APPEAL – 710

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: GREGORY DONALD HARPER

APPLICATION NO: A30/08/710

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 5 OCTOBER 2009

DATE OF DETERMINATION: 21 December 2009

IN THE MATTER OF an appeal by MR G D HARPER against the determination made by the Racing and Wagering Western Australian Stewards of Thoroughbred Racing on 13 July 2009 imposing a five year disqualification for breach of Australian Rule of Racing 178.

Mr D Grace QC, assisted by Mr S C Jacob, appeared for Mr Harper.

Mr R J Davies QC appeared for Racing and Wagering Western Australian Stewards of Thoroughbred Racing.

This is a unanimous decision of the Tribunal.

The appeal against penalty is dismissed.

Seal of the Racing Penalties Appeal Tribunal of W.A.

DAN MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

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BACKGROUND

On 13 February 2009 the Racing and Wagering Western Australia (**'RWWA'**) Stewards of Thoroughbred Racing opened an inquiry following receipt of a report

from the Racing Chemistry Laboratory that the blood sample taken from FLYTHAIGA, prior to it competing at Ascot on 31 January 2009, had a level of total carbon dioxide in excess of 36 millimoles per litre in plasma. Mr G D Harper was called to the inquiry as the trainer of FLYTHAIGA. Medical evidence was presented on behalf of Mr Harper which led the Stewards to adjourn the inquiry indefinitely. In view of the seriousness of the inquiry and the state of health of Mr Harper, the Stewards suspended both Mr Harper's thoroughbred and standard breeder's licences forthwith. The Stewards directed the suspension pertained to nominating and racing horses in races or trials. The Stewards took this action pursuant to Thoroughbred Local Rule 10 and Harness Racing Local Rule 298(3).

On 13 July 2009 the inquiry resumed. Evidence from a wide range of sources was produced. Some of the key aspects of the evidence is briefly set out (with the source, where applicable, stated in brackets) as follows:

1 the total carbon dioxide ('TCO2') content in the sample taken from FLYTHAIGA was 39 millimoles per litre, with an expanded measurement uncertainty at the threshold concentration (36 millimoles per litre) being 1 millimole per litre at more that 99.99% confidence. (Racing Chemistry Laboratory, Perth);

2 the other sample recorded a TCO2 concentration at greater than 39 millimoles per litre, with the same level of adjustment for uncertainty. (Racing Analytical Services Laboratory, Flemington);

3 *'Elevated levels of TCO2 in excess of 36 are evidence that excessive amounts alkalising agents have been administered (sic). Alkalising agents are prohibited under the Rules. They act on three systems. One is the muscular system for neutralising lactic acid, the second is the digestive system as an antacid and the third is the uro-genital system as an alkaline diuretic. They are considered to be performance enhancing because they can neutralise the lactic acid produced by*

exercise and lactic acid is what is responsible for the feeling of fatigue.' (Dr Symons, the Turf Club and RWWA Veterinarian);

4 anything in excess of 36 millimoles is an indication of administration of excessive amounts of alkalising agents which is the only way to reach that level and the results of the testing were well above the threshold and amongst the *"highest we've had".* The mixture prepared by Mr Stammers with the alkalising agent would raise the level at most 2 millimoles. There was "*No hope of getting to 39*". (Dr Symons);

5 Mr Harper stomach tubed his horses two days before races and after each race with feed containing 250gms per kilogram sodium bicarbonate. (Mr Harper, whilst being interviewed by Deputy Steward of Racing Jarrad and Dr Symons at Mr Harper's stables on 2 February 2009);

6 Mr Stammers drenched FLYTHAIGA *"by genuine mistake"* with one of the two different drenching mixtures which he had made up prior to Mr Harper attending at the crush on the morning of the race. (Mr Stammers);

7 Mr Harper was always present when his horses were drenched save for the particular occasion in question when he was preoccupied and had simply instructed Mr Stammers to *"Just start doing them".* (Mr Harper);

8 when Mr Harper learned FLYTHAIGA was drenched with what was described as a solution of salt and water, he became very angry. Despite that he *"inadvertently omitted scratching her from the race"* which he should have done but didn't know why he didn't. (Mr Harper);

9 Mr Harper was experiencing severe mental, physical, emotional and domestic problems at the relevant time. (Mr Harper, Dr Manea and Dr McCormack);

10 Mr Harper's depressive illness impacted on his judgment and affected his decision making. (Dr McCormack's letter Exhibit I);

11 Mr Harper "*...wasn't in the right state of mind to make a correct decision*" but acknowledged he knew a horse cannot receive anything on the day of racing, in fact not for some 48 hours before. (Mr Harper);

12 that when interviewed on 2 February 2009 and asked by the Deputy Steward of Racing "*at this time is there any particular reason that you can give us for that irregular sample*" Mr Harper answered "*No, nothing*";

13 additions had been given to the feed within 24 hours prior to racing (Mr Harper);

14 apart from FLYTHAIGA having sweated a lot on the hot day of the race Mr Harper noticed nothing out of the ordinary so far as the horse was concerned;

15 Mr Harper did not know why he failed to mention in the video interview whether there was any incident on the morning of the race or anything unusual on the day of the race (Mr Harper).

After hearing the evidence the Stewards charged Mr Harper with a breach of Australian Rule of Racing 178 which states:

> "*When any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.*"

The particulars of the charge were:

> *'... bringing the four-year-old mare FLYTHAGIA to Ascot racecourse on Saturday, the 31st of January 2009, for the purpose of engaging in Race 8 The Preened Handicap over 1600m with a level of TCO2 in excess of 36.0 millimoles per litre in plasma.'*

After Mr Harper pleading guilty to the charge the Stewards proceeded to deal with the penalty. They briefly adjourned to consider the evidence before they delivered their reasons.

THE STEWARDS' REASONS

The Stewards delivered very comprehensive reasons for imposing a penalty of five years disqualification. These reasons are arguably amongst the most detailed and cogent which I have had to consider in any racing appeal proceedings. Despite their length it is appropriate to quote them in full.

