

**REASONS FOR DETERMINATION OF THE  
RACING PENALTIES APPEAL TRIBUNAL**

**APPELLANT:** DR KIMBERLEY JOHN ROSE  
**APPLICATION NO:** A30/08/719  
**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
MS K FARLEY (MEMBER)  
**DATE OF HEARING:** 28 FEBRUARY 2011  
**DATE OF DETERMATION:** 25 MARCH 2011

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**IN THE MATTER OF an appeal by Dr Kimberley John ROSE against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 25 February 2010 imposing a fine of \$10,000.00 for breach of Rule 187(2) of the Rules of Harness Racing**

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Mr S W O'Sullivan appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

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This is a unanimous decision of the Tribunal.

For the reasons published, the appeal against conviction is dismissed.

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**PATRICK HOGAN, PRESIDING MEMBER**



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**Introduction**

This is an appeal against conviction. The Appellant is Dr Rose.

The appeal concerns a horse named FLYING VILLAGE LORD. The trainer was Mr James Currie. Mr Shane Loone was the stable hand at the relevant times, and he was also a part owner of the horse. Dr Rose is a veterinarian. Both Mr Currie and Mr Loone were licensed persons under the Racing and Wagering Western Australia ("RWWA") Rules of Harness Racing ("the Rules"). Dr Rose is not a licensed person.

FLYING VILLAGE LORD competed and won at Bunbury on 6 October 2009. The horse was swabbed. Two approved racing laboratories found the presence of aminocaproic acid in the horse's urine sample. This led to an investigation carried out by the RWWA Principal Investigator, Mr Phillip O'Reilly. Following investigations, there was a Steward's inquiry. The

inquiry commenced on 10 February, and was adjourned. The inquiry resumed and concluded on 25 February 2010.

On 25 February 2010, Mr Currie, Mr Loone and Dr Rose were each charged with and found guilty of giving false evidence to Mr O'Reilly. The findings were that Mr Currie gave false evidence on 2 November 2009, Mr Loone gave false evidence on a separate occasion on 2 November 2009, and Dr Rose gave false evidence on 6 November 2009. The subject matter was the same in each case, namely an explanation of how the substance came to be in the horse.

Mr Currie was also charged with and found guilty of presenting the horse to race not free of a prohibited substance. Further, the horse was disqualified

Mr Loone appealed against his conviction for giving false evidence to Mr O'Reilly. As a part owner, he also appealed against the disqualification of the horse. Those appeals were heard by this Tribunal, differently constituted. On 18 May 2010, the Tribunal dismissed Mr Loone's appeals. The Tribunal now sits to hear Dr Rose's appeal against his conviction for giving false evidence to Mr O'Reilly.

### **The Grounds of appeal**

The grounds of appeal are as follows:-

#### **AMENDED GROUNDS OF APPEAL**

*DR KIMBERLEY JOHN ROSE ('DR ROSE') appeals against the decision of RWWA Stewards dated 25 February 2010 purporting to impose upon him a fine of \$10000.00 upon the following grounds.*

- 1. The Stewards acted without jurisdiction in 'requiring' Dr Rose to attend the inquiry in the FLYING VILLAGE LORD matter.*
- 2. The Stewards acted without jurisdiction in charging Dr Rose with an alleged offence under Harness Rule of Racing 187(2).*
- 3. The Stewards acted without jurisdiction in purportedly fining Dr Rose the sum of \$10000.00.*

#### **PARTICULARS**

*Dr Rose is and was all material times a veterinary surgeon who treats harness racing horses from time to time and a member of a veterinary practice which treats such horses.*

*Dr Rose is not, as alleged by the Stewards, a person who is a jockey driver stable hand attendant or another person participating in or associated with the keeping training and racing of horses and greyhounds and is not generally, or in this matter, subject to the Rules of Racing.*

4. *In the alternative the Stewards in the hearing of 25 February 2010 acted beyond jurisdiction in that Dr Rose was not afforded procedural fairness and natural justice.*

#### **PARTICULARS**

*Dr Rose was called to the hearing part heard.*

*Dr Rose was called to the hearing as a witness.*

*Prior to attending the hearing Dr Rose was given no indication that he was at risk of charge.*

*The Inquiry was conducted in a disordered manner.*

*Dr Rose was interrogated by the Stewards without being advised that he could be at risk of charge when that possibility was known to the Stewards.*

*The charge against Dr Rose was not clearly and properly framed.*

*The Charge did not set out with particularity what was alleged against Dr Rose.*

*Dr Rose was not given time to consider the charge before being required to plead to the charge.*

*Dr Rose was not given the opportunity to be legally represented.*

*Dr Rose was not informed of the possible consequences of conviction.*

*Dr Rose's plea of 'Not Guilty' was ignored and he was engaged in debate which was then used as indicative of guilt.*

*The 'false evidence' alleged was not particularised but in some obscure manner was elicited through conversation.*

*Dr Rose was not given any opportunity to answer the charge in particularised form.*

*Having been charged Dr Rose was not given any opportunity to give or call evidence or examine witnesses whose evidence was relied upon who had given evidence in his absence.*

*The 'evidence' apparently relied upon arose from a conversation Dr Rose had with Investigator O'Reilly where no warning was given to Dr Rose that there could be personal consequences for giving erroneous answers.*

5. *The Stewards erred in finding that Aminocaproic Acid was a prohibited substance under Harness Rule of Racing 188A in that Aminocaproic Acid is not a substance capable of acting upon any of the mammalian body systems referred to in the Rule.*

6. *The Stewards exceeded their jurisdiction in simply preferring the evidence of Dr Medd a RWWA employee upon the issue of prohibition to that of Dr Rose which was to the contrary with no proper investigation.*
7. *The Stewards exceeded their jurisdiction when they refused Mr Loone the right to challenge this issue, a refusal which flowed through the Inquiry to the detriment of Dr Rose.*
8. *The Stewards' conclusion that Aminocaproic Acid was a prohibited substance was made without sufficient evidence in the Inquiry and using material not before the Inquiry and disclosed to the participants, particularly to Dr Rose.*
9. *The decision to fine Dr Rose implies conviction of the charged offence when no reasonable tribunal could reach such a decision upon the evidence before the tribunal.*
10. *The decision appealed against is beyond power reached without extending Dr Rose procedural fairness and natural justice, is unreasonable and should be set aside.*

I will deal with each of the grounds later in these reasons. It is necessary first to state some facts of general application. None of these were in dispute at the inquiry or here at the appeal.

