THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT:	GAVIN PHILIP SLATER
APPLICATION NO.:	A30/08/359
DATE OF HEARING:	10 JUNE 1997
DATE OF DETERMINATION:	13 OCTOBER 1997

IN THE MATTER OF an appeal by Mr G P Slater, against the determination of the Western Australian Turf Club Stewards on 8 April 1997 imposing a disqualification for 12 months for a breach of Australian Rules of Racing 175(h)(ii).

Mr S J McComish, on instructions from Kott Gunning, appeared for the appellant.

Mr R J Davies QC appeared for the respondent.

On 4 and 8 April 1997 the Stewards of the Western Australian Turf Club conducted an inquiry into a blood sample taken from the horse Wilbur before it won Race 9 at Ascot on 26 March 1997. This sample detected in the horse total carbon dioxide (TCO_2) at a level which was at least 37.7 plus or minus 1.2 millimoles per litre in plasma. At all material times the appellant was the trainer of the horse. He had been a trainer for two years before this incident.

Australian Rules of Racing (ARR) Rule 175(h)(ii) relevantly provides -

> "The Stewards may punish any person who administers to a horse any prohibited substance which is detected in any sample taken from such horse prior to the running of any race."

ARR 178B declares various substances as prohibited substances. ARR 178C provides that TCO_2 is a prohibited substance under ARR 178B so long as it is at a level in excess of 36.0 millimoles per litre. This was the case here. ARR 196 provides as follows -

> "Any person or body authorised by the Rules to punish any person may, unless the contrary intention is provided, do so by disqualification , suspension and may in addition impose a fine not exceeding $50,000, or may impose only a fine not exceeding $50,000."

In summary the facts revealed from the Stewards' inquiry were as follows. In late February 1997 the appellant sought to improve the health of the horse which had a TCO_2 level of 22. The appellant received veterinarian advice to the effect that he administer to the horse a dessertspoon and a half of sodium bicarbonate every night in its feed. However, the appellant departed from this advice. On the morning of the race in question, at some time between 9.30 and 11.00 AM, the appellant administered the sodium bicarbonate to the horse. This administration was achieved by "tubing" the horse. The appellant had also continued to treat the horse notwithstanding, firstly, that it had been more than a month since the last TCO_2 level had been taken from the horse, and second, his own assessment on the morning of the race in question that the horse was looking and feeling well. On 8 April 1997, after the completion of the Stewards' inquiry, the appellant pleaded guilty to a charge of administration of various substances which resulted in a TCO_2 level in excess of 36.0 millimoles per litre.

When asked by the Stewards to comment as to penalty, the appellant informed them that he had made a mistake, a suspension would affect his livelihood, and he had no other income apart from training horses. He also pleaded for leniency. In assessing the penalty, the Stewards informed the appellant that it was "taking into consideration all the aspects of the case". The Stewards then went on to state that "... whilst Stewards take note of your plea of not (sic) guilty and your plead for leniency, Stewards believe that this case warrants a period of disqualification in excess of those imposed previously and as such we're disqualifying you for a period of 12 months ...". The appellant now appeals against this penalty.

At the hearing before this Tribunal on 10 June 1997 leave was granted for the appellant to file a minute of amended grounds of appeal containing 6 grounds. Grounds 1 to 5 all involve insufficient weight being given by the Stewards to various factors when they were determining the penalty. It is not necessary for me to consider these grounds as I have determined this appeal on ground 6. Ground 6 provides -

"In the light of the fresh evidence, coupled with the evidence which was before the Stewards, the penalty is inappropriate."

The fresh evidence provided by the appellant was two references. This character evidence alone has no great bearing on the outcome of this appeal as the Stewards would have been aware of the appellant's good background.

Given that: past decisions of this Tribunal, in matters similar to the present one, have involved penalties no greater than 6 months disqualification; and the appellant's penalty of 12 months disqualification was imposed by the stewards *after* they took into account factors personal to him; I find that the penalty of 12 months disqualification was so excessive as to manifest an error in the exercise of their discretion under ARR196.

The determination of the appropriate penalty must depend on the circumstances of each particular case. The appellant's administration of the prohibited substance on 26 March 1997 was a deliberate course of conduct aimed towards unfairly maximising the performance of the horse. In this appeal it was not in issue that the administration did in fact affect the performance of the horse. In any event, the Guidelines for the Classification of Prohibited Substances, which were endorsed at a Conference of the Principal Clubs, rate TCO_2 in these circumstances as a potent performance/behaviour effecting substance. A particularly aggravating feature of this case is that the horse won the race. Disqualification for a substantial period of time is the only penalty available for conduct by a trainer which has, in my view, severely affected the integrity of the racing industry. A penalty of 10 months disqualification would be appropriate but for the factors personal to the appellant.

At all times throughout the Stewards' inquiry the appellant was co-operative. On three separate occasions he positively responded to questioning. The Stewards can largely attribute their knowledge of the circumstances of this matter to the appellant's co-operation. The appellant's prompt acknowledgment of the wrongfulness of the administration was a demonstration of his remorse for his actions. The appellant also has a good background with no adverse record in the racing industry.

For these reasons, I would uphold the appeal and impose on the appellant a penalty of 8 months disqualification.

A E Monisse

ANDREW MONISSE, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A. 1935

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	GAVIN PHILIP SLATER
APPLICATION NO:	A30/08/359
DATE OF HEARING:	10 JUNE 1997
DATE OF DETERMINATION:	13 OCTOBER 1997

IN THE MATTER OF an appeal by Mr GP Slater against the determination of the Western Australia Turf Club Stewards on 8 April 1997 imposing a 12 month disqualification for breach of Australian Racing Rule 175(h)(ii).