> *'The Stewards have considered the matter of penalty taking into account the submissions of yourself and of your adviser Mr Tom Dillon, following your acknowledgement of the offence by virtue of your plea of guilty. In this respect we are fully cognisant of your personal circumstances in relation to your health and well-being. You're almost 54 years of age and with considerable personal medical challenges before you that we are fully cognisant of from the extensive submissions tabled in camera, but for reason of privacy do not address them in detail. Sufficient to say they are upmost in our minds and we are sympathetic to your circumstances. Whilst also being challenged financially for a host of reasons as explained you retain some assets of value. You are dual licensed in the equine codes. You are a prominent trainer, some 30 horses in your stable at the time your licence was suspended. Whilst important factors for consideration in our assessment of penalty, your personal circumstances must be considered alongside all relevant matters that relate to penalty, including; such considerations as your'e (sic) prior history with RWWA, the circumstances of the offence, the nature of the substance involved and the general and specific implications that arise in a matter such as this.*
>
> *It is readily accepted in racing, the occurrence of a positive swab, particularly to a substance that is classed as potentially performance enhancing is a serious matter. Any positive swabs bring into question the integrity of racing.*

Participants, the betting public and the public in general have an expectation that competing animals do so on a level playing field and without artificial or drug assistance. The racing industry is reliant on the betting support of the betting public and anything that impacts or has the potential to impact on the turnover is of serious concern as it affects the viability of this industry.

In this case the prohibited substance is an elevated level of TCO2. The readings from the two laboratories of 38 millimoles and veterinary evidence indicates that administration of alkalising agent would have needed to occur. High levels of TCO2 beyond the industry threshold limit are not only deemed to be prohibited but as described by the veterinary evidence before us has performance enhancing quality. Elevated levels of TCO2 have the effect of artificially delaying the onset of lactic acid thus preventing normal fatigue from occurring. That places this matter in the serious category. This is the very reason, the industry sets a threshold limit.

It is a matter of science that the industry threshold is set at a level higher that what might otherwise be described as the natural level. The industry threshold level should not be substituted or confused as representing a natural level. When a horse such as yours exceeds the threshold level by such an amount it is well in excess of anything natural which heightens the level of seriousness of such offences. Whilst recognising that the matter before us relates to TCO2, there is no material relevance to the fact that, it is an endogenous substance when the recorded levels have no association with what might be considered to be normal or naturally occurring. It must be treated as a breach involving a performance enhancing substance as that is the very reason the threshold is set in the first place. While the matter was not pressed before us to any great detail the Lark Hill Vets report Exhibit K is of limited assistance to this inquiry as the purported tests were not taken under controlled or commensurate conditions to a race day sampling. A prior race day sampling from FLYTHAGIA returned what would be

considered a normal reading of 33.6 which is more closely related to the question of TCO2 levels in the mare on race day.

Your disciplinary record shows that you have breached the drug rules on three occasions. 26/11/93, charged under AR 175(h)(ii) for administering a prohibited substance, sodium bicarbonate to TOP VILLAIN. Also so charged under AR178 for presenting TOP VILLAIN to race with an elevated level of TCO2. Disqualified for six months on each charge. Served concurrently, appeal dismissed. The 16/11/99, charged under AR178 for presenting CORNER BLEAK to race with an elevated level of TOC2, disqualified for 12 months, appeal dismissed. The 17/2/2000, charged under AR178 for presenting CALIBRATION to race with caffeine in its system. Disqualified for 18 months.

In addition to the above penalties you also appeared before the Stewards on the 17/2/2000, in relation to failing to answer a Steward's question to identify the composition of a substance administered to horses under your care. You were disqualified for six months under AR 175(f). The composition of this substance has never been revealed or determined.

This is your fourth offence, in three of those cases the nature of the prohibited substances was performance enhancing, TCO2 and the fourth was a stimulant to caffeine. The history of your offences, particularly in relation to TCO2 indicates that despite previous penalties your horses continue to be presented for races beyond the prescribed level. The pattern of offending indicates that there must be a low degree of risk aversion in your stable or deliberate risk-taking to regularly have runners exceeding this important level and breaching the rules. The vast majority of industry licensees within both equine codes will never transgress this rule in relation to TCO2 on a single occasion let alone three. Indeed from the 700 licensed thoroughbred trainers and the 600 licensed harness trainer's, many of which have been trainers for many years, it would be difficult to find someone who has a record of four positive swabs, to substances classified

as performance enhancing. Significant mitigation is often afforded to first offenders in relation to TCO2 swabs, who have a long history within the sport, are totally reliant on it for their livelihoods and stand to suffer significant hardship in the event of disqualification. Even after allowing for such mitigation including pleas of guilt, such persons have been disqualified for 6 to 9 months as a first offence, since RWWA assumed control of the racing industry since 2003. Repeat offenders naturally incur a higher penalty. The significant mitigation's afforded for good records and first offenders clearly cannot apply in your case and the assessment of penalty we undertake must take into account that you are a multiple offender. Consequently in relation to these matters there is little that reduces what might be arrived at as the maximum penalty for the offence in all the circumstances.

Your record was of such serious concern that when you did reapply for a trainer's licence in 2005 within the thoroughbred code the Stewards opposed your application on the grounds of repeated breaches of drug rules. Just prior to the enactment of RWWA in 2003, the West Australian Trotting Association had seen fit, for reasons unknown to us, to allow you to resume as a licensed trainer in the harness code, which was a factor of some influence in the eventual decision of the IAC, given that you have resumed a licensed role without event in one of the codes now under RWWA control. You appeared before the IAC and after hearing submissions from yourself and your representative and the Stewards, the IAC granted you a licence subject to certain conditions. In doing so in the determination on the 12th of October 2004, they stated: "taking these matters into account, but not without some considerable hesitation, the IAC determined that it is prepared to grant a limited licence to train thoroughbred horses to Mr Harper. The committee is hesitant because it is conscious of the adverse impact of Mr Harper's convictions on the public image of thoroughbred racing and the potential for his return as a licensed trainer to diminish public confidence and the integrity of racing." In the years that followed until now, by not offending against the rules

you've been able to increase your level of involvement without restriction as you so desired and requested at relevant times. You are in control of your own destiny, clearly aware of the privilege and opportunity that had been extended to you by the IAC, despite the Stewards objection (sic) to you being given a licence. Unfortunately for you and the industry as a whole, the reservations expressed by the IAC in their 2004 decision have now being proven to be well founded. You ultimately are the person responsible for yourself, your actions and in so far as the Stewards are concerned, what happens in your stable and your horses. By breaching this serious and important rule you have failed in this important duty.

