APPEAL - 467

REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**BRUNO MONTELEONE**
APPLICATION NO:	**A30/08/467**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR J PRIOR (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING	**30 SEPTEMBER 1999**
DATE OF DETERMINATION:	**30 SEPTEMBER 1999**

IN THE MATTER OF an appeal by Mr B Monteleone against the determination made by the Stewards of the Western Australian Turf Club on 1 June 1999 imposing a six month disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr G Winston was granted leave to appear for the appellant.

Mr F J Powrie appeared for the Western Australian Turf Club Stewards.

On the 2 September 1999, for the reasons now published, the Tribunal dismissed the appeal as to conviction. The Tribunal is now reconvened to hear argument as to penalty.

This is the unanimous decision of the Tribunal.

The Notice of Appeal lodged on 3 June 1999 states as the only ground of appeal in respect to penalty:

> *"SEVERITY OF SENTENCE"*

The announcement of penalty by the Chairman of the Stewards' panel was quoted in my reasons for determination as to conviction delivered on 2 September 1999 and will not be repeated here.

The Tribunal has now had the benefit of hearing arguments from both parties as to the penalty imposed of disqualification for 6 months.

I begin by stating the principles applicable to an appeal against sentence. Sentencing is an exercise of discretion. A penalty will not be set aside unless there can be demonstrated to have been some error of fact or principle. Alternatively, the penalty itself may be so outside the range of penalties commonly imposed as to demonstrate error.

We must therefore attempt to identify a range of penalties for offences of this type. That is, offences which take into account the type of prohibited substance and the circumstances of the presentation. We are assisted in that regard by the table of penalties (Exhibit 1) relating to TCO_2 offences presented to us by Mr Powrie, on behalf of the Stewards. From that table, we identify broadly speaking a range of penalties anywhere between six months disqualification and a $10,000 fine.

We note that the penalty under appeal here is at the top of that range being a penalty of six months disqualification.

We turn now to consider whether there was an error of principle. In the process of imposing this penalty, we consider that there was an error and it arises in this way. The Stewards at page 52 of the transcript identified a mitigating factor. The Stewards said:

> *"Mrs. Monteleone made reference to the fact that it was certainly not structured as a fraudulent act, and the Stewards accept that, that it's not, there's no fraudulent nature related to it, or indeed it wasn't designed for betterment ..."*

The Stewards went on at page 52 of the transcript to identify another mitigatory factor. There it was said:

> *"I suppose against that to some degree there is the fact that BENVARO was a non-winner, he did not win and indeed didn't fill any placing. To that extent it didn't affect the public or other persons related to betting from that point of view because the horse was a non-winner from a betting point of view. Further to that, that it was from the stable of no significant betting."*

In their reasons for imposing penalty at page 53, the Stewards said:

> *"... we do not believe we should extend any leniency in relation to a penalty for what might, in the absence of that previous charge, have been a good record."*

In our opinion, it is an error of principle to impose a penalty at the highest end of the range, having at the same time identified mitigatory factors. In our opinion, the mitigatory factor first mentioned is an important one. It is of course an error of principle to impose a greater penalty for a second offence, as the Stewards themselves noted at page 53 of the transcript. In our opinion, it appears that no leniency was extended to the appellant because it was a second offence. In our view, the approach the Stewards took caused them to give insufficient weight to the mitigatory factors that have been mentioned.

The sentencing discretion having miscarried as we have found, it is now up to us to exercise it again. Taking into account the mitigatory factors identified, we are of the opinion that the correct penalty should remain one of disqualification. However, giving due weight to those factors, the appropriate penalty, in our opinion, is one of four months disqualification.

Bearing in mind those reasons, the appeal against penalty will be allowed. The penalty of six months disqualification is set aside and in lieu thereof, a penalty of four months disqualification will be imposed.

The suspension of operation of the penalty automatically ceases.

PATRICK HOGAN, PRESIDING MEMBER

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

APPEAL - 467

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (PRESIDING MEMBER)

APPELLANT:	**BRUNO MONTELEONE**
APPLICATION NO:	**A30/08/467**
DATE OF HEARING	**28 JUNE 1999**
DATE OF DETERMINATION:	**2 SEPTEMBER 1999**

IN THE MATTER OF an appeal by Mr B Monteleone against the determination made by the Stewards of the Western Australian Turf Club on 1 June 1999 imposing a six month disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr G Winston was granted leave to appear for the appellant.

Mr F J Powrie appeared for the Western Australian Turf Club Stewards.

On the 1 of June 1999 the Stewards of the Western Australian Turf Club conducted an inquiry into the analyst's finding that a level in excess of 36.0 mmol/litre of total carbon dioxide was detected in the pre-race blood sample taken from BENVARO prior to the running of Race 7, the Roma Cup over 1200 metres at Belmont Park on Saturday, 15 May 1999.

After receiving veterinary and other evidence, the Stewards charged Mr Monteleone with a breach of Rule 178 of the Australian Rules of Racing in the following terms:

> *" ... we charge you in terms of that rule, with being the trainer of BENVARO, that you brought BENVARO to Belmont Racecourse on the 15th of May 1999 to race, and indeed perform, in the Roma Cup. The pre-race blood sample taken from BENVARO, subsequently analysed to show an elevated level of TCO2."*

Rule 178 states:

> *"When any horse which has been brought to a race-course for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have had administered to it any prohibited substance as defined in A.R. 1, the trainer and any other person who was in charge of such horse at any relevant time, may be punished, unless he satisfy the Committee of the Club or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance."*

Mr Monteleone pleaded not guilty to the charge but was found guilty by the Stewards. In announcing the conviction the Chairman of the Stewards' panel stated the following:

