RACING NEW SOUTH WALES APPEAL PANEL

IN THE MATTERS OF ALEX KEAN & CHYNNA MARSTON

REASONS IN RESPECT OF APPREHENDED BIAS

Appeal Panel:	**Mr P F Santucci – Convenor and Acting Principal Member**
	Mrs J Foley
	Mr J Rouse
Appearances:	**Stewards: O Jones**
	Appellants: V M Heath
Date of Hearing:	**12 December 2024**
Date of Reasons:	**24 December 2024***

REASONS FOR DECISION

Summary

1. **The Panel:** By application dated 9 December 2024 Ms Marston and Mr Kean seek that the Panel recuse itself on the basis of apprehension of bias by reason of the fact that Racing NSW appoints (and re-appoints) the Panel members, Panel members are paid by Racing NSW, and in the circumstances of this case Ms Marston has legal claims against Racing NSW in respect of which Racing NSW has a financial interest in the outcome adverse to Ms Marston.

2. The matter was scheduled for a final hearing on 9 December 2024 and was expected to run for 3 days. But the lateness of the application is only relevant in respect of the Stewards case that the Appellants had waived any opportunity to object to the determination by the Panel of the appeal.

3. We have determined that the application should be dismissed. We are not satisfied that there is a reasonable apprehension of bias that warrants the Panel refusing to the determine the appeal.

The substantive case and Charges

4. In order to determine the application it is necessary to set out briefly some of the factual background to this matter.

5. These are separate appeals relating to Mr Alex Kean, and Ms Chynna Marston. The two appeals are being heard concurrently because of an overlap of some factual matters that are common to both.

6. The substantive issues involve several charges against the rules of racing, but the significant factual overlap between the cases relates to charges against LR 114(2)(a) in which it is alleged that both Mr Kean and Ms Marston failed to provide sufficient nutrition to horses (being "Eligible Horses, Unnamed Horses and Named Horse") in the possession, control or custody of Mr Kean and Ms Marston.

7. Of particular note for this application are the following allegations and charges against Ms Marston:

    (a) Charge 4 being an alleged breach of AR 232(b) for a failure to comply with directions of the Stewards issued by email on 5 August 2023 which directed a feeding regime and veterinary inspections;

    (b) Charge 5 being an alleged breach of AR 232(b) for a failure to comply with directions of the Stewards to permit access to a property where it is alleged horses were in the possession, control or custody of Ms Marston over the course of 8 and 9 August 2023;

    (c) Charge 6 being an alleged breach of AR 232(h) for a failure to attend a Stewards inquiry on 10 August 2023

Ms Marston's injury and subsequent claims against Racing NSW

8. Unbeknown to the Panel until the issue was raised on this application, Ms Marston also has claims against Racing NSW in respect of injuries she suffered, and in respect of which she claims damages, and workers compensation against Racing NSW.

9. By her statement of 9 December 2024 and Exhibit CM-1 Ms Marston has given details of the injury and resulting claims.

10. It is not necessary for the Panel to make findings in respect of Ms Marston's claims. The Panel considers it is appropriate to take Ms Marston's case at is highest for the purpose of this application.

11. Ms Marston described her injury and the claims in the following terms. Ms Marston wanted to have a career in racing, at least in the first instance as a jockey. Ms Marston described a career ending injury on 1 November 2024 at Tumut when she was an apprentice jockey, in which she suffered a broken neck, broken back, trauma-induced epilepsy, brain damages and post-traumatic stress.

12. Arising from that injury Ms Marston has a workers compensation claim in respect of which Racing NSW is the relevant insurer, and a potential claim for damages. Ms Marston has described that she felt dealing with Racing NSW in respect of the workers compensation claim to be stressful, and requested that contact be made with her through her solicitors rather than directly.

13. It was argued that the case is a significant one, and could potentially give rise to claims well over $1 million. For that reason it is said that Racing NSW has an adverse financial interest to the interest of Ms Marston in the resolution of any potential workers compensation, or damages claims.