The ability to participate in the racing industry in a licensed capacity is a privilege not a right. It is within this context of being a person fortunate enough to be extended yet another opportunity to participate in the racing industry that you are able to build your involvement following the 2004 decision of the IAC. As you have done before the Stewards today, you had pleaded for such an opportunity on the basis that being in the racing industry was central to your life and livelihood. It was said that you would do nothing to jeopardise your licence status if again afforded the opportunity to show that you could conduct your business as a trainer in accordance with the rules. It was explained by you and your adviser that this is of paramount importance to you for a number of reasons. The racing industry was said to be your priority. Sadly that has not been the case in these circumstances and according to your submissions many other factors have overtaken your priority to ensuring you did not breach this most important rule. Some of these are as a direct result of decisions you made. When (sic) deciding to take on the increased burdens of racehorse training two codes. You are ultimately responsible for the end product of whatever stresses these decisions have placed you under. Whilst we are sympathetic to your personal circumstances we cannot ignore that you have again breached one of the most important rules of racing and set aside the need for penalty in a case such as this.

Some explanation was tendered to us today, FLYTHAGIA being presented considerably in excess of the prescribed level of TCO2. Part of the explanation involved the statement of Mr K Stammers, Exhibit J. This explanation however was not offered to the investigating Stewards, only days after the events are said to have happened. This was despite direct questions to you regarding events on the day of the race which may have been out of the ordinary or that might have otherwise offered some potential explanation. Having watched this video, whilst you had little to say it does not account for why you had not mentioned this particularly given that you stated to this panel that you were extremely angry with finding FLYTHAGIA in the crush and knowing that it had been stomach tubed prior to racing. To not mention it only days later is inexplicable and when asked today, when you were unable to explain why you didn't. There is no accounting for an omission of this nature. We also note that according to you on the day in question you were functioning with sufficient clarity to organise alternative drivers for other horses and the normal duties of a busy racehorse trainer. To then find a horse destined to race that day in a crush having been stomach tubed and not deciding to withdraw it does not reflect of somebody who considered his licence an important part of his life as you now maintain. On the contrary it is demonstrative of an extremely cavalier attitude form someone who had to overcome considerable hurdles to return to the industry unfettered. Notwithstanding the strains you were under, the protection of your licence must always have been something that was critical to you, as you were well aware of the consequences of a positive swab having trod that path many times before to the extent that you were almost precluded from resuming in the industry. Yet it is said that although that day you were able to do a host of other less critical things, when finding a set of circumstances that must surely have been of great concern you did nothing and took the horse to the races as normal. Then when it returned the elevated reading it did and you were asked about it, again you did not mention this unauthorised stomach tubing of the horse you had responsibility for.

All this in the context where the stomach tubing was being done by a stablehand in your absence who mistakenly or otherwise took it upon himself on this occasion to stomach tube a horse, despite the fact you told this inquiry that the routine practice was for you to be present when any stomach tubing and was being done (sic). For his part, the statement from Mr Stammers maintains that he did not commit the error that you assume must have occurred. We therefore cannot rely on this as being a cogent explanation for the finding. This is often the case with cases, such as this, the Stewards are left with no explanation for how FLYTHAGIA came to be, above the prescribed level by such a high margin. This is not an entirely unusual position for the Stewards to be in, which is why the rules are structured in the manner they are which includes a rule such as AR178, which is a rule of strict liability for the presentation of horses. It would be entirely unworkable were the rules to operate in any other way if the Stewards were obliged to find as fact to the requisite standard how a horse came to breach this important rule.

Again the Stewards believe that a clear message needs to be sent to the racing industry that competing horses need to be presented drug-free when racing. The onus is on the trainer to ensure this happens. In this case you have given no accepted explanation for the elevated level, levels that are just not marginally over the limit but in considerable excess. Whilst the penalties previously issued to you have failed to deter or prevent further offences, there still needs to be a deterrent factor built into the penalty we issue. Any penalties involving prohibited substances particularly where the penalty being issued is to someone who has committed their 4th offence must fully convey the Authority's intolerance to such circumstances.

The Stewards believe that unless there are extenuating circumstances, disqualification should be a penalty for a positive swab. Certainly a fine is not

considered appropriate and similarly a suspension would not fit the seriousness of this case.

The Stewards are aware that your licence has essentially been suspended since the initial hearing on the 13th of February 2009, a period of five months. Whilst not being able to start a horse in a race or a trial you've continued to be involved with the equine activities by educating and agisting horses. This has permitted to you to (sic) continue to earn an income and be involved in the industry to some degree. Furthermore it was put to us at various stages when this matter was adjourned or delayed, that your state of health prevented you from participating in the inquiry or to any greater extent within the industry. Fortunately trainers breaching the drug rules on multiple occasions are not a regular occurrence. Two trainers that give some semblance of comparison are trainer F, Maynard, in 1990 received 2 years for therapeutic substance; 1996 18 month disqualification AR178, therapeutic; 2000, 18 months and 9 months served concurrently, AR178, therapeutic; in 2002, 2 years AR178, therapeutic. The nature of the prohibited substance in all of the above was therapeutic, which is different from yourself where in your case, your past offences all involved what are classed as performance enhancing substances. Trainer P. Graham 1976, 5 years under AR178 for a stimulant; 1986, four years under AR178 for a stimulant narcotic; 1998, 18 months under AR178 for a tonic; 2003, 12 months AR178 therapeutic substance and 2005, 10 years for administering to a horse an anabolic performance enhancing substance that he owned when he was a stable hand.

The Stewards recognise that we have an important and primary duty to ensure that the integrity of the racing industry is protected. We do this in a number of ways which includes exercising our discretion in relation to penalty for offences of this nature after taking into account all relevant matters. Whilst personal considerations are important in this exercise of our discretion on the question of penalty, the maintenance of integrity remains paramount. For the reasons

expressed this is a serious matter, which in our opinion must result in disqualification of a magnitude commensurate with the offence and all of the circumstances discussed. With respect to disqualification the RWWA Act 2003 and Rules provide that disqualification can either be permanent or temporary. This infers that the maximum penalty open to us would be a permanent disqualification with no date of expiry. We do not fall into the error of treating this matter as an assessment of whether you are fit and proper person to be licensed. Such questions are for the IAC. Nothing in our decision should be usurping as you serving this responsibility (sic). Neither should it be interpreted that by delivering a finite penalty there is an inference or expectation that a future licence will be granted in the event one has applied for (sic). Those decisions would have to be made at the appropriate time. The penalty we issue relates only to the matter squarely before us.