Mr SJ McComish, on instructions from Kott Gunning, appeared for the appellant.

Mr RJ Davies QC appeared for the respondent.

Background

On 4 April 1997 the Stewards of the Western Australia Turf Club commenced an inquiry into a report received from the Australian Jockey Club Laboratory that the blood sample taken from WILBUR before it won Race 9 the Fruit 'N' Veg Handicap over 1,600 metres at Ascot on 26 March 1997 had detected in it a level in excess of 36.0 millimole per litre of total carbon dioxide. The report from the Laboratory which was produced at the inquiry revealed that there was a plasma total carbon dioxide reading of 37.7 plus or minus 1.2 millimole per litre. The reserve blood tube sample which was sent to the Racing Analytical Services Ltd on analysis revealed a plasma total carbon dioxide reading of 37.9 plus or minus 1.2 millimole per litre.

Mr Slater the trainer of WILBUR is a licensed trainer of 2 years standing. Mr Slater who was present at the inquiry accepted the analysts' reports which were produced as exhibits in the inquiry without qualification.

A report from Mr RJ Goddard, Racecourse Investigator with the Turf Club, was also produced. This report reveals that Mr Slater was interviewed by Mr Goddard two days before the inquiry at Mr Slater's home and training establishment. During the course of that interview Mr Slater admitted he had been treating WILBUR with bicarbonate after having obtained a blood check a few weeks before. WILBUR's bicarbonate level was 22 which is very low. Mr Slater told Mr Goddard he was advised by his vet Dr T Lindsay to give the horse one and a half dessertspoons full of bicarbonate every night in the feed to build the level up. In addition Mr Slater admitted having tubed WILBUR with bicarbonate of soda between 9.30am and 11.00am on the morning of the race. The race took place later in the day at 5.15pm. At a subsequent interview Mr Slater told Mr Goddard that prior to racing WILBUR he tubed the horse with one litre of water mixed with bicarbonate of soda, 15 grams of potassium, some 10-15 grams of B1 vitamin and 60 grams of Harry's mix (Endeavonk Potassium Chloride). Further Mr Slater admitted to Mr Goddard *'I just made a fair dinkum blue, after I got that 22 reading from the vet. I just built it up too much without realising it.'*

Dr Lindsay was also interviewed by Mr Goddard. In the course of that interview Dr Lindsay stated that he had not seen Mr Slater for some weeks. He could not recall advising Mr Slater of bicarbonate doses but indicated that he recommends to all his racing and trotting clients that they can administer sodium bicarbonate up to 10 hours before racing their horses and to be safe from obtaining a reading above the legal limit 11 hours before.

A letter from Dr Lindsay from Baldivis Veterinary Hospital was introduced into the proceedings. In that letter Dr Lindsay refers to the fact that Mr Slater is devoted to the well being of his horses and is pro-active in medication and treatment of ailments to present them to race at their best. The letter went on to state he had discussed with Mr Slater bicarbonate administration to racehorses and had recommended if less than 80 grams of sodium bicarbonate were given orally at greater than 10 hours pre-race this was a safe dosage provided no other source of alkalising agent was being used concurrently. In the context of WILBUR's low blood bicarbonate level the letter states *'...he obviously continued this treatment beyond the horse's period of need... too close to swabbing time.'* Further the letter alleges Mr Slater was unaware that

Harry's mix contained sodium bicarbonate. Finally the fact that Mr Slater's normal pre-race protocol had been disturbed on the morning of the race as the horse received sodium bicarbonate too close to swabbing time was referred to.

After receiving all of this and other evidence, the inquiry was adjourned by the Stewards to enable Dr Lindsay to be called. At the reconvened hearing on 8 April 1997 Dr Lindsay told the Stewards he had not specifically advised Mr Slater to treat the horse. Dr Lindsay denied that he advised to stomach tube the horse prior to racing. He said *'I don't run around telling people to stomach tube their horse on race day, no.'* He went on to state that *'Gavin's taken that on himself to help get his horse to where he, where he thought it needed to be'* by administering the two substances both orally and via a tube.

Dr Symons gave evidence that it takes about 300 grams of sodium bicarbonate to get to a level of 38 or 39 millimole per litre. Taking into account that Harry's mix was given, being another 18 grams of sodium bicarbonate, it fell far short of the levels required to reach 38 particularly when administered $6^1/_2$ hours before racing.

At the reconvened hearing Mr Slater admitted he was not aware that Harry's mix contained 27.5% sodium bicarbonate in it. Mr Slater explained to the inquiry that despite Dr Lindsay's advice the tubing of WILBUR as late as $6^1/_4$ hours before the race had occurred because he had gone to a particular stable and ridden some horses. Only after feeding and working those horses did he then return to treat WILBUR. When asked by the Chairman of the Stewards why he did not perform these activities in reverse order he answered *'Yeah, I made a blue'*. Mr Slater also indicated that it is possible he could have added Salkavite to the feed in the morning. Mr Slater said *'yes, sometimes I do and sometimes I don't'*. The Stewards were also told by Mr Slater that he was feeding two scoops (60 grams) of Salkavite on each of the two nights prior to racing. Dr Lindsay was notified of this at the time his advice was sought.

