panel, by majority dismissed the appeal against severity of penalty and confirmed the penalty imposed by the Stewards of a three-month disqualification (**Penalty Decision**). The Principal Member of the Appeal Panel, Mr R Beasley SC, issued dissenting reasons in support of a view that a two-month suspension was an appropriate penalty in the circumstances.

10. On 21 October 2021, Mr Loy lodged a Notice of Appeal to the Tribunal against the Liability Decision and the Penalty Decision. The appeal is thus as to breach and penalty.

11. An appeal to the Tribunal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the decision appealed against was made.[2]

Procedural history

12. On 12 November 2021, the Tribunal made procedural directions by consent of the parties including, relevantly, for:

    (1) RNSW to file and serve the evidence including any documents and witness statements upon which it intended to rely by 5 pm, 19 November 2021;

    (2) Mr Loy to file and serve the evidence, including any documents and witness statements upon which he intended to rely by 5 pm, 22 November 2021;

    (3) RNSW to file and serve any evidence in reply by 5 pm, 29 November 2021;

    (4) The parties to notify each other and the Tribunal of any witnesses required for cross examination by 5 pm, 22 November 2021;

    (5) RNSW to file and serve written submissions by 5 pm, 30 November 2021;

    (6) Mr Loy to file and serve written submissions by 5 pm, 7 December 2021; and

    (7) RNSW to file and serve any written submissions in reply by 5 pm, 14 December 2021.

    (**Directions**)

[2] Racing Appeals Tribunal Act, 1983 (NSW), s 16

13. On or about 19 November 2021, RNSW lodged with the Tribunal, a bundle of documents of 127 pages together with an index comprising the evidence upon which it intended to rely in accordance with a direction made on 12 November 2021.

14. On or about 26 November 2021, RNSW lodged with the Tribunal its written submissions in accordance with the Directions.

15. On 23 November 2021, Mr Loy made an application to stay the decision of the Stewards the subject of this appeal. That application was opposed by RNSW.

16. On 24 November 2021, the Tribunal ordered that the decision of the Stewards the subject of the appeal not be carried into effect pending the determination of the appeal or other order on condition that Mr Loy prosecuted the appeal with expedition.

17. As at the date of the hearing of this appeal, the parties have agreed that Mr Loy has served 55 days of the disqualification imposed by the Stewards.

18. Mr Loy did not comply with the Directions.

The hearing of the Appeal

19. On 15 March 2022, the Tribunal heard the Appeal. Mr. D. Sheales, of counsel, appeared for Mr Loy. Mr B. Walker AO SC and Mr O.R. Jones, of counsel, appeared for RNSW.

20. Mr Sheales, of counsel, sought leave to adduce evidence being three newspaper reports published in the Herald Sun, WA Today and The Advertiser on 13 and 17 November 2021 in relation to comments made by trainer Mr Peter Moody on his nationally syndicated podcast concerning Premier Mark McGowan's decision on Western Australia's border restrictions for which he received a $2,000 fine from Racing Victoria Stewards. That evidence, he asserted, was relevant to the issue of penalty. The Directions provided that such evidence was to have been provided to the Tribunal and RNSW by 22 November 2021. Mr Sheales also sought leave to rely upon two written outlines of submissions, each dated 15 March 2022. Those submissions were, in accordance with the Directions, due by 7 December 2021. Mr Walker SC objected to leave being granted to Mr Loy to adduce the evidence and to rely upon the outlines of submissions as they were both served very late and without explanation or apology.

21. By way of explanation for the delay, Mr Sheales referred to his client being "distracted" by other matters related to the hearing at the time that the evidence was due to be provided in accordance with the Directions. That however, does not explain adequately or at all, Mr Loy's failure to adduce the evidence at any other time over the last four months. The failure by Mr Loy to comply with the Directions for the adducing of evidence was not accompanied by any evidence from him or by his solicitor on his behalf, although Mr Sheales did proffer an apology.