In determining penalty in light of the submission put forth by your adviser in relation to maintaining a role in the harness code, a code in which you have not offended against the prohibited substance rules, the Stewards are mindful of the provisions of Local Rule182 and the commensurate rule in Harness Racing being Local Rule 298, which prescribes that where a person is disqualified by RWWA in one code, they are taken to be disqualified in the other. The rule is absolute in structure and indeed it would render the penalty of disqualification nugatory, if a person was able to continue in another equine code unaffected. As the controlling body of all racing in WA we cannot devalue our own penalties or control of the industry in such a way, even if we had the authority under the rules to do so. Clearly the rules intend for disqualifications to apply across all codes and we must honour this intention and indeed are of the opinion that it is appropriate to do so, even in all of the circumstances of this case. Conscious of all the matters and reasons enunciated, it is the decision of this panel to disqualify you for a period of five years effective immediately."

Mr Harper appealed the five year penalty and raised three grounds of appeal.

THE APPEAL HEARING

The two grounds which were pursued at the hearing were simply framed as follows:

1 '*Severity of Sentence; and*

2 '*Prohibition for me to operate agistment activities at my Capel property. This prevents me from an income.*'

At the outset of the appeal Mr D Grace QC on Mr Harper's behalf indicated his intention to present further evidence and sought leave to call four witnesses. It is not the usual practice for witnesses to be called to give evidence before the Tribunal but it does occur from time to time. The Racing Penalties Appeal Act clearly contemplates in a variety of circumstances further evidence may be called (see ss11(3)(c) and (e), 16(8) and 17(6)). After hearing argument from counsel I ruled, despite the objection on behalf of the RWWA Stewards, that the justice of this case justified granting leave.

Dr McCormack, a consultant psychiatrist, gave evidence and produced a report detailing Mr Harper's condition from shortly after the offence occurred, namely 23 February 2009, to September 2009. The Tribunal was told Mr Harper had been suffering from a major depressive disorder at the time of the offence. The symptoms were described in some detail. Dr McCormack hypothesised that Mr Harper was confronted with a combination of stressful life events in the period leading up to his appearance before the Stewards in February this year. These combined to make it likely Mr Harper's judgment was diminished with a consequent increase in his error rate in performing as a horse trainer. The evidence presented to the Tribunal went into far greater detail than Dr McCormack's letter dated 29 March 2009 which was before the Stewards (exhibit I).

Mr Stammers, Mr Harper's stable hand, was taken through the statement which he had made dated 17 March 2009 (exhibit J in the Steward's inquiry). In the course of his evidence Mr Stammers acknowledged that he had made two mistakes on the morning of

31 January 2009. Firstly, he had administered the wrong batch of drench to FLYTHAIGA. Secondly, he was not supposed to give the horse any drench in any event. In cross examination Mr Stammers revealed the numerous containers of the two types of mix which he had made up to administer to various horses were not kept apart. The different batches were not labelled. Although Mr Harper was normally present for the drenching of his horses he was not present on this particular occasion. By the end of the cross examination this witness's evidence was so conflicting that in my assessment it was unhelpful. Mr Stammers became increasingly confused and mixed up the more he was questioned. He concluded by saying that he made a mistake by drenching the horse and was not in a position to know which drench had been administered to FLYTHAIGA. Either way, with or without this evidence, there can be no doubt the horse in question was stomach tubed and had been administered a substance when clearly it should not have been as it was racing on the day of the tubing.

In the course of giving his testimony Mr Harper went into greater detail of the circumstances leading up to and following the drenching of FLYTHAIGA than what he divulged when he appeared before the Stewards. Mr Harper told the Tribunal that Mr Stammers had never previously undertaken drenching by himself. On the morning in question he had given no instructions as to which horses were to be drenched. Mr Harper acknowledged he was well aware of the fact that it was an offence to stomach tube a horse within 48 hours before a race. Consequently he reiterated what he had told the Stewards, namely that he should have scratched the horse. However, he explained that he was mentally and physically exhausted at that time as a consequence of issues external to his training of at least 25 horses. Mr Harper acknowledged he was suffering from depression which was contributed to by having experienced bowel cancer, two serious horse riding accidents, separation from his wife and uncertainty regarding his children. This most unhappy set of circumstances was aggravated on the fatal morning by being both angry with Mr Stammers, once the drenching was revealed, and under pressure in having to find and nominate replacement drivers. If these negative factors were not heavy enough

burdens to bear, on the very same morning, Mr Harper was served with a violence restraining order.

In cross examination Mr Harper acknowledged that finding his horse that was due to race that day in the crush and having just been drenched *'... was a very dramatic event'*. Despite having appreciated the significance of the situation, the circumstances were not reported to the Stewards. When questioned repeatedly about this failure Mr Harper was incapable of offering any plausible explanation. He denied telling the Stewards in the July hearing that he had told Mr Stammers to start the drenching. Further, Mr Harper admitted *'... of course ...'* he knew *'... how to bicarb a horse for a race day'* and that he *'absolutely'* knew how to bicarb a horse to *'... get it to 36'* and *'Just under'*.

Mr Dillon gave evidence of his genuine care and concern for Mr Harper's welfare and described the level of support which he had provided to him. This evidence added another dimension to Mr Harper's unsound overall condition at the time.

In addition to the evidence of these witnesses senior counsel referred the Tribunal to correspondence relating to the agistment issue. Following the Stewards' determination in July 2009 to disqualify Mr Harper, Mr Harper wrote to RWWA Integrity Committee seeking permission to agist horses to earn some income and have some work to perform. The Committee responded by letter dated 23 July 2009 as follows:

> *'I refer to your letter to Mr J Freemantle, dated 22nd July 2009, regarding the request of a hearing before the Integrity Assurance Committee, to carry out agistment at your property.*
>
> *It has come to my attention that you have lodged an "Appeal and Stay of Proceedings application" in relation to your disqualification with the Racing Penalties Appeals Tribunal.*
>
> *The RWWA Integrity Assurance Committee cannot adjudicate on matters that have been lodged to be considered by the Racing Penalties Appeals Tribunal and*

cannot rule on decisions made by the Racing Penalties Appeals Tribunal.'

(Exhibit 4)

Apart from the two letters dealing with the agistment issue, the new evidence which was introduced in the appeal did not materially change the factual position as presented in the Stewards' inquiry. Both the appellant and the other witnesses elaborated on their evidence or clarified reports they had previously presented in the Stewards' inquiry without adding anything too distinctly different or particularly new.

OUTLINE OF CASE FOR MR HARPER

The following is a brief outline of Mr Grace's submissions made in support of the severity of penalty ground:

- that Mr Harper '*had been out of the game'* for longer than the actual periods of disqualification, as evidenced by Mr Harper's record notations (exhibit N in the Stewards' inquiry);
- the question in issue was the appropriateness of the length of the period of disqualification in the light of the guilty plea and all of the mitigating circumstances;
- there is no doubt that the personal circumstances of Mr Harper is a very relevant reason to reduce the penalty which should otherwise be meted out for a serious offence of this nature; and
- Mr Harper's penalty was harsh by comparison to the various other TCO2 decisions which were referred to. I will address these decisions and some other cases later.