The horse's level was 22 when tested on the 25 February 1997. Dr Lindsay gave advice to give the substance orally prior to the start on the 26 February. Over the period of the month the horse's blood was not sampled to determine the bicarbonate level. When asked by the Chairman of Stewards why he did not

test the horse to determine its level and *'...to truly then work out your regime for bicarbonate administration'* Mr Slater responded *'Yes, that's a mistake I've made, Sir. That is a mistake I've made'.*

After considering the evidence the Stewards charged Mr Slater with a breach of Australian Rule of Racing 175(h)(ii). The specifics of the charge are *'...in the period preceding the sampling of WILBUR at Ascot Racecourse on 26 March 1997 that you administered various substances namely bicarbonate soda, Harry's Mix and Salkavite to that gelding which resulted in the pre-race sample having detected in it a level of TCO_2 in excess of 36.0 mmol/litre which is contrary to the provision of Australian Rule of Racing 178C(a)...'.*

Mr Slater pleaded guilty to the charge. He acknowledged to the Stewards that he had made a mistake and sought leniency. When asked whether there was anything else he wished to place before the Stewards he simply referred to the fact that a suspension would affect his livelihood and that he has no other source of income.

After deliberating the Stewards made the following statement in regard to the penalty:

> *'Mr Slater in assessing a penalty the Stewards are taking into consideration all the aspects of the case and indeed the Stewards in charging you with administration believe that, that was the appropriate charge being that you, your own admission admitted to... .'*
>
> *'Tubing the horse. Now you administered with no specific advice substances to the horse WILBUR and indeed you added to Dr Lindsay's recommendations, you left the administration by tube itself not even on recommendation the fact that you tubed the horse to the last minute due to your words "running late and having had other things to do". But you said that you work, you were working on a theory that the low level had stayed low... .'*
>
> *'Even from before there, the Bunbury run and however, Stewards cannot accept that this was based on any scientific fact or Veterinary evidence, there was no test performed after the Bunbury start and that no Veterinary evidence was sought at all in relation to the continuance of the sub-normal level of 22 mmol. Now whilst you state that you made a "blew" your words and that you made a mistake this issue could, could*

have been elevated (sic) quite easily by you adhering to specific advice and indeed the testing of your horse added to the fact that if the horse hadn't been tubed then that would... .'

'Indeed been elevated without the tubing. Now evidence related to the performance enhancing ability of excessive level, an excessive level of TCO_2 is of no great significance to this inquiry, rather that the Stewards have taken into consideration a guide from the, the Australian Conference of Principal Clubs endorsement of the guidelines for the classification of prohibited substances in that they categorise TCO_2 at a level in excess of 36.0 mmol/litre in plasma in category two and category two being or repeating that it is a potent performance/ behaviour in effecting (sic) substance which has a legitimate medical use in horses (Veterinary Ethicals) and human prescription pharmaceuticals not registered for horses. Now in assessing a penalty the Stewards have looked at some precedents in West Australia related to TCO_2 elevated levels and indeed we look at the case of Harper where he was charged with presenting the horse and indeed administering to the horse and disqualified for a period of six months. Mr Paul Garner was disqualified for a period of six months for presenting the horse which was reduced by Committee to 10,000, Trainer Vicki Lane was disqualified for a period of six months for presenting the horse there was no appeal, and Trainer Ricky Brown was disqualified for a period of three months for again presenting the horse which was reduced to one month on appeal. Each one of those charges encompasses or includes the administration, sorry the presenting rather than administration of alkalising agents to horses and whilst Stewards take note of your plea of not (sic) guilty and your plead for leniency, Stewards believe that this case warrants a period of disqualification in excess of those imposed previously and as such we're disqualifying you for a period of 12 months.'

The Relevant Rules

Australian Racing Rule 175(h) states:

'The Committee of any Club or the Stewards may punish:...

(h) Any person who administers, or causes to be administered, to a horse any prohibited substance:

(i) for the purpose of affecting the performance or behaviour of such horse in a race or of preventing its starting in a race; or

(ii) which is detected in any sample taken from such horse prior to or following the running of any race. ...'

Rule 1 defines *'prohibited substances'* to be *'any substance declared by these Rules to be a prohibited substance, or which falls within any of the groups of substances declared by these Rules to be prohibited substances unless it is specifically excepted'.*

Australian Rule of Racing 178B declares various substances to be prohibited substances according to whether they act on the mammalian body systems or fall within specified categories of substances. Rule 178C, which was amended from 15 March 1997, states that:

> *'The following group of substances when present at or below the levels respectively set out are excepted for the provision of ARR 178B:*
>
> *(a) Total carbon dioxide (TCO_2) at a level of 36.0 mmol/litrs in plasma"*

Prior to that date the Rule specified that the excepted level of TCO_2 was 37.0 mmol/litrs in plasma.

I was informed during the course of the appeal hearing of Brown (Appeal 319) that the Guidelines for the Classification of Prohibited Substances recommended by the Therapeutics Sub-Committee of the Australian Conference of Principal Racing Clubs and endorsed by the Australian Jockey Club's Scientific Review Panel were adopted at a Conference of Principal Racing Clubs in March 1996. The Guidelines specify drugs into categories 1 to 4. The preamble to the Guidelines is relevant. It states:

> *'The Therapeutics Subcommittee of the Australian Conference of the Principal Racing Clubs and the Australian Jockey Club's Scientific Review Panel provides this technical advice in relation to the effect of the substances prohibited by AR.178B and AR.178C of the Australian Rules of Racing.*
>
> *Substances have been categorised in descending order according to their pharmacology and potency, and what is believed to be their potential for abuse.*
>
> *It is generally agreed by all persons associated with horse racing that the substances listed in Category One have no place in racing under any circumstances.*

In regard to the substances listed in Categories Two, Three and four, the classifications are formed on the hypothesis of accepted veterinary practice.

If the classification system is adopted, it is acknowledged that, following a positive analysis, Stewards will take into account not only the classification of the substance concerned, but also a number of other considerations that relate to the protection of the racing industry, fair racing, and the punitive and disciplinary provisions of the Rules of Racing.