14. Mr Jones for the Stewards noted that presently there were in fact no proceedings on foot, but was willing to accept that Ms Marston believes she has claims, and that there was no relevant limitation period that precluded commencement of any such claim.

15. Ms Heath also tendered and took the Panel to parts of the financial reports of Racing NSW that she said demonstrated that Racing NSW had insufficient funds provisioned for the size of its potential workers compensation liability generally, and therefore Racing NSW would have a heightened interest in this particular case.

16. Also tendered in evidence was press reporting, and a decision of the Supreme Court in *Webber v Racing NSW* [2019] NSWSC 46, that went to the allegedly "aggressive" approach to investigation of workers compensation claims taken by Racing NSW. Ms Heath said that material was relevant to establishing that a reasonable person considering the apprehension of bias would be aware that there is no information barrier between the licencing function of Racing NSW and its role as a workers compensation insurer, and would assume Racing NSW maintained its historically "aggressive" approach to claims handling.

17. Mr Jones referred to the fact that in the annual reports of Racing NSW it refers to the appointment since 1 July 2022 of Gallagher Bassett "in partnership with Racing NSW" to undertake claims management of such claims.

18. We are willing to accept for the purpose of this application that Ms Marston has a claim, that the claim could give rise to potential liability on the part of Racing NSW of over $1 million. That is enough for us to conclude that Racing NSW would be aware of the case, and would be interested in understanding the status and quantum of any claim. It is not necessary for us to resolve any question about the provision made in the accounts.

19. Without needing to rule on the use that can be made of press reports and factual findings in judgment, the Panel is also willing to accept that there is no information barrier between the licencing functions, and the ultimate decision-makers in respect of workers compensation claims at Racing NSW. That is an unsurprising conclusion in circumstances where the public would expect that if there were matters in respect of workers compensation claims that revealed any relevant issue for the purposes of the licencing function of Racing NSW that it would be acted upon for the public benefit, including the welfare of horses. We reject the imputation of an "aggressive" attitude to the treatment of workers compensation claims as that is a nebulous description and is difficult to apply. Nevertheless, we accept that Racing NSW has demonstrated vigilance in its assessment of claims, including in this case the use of video surveillance. We consider a reasonable person would be aware of that vigilance when assessing the reasonableness of any apprehension.

The effect of the injury and claims on Ms Marston's relationship with the Stewards

20. Ms Marston has also relied on her injuries and worker compensation claim as providing relevant context for the resolution of the Charges currently the subject of the appeal. That was said to arise from the effect it had on her relationship with the Stewards.

21. Ms Marston described her work with horses as her "happy place" and a source of solace and respite from troubles in her life (some of which she described in some detail in her evidence but we need not repeat here).

22. In light of that strong connection to her horses, Ms Marston explains in her evidence that in 2015 she made "poor choices" to drive to see her horses and take a quiet ride, despite medical advice not to do so. Ms Marston associated that poor decision-making with the effects of her injury which she says make her prone impulsive behaviour.

23. At that time in 2015 Ms Marson was under covert surveillance by a private investigator working for Racing NSW in respect of its assessment of her workers compensation claim.

24. By letter dated 22 December 2015 Racing NSW denied her cover (in a notice under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW)) on the basis of among other things, evidence from the surveillance that was alleged to show Ms Marston driving a car, towing a horse float, and "*riding a horse in show jumping training"* (CM-1 p27).

25. Ms Marston says at that time she was contacted directly by officers of Racing NSW, and found the interactions stressful and upsetting, and difficult to deal with in light of her injuries. Ms Marston describes being shocked to learn that Racing NSW had caused someone to follow her and video her, including on private property. She considered that conduct to be "creepy", anxiety inducing, and destructive of her relationship of trust and confidence with her treating doctor (who had been contacted by Racing NSW directly).

26. It is unnecessary to repeat here the full history of what has transpired since that time. But for the purpose of the bias application that the Panel was asked to draw inferences from this history to the effect that Ms Marston developed a distrust of dealing with Racing NSW, Ms Marston had at various times directed communications to be conducted only through her solicitors, and in the circumstances there had been a "chilling effect" on the lines of communication between Ms Marston and the Stewards.