As to ground two senior counsel for the appellant argued:

- the Tribunal has jurisdiction to vary the decision of the Stewards to allow Mr Harper specifically to agist horses. The wording of Rule 182(j), namely

'Participate in anyway in the preparation for racing or training of any racehorse',

includes agistment.

- based on the letter written in reply by the Integrity Assurance Committee RWWA considered that the Tribunal had jurisdiction to deal with this agistment issue;

- Mr Harper had already been punished for five months, having been under suspension during the inquiry which was on top of the five year disqualification following the inquiry;

- in view of the supplementary evidence the Tribunal is placed in a different position to the Stewards and is therefore able to make its own determination of the matter. Armed with the additional evidence and new material it was not necessary to find that the Stewards were in error; and

- Mr Harper was being punished for what he did in the past rather than what he did on this occasion. The Stewards were not entitled to take into account those past offences and incorporate them into the present punishment.

OUTLINE OF CASE FOR THE STEWARDS

In summary Mr Davies QC submitted that:

- the appeal relates only to the five year disqualification and should not involve interpreting Rule 182;

- the argument regarding the two adjistment letters was untenable. The Integrity Assurance Committee, which was created by RWWA, was vested with executive powers. All the Committee letter states is that no action will be taken pending the appeal. If the appeal fails, the matter can go back to the Committee;

- all of the cases relied on by the other side were distinguishable from this particular matter;

- Rule 178 vests wide power in the Stewards to penalise for a breach in a presenting case. The Rule says "*may be penalised*" without specifying what penalty may be imposed. This leaves the Rule at large to be determined at the discretion of the Stewards who are charged with the duty of protecting the wellbeing of the industry;

- The Stewards were entitled to find Mr Harper's explanations were unacceptable and incredible as to why the drenching was not reported. Mr Harper had been asked on four separate occasions to explain what happened. The Stewards were entitled to reject the explanations;

- The Stewards' reasons were impeccable and could not be faulted;

- This high profile trainer had been given numerous opportunities to comply with the Rules;

- The case was not unusual, as with most drug offences one really doesn't know how the offending substance found its way into the horse;

- No error on the part of the Stewards has been demonstrated;

- The power to suspend was an entirely different power to the power to disqualify, and in relation to this referred the Tribunal to page 66 of the transcript where the Stewards stated disqualification is appropriate in the case of a positive swab absent extenuating circumstances;

- Based on Dr Symons' evidence excessive levels of alcoholising agents had been administered;

- The case involved a simple question of fact as to credibility. The conclusion reached by the Stewards that Mr Stammers' conduct did not cause the high level of TCO2 and the previous penalties did not deter or prevent further offences were both totally justifiable; and

- The maintenance of the integrity of the industry is paramount.

MY REASONS

Introduction

In order to assist in the control of racing, the Stewards enjoy wide ranging powers under the Rules of Racing including the power *'To penalise any person committing a breach of the Rules ...'* (AR8(c)) *and 'To regulate and control, inquire into and adjudicate upon the conduct of all ... licensed persons...'* (AR8(d)). The Stewards are virtually given unlimited authority to inquire into, adjudicate upon and deal with any matter in connection with any race meeting (AR10). Under Local Rule 10, pending an inquiry or where a person has been charged with an offence, the Stewards are authorised to direct that a licence be suspended.

In the course of his argument in addressing the control of racing senior counsel for the Stewards referred to the joint reasons of Anderson and Owen JJ in *Lindsay Brett Harper v Racing Penalties Appeal Tribunal of Western Australia and Styles and others* (No 1963 of 1993 Full Court of Supreme Court of WA unreported delivered 8 February 1995) where their Honours stated at p11:

> *'The prize money which is paid to successful horses is generated for the most part from betting turnover. The commissions and taxes on these bets not only provide the prize money for which the horses compete but as well, as an examination of the legislation shows, provides the cost of administration and contributes to government revenue. Hence, the very survival of the industry as well as substantial government revenue would seem to depend on encouraging the public to bet on horse racing, that is, to bet on the outcome of each race.*
>
> *If it is correct to think that the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived*

> *to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by peremptory means.'*

Their Honours then proceeded to express their agreement with Seaman J's statement on the topic of maintaining the integrity of trotting as a *'clean'* sport in *Maynard v Racing Penalties Appeal Tribunal Western Australia* (1994) 11 WAR 1 at 5-6 where His Honour referred to a passage of Sir Thomas Bingham MR in *R v Disciplinary Committee of Jockey Club*; ex parte Aga Khan 91993) 1 WLR 909 at 914:

> *'… For a variety of reasons, including the large sums of money which stand to be won or lost on the outcome of a single race, horse racing is in activity peculiarly prone to criminality, cheating and chicanery of many kinds. Experience no doubt shows that strong measures of control and close vigilance are necessary preconditions of fair and honest competition'.*

Seaman J went on to state *'… It seems to me that a very significant policy consideration for the Turf Club when framing its rules is a requirement that races should be won by honest means so as to maintain public support for the industry which it controls. Indeed the level of public support affects the livelihood of licensed persons'* (p13).

Anderson and Owen JJ continued (at p15):

> *'… It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken from them if for any reason, even without actual fault on their part, they present a doped horse for racing.*

That this may be a legitimate approach to take with regard to the proper control of horse and greyhound racing is implicit in a number of cases, the most recent of which is R v Jockey Club ex part Aga Khan (supra). See also Law v National Greyhound Racing Club Ltd (1983) 1 WLR 1302 and R v Brewer; ex parte Renzella (supra)'.

In the course of reaching my conclusions I have been mindful of the wide powers enjoyed by the Stewards. They must apply their undoubted experience in determining what is best from a public or industry perspective weighed against the private interest of the licensed person whose conduct is under scrutiny. In so doing they must be seen to and in fact exert stringent control over the conduct of licensed persons.