> *"Mr Monteleone, after considering the charge and the evidence as presented, the Stewards believe that, and are indeed, we are satisfied with evidence as presented by Dr. Symons. Now some of that evidence that was presented by Dr. Symons is in direct conflict to the evidence presented by Dr. B.J. Charlie Stewart, however we're satisfied that Dr. Symons has indeed presented evidence and substantiated the origin of his evidence to the extent that we believe that we should rely upon that evidence. When you were questioned Mr., Stipendiary Steward Brad Lewis regarding the feeding of the three products together, you answered, no, because you'd had no problems with that regard, that was in answer to the question had you sought any experience related to that. Evidence disclosed today at the inquiry shows that none of the horses that have been pre-raced since you, none of your horses have been pre-raced since you've started using the Enzactiv-green, and indeed, any horses that you advised had been previously pre-race tested for levels of TCO2 were prior to your utilising this particular product. Now, whilst you state that the supplier of Enzactiv-green advised you that there was no problem, when the documentation states that it is not swabable, you did not seek of them any specific advice related to the use of Enzactiv-green with any other alkalising agent, which you advised us you have utilised, mainly by way of the bicarbonate and the approximately 6% from Humilyte. Now further, the documentation related to Enzactiv-green, as supplied by yourself from Rural West, states that, it makes the statement that the, there is a, by way of the bloodstream, a removal of the lactic acid from the tissue, and further, that a neutralising effect on the acidic metabolites in the bloodstream. These statements, Stewards believe, should have highlighted to you the need to seek further advice related to Enzactiv-green's usage. Now, further to that, your statement at the, drawn towards the end of the inquiry, you should have looked into it further by asking Dr. Symons, also we believe a very significant element that is one area of great significance that may have alleviated this particular set of circumstances. Now, in saying all of those points before, those particular reasons, Mr. Monteleone, the Stewards find you guilty of the charge and it remains with us to impose a penalty related to this particular charge."*

The appellant initially declined to put any submissions to the Stewards in respect of penalty. Both Mr Monteleone and Mrs Monteleone, who was also present as part owner of BENVARO, eventually disclosed some of their personal circumstances to the Stewards.

After retiring to consider the matter the Chairman of the Stewards' panel announced the penalty in the following terms:

> *"Mr Monteleone, after considering all the evidence and indeed your submission related to penalty, the Stewards have taken into consideration some aspects, and I'll take you through what we have considered. Mrs. Monteleone made reference to the fact that it was certainly not structured as a fraudulent act, and the Stewards accept that, that it's not, there's no fraudulent nature related to it, or indeed it wasn't designed for betterment, however, but in saying that that does not, whilst it does not put it into the worst category of positive swabs, it doesn't put it as being in the best interests of racing from the point of view of this, is that the Stewards see any case of a positive swab has the ability to lessen the integrity, and indeed the image, with which people perceive our integrity from outside. One of the reasons that it is somewhat more high profile is because indeed it was a metropolitan race and it was the major race on the day. I suppose against that to some degree there is the fact that BENVARO was a non-winner, he did not win and indeed didn't fill any placing. To that extent it didn't affect the public or other persons related to betting from that point of view because the horse was a non-winner from a betting point of view. Further to that, that it was from the stable of no significant betting. The loss of the $4,000, sorry, the $2,000 prize*

money for the fourth place for BENVARO is an element that the Stewards have considered, but somewhat against that also is the fact that TCO2, or a level in excess of 36 millimoles is seen by, by nature of the rules, as being a performance enhancer. Mr. Monteleone, your record shows that you had a previous conviction under this particular rule and that was in April 1996 under Australian Rule of Racing 178 when the horse MY SHEEBA returned a urine sample, urine sample was ascertained to have tiaprofenic acid present. Now you were disqualified for a period of three months at that stage. As such, this charge under the same rule becomes your second offence under this rule and it is in the minds of the Stewards that we could, we do not believe we should extend lenience in relation to a penalty for what might, in the absence of that previous charge, have been a good record. Now, Mrs. Monteleone made reference to the, or asked in relation to the differences between suspension and disqualification, or indeed the significance of a suspension, and you yourself, Mr Monteleone, made reference to the fact of a fine would be preferable provided it wasn't too large a fine. The Stewards have considered those issues, we believe that a fine would not be an appropriate penalty. We've also turned our mind to this issue of a suspension or a disqualification, and after taking into consideration all of the elements and, in particular, the fact that the Stewards have a responsibility to ingratiate the welfare and the image of racing, the Stewards believe that, Mr. Monteleone, you should be disqualified for a period of six months."

The appellant appeals against both the conviction and the penalty. The grounds of appeal are stated as follows:

> *"1. Unfairly convicted due to using a non swabable product that I used in good faith.*
>
> *2. Severity of sentence.*
>
> *3. Clearing name."*

Prior to the appeal hearing, Mr Monteleone submitted the following particularised grounds of appeal:

> *"1. Unfairly convicted due to using REGISTERED PRODUCT – declared NON-SWABBABLE.*
>
> *a. Took advice from manufacturers.*
> *b. And retailer – who employs a vet.*
> *c. Used in good faith.*
>
> *2. Disqualification not supported by evidence presented at inquiry.*
>
> *3. Severity of sentence – clearing name.*
>
> *4. Stewards didn't take all reasonable care to ensure that the material facts presented at the inquiry were true.*
>
> *5. AR 178 D (2) + (3) not strictly adhered to by testing labs.*
>
> *6. Supporting evidence not table (sic) at inquiry."*

Rule 178 creates an offence. It is commonly called a "*presenting offence*", in the sense that the person in charge of the horse presents that horse for racing on the day. The conduct sought to be

prohibited is not one of administering a substance, that being an offence of a different type ("*an administration offence*").

For Rule 178 to operate, the substance must be a prohibited substance. The charge read out by the Stewards would lead to an assumption that an elevated level of TCO_2 (total carbon dioxide) is a prohibited substance. This is not the case. Rule 178B lists the prohibited substances. It is an exhaustive list. If a substance does not fall within those definitions, then it is not a prohibited substance. TCO_2 is not in Rule 178B at any level.

However, alkalising agents are within Rule 178B, and these are prohibited substances. An elevated level of TCO_2 is considered to be evidence that an alkalising agent has been administered. What is considered to be an elevated level is defined by Rule 178C. Rule 178C excepts certain prohibited substances (at certain levels) from the operation of Rule 178B. Rule 178C(a) refers to TCO_2. Thus Rule 178C(a) removes TCO_2 (at a certain level) from the ambit of Rule 178B, when TCO_2 is not in Rule 178B to begin with.