### **Aminocaproic acid**

Dr Medd, the RWWA industry veterinarian, gave evidence at the inquiry on 10 February. Dr Medd said at T6 –

*".....and aminocaproic acid is classed as an anti-fibrinolytic drug. What that means is that it acts to stabilize blood clots that form within the vascular walls to help heal and repair those vessels walls....."*

Dr Medd went on to say at T 7-

*.....it's a drug that veterinarians have prescribed over the years to clients to help prevent bleeding in horse's lungs."*

Aminocaproic acid is sold under the trade name Amicar. The particular amount in this case was a 20 ml bottle. Mr Loone said at T63-

*"It comes in just a 20 ml bottle, but I heard people giving 'em 20 ml. On the bottle it just said, administer 24 hours out, didn't say 5 mls, 10 mls so, I presumed to administer, so I administered it"*

The drug can be administered either directly from the bottle by way of intramuscular injection, or indirectly by way of being introduced into a drip which itself can be administered to the horse. In this case, the drug was administered by way of direct injection. That is apparent from Mr Loone's answer above at T63. It is also apparent from the following exchange at T23

**BOROVICA** *Just to clarify...there wasn't a drip and the Amicar...there was no drip?*

**CURRIE** *No Sir*

**LOONE No****The scheme of the Rules**

The relevant parts of Rule 188A are in the following terms:

*'188A. Prohibited substances*

*(1) For the purpose of these rules, the following are prohibited substances:*

*(a) (Substances capable at any time of acting on one or more of the following mammalian body systems:*

*.....  
the cardiovascular system  
.....*

**The scope of the Stewards' inquiry**

By Rule 181, the Stewards are given jurisdiction to conduct inquiries and investigations. They have jurisdiction to inquire into any occurrence or matter connected with a race. Pursuant to Rule 15(1)(d), the Stewards also have jurisdiction to impose penalties for breaches of the Rules.

The scope of this particular inquiry was described by the Chairman at T1

**CHAIRMAN** *This is a Stewards inquiry into a Chem Centre report that aminocaproic acid was detected in the post race urine sample taken from FLYING VILLAGE LORD (NZ) after it had won Race 5 the Perkins Building Pace (2100m) at Bunbury on Tuesday, 6 October 2009*

There were any number of offences which may have come to light during the investigation referred to by the Chairman. Two of the most obvious offences which might have come to light in this case were offences against Rule 193(3) and Rule 190.

Rule 193(3) prohibits medication being given to a horse on race day. For conviction for an offence against this Rule in this case, aminocaproic acid does not have to be a prohibited substance.

Rule 190 provides for an offence if a horse is presented for racing not free of a prohibited substance. For conviction for an offence against this Rule in this case, aminocaproic acid does have to be a prohibited substance.

**The allegations against each person**

In order to properly understand the allegations and the evidence, it is necessary to first state 2 assumptions which in my view are self-evident. If a drug is administered by way of direct injection from its bottle, then the person doing the administration would know what was being administered because the drug had come straight out of the bottle with the label on it. On the other hand, if the person doing the administration did so by way of attaching a drip with the

drug already in the solution, the person may not know that the drug was in the solution because the bottle and label are absent from the scenario.

It is also self-evident that wrongdoing, and punishment following on a finding of wrongdoing, often depends upon knowledge. Unless there is an offence of strict liability, a person is not normally found guilty or punished for something which he or she did not know about.

Both of these assumptions are demonstrably correct and applicable in this case when an examination is made of each person's motive for the giving of the false evidence.

In this case, Mr Currie was the trainer of the horse which was presented not free of the drug, Mr Loone was the stable hand and the person who administered the drug by injection, and Dr Rose is a partner in the veterinary practice which dispensed the drug. The allegation by the Stewards, in broad terms, was that each of the 3 persons gave false evidence to Mr O'Reilly to the effect that the drug was dispensed as part of a drip and then administered by way of that drip.

### **The specific allegation against Dr Rose**

At the stage of the inquiry where Dr Rose was charged, he asked for particulars. They were supplied. The transcript shows at T106 to T107:-

**CHAIRMAN** .....Dr Rose you are charged under that rule and the particulars are that you gave false evidence to the RWWA Principal Investigator Mr P O'Reilly, when Mr O'Reilly interviewed you on November 6 2009, in connection to the swab irregularity returned from pacer FLYING VILLAGE LORD. Now do you understand the nature of the charge Dr Rose?

**ROSE** Yes I do.

**CHAIRMAN** And how do you wish to plead in answer to the charge?

**ROSE** Obviously, not guilty.

**CHAIRMAN** Alright is there anything further you wish to say? Or any witnesses you wish to call?

**ROSE** Not particularly under which was the false information that, that led you to make that charge?

**CHAIRMAN** Well in the relation to the time that Mr O'Reilly interviewed you.

**ROSE** Hmmm,

**CHAIRMAN** In relation to it and you advised that you had prescribed a drip with Amicar in it and that was not factual.

**ROSE** No I did not, I did not dispense any medication to the horse at that time at all.

**CHAIRMAN** But you said that you did.

**ROSE** Yes I did, someone else in the hospital had dispensed the medication, I took it as inference when he was inquiring that it was the Practice that dispensed the medication and not me personally, but that's inference.

What Dr Rose actually said was video recorded by Mr O'Reilly, and the disc became an exhibit. The relevant part of the transcript of that recording is reproduced at T58:-

**O'REILLY** Mr Currie came you provided him with?

**ROSE** I gave him a electrolyte drip with Amicar in the drip and instructed him, just on the basis that, not that the horse had bled in its previous start but we found him at point in time, so I put Amicar in there which does stabilise lungs to some degree.