Furthermore, it is acknowledged that each prohibited substance case can have unique circumstances, and that in discharging their responsibilities the Stewards are bound to advance or relegate the gravity of the offence depending on their judgment of those unique circumstances.

The Classification Guidelines, as set out hereunder, are acknowledged that prohibited substances are not equal in terms of pharmacology and potency. The Guidelines are commended as one component to be taken into account in the assessment of the gravity of an offence under this prohibited substance rules.'

Category 2 of the Guidelines states:

'This classification should be considered as one of the components to be taken into account for the assessment of gravity of an offence under the prohibited substances rules.

Potent performance/behaviour affecting substances which have a legitimate medical use in horses (veterinary ethicals) and human prescription pharmaceuticals not registered use in horses.

This category includes sympathomimetics and other CNS stimulants, CNS depressants and tranquillisers registered for use in horses, anabolic steroids, local anaesthetics, diuretics likely to be used as masking agents, large doses of sodium bicarbonate or other alkalinising agents, autonomic system drugs and muscle relaxants.

Examples in alphabetical order are: acepromazine, adrenalin, alkalinising agents giving rise to a plasma TCO_2 in excess of 37.0 mmol/l, atropine, boldenone, bumetanide, detomidine, etamiphylline, ethacrynic acid, frusemide, glycopyrrolate, guaifenesin, katamine, lignocaine, mepivicaine, methandriol, methocarbamol, nandrolone, prilocaine, procaine, reserpine, salbutamol, stanozolol, terbutaline, testosterone, theophylline, xylazine.

Substances in this classification can have a legitimate use in equine practice (eg. the tranquillisers acepromazine, detomidine, xylazine; local anaesthetics lignocaine, mepivicaine, prilocaine, procaine). Some are also scheduled human pharmaceuticals - for example, the bronchodilators glycopyrrolate, ipratropium, salbutamol, terbutaline; the non-steroidal antiinflammatory agents diclofenac, diflunisal, ibuprofen, ketorolac, mefenamic acid, naproxen, piroxicam, sulindac, tenoxicam, tiaprofenic acid.'

The other Rule that is relevant to refer to is Rule 178. That Rule 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.'

When a race horse has been brought to the course in order to race with a prohibited substance in its system and the Stewards are unable to prove how the drug entered the animal or who was responsible for its adminstration the charge will be laid against those in charge of the horse in terms of Rule 178. This rule is sometimes referred to as the *'presenting rule'* as distinct from Rule 175 which is described as the *'administration rule'*. Charges are laid for breaches of Rule 175 against those persons responsible for administration of prohibited substances to horses prior to them racing. The penalty for breach of both Rules is to be found in Australian Racing Rule 196 which states:

'Any person or body authorised by the rules to punish any person may, unless the contrary is provided, do so by disqualification, or suspension and may in addition impose a fine not exceeding $50,000, or may impose only a fine not exceeding $50,000.'

Grounds of Appeal

Mr Slater appeals against the penalty. The substituted grounds of appeal specify:

'1. *In determining penalty the Stewards put insufficient weight on the evidence that the Appellant:*

1.1 *intended only to treat the horse for a health problem;*

1.2 *did not intend to elevate the horse's level of TCO_2 beyond a healthy level;*

1.3 *did not intend to give the horse any unfair advantage; and*

1.4 *did not intend to elevate the horse's level of TCO_2 beyond the limit set by the Western Australia Turf Club Rules of Racing ("the Rules of Racing").*

2. *In determining penalty the Stewards put insufficient weight on the evidence that the level of TCO_2 only marginally exceeded the limit referred to in the Rules of Racing.*

3. *In determining penalty the Stewards put insufficient weight on the fact there was no harm inflicted on the horse.*

4. *In determining penalty the Stewards put insufficient weight on the character of the Appellant, he has only been licensed as a trainer since 1995 and only made a mistake due to his inexperience.*

5. *In determining penalty the Stewards put insufficient weight on the antecedents of the Appellant in that the Appellant co-operated and volunteered information in the investigation process and pleaded guilty immediately upon being advised of the charge.*

6. *In light of the fresh evidence, coupled with the evidence which was before the Stewards, the penalty was inappropriate.'*

The Appeal Hearing

At the hearing before the Tribunal counsel for the appellant produced two references from persons who have known Mr Slater for some time. Both were written in complimentary terms. Mr T Kailis in his reference refers to *'...an innocent mistake'* and the belief *'...he did not intend to give the basic and higher than normal level of TCO_2, his only intention was to treat the horse for a diagnosed problem'*.

Counsel for the appellant relied on s16A of the *Federal Crimes Act* which sets out the matters which the Federal Court shall take into account when passing sentence *"in respect of any persons for a federal offence'*. Save for the reliance placed on previous Racing Tribunal decisions the remainder of the argument for the appellant largely focused on the following propositions:

- that Mr Slater had pleaded guilty and sought leniency
- that on advice the horse was treated for its medical condition
- that Mr Slater cooperated with both Mr Goddard and the Stewards
- that the mistake occurred as a product of inexperience, and
- that the administration improved the condition of the horse and no harm came to the animal.

It was put to the Tribunal that in all of the circumstances of the matter that a maximum penalty should be 6 months for this type of offence and that a reasonable penalty in all of the circumstances of this case would be a 3 month disqualification. In further support of that proposition seven Tribunal decisions were relied upon. At this stage those decisions need only be briefly summarised as follows:

- *G Harper* (Appeal 165 heard 14 March 1994) where two periods of 6 months disqualification for breaches of Rules 175(h) (ii) and 178 in respect of sodium bicarbonate were reduced on appeal to 4 months.
- *RC McPherson* (Appeal 208 heard 22 March 1995) where the appeal against a 2 1/2 year disqualification in relation to the drug oxyphenbutazone in breach of Rule 178 was reduced to $5,000 fine in circumstances in which he had already served 6 weeks disqualification.
- *PC Garner* (Appeal 238 heard 27 February 1995) where the appeal against a 6 month disqualification in respect of an elevated TCO_2 reading in breach of Rule 178 was dismissed.