The elevated level of TCO_2 in Rule 178C is set at 36.0 millimoles per litre of TCO_2 in plasma. The level is set in a negative way, in that anything at or below that level is excepted from Rule 178B and is thus not a prohibited substance (which it never was anyway).

Despite the obvious shortcomings in drafting, the operation of the various rules appears to be well enough understood in the Racing Industry. Dr Symons, the Veterinary Steward at the Turf Club, gave evidence at the inquiry and explained the position at T16 to T17.

> "*CHAIRMAN* — *The two sample exhibits there in relation to the reports on this sample, could you tell us the significance of those reports related to the rule that Mr. Zucal has just read.*
>
> *SYMONS* — *Well both, one indicates a level of total carbon dioxide of 39.1 and the other indicates a measured level of 39.0 and with regard to the rule, elevated levels of total carbon dioxide above 36 millimoles per litre are considered evidence that excessive amounts of alkalising agents have been administered, so, alkalising agents are prohibited substances as mentioned by Mr. Zucal under the rules.*"

The operation of the rules was understood by the appellant as well. In his evidence to the inquiry, at T26, he spoke in terms which indicated that he knew that there was a limit, what a safe range was, and that feeding a particular product could change the level.

> "*MONTELEONE* — *... what I've fed and what I normally have fed all along has always and I've had pre-race swab, never gone over the limits, I do understand that some horses have it higher, and that you have to have a range of about 28 to possibly 33, 34 max, where you've still got two points in the safety guideline that you wouldn't ever have a problem. But in feeding this other product that I've fed, it's gone way over.*"

That piece of evidence from the appellant leads to another point, basic to understanding the evidence given at the inquiry. All horses have a naturally occurring level of TCO_2 (mean bicarbonate level). The appellant thought that it was between 28 and 33 or 34 (millimoles per litre). Much research has been done on the subject. For example, in the case of HARNESS RACING NEW ZEALAND v BRADY (JUDICIAL SUB-COMMITTEE HARNESS RACING NEW ZEALAND delivered 6 August 1997), research was referred which indicated a mean level of 31 or 32.

At the inquiry, the Stewards, the appellant and the expert witnesses were all concerned with the same three things. Those three things were what substances were given to the horse, in what quantities and at what times. The Stewards began the inquiry by proving the level of the blood sample itself and the reserve sample. Following that, the appellant was asked for his explanation (at T17), and it was in answer to that request that the focus of the inquiry shifted to the three matters mentioned above.

The appellant seems to have had an opinion as to the reason for the elevated level at or soon after the time he was told of it. Stewards visited the appellant at his stables on 19 May 1999 and advised him of the elevated level. Their report, Exhibit F at the inquiry, is reproduced here in full. The appellant accepted the report as being correct (T11).

> ***"REPORT ON VISIT TO THE STABLES OF B. MONTELEONE (CANNING VALE) ON INSTRUCTION FROM THE ACTING CHAIRMAN OF STEWARDS, MR JOHN ZUCAL***
>
> *At approximately 12.05 pm on Wednesday, 19 May 1999 myself, Stipendiary Steward Mr Brad Lewis and Cadet Stipendiary Steward Mr Gerard Bush attended the property of licensed W.A.T.C. trainer Mr Bruno Monteleone at Lot 105 Hughes Street Canning Vale.*
>
> *I informed Mr. Monteleone that the Australian Racing Forensic Laboratory in N.S.W. had advised the Chairman of Stipendiary Stewards of The Western Australian Turf Club, that the pre race blood sample taken from Benvaro before the gelding raced in the Roma Cup at Belmont, Saturday 15th of May 1999, had a level in excess of 36 mmol/litre of total Carbon Dioxide. Mr. Monteleone was then advised that the reserve blood tubes had been sent to the Racing Analytical Services in Victoria for confirmation.*
>
> *I asked Mr. Monteleone if he could explain this irregularity and if we could inspect his feed room. Mr. Monteleone then escorted us to his locked feed room. Mr. Monteleone explained that he is responsible for the feeding of Benvaro and that he gave Benvaro approximately 60gms of Humilyte on the morning of the race. The Humilyte was located in the feed room in a 20kg container. He also gave Benvaro 60ml of Enzactive on the morning of the race which he believed acted as a kidney flush and contained no prohibited substances. The Enzactive was also kept in the feed room in a one litre bottle. Mr. Monteleone further advised that he gave Benvaro one scoop or approximately 60gms of Sodium Bicarbonate on the previous Monday night before Tuesday morning fast work. The Sodium Bicarbonate was also kept in the feed room on a shelf in a plastic container marked Sodium Bicarbonate. These products were purchased from Oakford Traders and Bio John. A sample of these products were taken back to the offices of The Western Australian Turf Club.*
>
> *When questioned if he had sought any veterinary advice in relation to the feeding of these three products together, Mr. Monteleone replied "no", because he had experienced no problems in this regard previously.*
>
> *Myself and Mr. Bush then attended the property of Mr. Monteleone on Friday 21st of May 1999 at approximately 12:15 pm to deliver the official documentation related to this matter. At this time we took possession of a one litre plastic bottle marked Enzactive and a further sample of Humilyte from the feed room.*

Signed
Brad Lewis
Stipendiary Steward.

Signed
Gerard Bush
Cadet Stipendiary Steward.

31st May, 1999"

It can be seen then that the appellant's first reaction was to offer an exculpatory statement in respect of the substance called ENZACTIV. As to the substances HUMILYTE and SODIUM BICARBONATE, he merely reported on the quantities and gave no exculpatory statement. The appellant obviously then suspected that ENZACTIV was in some way responsible for his problem.

The appellant set about investigating the ENZACTIV. The inquiry was held on 1 June 1999, and the appellant had been advised of the elevated level on 19 May 1999. During those two weeks, the appellant had gathered up information from the manufacturer of ENZACTIV, and had commissioned a report from Dr Stewart, a doctor of Veterinary Medicine. The report (Exhibit H) was headed – "*Effect of Enzactive Green on TCO_2 Concentration*".