### **The Appellant's admissions to lying (giving false evidence)**

In these reasons, I keep in mind that the appellant Dr Rose was not found guilty of lying, but rather giving false evidence. However, it is both convenient and accurate to refer to the relevant statement as a lie. As will be seen from the reasons below, the statement can also be referred to as a "false statement" or an "untruth". Dr Rose himself referred to his statement as various things, including part of a "web of deceit". Whatever terminology is used, what Dr Rose said was a lie which in terms of the Rules can be categorized as "false evidence".

At the inquiry, each of the three persons Mr Currie, Mr Loone and Dr Rose admitted to giving false evidence to Mr O'Reilly during his investigation. Although the Rules prohibit the giving of false evidence to the investigator, the word "evidence" is not to be equated with evidence as it is sometimes understood in courts. "Evidence" in the Rules also contemplates the making of statements during an investigation. Dr Rose admitted the giving of false evidence on a number of occasions, for example at T77:-

*"Okay, well in the web of deceit, I have obviously given the wrong information to the Course Investigator in relation to the fact that Ascot Veterinary Hospital has dispensed some aminocaproic acid without being in a drip to a horse and at the end of the day it would appear that it's not a prohibited substance. I don't see whether it makes a difference whether it was in a drip or it wasn't, but to satisfy your question, I've said it was in a drip and it wasn't....that"*

This particular piece of evidence neatly encapsulates Dr Rose's position at the inquiry and on this appeal. Dr Rose's position was that he made the false statement, but it was of no consequence because aminocaproic acid is not a prohibited substance. Dr Rose's appeal ground 5 reflects this position.

It is also worth noting at this early point that three of the Appellant's admissions came before he was charged and before the falsehood was particularised. After he was charged, he pleaded not guilty. After he pleaded not guilty, and in speaking in his defence, he again twice admitted lying.

### **The background to the detection of aminocaproic acid in this case**

The aminocaproic acid was dispensed from Dr Rose's veterinary practice in a 20 ml bottle. It was injected from the bottle by Mr Loone. These things are not in dispute.

It is necessary then to know how the situation arose which led to the finding of the drug, which in turn led to the giving of the false evidence by Mr Currie, Mr Loone and Dr Rose. A convenient beginning point is the evidence of Dr Medd at T7, referred to above:-

*.....it's a drug that veterinarians have prescribed over the years to clients to help prevent bleeding in horse's lungs."*

According to Dr Medd, the drug would be excreted from the horse's system within 24 hours of administration (T8 and T11 to T12).

Dr Rose, in his statements to Mr O'Reilly, expressed the opinion that the Stewards may have changed their methodology for the detection of aminocaproic acid. It had not previously been detected in this State. As noted above, Dr Rose's interview with Mr O'Reilly was recorded and played at the inquiry and became an exhibit. The transcript shows at T58:-

***Rose** Look I don't (sic) the withdrawal times on aminocaproic acid. Obviously there's been some change in the methodology because it never had returned a positive test and now it would appear that it does.*

And further at T59:-

***Rose** Yes. Well yep I mean.....It would appear that the the Victorian Racing Industry is a bit slow to make that.....because they changed the methodology here because that's certainly what the Victorian Stewards advertised that they've changed the methodology or detection of aminocaproic acid.*

And further at T60:-

***Rose** If there had of been some notification as they did in Victoria these cases probably would never have occurred in Western Australia.*

The fact that Dr Rose was taken by surprise that aminocaproic acid had been detected in the horse was further evidenced by what he (Dr Rose) said to Mr Currie. Mr Currie's second interview with Mr O'Reilly was also recorded and played at the inquiry and became an exhibit. The transcript shows the following exchange between Mr Currie and Mr O'Reilly at T49 to T50:-

***Currie** .....when I got a phone call and I was coming back from trials and it was Kim Rose and Kim says "Did you give the horse that stuff?" I said "Yeh" he said "Did it win?" I said "Yeh it did actually, goes good"*

***O'Reilly** Hmmm.*

***Currie** And can't remember it word for word, but something like "Well, you're in trouble" "Why?"*

***O'Reilly** Yeh*

***Currie** "Well they're swabbing for it". I nearly ran off the road*

### **The false evidence in each case.**

The web of deceit, described as such by Dr Rose at T77, began with Dr Rose himself. At T50, the transcript records what Mr Currie went on to say to Mr O'Reilly said about the conversation between himself and Dr Rose after Mr Currie had been told that he was in trouble:-

**CURRIE** And he said "What are you going to do?" and I said "I'll probably just go and tell them I gave it to the horse" and Kim said "You can't do that, tell them you got a drip off me"

Once the seed had been sown, each of the 3 persons Mr Currie, Mr Loone and Dr Rose maintained the lie.

Mr O'Reilly interviewed Mr Currie on 2 November 2009. The transcript of the interview shows that Mr Currie denied any knowledge of how the substance came to be in the horse. At T 28:-

**O'REILLY** There has been a detection of that medication in the, in the horse, when analysed.

**CURRIE** Yes.

**O'REILLY** Can you tell me how it's got in there?

**CURRIE** No, no I shouldn't been, been the bloody trainer to be honest, I bought the horse for a bloke, it's got a no...

And further at T30:-

**O'REILLY** . . .so the idea of us coming out here today is to ask you the question, yes can you explain why it has returned this irregularity, you can't?

**CURRIE** No sir no.

And further at T32:-

**O'REILLY** Alright, okay no-one has suggested to you to use this as a precautionary thing or was that...

**CURRIE** There's probably no-one more gun shy than me, Phil I've got to tell you.

**O'REILLY** Okay.

**CURRIE** No, if I could think of something no I can't believe this.

Mr Loone was also interviewed by Mr O'Reilly on 2 November 2009. Mr Loone told the lie suggested by Dr Rose. The transcript shows at T34:-

**LOONE** No. All the horses had before the race was a drip by Kim Rose.

And further at T40:-

**O'REILLY** The treatment that FLYING VILLAGE LORD had the day before it raced. So that would have been the 5th of the 10th you said that Kim Rose, Dr Kim Rose.