22. The Tribunal has an expectation that directions, when made, will be complied with so that proceedings can be determined expeditiously, transparently and with sufficient notice to the Tribunal and other parties to the proceedings. Had it not been for the fact that Mr Walker SC indicated that reliance on the evidence sought to be adduced would not prejudice or embarrass his client and that he would be able to address matters raised in the written outlines of submission without the need for an adjournment, the Tribunal may have taken a

different course. In the circumstances, the Tribunal granted leave to Mr Loy to rely upon the evidence concerning Mr Moody and on the written outlines of submissions.

23. On 17 March 2022, after the hearing had concluded but before the delivery of these reasons, Mr Loy made application to place before the Tribunal a Racing Victoria Stewards Report dated 17 November 2021 (and accompanying Racing Victoria disciplinary record for Mr Moody) concerning the charge preferred by the Stewards against Mr Moody and referred to in paragraph 20 of these reasons. RNSW objected to Mr Loy's reliance upon this additional material. For the reasons set out in a separate determination issued 17 March 2022, the Tribunal permitted Mr Loy to rely upon that additional material.

24. RNSW relied upon written submissions, dated 26 November 2021.

25. Each party was afforded the opportunity to supplement their written submissions orally and did so.

Evidence on the Appeal

26. The evidence relied upon by RNSW comprised the following:

    (a) the exhibits from the Stewards Inquiry including each of the Facebook posts by Mr Loy the subject of the Charge, Transcript of that Inquiry and the Stewards Report following the inquiry (Ex. A);

    (b) the screenshots from Mr Loy's Facebook account and friend list from Mr Loy's Facebook account (Ex. B);

    (c) the transcript of the hearing before the Appeal Panel on 5 October 2021 (Ex. C); and

    (d) four newspaper articles published in the period 5 – 7 September 2021 (Ex. D).

27. The evidence relied upon by Mr Loy comprised three newspaper reports published in the Herald Sun, WA Today and The Advertiser on 13 and 17 November 2021 in relation to comments made by trainer Mr Peter Moody concerning Premier Mark McGowan's decision on Western Australia's border restrictions for which he received a $2,000 fine from Racing Victoria and the Racing Victoria Stewards Report dated 17 November 2021 concerning Mr Moody (with accompanying disciplinary record for Mr Moody) (Ex. 1).

Onus and Standard of Proof

28. The onus of proof lies at all times on RNSW. As the Charge involves an alleged breach of the ARs, RNSW must discharge its onus in accordance with the standard set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. As Dixon J observed in *Briginshaw* (at 361-362):

> when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence...It cannot be found as a result of a mere mechanical comparison of probabilities." The standard is of 'reasonable satisfaction'…but reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer.... In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

29. The so-called *Briginshaw* principle is thus understood as requiring care in cases where serious allegations have been made or a finding is likely to produce grave consequences. Importantly, and despite some confusion on this point, *Briginshaw* does not alter the standard of proof, that is, on the balance of probabilities, as the High Court of Australia emphasised in its authoritative re-statement of the *Briginshaw* principle in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 449–50. In that case, the High Court held (at 170-171) that, *"…the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove."* Thus, in a particular factual context, the more serious the misconduct alleged, the more cogent must be the evidence required to meet the civil standard of proof and thus to discharge the onus of proof.

30. The Tribunal has held on previous occasions that in determining issues relating to the breach of the rules of racing, and in the application of the so-called *Briginshaw* principle, it must be "comfortably satisfied" that the facts support the claims or issues in question (see, for example, *Eberand v Greyhound Racing NSW* (5.9.19); *Aiken & Roche v Harness Racing NSW* (19.3.19); *Gallagher v Harness Racing NSW* (14.9.19), *Schembri v Racing NSW* (13.12.19)) and *Pollett v Racing NSW* (16.3.21). This approach is also consistent with the standard that is most commonly applied in international sports disciplinary tribunals and in the Court of Arbitration for Sport (see Sports Law, Second Edition, 2012., Beloff & Ors, Hart Publishing at p 215).