The appellant's approach at the inquiry and at the appeal before us was to demonstrate that it was the ENZACTIV which had elevated the level. He was then not responsible for the elevated level because he did not know that ENZACTIV would have that effect. The appellant's approach was doomed to failure in two ways. In setting about to prove that it was the ENZACTIV, he advanced the Stewards' case because ENZACTIV contains an alkalising agent itself. His knowledge or lack of knowledge of the composition of and the effect of ENZACTIV could never amount to a defence in any event - HARPER v RACING PENALTIES APPEAL TRIBUNAL OF WESTERN AUSTRALIA (1995) 12 W.A.R. 337 per Anderson and Owen JJ at 348 to 349.

The Stewards' approach was to at least question the accuracy of everything which the appellant said, and the reasonableness of his actions in feeding the ENZACTIV. The Stewards, through the evidence of Dr Symons, set about proving that the ENZACTIV did have an effect, but not to the extent said by Dr Stewart for the appellant. The Stewards, in probing the appellant's evidence, asked him questions about whether he had deliberately set about increasing the TCO_2 level in the horse. At T34 to T35, the following exchange took place:

"*CHAIRMAN* *Mr. Monteleone, did this horse ever tubed at all, or ...*

MONTELEONE *No Sir.*

CHAIRMAN *Could anybody have got at this horse to ...*

MONTELEONE *No.*

CHAIRMAN *To ...(Inaudible) him? You say that fairly confidently?*

MONTELEONE *Well I've got a dog at home and we're always around the place so I don't think no-one's ever done nothing to my horses.*

CHAIRMAN *Was anything ...*

MONTELEONE *To my knowledge.*

CHAIRMAN *Was anything done to the horse in the final 24 hours leading up to the Roma Cup?*

MONTELEONE *No.*

CHAIRMAN *And if there had been something done, you would've known about it?*

MONTELEONE *Yes Sir.*

CHAIRMAN *That was a question, that wasn't s statement.*

MONTELEONE *Right.*"

The Stewards' approach was probably unnecessary, in that the appellant had himself set out to demonstrate that he deliberately fed a substance, ENZACTIV, which had the effect of creating a prohibited substance, excessive TCO_2, in circumstances where he could have no defence in law.

Despite all of the above, the inquiry proceeded and boiled down to a contest between the experts as to what effect occurred on the TCO_2 level as a result of the feeding of the admitted quantities of ENZACTIV, namely 60 mils. Further expert evidence from Dr Stewart was admitted at the appeal before us, as well as further evidence (referred to later in these reasons) from the appellant as to the precise quantity of ENZACTIV which was administered. The contest remained the same, namely what was the effect on the TCO_2 level.

At the inquiry, the appellant repeated what he had told the investigating Stewards on 19 May, as to the three substances which he had fed, namely HUMILYTE, ENZACTIV and BICARBONATE. The Stewards thought it worthwhile to find out something about a possible cumulative effect, quite apart from the effect of ENZACTIV alone. At T34, Dr Symons gave evidence as follows:

"*CHAIRMAN* *Dr. Symons, you've heard what Mr. Monteleone has said in relation to the Humilyte, Enzactiv-green and the bicarbonate at the levels that he's fed this horse, BEVARO, sorry, in the lead up to the Roma Cup.*

SYMONS *Yes.*

CHAIRMAN *Does it sound to you as if that would predispose to an elevated level of TCO2?*

SYMONS *Not to 39, no. I don't consider there's enough alkalising agent in there to do that.*"

The contest between the two experts formed the basis of the different approaches by the appellant and the Stewards at the inquiry. Dr Stewart's report tendered by the appellant was to the effect that then ENZACTIV would increment the TCO_2 level significantly - (Exhibit H and Dr Symons at T22). Thus, if accepted, that scientific evidence would give a possible answer to the question why there was an elevated level. It would at least bring the level down to one where the appellant would not have to provide an answer at all, namely 36.0 mmol/l. Dr Symons' evidence, at T22 and T24, was to the effect that the amount of ENZACTIV would have raised the level by an amount slightly more than one millimole per litre. Further, Dr Symons' evidence was to the effect that a combination of the three substances fed would not lead to the level found.

Hence, the Stewards 'suspicion as demonstrated by the question from the Chairman as to whether the horse had been "*tubed*". Tubing is a reference to a practice understood by all participants in the industry. It involves the direct and obviously deliberate insertion of an alkalising agent into the stomach of the horse. The substance is usually bicarbonate. It is inserted into the horse's stomach by way of a tube, fed from a funnel. The liquid preparation is poured into the funnel, passing down the tube into the stomach.

Towards the end of the inquiry, the appellant's position was beginning to look untenable. If his evidence and the evidence of Dr Stewart was accepted, it was clearly the appellant himself who had deliberately administered the alkalising agent which alone had created the prohibited substance. If the evidence of Dr Symons was accepted, there was no factual evidence which could explain how the prohibited substance came to be created. Thus suspicion remained on the appellant. That is because an elevated TCO_2 level acts to the benefit of the horse. It is more likely to win.

Based on all of the evidence obtained at the inquiry, the Stewards moved on to charge the appellant. He pleaded not guilty, and no further evidence was given. The Stewards found the charge proved.

In their reasons for convicting the appellant, the Stewards said two different things. They accepted conflicting areas of evidence as being correct.

The Stewards began by stating that they were satisfied with the evidence of Dr Symons, including where it was in conflict with the evidence of Dr Stewart. Therefore, the Stewards were satisfied that neither the ENZACTIV alone nor a combination of the three substances caused the elevated level. In the remainder of their reasons, the Stewards commented adversely on the appellant's failure to make proper enquiries in relation to ENZACTIV. The inference to be drawn from that is that the Stewards also found that it was the ENZACTIV which caused the elevated level.

The two findings were in conflict.

I consider that it would have been better had the Stewards chosen one version or the other. Either Dr Symons was incorrect in his expert opinion, or the appellant was incorrect as to any or all of the quantities of the three substances.