The Stewards' Reasons

The transcript of the proceedings below clearly reveals the Stewards inquired into this matter with at least their usual thoroughness and afforded Mr Harper every reasonable opportunity to be heard. An examination of the comprehensive reasons earlier quoted clearly shows the Stewards took into account all of the relevant facts and circumstances that emerged from the scenario before them. As is apparent from their findings the Stewards addressed the following key issues amongst others:

- the guilty plea;
- Mr Harper's medical condition;
- Mr Harper's financial circumstances;
- the dual licensing situation;
- Mr Harper's prominence as a trainer;
- all of the circumstances of the offence;
- the performance enhancing nature and effect of the substance involved;

- the expectation of the betting public that animals compete on a level playing field;
- the impact on the industry of a positive swab;
- the fact that administration was necessary to reach such a high concentration of TCO2 in FLYTHAIGA;
- the seriousness of the matter;
- Mr Harper's bad record, he being one of the worst multiple offenders in relation to performance enhancing substances;
- despite the wide range of genuine mitigating factors the circumstances justified imposing close to the maximum penalty;
- the opposition and reluctance to re-license Mr Harper after his previous transgressions;
- the implication of a trainer's licence, being a privilege rather than a right;
- the lack of explanation offered, or cogency of explanation, for the high TCO2 reading despite having been questioned about it;
- the failure to report the drenching at the time of interview;
- the lack of explanation days later for the failure to mention the stomach tubing;
- the failure to withdraw FLYTHAIGA from racing;
- Mr Harper's cavalier attitude and the cavalier approach displayed at the stables during the drenching process;
- the fact that AR178 is a rule of strict liability;
- the need to send a clear message to the industry that competing horses must be presented to race drug free;

- the onus placed on trainers by the Rules;
- the need for deterrence to be considered as part of the sentencing process and the fact that his previous penalties failed to prevent further offences;
- a disqualification usually should be imposed for a positive swab;
- the fact that Mr Harper's licence had in fact been suspended since 13 February 2009 as he had only been agisting horses in the interim;
- the delay in proceeding with and concluding the inquiry, which were due to Mr Harper's ill health;
- the penalties imposed on two other multiple drug offenders for their respective offences in respect of substances;
- the seriousness of the matter and why it warrants a proportionate length of disqualification; and
- the fact that disqualifying Mr Harper from thoroughbred racing also disqualified him from pacing.

All these issues were relevant, appropriately investigated and properly before the Stewards for their evaluation. I find nothing problematic with the way the Stewards conducted their investigation and analysed the evidence which emerged from their inquiry.

The new evidence before the Tribunal

The Tribunal has the benefit of further evidence to consider and is not confined simply to dealing with what is disclosed in the Stewards' inquiry transcript. As I have already stated, in the course of giving his testimony before the Tribunal Mr Stammers became confused and contradictory regarding his drenching activity. His testimony changed as it progressed and Mr Stammers proved to be a most unreliable witness. The answers revealed on the day in question Mr Stammers was neither qualified nor competent to be entrusted to conduct the unsupervised drenching of a number of horses with different substances.

Mr Stammers' late night coupled with his heavy drinking the previous evening combined to make him unsuited at the time to discharge the heavy burden of responsibility entrusted to him. If his actions of having the different mixes in unmarked and unsegregated containers were the usual practice at this training establishment it clearly reflects most adversely on the trainer, irrespective of whether he was actually present or not on this particular occasion.

It would appear from the evidence presented before the Stewards that Mr Harper was in no fit mental or physical state to be training race horses at the time of the offence. This was made all the more clear by the evidence presented to the Tribunal. One can empathise with Mr Harper in respect of the stresses and strains that confronted and preoccupied him at the relevant time. These factors combined to be a burden few could be expected to be able to cope with whilst properly discharging the responsibilities of running a relatively large stable of some 25 thoroughbred and harness race horses. Any person experiencing such a significant erosion to health and judgment would hardly be in a position to properly conduct a training establishment of this size.

Mr Harper's evidence provided additional detail to what he had presented to the Stewards. Despite that, it produced little to change the substance of what was before the Stewards. When all boiled down this evidence revealed the following key factual elements:

- Mr Harper was heavily preoccupied with personal issues on the morning in question;
- the drenching process was totally unsatisfactory in that FLYTHAGIA, which was due to race later that day, was stomach tubed;
- despite having learned of the drenching Mr Harper allowed the horse to race and failed to report the incident to the Stewards;

- this was not the first time Mr Harper was in trouble regarding a breach of the Rules relating to the detection of substances outlawed by the Rules in horses he was training; and

- on his own admission Mr Harper well knew the implications of drenching and how to do so within the Rules.

Australian Rule 175

Although there was clear evidence from Dr Symons that administration must have caused the high TCO2 reading Mr Harper was charged with the presentation offence. He was not charged with the more serious offence of administration provided for in Rule 175. The relevant part of this Rule states:

> *'The Committee of any Club or the Stewards may penalise; ….*
>
> *(h) any person who administers, or causes to be administered, to a horse any prohibited substance –*
>
> *(i) for the purpose of affecting the performance or behaviour of a horse in a race or of preventing its starting in a race; or*
>
> *(ii) which is detected in any sample taken from such horse prior to or following the running of any race.'*

This rule was not invoked was there as no direct proof of an administration by anyone and the responsibility for the high concentration of TCO2 in the horse remained a matter of speculation.

Ground one – severity

I have considered the proposition put by Mr Grace that over the course of his career Mr Harper had been excluded from participating in the industry for longer periods than the actual disqualification periods imposed on him. I am not persuaded that this fact should

have any significant influence on the determination of the appropriateness of the length of the particular disqualification under review. Of paramount importance to the disqualification imposed on 13 July 2009 is the fact that FLYTHAIGA raced on 31 January 2009 with a very high level of total carbon dioxide in its blood stream which was only consistent with an administration. Nothing plausible was offered by way of explanation. What is also clearly relevant is the fact that this was the fourth occasion that Mr Harper had offended the drug free racing rules. Mr Harper's record revealed that he was disqualified previously:

- in November 1993 for bringing TOP VILLIAN to run in the Kalgoorlie Cup with a pre-race blood sample returning in excess of the allowed amount of carbon dioxide in breach of AR178 and also for administering sodium bicarbonate to TOP VILLAIN in breach of AR175(h)(ii), resulting in a six months disqualification for each offence;

- in November 1999 for having presented CORNER BLEAK, also with a prohibited substance TCO2 being detected in breach of AR178, for which a 12 month disqualification was imposed; and

- in February 2000 for presenting CALABRATION with a prohibited substance caffeine detected in a post race sample in breach of AR178 incurring an 18 months disqualification.