31. It is thus incumbent upon RNSW to discharge its onus of proof to the comfortable satisfaction standard.

Issues on the appeal

32. Self-evidently the issues on the appeal are first, whether the Conduct comprises a breach of AR 228(a) and, secondly, if breach is established, the appropriate penalty.

33. It is for RNSW to establish that the Conduct satisfies each element of the Charge to the requisite standard.

Does the Conduct comprise a breach of AR228(a)?

Elements of the Charge

34. In *Waterhouse v Racing Appeals Tribunal* [2002] NSWSC 1143 (**Waterhouse**), Young CJ in Eq, when considering AR 174A, which provision contained wording similar though not identical to AR 228(a), endorsed the finding of the Tribunal in that case at [58] that:

> …before a charge relating to prejudice to the image of racing can be sustained, there has to be an element of public knowledge; and, secondly, that there is in fact a tendency to prejudice the sport as distinct from the individual involved; and lastly that the conduct in question can be labelled as blameworthy.

35. Following Waterhouse, the NSW Racing Appeals Panel made a similar observation in *Racing NSW v Zerafa* (6 November 2015) at [22] when considering AR175A (the predecessor to AR228(a)):

> For conduct to be prejudicial to the "image, or integrity or welfare of racing", the Panel accepts that the conduct must be publicly known. It must also be conduct which is prejudicial to racing itself, and not merely to an individual, such as the Appellant.

36. *Waterhouse* and *Zerafa* were applied by the Tribunal in *Pollett v Racing NSW* (16 March 2015), a decision involving AR228(a).

37. Accordingly, RNSW bears the onus of establishing to the requisite standard each of the following elements:

    (a) public knowledge of the Conduct;

    (b) that the Conduct had a tendency to prejudice the sport of racing rather than the individual involved; and

    (c) that the Conduct can be labelled as blameworthy.

38. What follows is a summary of the parties' submissions in relation to each element of the Charge proceeded by the Tribunal's consideration of those submissions and the evidence. The summary does not necessarily encompass every contention made by the parties. To the extent that it omits any contentions, the Tribunal notes that it has carefully considered all of the evidence and arguments advanced by the parties, even if there is no specific reference made to them.

Element 1: Was there an element of public knowledge of the Conduct**?**

Summary of the Stewards' Submissions

39. The Stewards submitted, in summary, that:

    (a) the Facebook posts were initially published to at least 2,600 people, although Mr Loy currently has 2,726 "friends" on Facebook;

    (b) Mr Loy admitted at the Stewards Inquiry that there were probably 600 people who were Facebook "friends" that he did not know;

    (c) the Facebook posts were subsequently given an even wider dissemination when one of Mr Loy's Facebook "friends" published them on a Facebook page accessible to any member of the public after which they came to the attention of the Stewards;

    (d) in these circumstances, the requirement for an element of public knowledge is made out;

Summary of Mr. Loy's Submissions

40. Without conceding the point, Mr Loy does not appear to dispute that the posts had an element of public knowledge. His outline of submissions is silent on the issue and Mr Sheales made no oral submissions directed to this element of the Charge.

Consideration

41. Mr Loy posted the comments to his "Norm Loy" Facebook account. The screenshots of that account (Ex. B) disclose that Mr Loy had 2,716 "friends". Mr Loy gave evidence at the Stewards Inquiry that 2,000 were probably known to him and that there were about 600 that he did not know. A consideration of a list of Mr Loy's friends as at 23 September 2021 (Ex.

B) discloses, not surprisingly given Mr Loy's extensive experience in the racing industry stretching well over 20 years, that a substantial number of them appear to have an interest or association with the racing industry.

42. Mr Loy's posts were subsequently given an even wider dissemination when one of Mr Loy's Facebook "friends" published them on a Facebook page accessible to any member of the public after which they came to the attention of the Stewards.