The evidence, however, did not stop at the end of the Stewards' inquiry. Leave was granted to the appellant to give further evidence before us at the appeal. At the appeal, the appellant gave evidence to the effect that he had administered ENZACTIV in an amount greater than that which he told the Stewards. He said that he was mistaken in what he had told the Stewards. He had told the Stewards who went to the stable (Exhibit F) that he had given the horse 60 mils of ENZACTIV on the morning of the race. Before us, he tendered in evidence the container which he had used. The amount he in fact administered was 150 mils, being one half of the container used. Based on that (150 mils) quantity, Dr Stewart prepared a further report, tendered to us at the appeal. The report is a more detailed analysis than that presented to the Stewards at their inquiry – (Exhibit H). Still, Dr Stewart was able to conclude that:

> "*It is not unreasonable to assume that an increment in [TCO_2] of 3 mmol/l may have been induced in BENVARO by the combined alkalising and dehydrating effects of the administration of 150 mils of ENZACTIV GREEN on race day.*"

Not surprisingly, the appellant was challenged in cross examination by Mr Powrie for the Stewards. It was suggested to him in effect that he had given untrue evidence before us as to the amount of ENZACTIV which was administered. It was a recent invention, put by the appellant to make a more plausible explanation for the level of TCO_2 found.

I find that the appellant has in fact given untrue evidence before us as to the quantity of ENZACTIV administered. When first questioned (Exhibit H) he said it was 60 mils. He re-affirmed that at the Stewards' inquiry - (T10). He is a person who knows quantities. He knows quantities for two reasons. Firstly, he is a mechanic by trade, owning a business in the service and repair of vehicle gearboxes. It is inconceivable that he does not know fluid quantities. The following exchange took place in the evidence before us:

"POWRIE	*Mr Monteleone, I don't wish to make too great a point of this but you'd be fairly used to dealing in liquids and amounts of liquids and so forth from the point of view of feeding your horses, but not only that, maybe in terms of automatic transmissions and gearboxes and so forth that you deal with. Is that correct?*
MONTELEONE	*Yes.*
POWRIE	*Mr Monteleone, you'd know the difference between 60 mls and 150 mls wouldn't you?*
MONTELEONE	*Sir, roughly. I wasn't um ... roughly that's what I fed. I said 60 to 80 and that's what it was. I never ever measured it."*

Secondly, as a trainer of horses, he demonstrated a very precise knowledge of the quantities of the other substances administered. At T10 to T11, the following exchange took place:

"CHAIRMAN	*Mr. Monteleone, Mr. Lewis is fairly explicit in relation to what he has said that you administered or fed to BENVARO, and it was contained in the report, I've got it written down here but, what you said at the time?*
MONTELEONE	*What's correct is the actual scoops, probably, would be 60 grams or near abouts to it, yes.*
CHAIRMAN	*Yes. So, well if I can just go through, you said 60 grams, Mr. Lewis states that you said 60 grams of Humilyte ...*
MONTELEONE	*Every day I give it.*
CHAIRMAN	*Yes. All right. So that is correct?*
MONTELEONE	*Yes.*
CHAIRMAN	*Right. And then the 60mls of Enzactiv, is that correct?*
MONTELEONE	*Correct.*
CHAIRMAN	*All right. And then one scoop on the Friday p.m. and also on the Saturday in the morning prior to the race, is that correct?*
MONTELEONE	*Yes, ...(Inaudible) probably be about 40 grams.*
CHAIRMAN *MONTELEONE*	*Have you got that scoop at all or not?* *No. It's at home.*
CHAIRMAN	*About 40 grams you say.*

MONTELEONE Roughly, Sir, it would be."

I find from the above reasons that the appellant was giving untrue evidence before us, and I do not accept that he fed 150 mils of ENZACTIV. Rather, it was 60 mils as he said in evidence before the Stewards.

The position so far as the evidence is concerned is now as it was before the Stewards. There is no reason to make any different findings of fact. However, as stated above, the Stewards made findings of fact which were in conflict. I consider that I am able to find the facts, because I have heard for myself the principal witness at the inquiry, namely the appellant. I have also had the benefit of hearing from Dr Stewart, and I have considered all the written material.

The appellant administered HUMILYTE, BICARBONATE and ENZACTIV to the horse. The precise quantities are unascertainable, because the appellant is not a witness of credit. Either one of those substances, or a combination of all three, had the effect of lifting the TCO_2 level to that found by the analysts. The appellant did not intend to reach an elevated level, because to do so would not be in his own interest. He may have miscalculated. He may have not known of the effect of ENZACTIV. Either one of those reasons would not have afforded him a defence. Mistake of fact is not available to him as a defence (HARPER'S CASE).

There is no evidence that the appellant in any way administered an alkalising agent by way of stomach tubing.

I turn to consider the individual grounds of appeal.

2. Disqualification not supported by evidence presented at inquiry

I consider there was ample evidence to sustain the conviction.

4. Stewards didn't take all reasonable steps to ensure that the material facts presented at the inquiry were true

Clearly the Stewards did take all reasonable steps to present the evidence, and gave the appellant an opportunity to present his evidence.

5. AR178D (2) + (3) not strictly adhered to by testing labs

Rule 178D (2) and (3) are in the following terms:

> *"(2) Upon the detection by an official racing laboratory of a prohibited substance in a sample taken from a horse such laboratory shall;*
>
> *(a) notify its finding to the Stewards, who shall thereupon notify the trainer of the horse of such finding; and*
>
> *(b) nominate another official racing laboratory and refer to it the reserve portion of the same sample and, except in the case of a blood sample, the control of the sample, together with advice as to the nature of the prohibited substance detected.*
>
> *(3) In the event of the other official racing laboratory detecting the same prohibited substance, or metabolites, isomers or artifacts of the same prohibited substance, in the referred reserve portion of the sample and not in the referred portion of the control, the certified findings of both official racing laboratories shall be prima facie evidence upon which the Stewards may find that a prohibited substance has been administered to the horse from which the sample was taken."*

This ground of appeal was not seriously pursued. The official laboratory chosen to test the sample was the Australian Racing Forensic Laboratory in Sydney. In turn, that laboratory chose Racing Analytical Services in Melbourne to analyse the reserve portion of the sample. It transpired that the Melbourne laboratory had technical difficulties and could not carry out the analysis. The Chemistry Centre (W.A.) carried out the testing instead. The process was explained in evidence by Dr Duffield at the inquiry. There was no effect on the accuracy or the integrity of the testing process.