27. For the purpose of this application the Panel is willing to accept those matters.

28. That fact is then relied upon by Ms Marston as explaining the factual nexus between the context of her workers compensation and injury claims against Racing NSW and the subject matter of the Charges that are before the Panel.

29. In particular in respect of Charges 4, 5, and 6 that we have outlined above it was suggested that on the determination of the appeal, the Panel would be required to determine matters that overlapped with the workers compensation claim because it was suggested that part of the defence to those Charges would be advanced by reference to the "chilling effect" on the communications between Ms Marston and Racing NSW. Those matters it was said were relevant to Ms Marston's reluctance to communicate with Racing NSW at all and may explain the circumstances of any alleged non-compliance with directions.

30. The Stewards for their part have submitted that despite the deadlines for the filing of any evidence on the substantive hearing having passed, there was no evidence that Ms Marston had filed, nor evidence that she could point to before the Stewards where she raised directly the the "chilling effect" on communications that was said to be relevant to her defence of any of the charges.

31. While the Panel accepts the submission of the Stewards that there was no evidence filed to that effect, and that we were not taken during the course of argument to any suggestion of evidence to that effect being given before the Stewards, for the purpose of this application we are content to take Ms Marston's claims at their highest. For that reason we are willing to accept that one of the ways in which Ms Marston may seek to defend the substantive charges will involve presenting evidence and making submissions in respect of the breakdown in communications between her and the Stewards based on the matters she has outlined in her evidence.

Principles in respect of apprehension of bias

32. The fact that the Appeal Panel was not otherwise aware of Ms Marston's claims against Racing NSW is relevant context, but it cannot be determinative of the apprehension of bias alleged in this case.

33. The test for apprehension of bias entails what is often described as the "double might". In *Charisteas v Charisteas* (2021) 273 CLR 289 at [11], the High Court reiterated the test for apprehended bias (established in ***Ebner*** *v Official Trustee in Bankruptcy* (2000) 205 CLR 337) as whether:

> a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

34. The "double might" emphasises that the test is concerned with "*possibility (real and not remote), not probability*": ***QYFM*** *v Minister for Immigration* (2023) 409 ALR 65 at [37], citing *Ebner* at [7]. Nonetheless, the allegation must be firmly established, and is not to be reached lightly: *Getswift v Webb* (2021) 283 FCR 328 at [28].

35. It requires three steps identified in *QYFM* at [38]:

    (a) the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits;

(b) the articulation of a logical connection between that matter and the feared departure from the judge deciding the case on its merits;
(c) the assessment of the reasonableness of the asserted apprehension of bias.

36. Ms Heath made clear in advancing the case for Ms Marston it was not alleged that there was any actual bias. Nor was it alleged, that there was any particular factor or characteristic relevant to any particular Panel member. Rather the application was pitched at level that would be applicable to any Appeal Panel however composed.

The factors that give rise to the application

37. The factors which were said by Ms Marston to give rise to the potential for an apprehension of bias were:

(a) The appointment, reappointment and terms of remuneration of the members of Appeal Panel are determined by Racing NSW;

(b) In addition to prosecuting the appeal in its role as the relevant licencing authority for thoroughbred racing, Racing NSW had an additional and distinct financial interest adverse to Ms Marston in related factual matters arising from its role as the relevant insurer of the workers compensation claim, and as a potential defendant to any future claim for damages.

38. We have set out above in some detail the facts that we are willing to take at their highest in relation to Ms Marston's injury and claims, and Racing NSW's financial interest in the outcome of those claims.

39. In respect of the remuneration of the Panel it is necessary to have regard to the statutory framework that establishes the Panel and provides for its remuneration. That statutory framework is as follows:

(a) Part 4 of the *Thoroughbred Racing Act 1996* (NSW) (**the Act**) is entitled Appeal Panel.
(b) Section 45(1) of the Act provides that Racing NSW "*is to appoint suitably qualified persons to be members of the Appeal Panel. A member of Racing NSW cannot be a member of the Appeal Panel*";
(c) Section 45(2) of the Act provides that, in determining appointments to the Panel, Racing NSW is to "*have particular regard to the need to minimise conflicts of interest*".