**LOONE** Yeh he supplied the drip and I administered it to the horse.

**O'REILLY** Okay, so then the drip was?

**LOONE** I think it was a potassium drip, I don't know exactly what was in it so.

**O'REILLY** How do you get it? How do you get that?

**LOONE** It was in the, in the pouch.

**O'REILLY** Okay so.

**LOONE** I put the pouch up put the needle in and that's it.

**O'REILLY** Okay, yeh right so you did that the day before?

**LOONE** The day before yes.

Dr Rose was interviewed by Mr O'Reilly on 6 November 2009. That interview too was recorded and transcribed and it too became an exhibit. As noted above, the transcript shows at T58:-

**ROSE** *I gave him a electrolyte drip with Amicar in the drip and instructed him, just on the basis that, not that the horse had bled in its previous start but we found him at point in time, so I put Amicar in there which does stabilise lungs to some degree.*

**O'REILLY** *Can you tell me why you didn't apply that yourself?*

**ROSE** *Probably, probably just busy, I live at the Vines.*

**O'REILLY** *Right*

**ROSE** *And he's...*

**O'REILLY** *Alright so he collected that drip from here?*

**ROSE** *Yep.*

### **The uncovering of the false evidence**

The web of deceit was uncovered because Mr Currie could not maintain the lie. His conscience got the better of him. He contacted Mr O'Reilly of his own accord. Mr O'Reilly interviewed Mr Currie again on 25 November 2009. The transcript of the interview shows at T42:-

**O'REILLY** *.....there may be some new information or some amendment information you want to tell me about? Just, over to you.*

**CURRIE** *Yeh, okay. Well there was no drip, I'll be honest.*

**O'REILLY** *Alright.*

**CURRIE** *I'm very embarrassed to be lying, very embarrassed and I apologise for it.*

**O'REILLY** *Okay.*

**CURRIE** *Do you want me to tell the, I'll tell you the series of events.*

And at T50:-

**O'REILLY** *But you knew that we would be knocking on your door?*

**CURRIE** *Yeh. I haven't been very comfortable I can tell you.*

**O'REILLY** *Hmmm.*

**CURRIE** *But I'm not a, I don't swear on camera, I'm not a bullshit artist, I a bit, I'm ashamed I've done it.....*

### **The admissions at the Stewards' inquiry**

At the inquiry, each of the 3 persons admitted lying to Mr O'Reilly. Each made the admission before being charged. Mr Currie and Mr Loone made admissions on the first day of the inquiry, 10 February 2010. At T23, the following exchange took place:-

**CHAIRMAN** *And that's consequently why Mr O'Reilly went there the first time.*

**CURRIE** *Yes.*

**CHAIRMAN** *And you told him it was in a drip?*

**CURRIE** *Yes.*

**BOROVICA** *Was there a drip?*

**CURRIE** No.....no

As to Mr Loone, the following exchange took place at T60:-

**CHAIRMAN** .....alright, well that's what taken place. Mr Loone, you've seen the interview of yourself there, so you didn't tell Mr O'Reilly the truth?

**LOONE** No sir.

**CHAIRMAN** And that was arranged between yourself and Mr Currie?

**LOONE** Yes sir.

Dr Rose admitted his lie to Mr O'Reilly at the inquiry on its second sitting day, 25 February 2010. At T76, Dr Rose said:-

**CHAIRMAN** Also you didn't dispense a drip, electrolyte solution?

**ROSE** Obviously not, obviously not

And again at T76:-

**ROSE** Well yes, I mean at the end of the day if, if I'm now to put my hand on a Bible and swear to tell the whole truth, the full truth and nothing but the truth, I didn't actually dispense the medication to Mr Currie. On the day that he received the medication, I believe my memory would be that we were doing other things

And further at T77:-

**ROSE** Okay, well in the web of deceit, I have obviously given the wrong information to the Course Investigator in relation to the fact that Ascot Equine Veterinary Hospital has dispensed some aminocaproic acid without being in a drip to a horse

### **The motive for the false evidence**

Dr Rose explained his motive as follows at T74:-

.....At that stage we didn't believe that there was that the testing procedures were going to pick it up. So I said well just for effect of affording you innocence of knowingly injecting it, just say that it was in a drip, which I would normally have done. On that particular case I did not.

Mr Loone made the same explanation at T61:-

**BOROVICA** So why come up with the story about the drip? What was that going to achieve?

**CURRIE** I have no idea, that's what Mr Rose told me to say.

**LOONE** I think that was to try and show that Mr Currie didn't know it was in there.

**BOROVICA** Oh, okay.

Mr Currie was aggrieved at what Dr Rose had done. At T75, he said:-

**CURRIE** .....can I just say something please. I mean I don't really understand and know why, why Mr Rose said that because I think, and I've thought about it a fair bit, I think somehow he's sort of trying to protect me and I don't really know why when I fight me own battles, and I would have copped my comeuppance because I just would have said well that's, this is what happened.

Dr Rose's explanation for getting involved in the first place was given at T78:-

**BOROVICA** Just seems to me from you action that you seem to have a personal connection to this, as if you felt responsible for the positive swab when yet you had nothing to do with it, if the story we've heard is right.

**ROSE** I feel that the Practice is associated with resulting of positive swabs, so certainly I feel.

### **The evidence against Dr Rose**

It is difficult to see why Dr Rose pleaded not guilty. Before he was charged, he made three admissions to lying. After he was charged, he made two admissions to lying. In between all of those admissions, he said that he was not guilty. The lie that he told to Mr O'Reilly was a "relevant" lie. It was a relevant lie because it was relevant to Mr Currie's liability for any possible finding of wrongdoing. As explained by Dr Rose himself at T74:-

**ROSE** .....just for effect of affording you innocence of knowingly injecting it, just say that it was in a drip,....

Apart from Dr Rose's admissions, the Stewards also had the evidence of both Mr Currie and Mr Loone. Their evidence was provided to Dr Rose by way of transcript before Dr Rose attended the adjourned inquiry. At the resumption, both Mr Currie and Mr Loone were present and Dr Rose declined the Steward's invitation to ask questions of either of them.