1. Unfairly convicted due to using REGISTERED PRODUCT – declared NON-SWABBABLE

This ground of appeal reflects the appellant's major complaint during the whole inquiry and appeal. As stated above on a number of occasions, his mistaken belief that ENZACTIV would have no effect affords him no defence (HARPER'S CASE). However, as evidence was given on the matter, it is incumbent on me to comment.

The appellant purchased a quantity of ENZACTIV. With the ENZACTIV, he received a sheet of paper containing information about the product. That sheet of paper became Exhibit J at the inquiry. In part, the printed information reads:

> *"Enzactiv-green contains NO SWABABLE ingredients and is safe to the animal at all doses."*

There is no such thing as a swabable ingredient. There are only prohibited substances, listed exhaustively in AR178B. Alkalising agents are prohibited substances. ENZACTIV contains Sodium Citrate - (Exhibit K2). Sodium citrate is an alkalising agent (Dr Symons at T21). Therefore, ENZACTIV contains a prohibited substance.

Despite the fact that Exhibit J uses the words "*NO SWABABLE ingredients*" there is other information on the sheet of paper which should have alerted the appellant to the alkalising effect of the substance. It is stated that ENZACTIV will "*remove the lactic acid from the tissue*". It also stated that "*Enzactiv-green exerts a mild diuretic action and neutralising effect on the acidic metabolites in the blood stream*".

It is important to remember that prohibited substances only become relevant to the operation of the rules when they fit in to the offences created by the rules. Outside of that, there are no offences known to the rules of possessing or using the same substances.

As the appellant's mistaken belief was not available to him as a defence, I do not consider it appropriate to review the evidence given as to the reasonableness or other wise of that belief.

For all of the above reasons, I would dismiss the appeal against conviction.

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

PATRICK HOGAN, PRESIDING MEMBER

APPEAL - 467

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT:	BRUNO MONTELEONE
APPLICATION NO.:	A30/08/467
DATES OF HEARING:	28 JUNE 1999 and 8 JULY 1999
DATE OF DETERMINATION:	2 SEPTEMBER 1999

IN THE MATTER OF an appeal by Mr B Monteleone against the determination made by the Stewards of the Western Australian Turf Club on 1 June 1999 imposing a six month disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr G Winston was granted leave to appear for the Appellant.

Mr F J Powrie appeared for the Western Australian Turf Club Stewards.

This is an appeal against conviction and penalty.

FACTS

On 1 June 1999 the Stewards of the Western Australian Turf Club conducted an inquiry into a pre-race blood sample taken from the horse Benvaro at Belmont Park on 15 May 1999. The first analysis of this sample detected total carbon dioxide (TCO_2) at a level of 39.1 plus or minus 1.2 millimoles per litre in plasma. The confirmatory analysis required by rule 178D of the Australian Rules of Racing ("ARR") detected TCO_2 at a level of 39.0 plus or minus 1.4 millimoles per litre in plasma. At all material times the Appellant was the trainer of the horse.

The Appellant stated that leading up to the race in question he deliberately administered to the horse a product called Enzactiv-green ("the product"). He stated that he used this product in combination with other products for the horse, and it had caused the increase in the horse's TCO_2 level.

The Appellant claimed that he innocently used the product, not knowing that it would affect the TCO_2 level of the horse. In support, he stated among other things that when he purchased the product he was informed by the supplier that it contained no ingredients that would cause a positive swab. Printed information on the product was tendered in evidence which also made this claim.

The Stewards charged the Appellant with contravening ARR 178. This rule provides -

> "When any horse has been brought to a race-course for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have had administered to it any prohibited substance as defined in A. R. 1, the trainer and any other person who was in charge of such horse at any relevant time may be punished, unless he satisfy the Committee of the Club or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance."

A charge preferred pursuant to ARR 178 is commonly known as a "presentation" charge. ARR 178B declares various substances as prohibited substances. ARR 178C provides that TCO_2 is a prohibited substance under ARR 178B where it is at a level in excess of 36.0 millimoles per litre. Accordingly, the sample the subject of this appeal detected a prohibited substance.

The Appellant pleaded "Not guilty" to the charge. After considering the evidence presented, the Stewards found the charge proven and accordingly convicted the Appellant of it. By way of penalty the Stewards imposed six months disqualification on him.

At the sittings of this Tribunal on 8 July 1999, Mr Hogan as member presiding in this appeal gave the Appellant leave to adduce further evidence. Much of this additional evidence concerned the precise amount of the product the Appellant administered to the horse, and the effect the product had on the horse's TCO_2 level. As to the latter an expert gave evidence.

GROUNDS OF APPEAL

The Appellant's grounds of appeal, after amendment, are as follows:

1. "Unfairly convicted due to using REGISTERED PRODUCT - declared NON-SWABABLE.
   a. Took advice from manufactures.
   b. And retailer - who employs a vet.
   c. Used in good faith.
2. Disqualification not supported by evidence presented at inquiry.
3. Severity of sentence - clearing name.
4. Stewards didn't take all reasonable care to ensure that the material facts presented at the inquiry were true.
5. AR 178D(2)+(3) not strictly adhered to by testing labs.
6. Supporting evidence not table (sic) at inquiry."

REASONS FOR DECISION

On 30 September 1999 the Appellant intends making submissions to the Tribunal on the penalty that the Stewards imposed. Accordingly, these reasons only address the Stewards' decision to convict the Appellant of the charge.

Honest and Reasonable Mistake

The Appellant by his evidence and evidence called on his behalf, effectively claimed that he held an honest and reasonable but mistaken belief as to the effect the administration of the product, in combination with other products, would have on the horse's TCO_2 level. In short, he believed that his administration of the product would not elevate the TCO_2 level of the horse above the allowable limit. However, in determining if a presentation charge has been proven, it has been held that the excuse of honest and reasonable mistake in section 24 of the Criminal Code (WA) has no application - *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337.

The ARR 178 Defence

ARR 178 contains the defence to a "presentation" charge. Here, one must -

> "... satisfy the Committee of the Club or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance."