(d) Section 45(3) requires at least one member of the Panel to be a lawyer of at least 7 years standing. Section 45(4) identifies various matters that would disqualify a person from being a member of the Panel, including (in sub-paragraph (a)) that the person "*holds a licence issued by Racing NSW or by a racing association*";

(e) Section 45(5) of the Act provides that a member of the Appeal Panel holds office for 4 years from appointment and is eligible (if otherwise qualified) to be reappointed. Section 45(7) vests a power of removal in the Governor acting on recommendation from Racing NSW to remove a Panel member for incapacity, incompetence, or misbehaviour.

(f) Section 46(1) provides that Racing NSW is to appoint one of the members of the Appeal Panel as Principal Member. Section 47(1) provides that the Principal Member is to determine how the Panel is constituted in any particular appeal. Section 47(5) provides that the Principal Member must, if practicable, consult with the Chief Executive before establishing an Appeal Panel under s 47. On some occasions contemplated by s 47(6), the Chief Executive may exercise certain functions of the Principal Member.

(g) Section 48 provides that the members of the Appeal Panel are remunerated as determined by Racing NSW from time to time. During the course of the hearing the Panel caused Racing NSW to provide information about the Panel's remuneration. That information was not known by those acting for the Stewards, but was known by the appeals administration team. That remuneration is, in respect of the Convenor (ie the legally qualified person) $1,600 plus GST, and in respect of other members $100 plus GST. There is some uncertainty whether the amount is per appeal or per day for multi-day appeals. In event the list of Panel members set out in the annual reports reveals that the legally qualified members are either partners in law firms, or barristers (all but the present convenor of whom are senior counsel) for whom the daily rates represent a modest stipend, and an amount well below what might be earned in a day of professional practice. The Panel also disclosed that from time to time Panel members receive invitations to race meets, at which hospitality is provided by Racing NSW.

(h) Section 43 of the Act deals with the procedure on appeal, and section 45(5) provides for the person presiding at a hearing of an appeal to have the powers, authorities, protections and immunities conferred by the *Royal Commissions Act 1923* on a Commissioner;

(i) Section 49A provides that the local rules of racing of Racing NSW may make provision for or with respect to appeals to the Panel, including the manner of making an appeal and the procedure for hearing and determining an appeal. The Rules of Racing, including Local Rules, are adopted by Racing NSW pursuant to its functions and powers in ss 13 and 14 of the TRA. Racing NSW has made rules concerning appeals to the Panel in the form of LR 106.

40. Both parties referred to the recent decision of the High Court of Australia in *Director of Public Prosecutions v Smith* [2024] HCA 32, 419 ALR 212. That case involved child sex offences and a statutory scheme in Victoria which it was held (at [83]) had authorised a pre-trial meeting between the judge, legal representatives of the Crown and the accused, and a complainant in the case. At [97] the majority referred to the fact that even though the meeting was authorised there were still circumstance in which the conduct of any particular meeting may have affected the fairness of the trial.

41. Ms Heath accepted that in light of *DPP v Smith* the fact that the statute authorises the remuneration of the Panel by Racing NSW cannot, without more, be a sufficient basis for an apprehension of bias. But Ms Heath submitted an apprehension of bias arises where, as here, there is a "super added" financial interest on the part of Racing NSW adverse to the appellant.

42. The Panel is willing to accept that for the purposes of the first stage of the three step analysis identified above, the "super added" issue in the present case of Ms Marston's injury and compensation claim and the adverse financial interest of Racing NSW is a matter which might be capable of grounding an apprehension that the Panel may not determine the matter impartially.

43. However, it is necessary to consider the second and third steps of that analysis

The logical connection and the reasonable person's apprehension

44. Ms Heath submitted that the Appeal Panel sits in a peculiar position without any of the "independence" associated with an appeal to NCAT, or even to the Racing Tribunal, where members are at least appointed by a Minister, and not by the licencing authority itself.