I turn now to consider the grounds of appeal

### **Grounds 1,2 and 3**

Grounds 1, 2 and 3 are in the following terms:-

1. *The Stewards acted without jurisdiction in 'requiring' Dr Rose to attend the inquiry in the FLYING VILLAGE LORD matter.*
2. *The Stewards acted without jurisdiction in charging Dr Rose with an alleged offence under Harness Rule of Racing 187(2).*
3. *The Stewards acted without jurisdiction in purportedly fining Dr Rose the sum of \$10000.00.*

### **PARTICULARS**

*Dr Rose is and was all material times a veterinary surgeon who treats harness racing horses from time to time and a member of a veterinary practice which treats such horses.*

*Dr Rose is not, as alleged by the Stewards, a person who is a jockey driver stable hand attendant or another person participating in or associated with the keeping training and racing of horses and greyhounds and is not generally, or in this matter, subject to the Rules of Racing.*

These grounds can be considered together. It is said that Dr Rose is not subject to the Rules.

Section 45(6)(f) of the Racing and Wagering Western Australia Act (2003) is in the following terms:-

(6) *Rules of racing apply to, and are binding on —*

.....

*(f) jockeys, drivers, stablehands, attendants and all other persons participating in, or associated with the keeping, training and racing of horses or greyhounds; and*

.....

Dr Rose is not a licensed person, nor is he required to be licensed. He is only subject to the Rules if he is a person "associated" with the keeping, training and racing of horses. This is a fact finding exercise, not a matter of law. If the facts show that Dr Rose is associated in the relevant sense, then he is subject to the Rules.

The evidence on this issue, raised for the first time here at the appeal, includes Dr Rose's own evidence at the inquiry. At T70, the following took place:-

**CHAIRMAN** *Dr Rose, just in your in your position and you've explained it, what, how do you function in relation to Trainers. Do you advise them in the, the associated and advise them, advise them in relation to veterinary treatments and the keeping and the racing of race horses?*

**ROSE** *I do. I, I act in a, as a veterinary function in the Practice I'm in, I also receive probably anywhere in the vicinity of 10 to 20 calls a week from various other Trainers, Veterinarians etc. inquiring my opinion about the use of various medications, which I find pretty much nuisance calls, but, but one has to respond to, if that's what you.*

**CHAIRMAN** *Yes, I would imagine, just in relation to race horses whether they be thoroughbreds or standardbreds...*

**ROSE** *Yes....*

**CHAIRMAN** *You are, you advise Trainers of what they should do and what they shouldn't do with the horses?*

**ROSE** *With, with the....to the best of my knowledge, yes I do.*

**CHAIRMAN** *And that would be veterinary treatment and in relation to work...*

**ROSE** *Yep.*

**CHAIRMAN** *Of a horse*

**ROSE** *Yes*

In the penalty part of the inquiry, the Stewards described Dr Rose's association with the industry in the following terms at T115:-

*....You are a prominent and highly respected veterinarian in the Equine Industry. You are held in high regard by many trainers who rely on you for*

*expert advice. You hold a position of respect and trust, a position of high qualification.*

This description of Dr Rose's association is consistent with what Dr Rose himself said at T73:-

*ROSE I...actually made..probably anywhere between 12 and 18 'phone calls to various Trainers who I...I knew..either I...I had administered Aminocaproic Acid to, or that they may have used it, and I just simply rang all of them to...to indicate that there'd been 3 positives recorded and suggested to all of them, I wouldn't remember my precise words, but I said if the Stewards come to see you best off and any legal advice is just say nothing, I mean people are probably put under pressure when they're suddenly confronted with Stewards.....*

And at T78:-

*.....My general advice to people is if you get a visit from Stewards to not say too much, because without, without thinking about it, when you suddenly shock people or confront them, people are somewhat intimidated, say all sorts of things which they may not need to say.....*

The fact that Dr Rose is associated in the relevant sense was so obvious to Dr Rose himself and the Stewards that it merited no discussion whatsoever at the inquiry. Dr Rose did not raise it as an issue, and the Stewards did not refer to it in finding him guilty. The statement in the particulars to grounds 1,2 and 3 that Dr Rose "treats harness racing horses from time to time" is incorrect on the evidence.

There is no merit in grounds 1, 2 and 3.

#### **Ground 4**

Ground 4 is in the following terms:-

*In the alternative the Stewards in the hearing of 25 February 2010 acted beyond jurisdiction in that Dr Rose was not afforded procedural fairness and natural justice.*

It is not in dispute that the Stewards were under a duty to afford Dr Rose natural justice. In the context of this case, that means that he was entitled to procedural fairness. The particulars of ground 4 assert that Dr Rose was not afforded procedural fairness in a number of particular ways. It is necessary first to know the content of the procedural fairness hearing rule.

In **APACHE NORTHWEST PTY LTD -v- AGOSTINI** [No 2] [2009] WASCA 231 delivered 22 December 2009, Buss JA said at 213 -215:-

213 *Fairness is essentially a practical concept. It is not abstract in nature. The law of procedural fairness is concerned to avoid practical injustice. See **Ex parte Lam** [37] (Gleeson CJ). The content or requirements of procedural fairness are flexible and variable. They must be moulded to the particular facts and circumstances. Proceedings or investigations where procedural fairness must be*

*accorded may be organised to ensure fairness having regard to the nature and circumstances of the particular proceeding or investigation; for example, the relevant facts, the statutory context, the matters in dispute, and the circumstances of the particular parties whose interests may be affected including the seriousness of the consequences of the proposed decision on the interests of those parties. In other words, the content or requirements of the hearing rule will depend on the facts and circumstances of the particular case. See **Kioa**, 585 (Mason J); **Laws v Australian Broadcasting Tribunal** [1990] HCA 31; (1990) 170 CLR 70, 91 (Deane J); **SZBEL** [26].*

- 214 *The relevant statutory framework, properly construed, and the seriousness of the consequences of the proposed decision for the particular parties whose interests may be affected are invariably the principal factors in determining the content or requirements of procedural fairness, where it applies.*
- 215 *A person to whom procedural fairness must be accorded is, ordinarily, entitled to have brought to his or her attention the critical issues or factors on which the decision is likely to turn, if and to the extent that those issues or factors are not apparent from the nature or terms of the inquiry or decision-making process, so as to give the person an opportunity to deal with them. This entitlement ordinarily includes the right to comment on adverse material from third parties which is before the decision-maker and is credible, relevant and significant to the decision in question. ....Further, the person is, ordinarily, entitled to put relevant information or material before the decision-maker and to make submissions on the critical issues or factors. See **Annetts**, 600 - 601 (Mason CJ, Deane & McHugh JJ).*

And further at 220:-

- 220 *There will be a denial of procedural fairness if, in all the circumstances, there has been actual unfairness or practical injustice in the decision-making process. See **Ex parte Lam** [37] - [38] (Gleeson CJ), [48] (McHugh & Gummow JJ), [111] (Hayne J).*

Before dealing with each of the particulars, complaining about what the Stewards did not do, it is useful to set out what the Stewards did do. That is because fairness is essentially a practical concept.