This defence primarily concerns a breach of security surrounding a horse whereby a prohibited substance is administered to it - see *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337 at 341 to 342. However, the Appellant did not contend that someone else had breached his security and physically administered the prohibited substance. Accordingly the defence prescribed by ARR178 is not available.

The Evidence

Given all the evidence, I find that a decision to convict the Appellant is reasonably open. Simply put, there is evidence that at the relevant time: a prohibited substance was administered to the horse; the horse was presented for racing; and the Appellant was in charge of the horse. For example, ARR 178D(3) provides that the analysis of the sample in question "shall be prima facie evidence upon which the Stewards may find that a prohibited substance had been administered to the horse from which the sample was taken".

The Inquiry

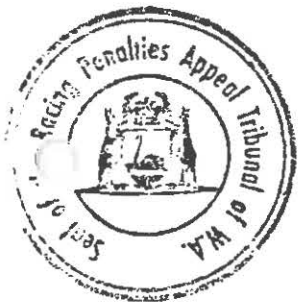
I find the Stewards conducted the inquiry fairly and fully. In any event for the same reasons enunciated by Murray J in *Danagher v Racing Penalties Appeals Tribunal*, I do not "place too much emphasis upon the way in which the Stewards in fact conducted their inquiry" - per Murray J in *Danagher v Racing Penalties appeals Tribunal* (1995) 13 WAR 531 at 552. Further, it has been held that "the inquiry that ensues when a doped horse is presented for racing cannot be equated to a criminal investigation and prosecution" - per Anderson and Owen JJ in *Harper v Racing Penalties Appeal Tribunal of Western Australia* (1995) 12 WAR 337 at 347 to 348. As to the ground of appeal relating to the testing of the sample in question, the Appellant accepted from the Stewards a thorough clarification of the process that had occurred. Further, no error was demonstrated with this process.

CONCLUSION

For these reasons, I find none of the grounds of appeal going to conviction to have been made out. Accordingly, I would dismiss the appeal against conviction.

A E Monisse

ANDREW MONISSE, MEMBER



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**BRUNO MONTELEONE**
APPLICATION NO:	**A30/08/467**
DATE OF HEARING	**28 JUNE 1999**
DATE OF DETERMINATION:	**2 SEPTEMBER 1999**

IN THE MATTER OF an appeal by Mr B Monteleone against the determination made by the Stewards of the Western Australian Turf Club on 1 June 1999 imposing a six month disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr G Winston was granted leave to appear for the appellant.

Mr F J Powrie appeared for the Western Australian Turf Club Stewards.

I have read the draft reasons of Mr P Hogan, Presiding Member. I agree with the reasons and the conclusions and have nothing to add.

John Prior

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

JOHN PRIOR, MEMBER

APPEAL - 466

DETERMINATION AND REASONS FOR DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**LENI SALVATORE CELENZA**
APPLICATION NO:	**A30/08/466**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)**
DATE OF HEARING	**15 JUNE 1999**
DATE OF DETERMINATION:	**15 JUNE 1999**

IN THE MATTER OF an appeal by Mr LS Celenza against the determination made by the Western Australian Greyhound Racing Authority Stewards on 19 May 1999 imposing three months disqualification for breach of Australian Rule 109(6)(a) of the Greyhound Racing Rules 1998.

Mr C Harrison was granted leave to appear for the appellant.

Mr M Kemp appeared for the Western Australian Greyhound Racing Authority Stewards.

On the 1 May 1999 the Stewards of the Western Australian Greyhound Racing Authority conducted an inquiry into an allegation revolving around incidents alleged to have occurred immediately after Mr Celenza left the Stewards' room following an inquiry into the greyhound VASTO CITY BOY which competed in Race 9.

The Stewards received evidence from a couple of witnesses to the incident. Their evidence, which was not in identical terms, addressed what they heard Mr Celenza state in a loud fashion following his departure from the Stewards' inquiry. Mr Celenza also gave evidence during the course of the inquiry.

The Stewards then adjourned proceedings and subsequently wrote a letter on the 5 May 1999 to Mr Celenza referring to the inquiry and stating that after considering all the evidence they had decided to lay a charge against him under Australian Rule 109(6)(a).

Australian Rule 109(6) states:

> *"Any person (including an official) who:*
>
> ...
>
> *uses improper, insulting or offensive language in either the written or spoken form towards, or in relation to:*

(a) a steward

...

shall be guilty of an offence and liable to a penalty pursuant to rule 111."

The specifics of the charge were in the following terms:

" ... that you Mr Celenza, used offensive language in the spoken form in relation to the Stewards at Cannington Greyhounds on 1 May 1999 following the stewards issuing of findings in regard to the performance of your greyhound VASTO CITY BOY."

Mr Celenza was told that the inquiry would be conducted or continued on the 13 May 1999. A copy of the transcript of the 1 May 1999 proceedings was supplied and Mr Celenza was advised to bring any witnesses that he thought may help his cause at the ongoing hearing.

When the inquiry was reconvened, a reasonable amount of additional material was introduced which ultimately led to the Stewards coming to the conclusion that the specifics of the charge had been met and accordingly Mr Celenza was found guilty as charged.

The Chairman of Stewards announced the finding of guilt in the following terms:

" This inquiry has been as a result of reports brought to the attention of the stewards by security officers Mr Ross and Mr Porter at Cannington Greyhounds on 1 May, 1999. These persons were in the vicinity of the stewards' room when you emerged following an inquiry into the performance of your greyhound VASTO CITY BOY. By your own admission you were dissatisfied with the stewards' decision regarding this greyhound to the point that you readily admitted to being irate and angry. The security officers reported that you, in a loud manner, proceeded to use offensive language in the spoken form in relation to the stewards. They further reported that this language continued up to the point that you began speaking with some other person in the vicinity of the kennelling area. The evidence of the security officers is only in question in regard to the exact nature of what words you were using. There is no dispute from you that you were loud and that you were irate. It is clear that they had no difficulties in hearing your words as they were said in a manner loud enough for them to hear them. Whilst we have noted your submission that there is some variation in the account of what words were exactly said, the evidence of the two officers is consistent in that they each offer a catalogue of offensive comments which are clearly in relation to the stewards. There is no question in view of their evidence, or indeed in our minds, that your comments about the stewards were anything but offensive. It does not strike us as significant that there may be some small variation in what offensive word was used at what time when it is clear that there was a litany of such words. We do not accept that given your emotional state at the time, which was clearly caused by the decision of the stewards in regard to your greyhound, that your outburst would be concentrated on matters other than the matter at hand. At the initial stages of this inquiry you have vehemently denied ever using any swear words or any words in relation to the stewards. As the inquiry has progressed you have conceded that you have used at least one swear work whilst speaking with Mr Hepple (Page 16) and that although according to you, you can not recall using the language reported by the security officers, you no longer categorically deny the possibility that you may have used some or all the words reported. The presence of the security officers at the relevant time was only by chance and as such there is nothing to suggest that the security officers would report such an incident if in fact it did not occur. We therefore find that the specifics of the charge have been met and accordingly find you guilty as charged."