- *RN Harvey* (Appeal 243 heard 23 February 1995) where on appeal a 4 months disqualification for adminstration of flunixin, a category 3 drug, in breach of Rule 175(h)(ii) was confirmed.

- *GW O'Donnell* (Appeals 263 and 264 heard 22 December 1995) involving the administration of ketorolac, a category 2 drug, where 2 penalties of 6 months disqualification to be served cumulatively in breach of Rule 175(h)(ii) were ordered on appeal to be served concurrently.

- *CG Willis* (Appeal 309 heard 10 July 1996) involving administration of clenbuterol, a category 3 drug, where a 3 months disqualification in breach of Rule 175(b)(ii) was confirmed.

- *RG Brown* (Appeal 319 heard 19 September 1996) where a 3 months disqualification for administration of bicarbonate in breach of Rule 178 was reduced on appeal to 1 month.

In response senior counsel for the Stewards submitted that the penalty which the Stewards had imposed was appropriate in all of the circumstances of the case. Despite having been given veterinary advice, that advice was not followed. A hazardous path was followed by Mr Slater with no precaution having been taken. The fact the horse won the race aggravated matters. The penalty which was imposed was not outside the discretionary range open to the Stewards in an administration case where the administration was contrary to the veterinarian's advice and occurred prior to racing. The incident had damaged the image of racing and the privilege of being a licensee was legitimately jeopardised.

The Decision

I have given careful consideration to all of the passages in the transcript which counsel for the appellant referred the Tribunal to as well as all of the arguments which were raised by counsel for both sides. I have weighed up the underlying argument for the appellant which is to the effect that the maximum penalty for this type of offence is a 6 months disqualification which

should be reduced to 3 months in this case. In addition I have studied each of the previous decisions which were relied upon in support of that proposition. I will comment on those decisions as well as some other cases shortly.

I am satisfied that no reliance can be placed on s16A of the *Federal Crimes Act* in this jurisdiction. That particular provision dealing with criminal considerations has no bearing on the types of matters dealt with by Stewards. That Federal Act is not relevant to the contractual rules which govern the domestic operation of the racing industry in this State.

The **first ground** of appeal alleges there was **insufficient weight given to four specified aspects of the evidence.** The first aspect of the evidence is the claim that the appellant's only intention was to treat the horse for a health problem. Whilst that no doubt was the motive when treatment first started approximately one month before the race in question the important consideration is to consider what the motive was at the time of the administration by tubing the horse on the morning of the race. In order to deduce that motive one must consider and evaluate the relevant surrounding circumstances which include:

- the fact that the diagnosis of the health problem occurred one month before presenting the horse to race with the prohibited substance in its system,

- the fact that no follow up testing occurred in the interim and no action was taken to determine how the horse was responding and whether treatment with bicarbonate should cease, and

- the fact that veterinary advice was not followed in many significant respects; for example the timing of administration was completely wrong having occurred 6 1/4 hours before racing when it should have occurred at the very least 10 hours before racing, the means of administration should have been oral rather than by tube and the instruction was to administer bicarbonate on its own whereas it was mixed with alkalising agents.

The second aspect of the evidence which is relied upon to support the first ground of appeal alleges that there was no intention to elevate the level of TCO_2 beyond a healthy level. This allegation is not supportable in view of a number of pertinent facts. Firstly, the advice of the veterinarian was flaunted in a number of material respects. Secondly, contrary to the express professional advice which Mr Slater received the horse was tubed rather than given bicarbonate orally. Thirdly, the administration took place far too close to the time the horse was due to race. Fourthly, other substances were administered at the same time without any apparent care or consideration for their consequences and what the cumulative effects of them may be. Fifthly, Mr Slater was not even able to say whether he did or did not add Salkavite to the morning feed on the day of racing in question in addition to having administered the other substances to the horse. His administration regime was more than haphazard and unclear. There is no evidence of any records or treatment sheets having been maintained in his stables. Mr Slater at no time bothered to determine whether the level was rising or had risen to an appropriate level over the one month period of administration of the sodium bicarbonate. The evidence indicates that in the numerous weeks following having received the professional advice he neither knew nor cared what the level was and whether the treatment should be continued, varied or should cease.

In all of these circumstances, I can only conclude that Mr Slater was not simply motivated to address WILBUR'S health but rather that he did deliberately set about to improve WILBUR's prospects of success in the race on the 26 March 1997 by elevating the level to excess. In view of this unsavoury situation I give no credence to the third aspect of the evidence relied on, namely that it was not intended to give the horse any unfair advantage. The same can be said of the fourth aspect alleging no intention to elevate the level beyond the set limit.

The Stewards in giving the reasons for their findings have not spelt out anything which expressly or impliedly indicates the actual weight if any they gave to each of these four aspects of the evidence. The same comment also applies in relation to the grounds of appeal 2 to 5 inclusive.