The Stewards had information that there had been a substance detected. One of the things for them to enquire into was whether it was a prohibited substance. Another matter to be enquired into was when and how it got in to the horse. They sent their investigator, Mr O'Reilly, to make enquiries.

Before the inquiry commenced, Mr O'Reilly had carried out 4 recorded interviews. The last in time of those interviews was with Mr Currie on 25 November 2009. In it, Mr Currie admitted that he had lied on his first interview, and said that he did so because Dr Rose told him to.

The inquiry commenced on 10 February 2010. Mr Currie and Mr Loone attended. Both admitted their respective lies to Mr O'Reilly during his investigation. Mr Currie repeated his assertion that Dr Rose had told him to lie. Dr Rose was not at the inquiry on 10 February.

The Stewards therefore had evidence that Dr Rose might have committed an offence against the Rules, namely lying to Mr O'Reilly. The Stewards could have concluded the inquiry then and there. For a number of obvious reasons, they did not do so. Firstly, the information gathered during the investigation and the inquiry to that date was incomplete, in that Dr Rose, whose actions were integral to the whole circumstances, had not been heard. Secondly, Dr Rose did not know what had been alleged against him by Mr Currie, and he had not been given a chance to answer it. Therefore, the Stewards adjourned the inquiry. Towards the end of proceedings on 10 February, the Chairman said at T68:-

**CHAIRMAN** *Come in Mr Currie and Mr Loone. Look it's the intention of the Stewards to adjourn this inquiry, so we..it'll hopefully be resumed next Wednesday, but it's our intention to call Dr Rose to this inquiry.*

During the adjournment period, the Stewards required Dr Rose to attend the resumed inquiry. They also sent to him the transcript of the proceedings to date, including the transcripts of each of Mr O'Reilly's interviews.

When the inquiry resumed on 25 February 2010, Dr Rose certainly knew what had been alleged against him by Mr Currie, if not with legal particularity certainly in great detail. To a large measure, the procedural fairness rule had been satisfied. It remained for Dr Rose to take the opportunity which had been given to him, so that he could be heard on the allegations.

The particulars of ground 4 are in no logical order. Yet they seem to me to fall into categories which should be dealt with together. Two of the particulars refer to events happening before Dr Rose's appearance at the inquiry on 25 February:-

*The 'evidence' apparently relied upon arose from a conversation Dr Rose had with Investigator O'Reilly where no warning was given to Dr Rose that there could be personal consequences for giving erroneous answers.*

*Dr Rose was not given the opportunity to be legally represented.*

Dr Rose's statement to Mr O'Reilly was a lie, and to call it an "erroneous" answer is misleading. This particular complains that Dr Rose should have been told that it is wrong to tell a lie, and that he could get into trouble if he did. There is no merit in this complaint.

As to the second of these particulars, it is certainly true that Dr Rose was not given the opportunity to be legally represented. He did not ask to be represented. Had he done so, the Stewards no doubt would have considered his request pursuant to Rule 182. The facts were not complicated. Dr Rose is self evidently an educated person, and he is also a person able to make decisions of a legal type as may be necessary at an inquiry. As noted above, at the inquiry, Dr Rose said at T73:-

*I wouldn't remember my precise words, but I said if the Stewards come to see you best off and any legal advice is just say nothing, I mean people are probably put under pressure when they're suddenly confronted with Stewards.....*

No injustice has been done by Dr Rose not being given the opportunity to be legally represented. There is no merit in this complaint

The next group of particulars refer to how Dr Rose came to be at the inquiry, and what warnings should have been given to him. The first thing to note is that Mr Currie had made the allegations against Dr Rose, and justice required that Dr Rose be given the opportunity to answer them. The second thing to note is that prior to his attendance, Dr Rose had been given the transcript of the earlier sitting of the inquiry, which included the transcripts of Mr O'Reilly's interviews with all 3 persons. The relevant particulars are:-

*Dr Rose was called to the hearing part heard.*

*Dr Rose was called to the hearing as a witness.*

*Prior to attending the hearing Dr Rose was given no indication that he was at risk of charge.*

*Dr Rose was interrogated by the Stewards without being advised that he could be at risk of charge when that possibility was known to the Stewards.*

As to the first of these particulars, Dr Rose had to be called because allegations had been made against him, and he had to be given an opportunity to answer them. Secondly, both Mr Currie and Mr Loone were present again on 25 February, and therefore available to answer any questions by Dr Rose. Not surprisingly, Dr Rose did not ask any questions. He declined the offer (T92). Quite the contrary, he admitted lying to Mr O'Reilly. There is nothing in the alleged fact that he was called as a witness, because the Rules do not say that a person must be called to an inquiry in any particular category. He could not be called as an accused person, because he had not yet been heard as to his version of events. There is no merit in these first 2 particulars.

As to the remaining particulars, it should be noted that at the very beginning of proceedings on 25 February, Dr Rose was warned. The following exchange took place at T69 – T70:-

**CHAIRMAN** *Of the Practice right. Look Dr Rose this is a somewhat of a serious inquiry, that is before us, you received a copy of the transcript?*

**ROSE** *Yes I did.*

**CHAIRMAN** *You received a copy of Mr O'Reilly's report, as did you Mr Currie and you Mr Loone?*

**LOONE** *Yes.*

**CHAIRMAN** *And this is a serious matter, so I must advise you that under the Rules of Racing, a charge or charges may be laid. Are you clear on that?*

**ROSE** *Yes.*

There is nothing in the concept of fairness to say that Dr Rose should be told before attending that he was at risk of charge. Further, there is nothing to say that he should have been told before being questioned. Nevertheless, the Stewards did, as is their practice, tell him so at the beginning of proceedings. Nothing is served in the terms of the second of these particulars by describing the Stewards questions as an interrogation.