45. Ms Heath put her submission in the first place, at its highest, by saying that the Appeal Panel would be the subject of a reasonable apprehension of bias in respect of every case in which Racing NSW also had a separate adverse financial interest to an appellant, irrespective of how close the factual substratum of the separate case overlapped with the Charges on appeal. Ms

Heath readily advanced an alternative submission that in any event on the facts of the present case there was a sufficient connection between the subject matter of the injury and compensation case and the present appeal to give rise to the apprehension of bias.

46. Mr Jones for his part made the mirror image submission. First, at level of principle it was asserted that Parliament and the statute had authorised the Appeal Panel to determine any and every such case that comes before it, irrespective of other interests the parties may have. Mr Jones made the point that some cases may involve a separate financial interest in respect of one appellant, but other cases may involve the broader interests of Racing NSW and its social licence to continue to operate racing in the State based on perceptions about the welfare of horses, or misconduct in respect of doping, or betting on races. Alternatively, Mr Jones submitted the Panel would readily conclude that, on the facts of this particular case, there was insufficient logical connection between the subject matter of the Ms Marston's claims and Racing NSW's interest, and the reasonable apprehension that determination of the appeal by the Panel might not be impartial.

47. It is relevant in the present context to recall what the High Court of Australia said in *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583, 583 when applying the "double might" test for apprehension of bias to the Industrial Relations Commission:

> The precise practical requirements of that principle vary from case to case. They will be influenced by the nature, function and composition of the particular tribunal.

48. It is necessary to emphasise the nature, function, and composition of the Appeal Panel. The Appeal Panel is not (and is prevented by statute from being) constituted by members of Racing NSW.

49. Section 45 of the Act contains both a power of appointment and a statutorily imposed disability on Racing NSW from appointing any person who is a member of Racing NSW. Insofar as Parliament thought it was appropriate for this level of merits review to be conducted by persons of Racing NSW's choosing, who are remunerated as Racing NSW sees fit, it is clear that Parliament required something more than what is sometimes referred to as an "internal" review -for example by a more senior decision-maker, or by the CEO or board of Racing NSW.

50. Moreover it is also apparent that the legislature intended the presiding member's immunity consistent with that of a Royal Commissioner, would indicate some level of independence from Racing NSW.

51. Despite some semblances of independence, it is evident from the nature of the tribunal that its remuneration would be paid by a party who frequently appears before it, without the full guarantees of independence that buttress a Chapter III Court – ie security of tenure, and judicial pensions etc.

52. In those circumstances the Panel concludes that the statutory regime of the Act authorises the Panel to determine any appeal that comes before it even where Racing NSW may have some other adverse interest to one of the litigants independently of the licencing issue that is the subject of the appeal.

53. That is not to say that the statutory regime authorises other factors that may in the circumstances give rise to an apprehension of bias about the outcome of a case. Examples would be where a Panel member had placed a bet on a race in which an appeal to the Panel may affect the outcome of the race. Or where the Panel member was a personal friend or business associate of a licenced person bringing an appeal.

54. But absent some particular matter concerning an individual Panel member, the Panel is not satisfied that an interest of Racing NSW adverse to an appellant, coupled with the Panel's remuneration and reappointment by Racing NSW is sufficiently (ie "logically") connected to an apprehended deviation from the determination of the case on its merits.

55. Determination of the appeal at that level of generality means that it is not strictly speaking necessary to determine whether the facts of the particular case involve such a connection. But if the Panel is wrong about its determination in that respect, we are also satisfied that there is no sufficient logical connection in this particular case.

56. It remains open for the appellant to defend her case, including in respect of the alleged failure to adhere to direction of the Stewards, on the basis that there was strained or "chilled" communications between the Stewards and the appellant arising from the injury and compensation claims. But nothing that the Appeal Panel would determine in either accepting or rejecting that defence will have a material impact on the ultimate resolution of any legal claims against Racing NSW for compensation or damages.