As to **ground 2** which complains that **insufficient weight was given to the fact that the TCO_2 level only marginally exceeded the limit** it is clear the Stewards were not so much concerned with the amount by which the level detected exceeded the cut off but rather with the nature of the drug, being a category 2 potent performance enhancer where the level exceeded 36.0 mmol/litre in plasma. In terms of the Guidelines *'...the category itself should be considered as one of the components to be taken into account in the assessment of the gravity of an offence...'*. Being a category 2 drug it is the highest of three descending levels in terms of seriousness of the categories of drugs which are not otherwise totally excluded from having any accepted therapeutic use or otherwise prohibited at law. The preamble to the Guidelines also makes it clear that in each case the Stewards should take into account the other identified considerations over and above the simple classification of substances, relating *'...to the protection of the racing industry, fair racing and the punitive and disciplinary provisions of the Rules of Racing'*. From what is actually stated in the Steward's decision it is clear that the Stewards have not specifically addressed any of these matters as is contemplated by the Guidelines. Whilst the Stewards in my opinion quite properly addressed the question of the penalty from the aspect of the level and nature of the drug they made no reference to any of these other issues which may generally be described as the broader industry considerations. Whilst it is difficult to imagine that the Stewards would have completely overlooked those other aspects in view of their relevance to determining the penalty, some reference should be made to them by the Stewards as a necessary part of explaining how the actual penalty was ultimately arrived at.

In my opinion nothing much turns on **ground 3** which alleges **insufficient weight was given to the fact that the horse was not harmed** in the light of all relevant circumstances in this case. Mr Slater's recklessness and indifference to the veterinary advice are compelling factors which the Stewards properly gave close consideration to. They were entitled to be heavily influenced by the unsatisfactory conduct. This conduct weighs more heavily than the aspect relied upon on behalf of the appellant, namely the lack of harm to the horse.

In relation to the first three grounds of appeal it is relevant to refer to an early useful comment on the outlawing of prohibited substances in racing in

VP Sutherland and the Owners of the horse RED POCO (NSW Racing Appeals Records of Decision Vol 1, p146 (see *O'Donnell* supra p20) where it is stated:

> *'Yet it is the natural consequence of the definition of prohibited substances in the rules, which not only describes the nature of the substances, but also their prohibition in actual racing, as part of that same definition.*
>
> *What the racing legislators were doing was setting up a method of controlling drugs in racing. They made no attempt to control the use of therapeutic substances. They simply forbade their use in races. In doing so they threw the onus upon trainers to ensure that when horses came to race they were completely free of such substances even though they had been used in therapy. In this context the question of whether, or to what extent, the substance affected the performance of the horse, becomes completely irrelevant and misleading.'*

The philosophy which is espoused in this early New South Wales case is worth considering in the light of the relatively recent adopted Guidelines for the Classification of Prohibited Substances. It would appear logical that the Guidelines be applied by the Stewards in the context of the severity of an offence, rather than on the question of conviction. I notice that the Stewards did in fact make specific reference to the Guidelines in arriving at Mr Slater's penalty. I can well understand that the Guidelines do play a useful role in the process of arriving at an appropriate penalty to impose in these matters.

The **fourth ground** which alleges **insufficient weight given to Mr Slater's character, his newness as a trainer and attributing the mistake due to inexperience** does not find any favour with me. I am not persuaded that the high level of TCO_2 was a mistake caused by inexperience. The character references which were introduced as fresh evidence before the Tribunal are of some relevance here. However, they really have little impact on the matter bearing in mind all of the material factors surrounding the actions of the appellant in treating the horse in an inappropriate fashion and in administering the substance prior to racing in a manner and at a time contrary to the professional advice. Collectively the references really add little if anything of great significance or relevance. On their own they would not warrant interfering with the decision of the Stewards.

As to **ground 5** alleging **insufficient weight placed on the cooperation, volunteering information and immediate guilty plea** it is relevant that the transcript reveals the Stewards did make express reference to the spontaneous guilty plea. Precisely to what extent the Stewards were influenced by the plea of guilt and whether any of the other aspects of Mr Slater's cooperation were in fact taken into account and treated as mitigating factors is unclear.

The **final ground** alleges **the penalty was inappropriate due to the fresh evidence and the evidence before the Stewards.** I have already indicated I consider the fresh evidence is of little persuasive value. The inappropriateness of the penalty argument requires careful consideration and reference to the Tribunal decisions previously identified which were relied on by the appellant as well as other relevant cases. In determining a matter of this nature and complexity it is desirable to refer to the reasons of judgment of Rowland J in *Robert Charles McPherson v RPAT, GE Bennier & Ors* (unreported F/CT Supreme Court of WA No 1768 of 1994 Library No 950085). This matter involved a presenting offence where the presence of the drug oxyphenbutazone (a category 3 drug) in breach of Rule 178 resulted in a $2^1/_2$ year disqualification. In that case Rowland J stated:

> *'Unfortunately, the Stewards did not give any reasons as to why they imposed a penalty of $2^1/_2$ years' suspension (sic).*
>
> *...the Tribunal, which is obliged to give reasons under s21 of the Act, should at least identify the range of penalties usually adopted for the offence and the circumstances of this offence. Its finding was that the penalty imposed was within the range.*
>
> *We are here dealing with the livelihood of a trainer. As there is a right of appeal there is an obligation on the appellant body to give sufficient findings or reasons so as to explain to the recipient and all others in the industry the basis on which the penalty is given or how it is arrived at.*
>
> *... As no reasons have been delivered by the Stewards or the Tribunal as to what the local penalties are that have been usually imposed, then there is an inference that the Tribunal has failed to consider this issue for itself. If it be the fact there is a range of penalties imposed in this State, which is greater than those in New South Wales, then it seems to me that both that fact and the reasons for such a large discrepancy should be identified.'* (at 10-12).