I find no merit in these remaining 2 particulars.

The next group of 4 particulars complains that the charge against Dr Rose was not itself particularized. They are as follows:-

*The charge against Dr Rose was not clearly and properly framed.*

*The Charge did not set out with particularity what was alleged against Dr Rose.*

*The 'false evidence' alleged was not particularised but in some obscure manner was elicited through conversation*

*Dr Rose was not given any opportunity to answer the charge in particularised form.*

It is necessary therefore to see how it came about, procedurally, that Dr Rose was charged. On 25 February, all 3 persons were questioned by the Stewards, Dr Rose for the first time and Mr Currie and Mr Loone for the second time. At the conclusion of that questioning phase, all 3 persons left the room. They were then asked back in one by one, and each was charged. When Dr Rose came back in, he was charged and pleaded not guilty. The Chairman put the charge as follows at T106:-

*....a person shall not refuse to answer questions or to produce a horse, document, substance or a piece of equipment, or give false or misleading evidence or information at an inquiry or investigation. Dr Rose you are charged under that rule and the particulars are that you gave false evidence to the RWWA Principal Investigator Mr P O'Reilly, when Mr O'Reilly interviewed you on November 6 2009, in connection to the swab irregularity.....*

Dr Rose pleaded not guilty. He immediately asked for further particulars. At T107, he said:-

**ROSE** .....under which was the false information that, that led you to make that charge?

The Chairman went on and gave further particulars at T107. The Chairman said:-

**CHAIRMAN** Well in the relation to the time that Mr O'Reilly interviewed you.

**ROSE** Hmmm,

**CHAIRMAN** In relation to it and you advised that you had prescribed a drip with Amicar in it and that was not factual.

In his attempt to summarise the particulars, the Chairman made an error. Dr Rose did not say to Mr O'Reilly that he prescribed the drug, he said that he dispensed (gave him) the drug. (T58). However, nothing turns on the point. The particulars clearly refer to 2 things, one being what part Dr Rose said he had in the dispensing (prescribing) and the other being the method of dispensing.

I would certainly accept that the charge against Dr Rose needed to be particularised. That is part of him knowing the case against him and being able to properly answer it. The plain fact is that the charge was particularised, and even admitted before being particularised.

There is no merit in these 4 particulars.

The next group of particulars which can be considered together are the following:-

*Dr Rose was not given time to consider the charge before being required to plead to the charge.*

*Dr Rose was not informed of the possible consequences of conviction*

*Having been charged Dr Rose was not given any opportunity to give or call evidence or examine witnesses whose evidence was relied upon who had given evidence in his absence.*

The first of these is a meaningless particular. It seems to belong in an appeal situation where a person seeks to set aside a plea of guilty. I cannot see any injustice to Dr Rose. It was his entitlement, not obligation, to plead not guilty, which is what he did. As to the second of these particulars, again it seems out of place in this appeal. I cannot see that fairness required that the Stewards tell Dr Rose what might happen if he was convicted. It is self-evident that if a person is found guilty of an offence there will be adverse consequences. No rule of fairness requires the Stewards to state the obvious.

The third of these particulars is both factually incorrect and compendious. It needs to be considered in separate parts. As part of the requirement of fairness, Dr Rose should have been given an opportunity to test the evidence. He was given that opportunity. This should have happened before he was charged, not after. It did happen at that stage of proceedings. The persons who gave relevant evidence against Dr Rose were Mr Currie and Mr Loone. At T92, the following exchange took place:

**CHAIRMAN** *Dr Rose any questions you wish to ask Mr Currie or Mr Loone?*

**ROSE** *No.*

The last part of this particular is factually incorrect. I would accept that procedural fairness in this case required that Dr Rose be given an opportunity to call witnesses. He was given the opportunity, and declined it. The transcript shows at T107:-

**CHAIRMAN** *And how do you wish to plead in answer to the charge?*

**ROSE** *Obviously, not guilty.*

**CHAIRMAN** *Alright is there anything further you wish to say? Or any witnesses you wish to call?*

**ROSE** *Not particularly under which was the false information that, that led you to make that charge?*

The chairman's questions were "...anything further you wish to say?" and "...any witnesses you wish to call?" Dr Rose's answer was "not particularly". He answered no to both questions. Dr Rose then went straight on from answering the Chairman's questions to asking a question of his own. There is no merit in this particular.

The final 2 particulars are in the following terms:-

*The Inquiry was conducted in a disordered manner.*

*Dr Rose's plea of 'Not Guilty' was ignored and he was engaged in debate which was then used as indicative of guilt.*

As to the first of these, I dismiss it without further consideration. Nothing is pointed to which it is said was productive of injustice to Dr Rose

As to the second of these particulars, it seems the complaint is that the Stewards found the charge proved after Dr Rose had pleaded not guilty. It can hardly be said that the Stewards ignored the plea of not guilty. They immediately asked Dr Rose if he wanted to call witnesses, and he declined. He asked for particulars, and they were provided. The fact that the Stewards continued to ask questions and Dr Rose continued to answer indicated that the plea of not guilty was further explored, rather than ignored.

The Stewards may have been surprised at the plea of not guilty, bearing in mind the earlier admissions, and may have been even more surprised that Dr Rose continued to admit lying even after he had pleaded not guilty. At T107 after Dr Rose pleaded not guilty, there was the following question and answer:-

**CHAIRMAN** .....In relation to the actual charge Dr Rose you didn't tell the actual truth when Mr O'Reilly interviewed you though did you?

**ROSE** No I, I, I claimed that I had dispensed the medication and I had not, so I have not given the full truth. That's correct.

And again at T109 – T110:-

**CHAIRMAN** *You've been charged with false evidence, giving false evidence to Mr O'Reilly, isn't it a fact that you weren't truthful to Mr O'Reilly about this matter?*

**ROSE** *The facts are that, yes I'd given him false information, but the fact is I did tell him we dispensed the medication and I meant that it was inference under his questioning that the Practice dispensed that medication. I took it meaning the Practice, not myself, I mean if we were going to talk about me specifically I would have said "No I did not dispense any medication to the horse."*

If the above exchanges could be categorized as debate, that would not of itself mean that procedural fairness was not given to Dr Rose. Further, it would seem to me that the relevant parts of the "debate" which went on after the plea of not guilty were properly used by the Stewards in their decision making process. They were not "indicative" of guilt but straight out admissions of guilt.