43. The fact that Mr Loy apparently only intended to disseminate the information the subject of the posts to a closed group of his "friends" by publishing it on his personal Facebook account to which only persons authorized by Mr Loy has access, does not diminish the "public" nature of the posts. As the Tribunal determined in *Pollett,* publication for the purposes of a breach of AR 228(a) does not require that the publication be to the public at large. It only requires that there be "an element" of public knowledge. Publication, in its most basic form, comprises a bilateral act by which a person communicates information to another in a form which is comprehensible to that person. Further, and in any event, the evidence discloses that the posts were disseminated by one of Mr Loy's Facebook friends more widely than the closed group.

44. The Tribunal is therefore comfortably satisfied that the distribution of the Facebook posts to the 2,716 "friends" on Mr Loy's Facebook account was sufficient to comprise publication or "an element" of public knowledge for the purposes of AR 228(a). The fact that the posts were further published by one of Mr Loy's Facebook friends more widely than the closed group only served to extend the persons to whom the posts were published.

Element 2: Did the Conduct have a tendency to prejudice the sport as distinct from the individual involved"?

Summary of the Stewards' Submissions

45. The publication of the Facebook posts by Mr Loy had a tendency to prejudice the racing industry, that is, to give rise to an unfavourable opinion or feeling amongst the public or a segment of the public made aware of the conduct because:

- Mr Loy, as a licensed trainer of over 20 years, is a representative of the racing industry or closely associated with the industry;

- a number of Mr Loy's Facebook "friends" are owners and include a lot of racing people and people who are not part of the racing industry at all;

- the Facebook posts were couched in abusive, highly offensive, denigratory, derogative and inappropriate language which sought to ridicule and mock the intelligence and appearance of the then Premier of NSW;

- reasonable members of the public would find the Facebook posts both sexist and misogynistic;

46. It is no defence to the Charge that the Facebook posts appeared only on Mr Loy's private page. Even in relation to a private text, if there is a possibility of its discovery that could not be described as remote, then the fact that it was initially made available to a limited audience is no excuse (see *Zerafa,* [43] – [45]).

47. By its terms, AR 228(a) applies to conduct both on and off the racecourse. Where a sporting participant engages in inappropriate behaviour "off course" or "off field", there is a real possibility that this will have a negative impact on the reputation of the sport concerned, especially where that person is permitted to continue to participate in that sport (cf. *De Belin v Australian Rugby League Commission Ltd* [2009] FCA 688 and *Zucal, RWWA Chairman of Stewards and Ors v Harper* (2005) 29 WAR 563).

48. If it were necessary to establish that the Premier of NSW were in some way connected to racing or the racing industry (which it is not), a person holding that office is so connected in light of the importance of racing to the NSW economy and the control of the racing industry by statute.

Summary of Mr. Loy's Submissions

49. Mr. Loy submitted that:

(a) the personal views that one holds as to the competence or character of any person is not a matter that is relevant to the proving of an offence against AR 228(a);

(b) the views expressed by Mr Loy in his Facebook posts were in the nature of political commentary. The reasonable person must appreciate that in an apolitical industry or organisation neither endorses nor repudiates the political view of any of its members;

(c) the posts were about the Premier of NSW is only relevant to the weighing in the balance by a reasonable person the overtly political nature of the post. This seminal feature of the posts inexorably would lead a reasonable person to conclude that the posts, reflected only upon the image or reputation of the author and not the image or reputation of persons or organisations with which the appellant is associated;

(d) by contrast, Mr Alan Jones AO, a person bound by the ARs has been publicly criticized for being misogynistic and sexist towards many women who hold high office including the Prime Ministers of Australia and New Zealand and has not been investigated for potential breaches of AR 228(a) specifically and other ARs more generally;

(e) the Stewards contentions that the posts are sexist, misogynistic, sought to ridicule and mock the intelligence and appearance of Ms Berejiklian are fanciful;

(f) the word "fuck" is not, without more, offensive. It depends on whether the word is used in a way calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable person;

(g) the word "MOLE" (or "moll") is relevantly defined as a gangster's female companion;

(h) a "tip turkey" is an Ibis and the word "gonzo" is defined as "bizarre or crazy" and "wild or crazy person"; and

(i) emotions such as anger or resentment or disgust and outrage would not be aroused in the mind of a reasonable person upon reading the posts.