Rule 196 gives the Stewards a very wide discretion in imposing penalties. They may choose between a disqualification, a suspension or a fine of up to a maximum of $50,000. Also they may impose a fine of $50,000 in addition to a disqualification or a suspension. There is no stated limit to the length of disqualification or suspension which may be imposed. Being such an open ended penalty provision Rule 196 contrasts with the equivalent provision under the Rules of Trotting where the Trotting Stewards must impose minimum penalties unless special circumstances apply. Rule 55A of the Rules of Trotting states that:

> *'A person who is convicted of an offence under Part 42 of these Rules, or under Part XXXII of the Rules of Trotting repealed by these Rules, is liable to a penalty which is not less than-*
>
> *(a) in the case of a first such offence, a period of 12 months disqualification;*
>
> *(b) in the case of a second such offence, a period of 2 years disqualification;*
>
> *(c) in the case of a third such offence, a period of 5 years disqualification; and*
>
> *(d) in the case of a fourth or subsequent such offence, disqualification for life,*
>
> *unless, having regard to the extenuating circumstances under which the offence was committed the Controlling Body or the Stewards decide otherwise.'*

As I pointed out in my reasons in Willis (at p15) the task of determining drug penalties in trotting under that code's equivalent Rule is a far less onerous one. On the authority of McPherson (supra) sufficient findings or reasons must be given to explain the basis of arriving at the penalty.

As a consequence of this very wide discretion open to Turf Club Stewards the task of review on appeal can be complicated and there is a need to gain some guidance from the established authority. In *House v The King* (1936) 55 CLR 499 at 504-505 where Dixon, Evatt and McTiernan JJ stated:

> *'The manner in which an appeal against an exercise of discretion should be determined is governed by established*

principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'

Subsequent cases followed this approach including The Queen v Tait (1979) 46 FLR 386 at 388 where Brennan, Deane and Gallop JJ stated:

'An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.'

As is stated by Mason and Deane JJ in Norbis v Norbis (1986) 161 CLR 513 at 518 - 519:

'If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the question, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at the first instance, in the absence of error on his part. According to our conception of the appellant process, the existence of an error, whether of law or fact, on the part of the

court at first instance is an indispensable condition of a successful appeal.'

The Stewards in dealing with Mr Slater have in their reasons made some attempt to identify a range of penalties. Counsel for the appellant has relied on some additional cases. In order to clarify the offences and the relevant details in respect of each of those cases which counsel relied upon as well as for ease of comparison the information is set out in the following table. The 4 cases referred to by the Stewards in their reasons are underlined:

Trainer	**Rule**	**Prohibited Substance**	**Stewards' Disqualification Penalty**	**Tribunal's Varied Penalty on Appeal**
Harper	175 & 178	TCO_2 TCO_2 (Category 2)	6 months 6 months	4 months 4 months
McPherson	178	Oxyphenbutazone (Category 3)	$2^1/_2$ years	$5,000 (after serving 6 weeks disqualification)
Garner	178	TCO_2 (Category 2)	6 months	-
Lane	178	TCO_2	6 months	-
Harvey	175	Flunixin (Category 3)	4 months	-
O'Donnell	175	Ketorolac (Category 2)	2 penalties of 6 months cumulative	2 penalties of 6 months concurrent
Willis	175	Clenbuterol (Category 3)	3 months	-
Brown	178	TCO_2 (Category 2)	3 months	1 month

It is necessary to examine the cases in which the penalties were reduced on appeal to the Tribunal and to elaborate on some of the information in the table to enable some sensible conclusions to be drawn.

The circumstances surrounding the reduction of the two penalties of 6 months disqualification in *Harper* were described by the Tribunal as being *'...somewhat unusual due to the effect of other penalties which were imposed on him, combined with the operation, in the meanwhile, of a suspension of the penalty in relation to the matter the subject of this appeal. We are persuaded to alter the penalties to concurrent period of 4 months in order to reflect the fact that, otherwise, Mr Harper will in effect serve a longer period of disqualification than was originally intended by the Stewards'.* In effect therefore the appeal ratified the 6 months imposed by the Stewards. The circumstances of administration was not as serious as in Mr Slater's case as the bicarbonate was administered in the horse's feed.

In *O'Donnell* I carefully analysed a substantial number of decisions relating to penalties and concluded that *'...it is my respectful belief that the panel in McPherson on their first determination of the matter* (imposing a $2^1/_2$ year disqualification) *were correct in having concluded that... the penalty has not been shown to be so outside the range as to demonstrate error'.* The member LB Robbins agreed with my reasons for decision. Collectively with the other member Ms P Hogan the Tribunal unanimously confirmed 6 months were appropriate periods of disqualification.

In *Brown* the facts were that the trainer gave the horse a handful of bicarbonate in its feed every night for a week before it raced and every second day when not racing. Mr Brown never drenched the horse which was getting old but as it tied up it was in need of bicarbonate in order to alleviate its symptoms. Mr Brown pleaded guilty to the charge. He relied totally on training to support his young family. It was argued that if he were disqualified it would wreck his career and he would go out of racing permanently. Mr Brown had a clean record for the 19 year duration of his licence. His horse ran eighth and did not have to be disqualified from the placings and the winnings were unaffected. In that case the Stewards in relation to the penalty stated they had taken into account the *Harper* penalty of 6 months, the *Ricky Lane* penalty of 6 months disqualification and the *Paul Garner* disqualification for 6 months, that was reduced to a $10,000.00 fine by the Committee of the Club after it was sent back to the Committee by the Tribunal. The Stewards in their reasons stated

> *'the Stewards believe that we shouldn't necessarily depart from our stance in terms of the 6 month disqualification. However, after taking into consideration, particularly, the elements of your personal circumstances and indeed your clean record, the support of your family, your plea of guilty and indeed the element I mentioned in relation to the unplaced nature of the horse, accompanied with what you have put forward with us today, the Stewards believe that appropriate penalty would be a period of disqualification which would be of 3 months.'*

A substantial amount of further evidence was introduced into the appeal proceedings on behalf of Mr Brown in contrast to that which was entered in support of Mr Slater. The circumstances of Mr Brown's case were also different in that he enjoyed some support and backing from members of the Western Australian Race Horse Trainers' Association. The new evidence added some detail and weight to the argument on behalf of Mr Brown and provided a wider basis for determining the issue than that which the Stewards had before them. At the very least it was arguable that the Stewards did not give sufficient weight to matters referred to in the first 3 grounds and that with the benefit of the additional evidence it could be said that insufficient weight was placed upon those matters.