I find no merit in this particular.

It follows from all of the above that I find no merit in ground 4.

### **Grounds 5,6,7 and 8**

These grounds were determined as a separate issue during the course of this appeal. The Tribunal unanimously dismissed these grounds.

In my opinion, Dr Rose's conviction did not depend upon whether aminocaproic acid is a prohibited substance. Counsel for Dr Rose explained the relevance. He said that the Stewards had no jurisdiction to embark on the inquiry at all because aminocaproic acid is not a prohibited substance. I reject that argument.

The Stewards investigation and inquiry was not limited to whether aminocaproic acid is a prohibited substance. As noted above, the inquiry was wide enough to include any number of breaches of the Rules, most notably whether there had been medication administered on race day. For that offence, it does not matter whether aminocaproic acid is a prohibited substance.

The question of whether or not aminocaproic acid is a prohibited substance was relevant for different reasons, at both the inquiry and at the hearing of Mr Loone's appeal against the disqualification of the horse. At the inquiry, it was an element of the offence with which Mr Currie was ultimately charged, and it was also relevant to the possible disqualification of the horse. At Mr Loone's appeal, it was relevant to the disqualification of the horse. The fact that the evidence on the subject was relevant and therefore admissible at those places and for those purposes does not make it relevant to Dr Rose's conviction, and does not make it relevant on this appeal.

There is no merit in these grounds.

### **The Appellant's application to adduce other evidence**

At the hearing of this appeal, the Appellant applied to adduce other evidence. The other evidence was to be further evidence from Dr Rose himself. The application was made pursuant to section 11(3)(c) of the **Racing Penalties (Appeals) Act 1990 (WA)**. The relevant part is in the following terms:-

- (c) *an appeal shall be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was made, but, if the member presiding considers that to be proper, expert or other evidence may be required or admitted;*

I determined that it was not proper to admit the other evidence sought to be admitted on behalf of the Appellant. I made that determination because nothing which was proposed appeared to me to be properly categorised as fresh evidence.

### **Ground 9**

Ground 9 is in the following terms:-

9. *The decision to fine Dr Rose implies conviction of the charged offence when no reasonable tribunal could reach such a decision upon the evidence before the tribunal.*

This ground of appeal invokes the so-called "Wednesbury unreasonableness" principle, originating as it does from the case of **Associated Provincial Picture Houses Ltd –v- Wednesbury Corporation** (1948) 1 KB 223. In order to succeed on this ground, Dr Rose would have to demonstrate that the Stewards decision was irrational or illogical and not based on findings or inferences of fact supported by logical grounds. I am not persuaded that the Stewards' decision falls into that category. There was sufficient evidence for them to find the charge proved. It was a case of direct evidence, not relying on inference. There is nothing illogical or irrational in the Stewards' findings.

The Stewards' reasons for finding the charge proved were very brief. At T114, the Chairman said:-

**CHAIRMAN** *Dr Rose take a seat, Dr Rose the Stewards have considered the charge and all the evidence before them. By your own admission you have not been truthful and after considering all the evidence the Stewards find you guilty as charged. It's left for the Stewards to arrive at a penalty. Is there anything you wish to place before the Stewards in relation to penalty?*

It is difficult to see what more the Stewards could have said. On 3 occasions before he was charged, Dr Rose admitted lying. On 2 occasions after he pleaded not guilty, he admitted lying. In the face of those undisputable facts, it would have been illogical and irrational for the Stewards to find Dr Rose not guilty.

There is no merit in this ground.

### **Ground 10**

Ground 10 is in the following terms:-

*10. The decision appealed against is beyond power reached without extending Dr Rose procedural fairness and natural justice, is unreasonable and should be set aside.*

This ground does not require separate consideration. So far as it asserts that Dr Rose was not extended procedural fairness, it adds nothing to ground 4. As to the assertion that the conviction was beyond power, it adds nothing to grounds 1, 2, 3 and 5.

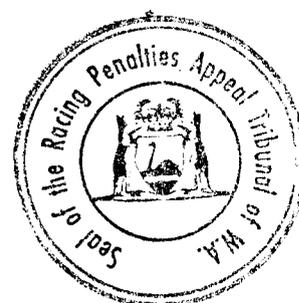
There is no merit in ground 10.

### **Conclusion**

For all of the above reasons, I would dismiss the appeal



**PATRICK HOGAN, PRESIDING MEMBER**



**REASONS FOR DETERMINATION OF MS K FARLEY (MEMBER)**

**APPELLANT:** DR KIMBERLEY JOHN ROSE  
**APPLICATION NO:** A30/08/719  
**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
MS K FARLEY (MEMBER)

**DATE OF HEARING:** 28 FEBRUARY 2011

**DATE OF DETERMATION:** 25 MARCH 2011

---

**IN THE MATTER OF** an appeal by Dr Kimberley John ROSE against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 25 February 2010 imposing a fine of \$10,000.00 for breach of Rule 187(2) of the Rules of Harness Racing.

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Mr S W O'Sullivan appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

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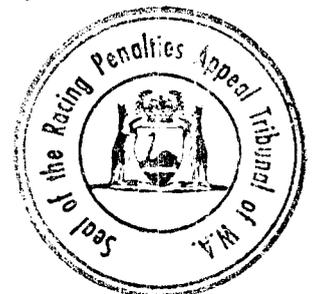
I have read the draft reasons of Mr P Hogan, Presiding Member.

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

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*Karen Farley*

**KAREN FARLEY, MEMBER**



**REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)**

**APPELLANT:** DR KIMBERLEY JOHN ROSE  
**APPLICATION NO:** A30/08/719  
**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
MS K FARLEY (MEMBER)

**DATE OF HEARING:** 28 FEBRUARY 2011

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Mr S W O'Sullivan appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

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I have read the draft reasons of Mr P Hogan, Presiding Member.

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

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*John Prior*

**JOHN PRIOR, MEMBER**