Summary of the Stewards submissions in reply

50. In reply, the Stewards submitted, in summary, that:

    (a) the words used by Mr Loy were expressed in a nasty way calculated by their nature to invoke the range of reactions that such words would be expected to arouse such as anger, resentment, disgust and outrage;

    (b) the words used were not in the nature of political commentary or political analysis; and

    (c) Mr Loy is not being punished or prosecuted for his views; it is not those views but rather the manner in which they have been expressed that is in issue.

Consideration

51. In *Waterhouse*, the Court found that the conduct in question must have a "tendency to prejudice" the sport rather than the individual. As the Tribunal noted in *Pollett*, "prejudice" is not defined in the ARs but is defined in the Macquarie Dictionary, Second Edition, as including "*an unfavourable opinion or feeling formed beforehand or without knowledge, thought or reason"* and *"any preconceived opinion or feeling, favourable or unfavourable*."

52. Hence, to comprise a breach of AR 228(a), the Conduct must have a tendency, that is, a natural or prevailing disposition, to cause an unfavourable opinion or feeling in the public or a segment of the public made aware of the Conduct. That opinion or feeling may also, though not necessarily, have been formed without knowledge, thought or reason.

53. It is not necessary for the Stewards to establish that the Conduct has, as a matter of fact, prejudiced the sport of racing. It is sufficient for the Stewards to establish to the requisite standard that the Conduct had a tendency to cause prejudice to the sport of racing, that is, to produce an unfavourable opinion or feeling in the public or a segment of the public made aware of the Conduct (*Pollett* [38] [39] & [41]).

54. The Tribunal finds that the Facebook posts were, as the Stewards contend, couched in abusive, highly offensive and inappropriate language. Reasonable members of the public, would find the comments to be denigrating, derogatory and demeaning of the then Premier of New South Wales.

55. A "moll" is, as Mr Loy submits, defined in the Macquarie Dictionary as "the girlfriend or mistress of a gangster or thief. The definition extends to "tart" or "prostitute". The use by Mr Loy in one of his Facebook posts of the phrase "stupid fucking mole" was thus clearly directed to the Premier's gender and reasonable persons could consider the comment to be not only denigrating, derogatory and demeaning but also sexist and misogynistic.

56. The posts contained political commentary on the policy of the State government concerning Covid-19 related lockdowns. The Tribunal accepts that Mr Loy, like any other citizen, is entitled to express a political view. However, the Stewards' complaint is about the manner in which those views has been expressed by a person who, as a licensed trainer, bears an obligation to the industry over and above an ordinary citizen who is not so constrained.

57. The posts were published by Mr Loy, a person who has had the privilege of being a licensed trainer for about 20 years and a licensed jockey for about 16 years prior to that. The

Tribunal accepts the submission of the Stewards that by virtue of being a licensed trainer, Mr Loy is a representative of the racing industry, or at the very least closely associated with it and has a responsibility both on and off the racecourse to conduct himself in a manner which upholds the image, interests and reputation of the industry. So much is apparent from the terms of AR 228(a) which refers to conduct taking place "within a racecourse or elsewhere."

58. It is not, in the opinion of the Tribunal, a necessary element of the Charge that there be a direct nexus, as Mr Loy contends, between the Conduct and the racing industry. AR 228(a) is directed to regulating persons who are subject to the ARs to ensure that they conduct themselves both "on and off the pitch" in a manner so as to uphold the "image, interests, integrity, or welfare" of racing. That Mr Loy is a licensed person provides, without more, the necessary nexus between the Conduct and the racing industry.

59. To the extent that a nexus is required between the comments and the racing industry, the Tribunal accepts that in an industry such as racing which is heavily regulated by statute and governmental policies, a person holding high office such as the Premier of NSW is arguably connected to the racing industry so as to establish the nexus, if one be required.