Having once again offended against these important rules of racing clearly meant Mr Harper could not expect to be permitted to resume training or to be punished with anything short of a lengthy disqualification. The permission to train horses is granted by being issued a licence by the controlling authority. Such licence is not a right. Rather, it is a contractual privilege. In the first instance an aspiring trainer must be worthy of the privilege. Thereafter a licensed person's conduct must not offend the Rules. Such a person must remain worthy of the trust placed in the trainer. A person must remain fit and proper to continue to exercise the privileges of a licence. By virtue of what took place at his stables on 31 January 2009 Mr Harper clearly has again betrayed that trust and no longer

enjoys the status of qualifying for the privilege by being fit and proper. By his conduct Mr Harper has forfeited his privileges once again.

The principal issue for determination by the Tribunal is, as was clearly put by Mr Grace, to decide whether the five year disqualification is an appropriate length in the face of the guilty plea and other mitigating circumstances. There was no dispute that a term of disqualification was appropriate. Relevant to determining the severity of the sentence are all of the surrounding pertinent facts which must be weighed up and evaluated in the mix. As I have indicated those surrounding facts were clearly identified and considered by the Stewards in their reasons. The unhappy personal circumstances and consequent erosion of health and well being experienced by Mr Harper at the time must be carefully evaluated with the other pertinent facts including Mr Harper's propensity to re-offend. In addition the Tribunal must tread carefully before reaching a conclusion to interfere with the Stewards' determination in such a matter.

As Mr Davies argued Rule 178 is open ended so far as the penalty is concerned. The provision simply concludes with the words *"may be penalised".* This wording is consistent with other offence provisions in the Rules. One therefore must go to Australian Rule 196 to find the prescribed range of penalties, namely:

> *'(1) Subject to subrule (2) of this Rule any person or body authorised by the Rules to penalise any person may, unless the contrary is provided, do so by disqualification, suspension, reprimand, or fine not exceeding $75,000. Provided that a disqualification or suspension may be supplemented by a fine.*
>
> *(2) In respect of a breach of AR137A the Stewards may, in addition to the penalty options conferred on them in subrule (1) of this Rule, order the forfeiture of the rider's riding fee and/or the forfeiture of all or part of the rider's percentage of prizemoney notwithstanding that the amount exceeds $75,000.*

(3) Unless otherwise ordered by the person or body imposing the penalty, a penalty of disqualification or suspension imposed in pursuance of subrules (1) and (2) of this Rule shall be served cumulatively to any other penalty or suspension or disqualification.'

The way the Rules are framed the penalty decision to be made as to a penalty is entirely left to the Stewards to determine based on their evaluation of the relevant facts and circumstances of each case in the light of their experience and judgment of the seriousness of the matter and the impact of the particular conduct on the racing industry. The Rules of Racing are clearly not framed the same as the Harness Racing Rules formerly were, where for a first offence a mandatory minimum was effectively imposed of 12 months and two years for a second offence. Unlike those former provisions where there was no sentencing discretion, the Stewards in the present case had an unfettered discretion subject to compliance with the rules of natural justice.

It can therefore clearly be seen from the reading of Rule 178 with Rule 196 the discretion open to the Stewards is a very wide one indeed. As previously made clear, in performing their duty to protect the interests and integrity of the industry the Stewards must not only be mindful of the rights of licensees but also such important questions as the impact of the outcome of their determination on the general betting public as well as government revenue. The Rules leave it entirely to the decision makers below to weigh up and balance all of the numerous competing interests in deciding what penalty should be imposed. The Tribunal should not usurp the role of the Stewards nor tinker with a penalty but should only interfere with a decision when a manifest error has been demonstrated.

As Rowland J stated in *Robert Charles McPherson v Racing Penalties Appeal Tribunal of Western of Australia* and *Graeme Eric Bennier and others* (1995) 79 A Crim R 256 with Ipp and Steytler JJ agreeing (at 261):

'Unfortunately, the stewards did not give any reasons as to why they imposed a penalty of two and a half years suspension.

With respect, it seems to me that the Tribunal, which is obliged to give reasons under s21 of the Act, should at least identify the range of penalties usually adopted for the offence and the circumstances of this offence. Its finding was that penalty imposed was within the range.

We are not given the benefit of argument from either side as to the correct approach in dealing with this matter, except counsel for the applicant said it was patently too high when considered in conjunction with Eastern State penalties and counsel for the second respondent, without giving us any details, simply said it was within the discretion of the stewards and therefore the Tribunal.

We are here dealing with the livelihood of a trainer. As there is a right of appeal given to a person who claims to be aggrieved with a decision of the stewards, it is implicit, in my view, that there is an obligation on the appellate body to give sufficient findings or reasons so as to explain to the recipient and all others in the industry the basis on which the penalty is given or how it is arrived at. Also, the Tribunal is expressly required by statute to give reasons. It seems to be accepted by both parties that both the transcript before the stewards and the Tribunal, and the reasons given by the Tribunal, form part of the record. The question really arises as to whether the failure to disclose reasons which identify how the penalty is arrived at may give rise to an inference that there is error if the failure to give reasons may lead to "a logical inference towards suggesting that the Tribunal has failed to consider these issues", per Stephen J, with whom Gibbs J agreed, in Kentucky Fried Chicken Pty Ltd v Gantidis (1979) 140 LCR 675, at 682, and see also Commonwealth of Australia v Pharmacy Guild Australia (1989) 91 ALR 65, per Sheppard J, at 88.

In my view, it is impossible for this Court to say that the penalty imposed was manifestly excessive. On the other hand, on the material before us, it appears to be far outside the range of penalties apparently imposed for similar offences in the Eastern States. As no reasons have been delivered by either the stewards or

the Tribunal as to what the local penalties are that have been usually imposed, then there is an interference that, at least insofar as the Tribunal is concerned, it has failed to consider this issue for itself. If it be the fact that there is a range of penalties which has been imposed in this State, which is greater than those which apply in New South Wales, then it seems to me that both that fact and the reasons for such a large discrepancy should be identified. The failure to give the type of reasons I have indicated, in the circumstances, discloses error of law.'

As is clearly apparent the Stewards did address the question of the range of penalties previously imposed for this type of offence by reference to the two multiple offenders F Maynard and P Graham. Mr Maynard, unlike Mr Harper, was disqualified for therapeutic rather than the more serious performance enhancing substances. As the Stewards' reasons reveal, between 1990 and 2002, Mr Maynard was successively disqualified for two years, 18 months, 18 months and nine months concurrently and two years. The other trainer, between 1976 and 2005, as punishment for various performance enhancing substances, was disqualified for five years, four years, 18 months, 12 months and 10 years.