57. Presently, there are no proceedings on foot. But even if there were such proceedings, any overlapping question of fact will be determined separately and independently in some other tribunal or Court. Nothing this Appeal Panel says will give rise to an issue estoppel in respect of liability arising from a workplace injury. That is because the only issues determined by the

Panel in any appeal concern breaches of the rules of racing. Moreover, it seems doubtful that issue estoppel could arise even on the same points: see to similar effect *Commonwealth v Snell* [2019] FCAFC 57 [51].

58. For that reason, there is no logical connection between Racing NSW's adverse financial interest and the determination of the case on the merits, even when looking to the particular facts of this case.

59. Finally, the assessment of reasonableness of the apprehension from the perspective of a fair-minded lay observer does not result in a conclusion that there is a reasonable apprehension of bias.

60. Even if, as the Panel has accepted, the reasonable fair-minded lay observer was aware that the licencing and insurance functions of Racing NSW were not separate and distinct, and the same observer were to think that Racing NSW is vigilant in its assessment of claims, the apprehension of bias is not reasonable.

61. That is because the fair-minded lay observer must be taken to understand the basic scheme of the Act provides for the appointment and remuneration of Members of Panel who are not part of Racing NSW. That is to say he or she would understand there is some level of separation between Racing NSW and the Panel, but less independence that is required of a Court from the executive branch.

62. The fair-minded lay observer would understand the presiding member is legally qualified,but something less than a judge in Court.

63. He or she would also understand that Ms Marston will be entitled to have a different body somewhere else determine any compensation or damages claims arising from her injury.

64. In those circumstances no reasonable fair-minded lay observer could think that the fact of Ms Marston's separate claims and Racing NSW's adverse financial interest in the resolution of those claims, when taken with the appointment and remuneration of the Panel, is sufficient to give rise to a reasonable apprehension of bias.

Necessity

65. Give our above rejection of the application it is not necessary to determine the question of necessity. But in case this matters goes further we record our conclusion that we prefer the

statutory construction advanced by Mr Jones for the Stewards that there is nothing in section 44 of the Act that gives the Panel the power to *refuse* to determine an appeal.

66. The provisions of the *Racing Appeals Tribunal Act 1993* (NSW) relied upon by Ms Heath provide jurisdiction to the Tribunal, where a Panel "neglects or refuses to hear and determine" an appeal: s15(1)(c) *Racing Appeals Tribunal Act 1993* (NSW).

67. However, that provision concerning the power of the tribunal does not speak to the power of the Panel. We understand the interaction between the two Acts as ensuring the Tribunal always has power to determine an appeal even where, contrary to its obligations, the Appeal Panel neglects or refuses to determine an appeal. Examples may be where through sickness, incapacity, retirement, or assumption of some disqualifying position, the Panel did not or cannot render a decision. It is a safety net to ensure a further level of merits review is available.

68. But none of that can properly excuse the Panel from determining an appeal. It would remain a breach of the Panel's duty to fail to determine an appeal before it.

69. In those circumstances where any other differently composed appeal would be subject to the same objection, we would have found that there is necessity for the Appeal Panel seised of this matter to hear and determine the case to ensure the statutory purpose of appeals to the Panel is not frustrated – even if the apprehension of bias application in this case had (contrary to our conclusion) been successful in establishing such an apprehension.

Waiver

70. The Stewards also raised the point that parties may be held to have waived the right to invoke the bias rule if they were fully informed of the facts that could support a claim of bias but failed to raise the issue in a timely manner: *Smits v Roach* (2006) 227 CLR 423 [43]. It is said that earlier arguments on jurisdiction and having participated in the case for 15 months means that the opportunity to object has been lost.

71. Given our substantive conclusion that there is no apprehension of bias we do not determine the point.

Orders

72. Accordingly, the Panel makes the following orders:

    1. The application for recusal based on apprehension of bias is dismissed

2. By 3 February 2025 both parties are to submit to the Panel proposed directions for the further conduct of this matter.

3. Should the appellants appeal this decision to the Tribunal, or seek judicial review pursuant to section 69 of the Supreme Court Act 1970 (NSW), then on notification to the Panel of such an appeal or application being filed, order 2 hereof is stayed pending resolution of such a proceeding.

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(* Revised to correct typographical errors on 6 January 2025)