60. Reasonable members of the public would, in the opinion of the Tribunal, find the posts to be abusive and highly offensive. The language employed was intended to ridicule and mock the intelligence and appearance of the then Premier of NSW. Reasonable members of the public reading the posts could, as the Appeal Panel found, have a myriad of reactions which would have a tendency to prejudice the image of racing including that the comments are representative of the nature and character of persons associated with the racing industry.

61. The Conduct fell far short of that expected of a licensed professional trainer of Mr Loy's experience. It reflected poorly on Mr Loy and, by association, on the industry as a whole.

62. The Tribunal considers Mr Loy's submission as to the Stewards not pursuing high profile commentator Mr Alan Jones AO for comments said to have been sexist and misogynistic of no relevance to the issues currently before it.

63. The Tribunal is therefore comfortably satisfied that the Stewards have discharged their onus of establishing that the Conduct had a tendency to prejudice the sport of racing in breach of AR 228(a).

Element 3: Was the Conduct blameworthy?

64. For the reasons discussed in relation to Element 2, the Tribunal is comfortably satisfied that the Stewards have discharged their onus of establishing that the Conduct was blameworthy.

The Appropriate Penalty

65. The ARs do not specifically prescribe a penalty or range of penalties for breach of AR 228(a). Under AR 283(1), penalties that can be imposed for a breach of the ARs are a disqualification, a suspension, a reprimand or a fine not exceeding $100,000. AR 283(6) provides for a specified period of disqualification for a breach of any of the rules there referred to, none of which is of direct relevance in the present circumstances.

66. In the absence of any prescribed penalty or range of penalties, the appropriate penalty for breach of AR 228(a) lies at the discretion of the Tribunal. In the exercise of that discretion a tribunal must ensure that a penalty:

(a) is proportionate to the gravity of the offence (see, for example, *Veen v The Queen (No. 2)* (1998) 164 CLR);

(b) ensures that the offender is adequately punished for the offence;

(c) deters the offender and other persons from committing similar offences;

(d) takes into consideration all the conduct of the offender including that which would aggravate the offence (see *R v De Simoni* (1981) 147 CLR 383); and

(e) takes into account by way of mitigation or reduction of sanction factors such as discounts for early guilty pleas, evidence of character and record and evidence of remorse or contrition.

Summary of the Stewards' Submissions

67. The Stewards submit that the three-month disqualification imposed on Mr Loy was appropriate in all the circumstances, because:

(a) the Conduct was serious and entirely gratuitous. The posts, which were published to at least 2,700 people, contained abuse and derogatory comments that were sexist and misogynistic;

(b) as to general deterrence, Mr Loy's posts were widely publicised and it is therefore important that members of the racing community and the general public who are aware of the racing industry appreciate that this behaviour cannot be, and is not, tolerated;

(c) as to specific deterrence, Mr Loy has not displayed any contrition or remorse for the Conduct. Instead of acknowledging that what he did was wrong, Mr Loy has sought to justify and excuse his behaviour. He has continued to maintain throughout the proceedings that what he did was appropriate and not open to criticism or sanction. It is important that it be made clear to Mr Loy that he is mistaken in this regard and that he appreciates he must take responsibility for his actions;

(d) it is not the first time that Mr Loy has been sanctioned for bringing racing into disrepute because of a post on Facebook. On 7 February 2014, Mr Loy pleaded guilty to a charge under (what was then), AR 175A for conduct prejudicial to the image of racing, for making comments on his Facebook page which referred to RNSW employees as "office jockey morons" and for which he was fined $1,000;

(e) the Conduct is far more serious than that which was the subject of the 2014 charge and is deserving of a far greater sanction. Moreover, it is apparent from the circumstances of the present case that the previous fine did not cause Mr Loy to avoid making offensive or abusive comments on his Facebook page that were prejudicial to the image and interests of racing;

(f) there is every risk that, if a significant penalty is not imposed on this occasion, Mr Loy will offend again;

(g) a further consequence of a period of disqualification is that it will require Mr Loy to reapply to RNSW for his licence at the conclusion of that period of disqualification. This will require RNSW to be satisfied that Mr Loy is a fit and proper person to hold a licence. It is hoped that this will bring home to Mr Loy the seriousness of his conduct; and

(h) whilst the Stewards contend that a three-month disqualification is appropriate, they accept that there was nothing inappropriate about the decision of Principal Member Beasley SC who determined (in the minority) that a two-month suspension was warranted and that this penalty is also within an acceptable range;

Summary of Mr Loy's Submissions

68. Mr Loy contended that:

(a) disqualification was not within the penalty range upon a proper exercise of discretion;

(b) RNSW cannot identify any other instance in which a disqualification has been imposed in like circumstances of offending;

(c) on 16 November 2021, the Stewards of Racing Victoria imposed a $2,000 fine on prominent licensed trainer and media personality Mr Peter Moody for comments made by him on a national podcast critical of the Western Australia Premier, Mark McGowan;

(d) in *Newing* (Racing Appeal Panel, 12 February 2020), a case involving a breach of AR 228(b), the appellant engaged in conduct of causing actual bodily harm for which a three-month suspension of Mr Newing's licence was imposed, the operation of that suspension being suspended for three months;

(e) in *Price* (Racing Appeal Panel, 17 August 2020), a case involving a breach of AR 228(b)), a licensed trainer made comments to licensed persons that were intimidatory in nature, for which he was fined $1,500;

(f) in *Lambourne and Pollett* (Racing Appeal Panel, 6 October 2020), Lambourne was fined $2,000 in total for breaches of AR 228(a) & (d) and Pollett $2,000 for a breach of AR 228(a);

(g) in *Prest* (Racing Appeal Panel, 24 December 2020), Mrs Prest was found guilty of two offences against AR 228(c) for posting 40 tweets that were found to be improper and insulting to RNSW and its CEO for which her licence was suspended for a period of one month and a fine of $7,500 imposed. In this instance, Ms Prest had pleaded guilty to the offences with which she had been charged;

(h) *Prest, Lambourne and Pollett* reflect the proper penalty range in this case;

(i) the only similar case that resulted in an interference with licence was that of *Prest*, the offending in that case is different from Mr Loy because the potential for damage

to the image and reputation of the racing industry of the posts in *Prest* were far greater;

(j) the Stewards have not advanced any basis as to why the proper penalty should be a disqualification, or incorporate any interference with Mr Loy's licence at all; and

(k) in the circumstances, the appropriate penalty is a fine in the amount of $1,000-$2,000.

Consideration

69. Neither party was able to provide the Tribunal with a reference to relevantly analogous circumstances nor is the Tribunal otherwise aware of any.

70. The decisions of the RNSW Appeals Panel to which Mr Loy has taken the Tribunal are of no direct assistance because none of those cases, in the view of the Tribunal, address relevantly analogous circumstances and are thus wholly distinguishable on their facts. In any event, it should also be noted that whilst Mr Sheales referred to those cases as "precedent" they are, of course, not binding on the Tribunal. That is not to say that decisions of the Appeals Panel are not helpful and informative to the Tribunal.

71. That said, whilst, there are some significant differences in the tone, nature and language of the tweets posted by Mrs Prest and the Conduct, it is the decision with the closest similarity to the circumstances under consideration. Whilst Mr Sheales submitted orally that Mrs Prest had pleaded guilty to each of the two charges, a consideration of the reasons for decision of the Appeal Panel reveals the contrary. Mrs Prest in fact appealed both breach and severity of the penalty imposed by the Stewards.

72. A relevant point of distinction between *Prest* and the circumstances presently under consideration is that Mrs Prest was charged with two breaches of AR 228(c), a serious but arguably lesser charge than one under AR 228(a). AR228(c) has, as its objective, to prevent behaviour towards the persons there referred to in relation to their functions, powers or duties. Such conduct may or may not, depending upon the circumstances, also comprise a breach of AR 228(a). However, Mrs Prest was charged with two breaches of AR 228(c) only.