Mr Grace referred the Tribunal to the penalties imposed in the following cases to support his argument that Mr Harper's penalty was too harsh:

D Lalich (Appeal 368)	-	three years disqualification, reduced on appeal to two years.
T A Bettesworth (Appeal 503)	-	four years disqualification, reduced on appeal to two years.
JJ Miller Jnr (Appeal 575)	-	12 months disqualification, confirmed on appeal.
A F Bratovich (Appeal 597)	-	Two years disqualification, confirmed on appeal.

S J Suvaljko (Appeal 638) - 12 months disqualification, confirmed on appeal.

C W Hall (Appeal 676) - five years disqualification, confirmed on appeal.

By way of response Mr Davies argued that the present cases can clearly be distinguished from the various cases relied on by the other side. I agree they are all distinguishable for various reasons including the following factors:

- As to Lalich:
  - the horse was scratched which meant any damage to the industry and loss of confidence by the betting public which would have flowed had the horse raced with the substance in its system were avoided.
  - he was a first offender with 16 years prior involvement in the industry.
- As to Bettesworth:
  - he was a young first offender who pleaded guilty, having been unaware that it was an offence to tube a horse within 24 hours of its engagement.
  - the level of TCO2 was less than in the present case.
  - the race was a minor provincial race with inconsequential stake money.
  - he was remorseful having acknowledged the error of judgment on his part.
  - he was highly unlikely to reoffend.
- As to JJ Miller Jnr:
  - the elevated level of TCO2 was not as high as in Mr Harper's case.
  - this was a first TCO2 presentation offence.

- As to Bratovich:
    - this was a harness racing matter which occurred at a time when the Rules were significantly different. (The Western Australian Trotting Association Committee had introduced Rule 26AA which specified penalties for first offences ($5,000 or six months suspension), second offences ($7,500 or eight months suspension), third ($15,000 and 3 months suspension or six months disqualification) and fourth or subsequent not less than 12 months disqualification, unless in any case special circumstances justified a higher penalty).
- As to Suvaljko:
    - the concentration was less.
    - there was one prior TCO2 conviction.
    - the Rules of the time imposed a lesser penalty.
- As to Hall:
    - this involved a breach of Rule 194 of the Rules of Harness Racing for holding or controlling drugs unlawfully (unlabelled or without a supporting prescription).

I have not overlooked the fact that there were aggravating factors present in most of these cases. I am also conscious of the fact that there have been a number of more recent appeals than those relied on by Mr Grace which have come before the Tribunal in the last 12 months involving the same charge Mr Harper met. Some of those cases contain a detailed analysis of the range of penalties that have been imposed. They all reveal lesser penalties than Mr Harper's. I refer in particular to Gavin (Appeal 694), McIntosh (Appeal 695) and Nazzari (Appeal 697). In the latter case I referred to two tables which set out all presentation offences since RWWA was established and included an extract of all TCO2

drug offences in Western Australia since October 1993 both for administration and presentation. Those two tables provide some guidance as to penalties previously imposed. The first table reflects a range of penalties up to 12 months. The second table reflects a maximum of 2 years. However, the distinguishing feature compared to all of these more recent cases is the fact that Mr Harper is a multiple offender who has not learnt the error of his ways and has not been deterred from re-offending despite the imposition of stiff penalties previously. Further, it does not help Mr Harper's cause that having failed to report the drenching to the Stewards prior to the race, when asked later for an explanation or comment about what happened on the day in question, Mr Harper continued to ignore it.

Conclusion

The range of administration offence penalties imposed in this State over the last 23 years has been identified and considered. I am satisfied that many of the cases prior to the introduction of RWWA are of little relevance. In exercising the wide discretion of deciding where a particular offence fits within the range many factors must be considered, weighed and balanced with each other. Although the five year period imposed clearly does stand out as one of the longest, can it be demonstrated to be manifestly excessive? The most relevant case is that of P Graham which is quoted by the Stewards in their reasons. For a first offence Mr Graham was given a five year disqualification. For his fifth offence, 10 years. Mr Harper's sentence must be analysed carefully particularly in the light of the Graham case and all of the matters personal to himself. Some of the telling factors which have influenced my thinking include:

1 the high level of the substance, which I find could only have been the result of an administration;

2 Mr Harper's bad record, this being his fourth infraction which places him in the worst class of offenders;

3 the likely impact of this on the industry;

4 the need for deterrence; and

5 the laxity which occurred at the stables on the day in question.

As I stated in JP Gavin (supra) at page 13:

> *'I am mindful that an appellate review of a discretionary decision must be conducted carefully with the necessity to show an error on the part of the decision maker rather than it simply being the case that the appellate body would have arrived at a different decision.'*

After considering all these factors I have reached the conclusion the penalty imposed has not been shown to be in error. I do not consider it to be manifestly excessive despite being high compared to the examples referred to by Mr Grace and most of the examples analysed by the Tribunal in the more recent period.

For these reasons I would not interfere with the judgment of the Stewards by substituting a lesser period of disqualification. I have reached this conclusion despite the fact that Mr Harper was excluded from racing whilst under suspension pending the completion of the inquiry namely, from 13 February 2009 to 13 July 2009.

Ground two has no merit. The IAC has not and could not by means of correspondence bestow on the Tribunal jurisdiction to deal with this matter. The Racing Penalties Appeal Act does not empower the Tribunal to deal with agistment. Mr Harper must resort to the Committee for any relief in this regard. The correspondence produced in the appeal reveals the Committee potentially is likely to be prepared to consider the matter once the appeal has been determined.

For these various reasons I would dismiss the appeal.

Seal of the Racing Penalties Appeal Tribunal of WA

DAN MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT: GREGORY DONALD HARPER

APPLICATION NO: A30/08/710

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 5 OCTOBER 2009

DATE OF DETERMINATION: 21 December 2009

IN THE MATTER OF an appeal by MR G D HARPER against the determination made by the Racing and Wagering Western Australian Stewards of Thoroughbred Racing on 13 July 2009 imposing a five year disqualification for breach of Australian Rule of Racing 178.

Mr D Grace QC, assisted by Mr S C Jacob, appeared for Mr Harper.

Mr R J Davies QC appeared for Racing and Wagering Western Australian Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing further to add.

Seal of the Racing Penalties Appeal Tribunal of W.A.

PATRICK HOGAN, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT: GREGORY DONALD HARPER

APPLICATION NO: A30/08/710

PANEL: MR D MOSSENSON (CHAIRPERSON)
MR P HOGAN (MEMBER)
MR R NASH (MEMBER)

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Seal of the Racing Penalties Appeal Tribunal of W.A.

ROBERT NASH, MEMBER