After entertaining some further evidence regarding Mr Celenza's background, experience, record and involvement in greyhound racing the Stewards considered (at page 54 of the transcript) a range of offenders and offences where, amongst other things, fines and penalties of disqualification ranging from 3 to 9 months had been imposed.

Australian Rule 111 states:

> *"(1) Any person found guilty of an offence under these rules shall be liable to, in the sole and absolute discretion of the Board/Commission or the stewards:*
>
> *(a) a fine not exceeding $5,000 for any 1 offence; and/or*
> *(b) suspension; and/or*
> *(c) disqualification; and/or*
> *(d) cancellation of registration."*

The Stewards referred to the penalty provisions of Rule 111 and eventually came to the conclusion why, in the circumstances in dealing with this matter on its own merits, it was appropriate to impose a disqualification of three months.

The Chairman of Stewards announced the decision as to the penalty in the following terms:

> *" The stewards have taken into account the following:*
>
> *Firstly, your length of involvement in the industry. Secondly, the number of greyhounds you are currently training and the fact that most of these are engaged in races this weekend. Thirdly, the fact that greyhound racing is not your livelihood. Fourthly, your current financial situation.*
>
> *The stewards, however, take a very dim view of the actions you have indulged in on the night in question. A stewards' inquiry was conducted and after hearing all the submissions your greyhound was quite fairly and reasonably afforded the benefit of the doubt and a far lesser penalty was imposed on your greyhound. Rather than be relieved or grateful for the decision, you have responded to the decision in a highly inappropriate and offensive manner. To further compound the seriousness of the offensive (sic) your unsavoury display has occurred in an area where there are members of the public who would in all likelihood also be offended by the nature of the language used by you. The level of language used was clearly offensive in the extreme. In an industry, which relies on the support of the public for it's long term viability, we cannot allow behaviour which has the potential to affect the support of the public. Furthermore, it should be clear to registered persons that it is simply not acceptable to indulge in such behaviour when they are dissatisfied with stewards' decisions. This is not the first time you have reacted inappropriately to a stewards' decision involving your greyhounds and in fact it was only some six months ago that you were fined what was then the maximum amount in similar circumstances. It is clear that this has had little effect in you curtailing your words and emotions when decisions are made which do not satisfy your level of expectation. Whilst we are conscious of previous incidents and penalties, in particular those brought to your attention, we are of the view that in most instances direct comparisons are of little value. The circumstances of each offence and the person concerned should be dealt with on it's own merits.*
>
> *Given the circumstances of the offence and your personal antecedents we do not feel that a fine would be appropriate. It is our opinion that the appropriate penalty in your circumstances is a disqualification of three months, effective immediately."*

Mr Celenza appeals against both the conviction and the penalty. In the notice of appeal the ground of appeal as to the conviction is set out as follows:

> *" I am not guilty of this charge as to the best of my recollections I did not use improper, insulting or offensive language towards a steward. If I did swear then those words were not directed towards an official."*

This has been further particularised subsequently with additional points numbered 1 to 4 as follows:

> *"1. Not guilty of the charge.*
>
> *2. Did not use improper, insulting or offensive language towards or in relation to a steward.*
>
> *3. To (sic) much inconsistency in witnesses evidence relating to the given cause to be permitted for a conviction.*
>
> *4. No official report of incident to instigate the inquiry."*

Mr Harrison has argued this appeal along the following lines. He has painted the picture of the special circumstances surrounding the particular incident and identified the fact that Mr Celenza was irate having already attended an inquiry at the end of a long day. Mr Celenza was called to attend the second inquiry where no official report instigating that second inquiry was issued in accordance with various rules which were drawn to my attention. I am satisfied that there is no merit in the argument relating to the convening of the inquiry. The Stewards clearly do have the power to require persons to attend their inquiries without necessarily going through or exercising the procedure of issuing a formal notice along the lines suggested by Mr Harrison.

Mr Harrison also argues that the evidence of the two witnesses, that is Messrs Ross and Porter, was not on all fours both as to content and as to the alleged position of the witnesses and Mr Celenza, should lead the Tribunal to conclude that the evidence is unreliable and does not amount to a breach of the particular rule. Despite my best efforts to seek clarification of the argument on this particular point, Mr Harrison was not able to satisfy me that in all of the circumstances the language of Mr Celenza did not amount to anything but a breach of the rule in question. It doesn't matter in this particular case that there is some discrepancy between the words attributed to Mr Celenza by the two witnesses.

Some of the words in fact have been admitted by Mr Celenza during the course of the inquiry. When one looks at the circumstances and takes into account generally Mr Celenza's behaviour in the public domain at the particular time, I am satisfied that the language which was used in the spoken form was offensive language and was language which was in relation to the Stewards. Furthermore, there is nothing in the argument that has been pressed regarding the alleged eavesdropping by the two witnesses of a private conversation.

Finally the further particularised grounds allege severity of the penalty.

I am also not persuaded by the submission that in the circumstances it would be appropriate to impose a fine or a suspension. Rather, I am satisfied that the Stewards were entitled to impose a penalty of disqualification of three months for the reasons enunciated by Mr Kemp in his submissions.

In those circumstances, the appeal fails both as to conviction and penalty and is dismissed.

The suspension of operation of the penalty which was ordered on the 20 May 1999 now ceases to operate.

DAN MOSSENSON, CHAIRPERSON

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