73. Further, in considering penalty, the Appeal Panel had regard to:

(a) Mrs Prest's good character as disclosed in some seven-character references tendered in evidence;

(b) Mrs Prest's over 30 years as a licensed trainer and industry participant and apart from a breach of AR 228(a) and AR228 (c) in 2019 also arising from her use of social media, her otherwise excellent record during such time; and

(c) Mrs Prest's genuine affection and concern for, and service to, the racing industry.

74. The Appeal Panel imposed a penalty of a suspension of licence for 1 month and a fine of $7,500.

75. In so far as the decision of the Stewards of Racing Victoria in the case of Peter Moody, upon which Mr Loy placed particular emphasis, is concerned:

(a) the comments made by Mr Moody on his podcast and are of a wholly different nature to those the subject of the Conduct. Importantly, those comments are not couched in the same abusive, highly offensive and inappropriate language that is denigrating, derogatory and demeaning or sexist and misogynistic;

(b) Mr Moody was charged with a breach of AR 227(a) which outlines the powers of the PRA or the Stewards to penalise any person who "*commits any breach of the Rules, or engages in conduct or negligence which has led or could have led to a breach of the Rules*";

(c) Mr Moody provided what is recorded in the Stewards report as "*candid evidence*" and expressed "*remorse, including that he regretted making the comments, awareness as to the Rules, related precedents profile…*" and

(d) it appears that the Stewards also took into consideration Mr Moody's "long-standing position in racing" and the fact that he had a reasonable record including one prior breach of AR 175A in 2017 for which he was fined $3,000 after pleading guilty.

76. The *Moody* case is thus distinguishable on its facts including as to the nature of the offending, the charge and Mr Moody's remorse and contrition. It accordingly, provides the Tribunal with no assistance in relation to the question of the appropriate penalty in this case.

77. In considering the appropriate penalty in this case, the Tribunal has, in addition to *Prest*, also had regard to:

(a) the serious and entirely gratuitous nature of the Conduct which is an affront to human decency;

(b) the important and privileged position held by Mr Loy as a licensed trainer and the fact that his conduct fell far short of that expected of a person in his position;

(c) the need for specific deterrence especially as Mr Loy has shown no remorse or contrition for the Conduct;

(d) the need for general deterrence; that is, a strong message must be sent to members of the racing community who hold the privileged position as licensees that such conduct cannot and will not be tolerated; and

(e) the fact that this is not Mr Loy's first offence for a breach of AR 228(a) but that he has otherwise had a reasonably unblemished career.

78. Disqualification is a sanction that is reserved for the most serious of offences and offending. So much is apparent from the provisions of AR 283(6). Where imposed, it requires a person to re-apply to RNSW for his licence at the conclusion of the period of disqualification.

79. Notwithstanding the seriousness of the breach in this instance, the Tribunal is of the view that given, in particular, Mr Loy's record, a disqualification is not warranted. Instead, the seriousness of the offending and all the other circumstances to which the Tribunal has had regard justifies a lengthy period of suspension.

80. A fine would not, in all the circumstances, be proportionate to the seriousness of the offending nor would is address the need for specific and general deterrence

81. The Tribunal determines that the appropriate penalty is a period of suspension for 2 months. Noting that Mr Loy has already served a period of disqualification of 55 days; in lieu of time served, he will be required to serve an additional 5 days of suspension upon the vacating of the stay ordered by the Tribunal on 24 November 2021.

Orders

82. The Tribunal orders as follows:

(1) The appeal by Mr Loy against his conviction for breach of AR 228(a) is dismissed.

(2) The decision of the Appeal Panel dated 6 October 2021 is affirmed.

(3) The appeal by Mr Loy against severity of penalty is upheld.

(4) Orders 3 and 4 of the decision of the Appeal Panel dated 14 October 2021 are set aside.

(5) Mr Loy is suspended for a period of 2 months.

(6) The stay ordered by the Tribunal on 24 November 2021 be vacated.

A.P. Lo Surdo SC
Acting Racing Appeals Tribunal