As is the case of Mr Slater in Mr Brown's case I was not satisfied that (even if it were true) the argument raised that no harm was inflicted on the horse would in any way justify reducing the penalty imposed. The further evidence in support of Mr Brown did demonstrate that the penalty should be reduced. At p13 of my reasons I stated *'From the information placed before the Tribunal in this and other appeals it is clear that in this State the penalties for drug offences do range from monetary penalties on some occasions, through to periods of disqualification. Often disqualifications are for considerably longer periods than the 3 months which was imposed in this particular matter. ...I have taken into account the fact that 6 months appears to be at the upper end of the usual range of disqualification for this type of offence.'* It will be necessary to return to this comment later. Brown's case was far less serious an offence for many reasons including the method of administration, being oral rather than by means of tubing, the timing of the administration, the motivation behind it and the fact the horse ran eighth whereas Mr Slater's horse won.

As I believe I clearly spelt out in *O'Donnell* the penalties do vary greatly from State to State and, over time, do in fact vary within jurisdictions. Clearly there are differences to the racing scene in each State from an adjudication perspective. With the passage of time, Stewards in different jurisdictions develop their own particular attitudes to offences. This is especially so in the case of offences of a serious nature such as offences involving prohibited substances which may adversely affect the industry in each jurisdiction differently depending on the size of the industry and other circumstances prevailing locally. Circumstances which may change over time and which may justify variations to the range of penalties previously imposed short of express changes being made to the Rules could include introduction of new official policies. This is what now appears to have occurred with the adoption of the Guidelines for the Classification of Prohibited Substances. The Stewards in sentencing Mr Slater have expressly referred to the Guidelines. The Guidelines spell out a range of factors which are relevant to be considered in arriving at an appropriate penalty. I am satisfied that the Stewards in dealing with Mr Slater have erred by not referring to the obvious adverse effect on the industry of the fact that Mr Slater's winning horse had been tubed with a prohibited substance relatively shortly before its race in circumstances contrary to the advice of the veterinarian. I regard the appellant's misconduct in this case to be at the upper end of the level of seriousness. The broader industry considerations which are referred to in the Guidelines should have been addressed. The whole affair is a very sad blight on the racing industry. As stated by Owen J and Anderson J in *Harper v The Racing Penalties Appeal Tribunal of Western Australia* (1995 12 WAR 337 at 347) in the context of a drug offence:

> *'... survival of the industry as well as substantial government revenue would seem to depend on encouraging the public to bet on horse racing, that is, to bet on the outcome of each race.*
>
> *If it is correct to think that the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect of the administration of drugs to*

horses and the enforcement of those controls by peremptory means.'

I agree with the Stewards that, compared to the 4 cases they have identified in their reasons each involving presenting, Mr Slater's *'case warrants a period of disqualification in excess of those imposed previously'*. However, to go from the upper end of the range of penalties of 6 months disqualification to a 12 months disqualification penalty reflects an error on the part of the Stewards. The 12 month disqualification imposed in all of the circumstances of this case is unreasonable or unjust.

Whilst the Stewards considered that the case warranted a penalty of disqualification in excess of those imposed previously, it is difficult to understand how the Stewards could have concluded they were entitled to impose a period of 12 months disqualification being double the harshest penalty previously applied in this State for a TCO_2 offence. Mr Slater deserves a most severe punishment for having administered the substances shortly before racing his horse with other alkalising agents by means of a tube. The racing industry can ill afford this type of conduct which flies in the face of fair racing. The spectacle of WILBUR being disqualified as the winner of the race in question and the placings having to be amended causes the public to lose faith in the integrity of racing as well as interest in betting on the outcome of horse races. Being on the upper end of seriousness for this type of administration I consider that a maximum penalty of 9 months would have been appropriate here but for the existence of the mitigating factors. The 9 month penalty of disqualification must however be reduced to take into account Mr Slater's co-operation including his volunteering of information. The circumstances of the administration are known and are not disputed due to Mr Slater's full co-operation in this regard. The Stewards failed to take into account such factors beyond simply referring to Mr Slater's plea of guilty. In view of this consideration I am of the opinion that a disqualification for a period of 8 months is the appropriate penalty. To that extent I would allow the appeal.

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

DAN MOSSENSON, CHAIRPERSON

APPEAL 359

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**GAVIN PHILIP SLATER**
APPLICATION NO:	**A30/08/359**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR A MONISSE (MEMBER)** **MR L ROBBINS (MEMBER)**
DATE OF HEARING:	**10 JUNE 1997**
DATE OF DETERMINATION:	**13 OCTOBER 1997**

IN THE MATTER OF an appeal by Mr GP Slater against the determination of the Western Australian Turf Club Stewards on 8 April 1997 imposing a 12 month disqualification for breach of Australian Racing Rule 175(h)(ii).

Mr SJ McComish, on instructions from Kott Gunning, appeared for the appellant.

Mr RJ Davies QC appeared for the respondent.

For the reasons published separately by Mr D Mossenson and Mr A Monisse, and in the absence of Mr L Robbins, the appeal against penalty is allowed. The Tribunal sets aside the 12 month disqualification and substitutes an 8 month disqualification.

The fee paid on lodgement of the appeal is forfeited.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA