

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D. MOSSENSON  
(CHAIRPERSON)

APPELLANT: DAVID HARRISON

APPLICATION NO: A 30/08/215

DATE OF HEARING: 8 May 1996

DATE OF DETERMINATION: 10 July 1996

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IN THE MATTER OF the remission hearing ordered by the Full Court of the Supreme Court of Western Australia in relation to the appeal made by Mr D Harrison against the decision of the Western Australian Turf Club Stewards on 26 August 1994 imposing a penalty of 10 months disqualification under Rule 175(h)(ii)

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Mr MJ McCusker QC, on instructions from Karp & Monaghan, appeared for the appellant.

Mr RJ Davies QC appeared for the respondent.

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BACKGROUND

Mr Harrison's matter was remitted to the Tribunal for further consideration following the making of an order absolute for a writ of certiorari by the Full Court of the Supreme Court of Western Australia. The proceedings involving Mr Harrison have had a long and tortuous history. They involve the question, which is usually quite difficult, of determining the appropriate punishment to be meted out to a racing drug offender. Added to this is the complicating factor that

the terms of the Supreme Court order throw up some uncertainty as to the precise function now to be performed by the Tribunal. Indeed by virtue of the wording of the order the question of the capacity of the Tribunal to deal with this matter needs to be considered.

Mr Harrison is a registered trainer with the Western Australian Turf Club. One of the horses which Mr Harrison was training, SAMMY THE BULL, raced on 11 June 1994 and, after winning, was routinely drug tested. The presence of 0.3 micrograms per millilitre of oxyphenbutazone was confirmed in the horse's urine sample. As a result, on 15 July 1994 the Western Australian Turf Club Stewards conducted an inquiry into the matter.

Dr Symons, the Turf Club veterinary surgeon, gave evidence at the inquiry that oxyphenbutazone, an active metabolite of phenylbutazone, is a prohibited substance. He stated that "... *Oxyphenbutazone is one of the main metabolites of phenylbutazone which is in Butasyl*". As an anti-inflammatory agent oxyphenbutazone is usually used for inflammation of the musculo-skeletal system. During the inquiry Mr Harrison accepted the fact that oxyphenbutazone was a prohibited substance. Mr Harrison admitted that he injected 20 millilitres of Butasyl into SAMMY THE BULL due to inflammation of the horse's front joints. He had prior to the inquiry told the racecourse investigator, Mr Goddard, that he did so 6<sup>1</sup>/<sub>2</sub> days prior to when the horse next raced. This period of time prior to racing was alleged to have been chosen based upon the evidence presented by Dr Symons at the November 1993 ROKEBY ROAD inquiry before the Stewards at which Mr Harrison was convicted of a breach of Australian Racing Rule 175(h)(ii).

Mr Harrison did not keep any documentation or card system of his treatments. In relation to horses needing treatment his practice simply was to examine the racing calendar each morning and to work out those horses which were racing the following week in order to decide whether he could treat them or not.

In response to the question from the Deputy Chairman of Stewards who was chairing the inquiry as to whether he consulted his veterinary surgeon, Mr

Harrison responded that "...Dr. Davies, ...or Phil Adams the vet, just comes in on Tuesdays but nearly always just has a cup of coffee...and leaves some vitamins for me." Mr Harrison stated that he did not specifically consult them, rather "... I just took notice of that one thing in the inquiry because I didn't think that Dr. Symons would muck around with anyone's livelihood because he couldn't afford to, because he's a Turf Club vet." This reference to Dr Symons, as already mentioned, related to the November 1993 ROKEBY ROAD inquiry before the Stewards. At that inquiry Dr Davies had asked Dr Symons "What would you consider a reasonable withdrawal period for multiple dosing of phenylbutazone?". Dr Symons response to this was:

*"Well I look at this regime and I agree with you that you can give a six day treatment with phenylbutazone and when I do that I say an I.V. injection, one single injection. I get worried when I look at this and say, its' been fed because phenylbutazone binds to the fibrous part of the feed and extends the excretion time. It has a course, it is a four day treatment so then again I would extend the treatment time again, and also the Tomanol I have a reference here that says, with the two anti-inflammatories in Tomanol, it also extends the excretion time for phenylbutazone."*

At the 15th July 1994 hearing before the Stewards Mr Harrison was charged by the Stewards with a breach of Australian Racing Rule 175(h)(ii), namely that:

*"...sometime prior to SAMMY THE BULL running in Race 1, the Eat More Fruit 'N' Veg. Handicap Second Division over 1200 metres on the 11th of June, 1994, you administered Butasyl to SAMMY THE BULL resulting in the prohibited substance oxyphenbutazone being detected in the post-race urine sample taken from SAMMY THE BULL."*

The Rule states:

*"The Committee of any Club or the Stewards may punish:*

- (h) Any person who at the time administers, or causes to be administered, any prohibited substance as defined in A.R.1:
  - (ii) which is detected in any pre- or post-race sample taken on the day of any race."**

The penalty provision is 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."*

Mr Harrison was convicted. No reasons were given at the time of announcing this decision, but in imposing a 12 month disqualification the Deputy Chairman of Stewards stated:

*"Mr Harrison the Stewards have considered your plea in mitigation and taking into account all the matters you have placed before us, further the forthright manner in which you have presented yourself and conducted yourself at this inquiry has also been taken into account. After considering all factors, the Stewards have decided to disqualify you for a period of twelve months."*

The Tribunal heard Mr Harrison's first appeal in relation to this matter on 22 August 1994. The Tribunal upheld the appeal and returned the matter to the Stewards for re-hearing on the basis that the Stewards had failed to address Mr Harrison's defence of honest and reasonable but mistaken belief that the prohibited substance administered to the horse would have been excreted by race day and therefore would not be present in the blood or urine of the horse. This defence was open to the appellant at that time following the majority decision of the Full Court in Maynard v Racing Penalties Appeal Tribunal of Western Australia & others (1994) 11 WAR 1. However in February 1995 the Maynard decision was overruled by the unanimous decision of a bench comprising five Judges of the Full Court in Harper v Racing Penalties Appeal Tribunal of Western Australia & others (1995) 12 WAR 337.

The Stewards conducted the re-hearing on 26 August 1994 at which Mr Harrison confirmed that despite the fact that he had no records as to when the administration took place and of the dosage that "...I always just give them 20 mil. Have forever, never ever given a shot more than 20 mil, or less than 20 mil because that was the recommended dose, 20 mil, by Dr Symons". He told the Stewards that he administered the substance 6<sup>1</sup>/<sub>3</sub> days before. Mr Harrison was

again charged with the same offence. In handing down the finding the Deputy Chairman of Stewards made the following statement:

*"Mr Harrison in assessing the charge the Stewards have given consideration as to whether, under an honest and reasonable but mistaken belief, that SAMMY THE BULL was drug free at the time of racing on the 11th of June, 1994, is applicable. The salient points of this case as seen by the Stewards are one, you admitted injecting SAMMY THE BULL on Sunday the 5th of June, with 20 mils of Butasyl. The reason for this was that SAMMY THE BULL quote "after he had galloped, he pulled up with a little bit of, tiny bit of swelling or something" end of quote. Further, Mr Goddard's report in part states on page 11 "I said 'what is the problem with the horse?' He said 'both front joints'. Two. You say you did this on Dr Symons' advice, that advice coming from a previous unrelated inquiry, the ROKEBY ROAD inquiry held on the 30th of the 11th, 1993. However, the evidence has shown that Dr Symons was referring to phenylbutazone and not Butasyl, which you used. Butasyl has two compounds phenylbutazone and sodium salicylate. Expert evidence suggests that may affect the excretion of phenylbutazone. Three. You did not seek vet. advice in regards to the use of Butasyl and the treatment to SAMMY THE BULL. Dr Davies and Dr Adams visit your stables regularly. However, you did not seek their professional opinion in regards to this treatment. Further, you did not consult Dr Symons on any aspect of this treatment either before or after. Four. No records were kept. In your stable you function daily with a work list which after use is discarded. You have no documentation as to when and how much was given to SAMMY THE BULL and in what manner. In regards to an honest and reasonable belief Mr Harrison, the Stewards are of the opinion that before there can be a conviction we must ask ourselves the question - are we satisfied the person charged did not have an honest and reasonable belief at the time of administration of the drug. That (sic) the drug would not be found to be present in the horse when tested on race day? For the abovementioned reasons the Stewards are of the opinion that it was not reasonable for you to hold the belief that SAMMY THE BULL would be drug free on Saturday the 11th of June 1994. Consequently the Stewards find you guilty as charged."*

On this occasion a 10 month disqualification was imposed. As to the penalty the Stewards stated that:

*"Mr. Harrison the Stewards consider any breach of the drug Rules as a serious matter. After considering in total your plea in mitigation, the Stewards have decided to disqualify you for a period of ten months."*

Prior to making that decision, and in the course of receiving evidence as to penalty, the Deputy Chairman stated:

*"You have already received a disqualification on the 15 July, you weren't granted a Stay of Proceedings... and on the 22nd August that conviction was quashed, so there has been a period which you have served or you have been disqualified for. "*

Mr Harrison again appealed to the Tribunal. On 3 November 1994 the Tribunal dismissed the appeal as to conviction. In regard to the appeal as to penalty the Tribunal concluded:

*"It has not been demonstrated that the Stewards have fallen into any error in the exercise of the discretion which is vested on them in imposing the penalty. The penalty is consistent with previous penalties imposed by them. The Tribunal has taken into account all of the submissions personal to the appellant which were put on behalf of Mr Harrison. Whilst giving those submissions sympathetic consideration, the Tribunal is not of the view that these matters weigh so heavily as to persuade it that the penalty imposed should be reduced."*

The appellant being dissatisfied with the Tribunal's decision applied to the Supreme Court for a writ of certiorari (David Robert Harrison v Racing Penalties Appeal Tribunal of Western Australia, I A Zucal and others, Supreme Court Lib No. 960097S, delivered 27 February 1996). An order nisi for a writ of certiorari was made on 18 November 1994 which included liberty to vary the grounds upon which the order was granted to include a challenge that the penalty was excessive. At the same time Mr Harrison was granted a stay of the penalty. On 27 February 1996 the Full Court made orders in the following terms:

1. *The Order Nisi be made absolute.*
2. *The Order of the Second Respondents (the Stewards) disqualifying the applicant for 10 months be quashed.*
3. *The matter be remitted to the First Respondent (the Tribunal) for further consideration. ..."*

In his reasons Kennedy J sets out the matters to be considered in relation to providing adequate reasons when imposing a penalty as follows:

*"...the first step must be to set out circumstances of the offence which determine the culpability of the person concerned and which give rise to the penalty. It was particularly important in the present case to find the facts, because a defence of honest and reasonable but mistaken belief was raised, and although the defence had no application, as such, the circumstances which it claimed gave rise to it could have been very material on the question of penalty. Furthermore, it is important to know whether the Tribunal considered that the applicant acted knowingly or negligently, and to what extent, if at all, it believed he was influenced by the remarks made by the veterinary steward at the earlier inquiry. Some indication is also necessary as to why disqualification, as against other penalties, was chosen." (at pp. 7 and 8)*

In his reasons Scott J states that:

*"...those fundamental matters upon which penalty is based should be expressed by the Tribunal when penalty is handed down. In this case, those steps were not taken. If it be the case that the Tribunal was of the view that the applicant did hold an honest and reasonable mistaken belief that the Butasyl administered to the horse would have been excreted from the horse's system prior to the horse racing, then that view is of critical importance in determining the appropriate penalty. There is a fundamental distinction to be drawn between a horse trainer who administers an illegal substance either knowing that the substance is administered in circumstances where it will be in breach of the rules of racing, or in circumstances where the substance is administered negligently either not caring or being indifferent as to whether or not the substance will remain in the horse when the horse is due to race, and the case of a trainer who administers a substance to a horse based upon veterinary advice and his own belief that the substance will be excreted from the horse's system prior to the time the horse is next to race. These matters are fundamental and of critical importance in assessing the appropriate penalty." (at p. 3)*

#### THE APPELLANT'S ADDITIONAL EVIDENCE

On 8 May 1996 in the course of the remission hearing before the Tribunal further evidence was presented on behalf of Mr Harrison. This evidence was followed by reasonably comprehensive submissions made by senior counsel on both sides.

Oral evidence was presented by one of Mr Harrison's veterinarian Dr PS Adams. Because of the significance of this evidence it is appropriate to quote some lengthy extracts of it. Some minor editing of the evidence has been made in order to make it clearer. The relevant parts of the evidence-in-chief are as follows:

Q *"Over what period have you known him? A. At least a minimum of 6 years.*

Q *And was that on a professional basis? A. Yes.*

Q *Could you tell the tribunal, please, dealing with that professional basis, how frequently - - what was your practice as regards seeing Mr Harrison professionally? A. My practice was to go down to his property and a couple of other properties next to him once a week, as a routine visit, just dropping in to see if they've got any problems; see if they want any type of drugs that I sell, which is vitamins and minerals and also, if they request, any other type of drugs.*

Q *Are you talking of drugs here for therapeutic purposes? A. Yeah, mostly for therapeutic purposes.*

Q *On those occasions, did you actually see David Harrison? A. Yes, most frequently.*

Q *On those regular weekly visits, could you tell the tribunal of any advice that was sought by Mr Harrison? A. Well, regarding the drugs supplied or administered, it was always a worry of David's that the excretion rates of the drugs administered.*

Q *And how did he express that worry? A. Well, he did question me quite frequently about them.*

Q *Has he purchased butasyl from you, on occasions? A. Yes; on a couple of occasions.*

Q *Was that before the Sammy the Bull incident, that he purchased butasyl? A. I would say so; yes.*

Q *Do you recall the occasions of Mr Harrison's conviction in late 1993, concerning the horse Rokeby Road? A. Yes.*

Q *Were you told of the nature of the conviction; what it was for? A. Yes Butazolidin.*

Q *Did Mr Harrison, after that time, ask you any questions? A. He did request - - - asked questions about the excretion times of butazolidin and the reason why his horse, Rokeby Road, would have got positive to butazolidin. I've been able only to supply what information I had through the books, which was the fact that it should not show.*

Q *It would not show after what period? A. Six days.*

Q *Six days. What should not show? What kind of treatment are we talking about? A. Well, we're talking about butazolidin now.*

- Q Butasyl or Butazolidin? A. Well butazolidin which is a component of butasyl.
- Q Did you give him any advice as regards the use of butasyl? A. I would say that I would have said that it's not to be used within 6 days of the race.
- Q Why would you have said that? A. Because this was according to the Australian Equine Veterinary Association handbook that we received.
- Q And that is after what kind of dosage, how administered? A. This is a single dosage of up to 20 mls I think.
- Q Administered how? A. Intravenously.
- Q Now, are you able to say whether he specifically referred to a proposed use of that drug on the horse, Sammy the Bull? A. No, I cannot recall definitely that he specifically mentioned Sammy the Bull.
- Q It is possible he might have? A. He may have; yes.
- Q But do you have a recollection of him asking questions concerning - - well, when you say he asked you about the application of butasyl and you gave the answer you just told us, with respect to dosage, 20 mls intravenously 6 days before any race, on how many occasions are you able to say roughly you told him that, after the Rokeby Road incident and before the Sammy the Bull incident? More than once? A. I would say more than once. Definitely more than once.
- Q I think it is a common ground that butasyl is an anti-inflammatory drug? A. Yes.
- Q Is it commonly used in Western Australia? A. Oh, very commonly used in Western Australia.
- Q Does it, in your view, require the administration by an experienced veterinary surgeon? A. Not necessarily - - most trainers are able to administer drugs intravenously.
- Q In the light of the positive - - you told us the advice that you gave; that 6 days was a safe excretion period, I take it? A. Yes.
- Q Since the positive swab of Sammy the Bull, have you changed your advice? A. Well, I've had to change that advice.
- Q And why is that? A. Well, if you can pick it up at 6 days, I felt that possibly you would have to go back another 24 hours because the dosage was picked as a very minute one, and possibly if - - another 24 hours would prevent any sort of showing of the drug in urine."

The relevant parts of the cross-examination are as follows:

- Q Confidently, you would have advised anybody who asked you some years back, that oxyphenbutazone will not show up 2 days later? A. No. I don't think so.

- Q 3 days? A. No. It was 4 days.
- Q Well, all right, four, and being proved right every time, when you were giving that advice in those days? A. That's true,
- Q "Yes. Did you in your advice to Mr Harrison, Dr Adams, tell him anything about the lack of certainty in any advice that you could give? A. Well, there's always the chance you're going to get an odd horse- -
- Q You've told us that. What I'm asking you is did you tell him that? A. I was - - -probably say yes.
- Q You have to don't you? I mean, anyone who asks for this; you have to say, "Well, look, I can only do my best but, boy, you know, it's a moving feast. Things are changing rapidly these days". You have to say that to them, don't you? A. I can only say according to the advice I get from the Australian Equine Veterinary Association.
- Q Are you conceding that in the course of your discussion about this and other drugs, you did say to him that it is a dicey area and it's pretty hard for anyone to be too sure of what is going to show up these days? A. Well, I would say that you could do that. I probably would have.
- Q Well, you would have to, wouldn't you, to anyone who asked? A. Yeah.
- Q At the end of the day, it has to be their decision to take the chance, if there would be any, doesn't it, not yours? A. It's not my risk, it's their risk.
- Q Well, now, how many different drugs did he ask you about the safe withholding period for? A. Possibly a couple of others that I can think of.
- Q Such as? A. Some of the cortizones that we used to administer intra-articular.
- Q Was there a lot of anti-inflammatory treatment going on in the stable, was there? A. Not necessarily but - - - no more than any other stable.
- Q Well, that may be, but was there a lot? A. No.
- Q Well, why all these conversations about - - -we've heard of at least three and - - -was he really saying to you "You know, how close to a race can I go with this one and the other one and the other one"? A. No. I think he has had one conviction and felt he didn't need another one.
- Q Well, I understand that, but he was still using them - - -clearly still using them after one conviction. Was he not saying to you "Look how close can I go?" That is the purpose of the questioning, was it not? A. Well, the purpose of the questioning - - as long as he can get it - - administer it without it showing - - -
- Q "How close can I go with this one?"; wasn't that what it amounted to? Isn't that what they all want to know? A. Well, that's true, because that's why we've got a book that supplies those figures.

The relevant parts of the re-examination are as follows:

- Q *Dr Adams, when you advised that 6 days was a safe excretion period, I take it from your evidence that you thought that there was always a chance, I think you said, that you could get the odd horse. What degree of chance did you consider there was at that time, that you get an odd horse, if you used a 6-day excretion period? A. I would say a very minimum one and possibly none at all, anyway.*
- Q *And you've said something about the detection techniques having improved over the time you've been a veterinary surgeon, and that you can detect - - - there's been an increase in the degree to which you can technically detect the presence of this drug. Is that right? A. That's true; yes.*
- Q *In terms of measurable quantity of this particular drug, phenylbutazone, what excretion period do you consider, today, to be a safe excretion period? A. I would still say 7 days.*
- Q *You were being asked, you recall, about the improvement in detection techniques to the point where the period - - -at periods well beyond the 6 days or 7 days, you may still be able to detect this drug phenylbutazone? A. Yes.*
- Q *And you made a comment to the effect that, "Yes, but not at a level that affects the performance of the horse". Do you recall that? A. Yes.*
- Q *Could you elaborate on that; what you meant by that? A. Well, from all the evidence studied through a lot of books, the effect of a single shot of butazolodin would not have had any effect after 3 days. The levels at 3 days would be a lot higher than what they were at 6 days, and as far as we can see, there should be no effect on the horse, with those levels, at 6 days."*

A statutory declaration from disqualified trainer KL Moore and a letter from disqualified trainer PJ Daly were also produced at the remission hearing. Both documents revealed that these trainers each received a period of 4 months disqualification following the detection of both phenylbutazone (the parent drug) and oxyphenbutazone (the metabolite) in the respective samples which were taken from the horses they trained.

### SUMMARY OF APPELLANT'S SUBMISSIONS

The submissions made by Mr McCusker QC on behalf of the appellant are summarised as follows:

1. The very low level of Butasyl detected in the horse involved corroborates Mr Harrison's evidence that he administered the Butasyl 6  $\frac{1}{3}$  days before the race.

2. Mr Harrison believed that all evidence of Butasyl would be excreted within 6 days. This belief was based partly on Dr Symons' evidence at the ROKEBY ROAD hearing in November 1993 as well as partly on the advice given to him from time to time by Dr Philip Adams that 6 days was a safe excretion period. *"Mr Harrison had himself been very conscious of the need to take care and was therefore anxious to ensure that he did follow appropriate veterinary advice."*
3. It was highly improbable that Mr Harrison would have raced the horse had he thought it had any trace of a prohibited substance in it as the horse was favourite and he would have had good reason to believe that it would probably win. At that time there was no elective pre-race swabbing available for oxyphenbutazone.
4. It has not been suggested by the Stewards that Mr Harrison did not have an honest belief that the horse would be drug free on race day. There is no basis for suggesting that he was uncaring or recklessly indifferent. The penalty is too high. Taking into account the lack of intent and reckless indifference coupled with the fact that the parent drug was not found, a fine would be the appropriate penalty.
5. Alternatively, having regard to the impact of the penalty already felt by Mr Harrison it would be fair to reduce the penalty to the 57 days period of disqualification which he has already served with no further penalty added. The severe effect of the disqualification already served includes the considerable suffering both financially and in terms of health and mental outlook and the adverse impact on others, namely owners and apprentices. Senior Counsel also referred the Tribunal to some recent relevant local determinations and a summary of penalties imposed in other States as a guide to an appropriate penalty.
6. This matter comes back to the Tribunal by way of a re-hearing and the Tribunal may determine an appeal virtually at large and must reach its

own determination. The reasons for the determination by this Tribunal must be based on everything that went before it and was put before it including, but not limited to the material before the Stewards. *"This Tribunal is in a totally different situation from an appellate court in that the basis upon which it may determine an appeal is virtually at large. It may receive in evidence any transcribed evidence, receive and admit any evidence given by affidavit or statutory declaration, adopt any finding, decision or judgment of a court and so on... it is indeed, ..., a re-hearing. It's a re-hearing not only as to conviction, but also as to penalty."* The matter is to be heard and considered afresh. It is a matter of reviewing the circumstances, making findings of fact going to the question of penalty and then determining for itself what is the appropriate penalty.

7. The interests of the industry are relevant but do not override the interest of doing justice to the individual.

#### SUMMARY OF RESPONDENT'S SUBMISSIONS

Briefly, the argument put by Mr Davies QC for the respondent is as follows:

1. Although technically 57 days disqualification has been served one can wonder as to its effectiveness bearing in mind the benefit of the suspensions of operation of the penalties and the consequent short periods of disqualification involved.
2. The respondents can rest entirely upon the O'Donnell (Appeals 263 and 264) determination of the Tribunal on 22 December 1995 which was followed in Bamford (Appeal 290 of 1996). By virtue of these decisions it has been established that the Stewards in Western Australia are entitled to take a different stance from Stewards in some of the other States with regard to penalties of disqualification. The additional penalty decisions which have been referred to change nothing.

3. That in remitting the matter back to the Tribunal "*...for further consideration...*" the Full Court was not in effect saying that the decision of the Tribunal was wrong in its review of penalty but rather that the Tribunal "*...really need to express the reasons why they took the view that they did*". In effect the Full Court said "*Tell us why you regarded the step of imposing disqualification, when you reviewed it, as appropriate in view of all these Eastern States matters and in view of the consequences of disqualification*".
4. "*...the Supreme Court did not have before it the reasons that this Tribunal had before it, of the stewards, for making certain of their findings, which were not said in the context of penalty, but were nevertheless relevant to the penalty imposed.*"
5. "*It would be wrong... if human considerations, ...overtook considerations of the wider interest of the industry, which are what justified the use of disqualification in cases such as this.*" The protraction associated with the proceedings of itself ought not to be treated as a mitigation.
6. The Tribunal did not choose disqualification but simply reviewed the exercise of someone else's discretion to impose it. The Tribunal was not required to reconsider the whole decision but rather to review the imposition of the penalty and determine whether it was properly open on all of the facts and justifiably found by the primary tribunal.

### THE TRIBUNAL'S ROLE UPON REMISSION

The scope of the "further consideration" which the Tribunal has been ordered to give to this matter and the nature of the current proceedings are not entirely clear. They need to be considered and resolved. The order nisi was made in respect of a number of grounds. As already stated when it was granted it included liberty to challenge the penalty. It was made absolute only on the one ground which dealt with the question of the reasons in relation to penalty. The other

grounds of the application, which included the allegations of failure to hold that the appellant had an honest and reasonable but mistaken belief, were abandoned or dismissed. The grounds addressing conviction failed. After having given careful consideration to the opposing views of counsel as to the Tribunal's role I am satisfied that one should not interpret the Full Court to have decided that the Tribunal was wrong in confirming the conviction. I am also satisfied that the reasons for the appropriate period of disqualification are matters requiring further consideration. But for the fresh evidence all that would have been relevant would have been the enunciating of the reasons why 10 months disqualification was appropriate.

Despite having reached these conclusions I remain somewhat concerned in principle as to the appropriateness of dealing with this question of the reasons as to penalty in view of the effect of the express terms of the order absolute. As has previously been stated that order specifically quashes the determination of the Stewards in disqualifying Mr Harrison for 10 months. The order does not quash the Tribunal's determination. The Tribunal's role in making the determination of 3 November 1994, when it confirmed the disqualification imposed by the Stewards, simply was to review the Steward's decision as to both conviction and penalty. The Tribunal in performing its appellate role pursuant to the Racing Penalties (Appeals) Tribunal Act 1990 ("the Act") did not set any penalty. It is not the function of the Tribunal to set penalties. Rather, as the preamble to the Act indicates, the Tribunal has jurisdiction "*...in respect of appeals against penalties imposed in disciplinary proceedings...*". Whilst the Tribunal was not referred to any authorities on the subject of the Tribunal's jurisdiction and the nature of appeal proceedings under the Act I have considered the jurisdictional question to be of sufficient relevance to warrant an examination of a sizable body of cases which deal with the different categories of appeal with a view to satisfying myself as to the Tribunal's role and any limitations it may have in dealing with this matter on remission. Although the penalty imposed by the Stewards has been set aside the Tribunal's determination is not directly affected by the literal terms of the order. The order nisi on the other hand ordered the Tribunal to

*"show cause...why a writ of certiorari should not issue against the First Respondent (the Tribunal) to remove into this Court for the purpose of being quashed the decision made on the 3rd day of November 1994 whereby the First Respondent dismissed an appeal against the conviction made against the Applicant on the 26th Day of August 1994 by the Second Respondents (the Stewards)..."*

Technically there does appear to me that there is something of an hiatus created as a result. The basis for the appeal to the Tribunal has been removed by the quashing order. Unfortunately this question was not raised before the Tribunal.

Despite any misgivings I may have as to the Tribunal's role by virtue of it performing an appellate authority, the appropriate course in this matter is to take a pragmatic and robust approach and to give the matter the further consideration as contemplated by the Full Court's reasons. In other words, I will now make my factual findings and then attempt to clearly enunciate the basis for the result which I consider should be arrived at.

### DETERMINATION

It is clear that when the Tribunal considered this matter and arrived at its unanimous determination on 3 November 1994 the Tribunal did have the benefit of the two transcripts of evidence of the earlier inquiries conducted by the Stewards. This meant that the Tribunal was fully aware of the basis upon which the Stewards determined the guilt of Mr Harrison, at least in relation to the second hearing when the Stewards set out their reasons. As the statement made by the Deputy Chairman of Stewards (which is quoted above in the "Background" section) clearly shows, in deciding to convict Mr Harrison on the second occasion, four factors influenced the Stewards in relation to the "honest and reasonable but mistaken belief" defence. This belief argument continues to remain relevant to the question of penalty (even though, as stated earlier, it is no longer available as a defence since the Harper(supra) decision). These influencing factors, despite having been dealt with by the Stewards expressly in relation to the question of conviction only, cannot now be ignored in relation to the question of the

appropriate penalty. The factors need to be commented on in turn in the light of the fresh evidence presented before the Tribunal.

The first factor was that Mr Harrison admitted injecting SAMMY THE BULL on Sunday the 5th of June 1994, with 20 millilitres of Butasyl. Mr Harrison did not break the Rules when he injected the racehorse with the substance. As the Deputy Chairman of the Steward's who was conducting the enquiry on 15 July 1994 stated "*There's nothing wrong with using therapeutic treatment in Racing, the problem is not to race your horse.*" Clearly it is the actual racing of a horse (or in other cases the bringing of a horse to a race course) whilst it has a prohibited substance inside it which constitutes the breach of the Rules of Racing. In Mr Harrison's case the introduction of the prohibited substance was due to a deliberate act which was taken on his part. Often with drug offences, the means of introduction of the drug is unknown, in which case the relevant offence is a breach of Rule 178 rather than Rule 175(h)(ii). I consider that it is helpful to Mr Harrison's position that he was forthright with his admissions as to how the drug in question found its way into SAMMY THE BULL.

The second factor was that the administration of the drug was done on Dr Symons' "advice" from a previous unrelated inquiry. Such a description, which was that used by Mr Harrison, clearly overstates the matter. As Kennedy J states in his reasons in the Full Court proceedings in relation to this matter "*The "advice", however, appears to have been simply an observation made by the veterinary steward in the course of his evidence in a previous unrelated inquiry concerning the applicant, held on 30 November 1993. Further, the observation, it would seem, had related to the administration of oxyphenbutazone and not Butasyl. The latter drug contains sodium salicylate, a substance capable of affecting the rate of excretion of oxyphenbutazone. The applicant kept no record of the administration by him of the drug and he had not consulted the veterinary steward in his official capacity either before or after its administration. Nor had he consulted either of two other veterinary surgeons, who visited his stables regularly concerning the use of Butasyl.*" Save for the last sentence, which I will comment on in the context of the third factor, the other circumstances comprising this factor are established by the evidence. As I will explain shortly I

do not consider that these other circumstances do assist Mr Harrison's position on penalty at all.

The third factor was that the appellant "*did not seek vet. advice in regards to the use of Butasyl and the treatment to "SAMMY THE BULL" despite the fact Dr Davies and Dr Adams visit your stables regularly. However, you did not seek their professional opinion in regards to this treatment.*" The Tribunal has now had the benefit of the additional evidence given by Dr Adams which directly affects this aspect and accordingly impacts on the adjudication of the penalty. The relevant parts of that evidence were quoted earlier.

The material circumstances leading to the drug administration have now been placed in a very different light compared with that which emerged earlier at the two Stewards' inquiries. The Tribunal now knows, from Dr Adams' evidence, that the facts were not as specified by the Stewards in relation to the third factor, although what the Stewards stated at the time was accurate in the light of the information which had emerged before them. The Stewards obviously were not at fault for this inaccuracy. Mr Harrison had been offered all reasonable opportunity to present his case in the best possible light. The reality is that Mr Harrison was responsible for the Stewards having concluded that there was a failure by him to consult his veterinarian in regard to withholding periods for the particular drug in question. He gave clear evidence to that effect. Dr Adams was not called before the Stewards. Mr Harrison failed to tell the Stewards at either of the inquiries firstly, that he had enquired as to excretion times and secondly, that he did receive advice as to the administration of Butasyl. As a result some of the other associated facts which are also helpful aspects as to what he was told by Dr Adams were not conveyed to the Stewards. Surprisingly these facts only emerged from Dr Adams' evidence to the Tribunal which was given the best part of two years later. No explanation or even a passing comment was offered to the Tribunal for these surprising omissions by Mr Harrison at the time when he was before the Stewards. Interestingly the Stewards, who had the benefit of hearing from and observing Mr Harrison during the first inquiry, expressly found him to be forthright in both his presentation and conduct at that inquiry.

As far as I am concerned Mr Harrison's failure to divulge the fact that he consulted Dr Adams must have some adverse consequences to his position. Firstly it reveals that Mr Harrison did not have anything like an impeccable memory in relation to this matter. No other explanation seems plausible particularly as Dr Adams' evidence was not in any way shaken under cross-examination in regard to the consultations by Mr Harrison. The second adverse consequence is in relation to the question of the extent, if at all, that it may now properly be inferred that Mr Harrison was actually influenced by his veterinary's advice. It is not as simple as Mr Harrison having, on successive occasions before the Stewards, failed or omitted to recall receiving such advice or indeed even having consulted his veterinarian on the subject. After all Mr Harrison did state in answer to the question from the Deputy Chairman of Stewards as to whether he consulted his "*...vets for this specific treatment*", "*No sir...*".

Further, I am not satisfied that it can be said that Dr Adams was specifically consulted in relation to the proposed treatment of SAMMY THE BULL approximately a week before the race in question. When asked "*...are you able to say whether he specifically referred to a proposed use of that drug on the horse, Sammy the Bull?*" Dr Adams replied "*No, I cannot recall definitely that he specifically mentioned Sammy the Bull.*" In any event the actual advice which Dr Adams told the Tribunal he gave was not only quite general in nature but also did in fact countenance the risk factors. According to Dr Adams Mr Harrison was told that there was the possibility that the drug could show up even if administered more than six days prior to racing, as the passage in the cross-examination reveals. Further, as quoted earlier, when asked "*At the end of the day, it has to be their decision to take the chance, if there would be any, doesn't it, not yours?*" he answered "*It's not my risk, it's their risk.*"

The Stewards' fourth factor was that "*No records were kept. In your stable you function daily with a work list which after use is discarded. You have no documentation as to when and how much was given to Sammy the Bull and in what manner.*" Even although all of the evidence suggests that administration had occurred some time more than six days prior to racing, and the Stewards

appear to have accepted that fact, I consider that the failure to keep proper records is a less than satisfactory practice in relation to the treatment of a horse with a prohibited substance in preparation of it racing. Further, the applicant's somewhat off-hand and unsystematic manner in deciding when to treat racing animals under his charge are both factors which are relevant to the question of the reasonableness of the belief. In my assessment this somewhat unscientific and unprofessional approach is aggravated in light of the fact that Mr Harrison's memory of all relevant matters is far from reliable as is now evident from Dr Adams' revelations to the Tribunal. Anyone who trains some 60 horses, as Mr Harrison does, should not chance simply relying on memory alone in relation to the treatment of those horses if they are in the process of racing. This is particularly so in the case of treating with prohibited substances where the adverse consequences can be so serious to all concerned.

I am satisfied that the administration to SAMMY THE BULL did occur more than the six days prior to the race as Mr Harrison alleged. Such a conclusion is supported by the low level of the metabolite involved, the likelihood of this horse being swabbed if it won, coupled with what was learnt indirectly from Dr Symons at the earlier hearing and possibly what should have been learnt from Dr Adams had his advices been recalled by Mr Harrison. I am therefore satisfied that Mr Harrison did hold an honest belief that the substance would have been excreted from the horse's system by the time of the race.

The reasonableness of this belief in all of the circumstances is another matter. Mr Harrison should have known that there was a possibility that the drug may not have been fully excreted based upon what Dr Adams told the Tribunal that he discussed with Mr Harrison. It was a risk to cut the timing of the administration so finely prior to the 11 June 1994 race. In the case of the administration of a prohibited substance there is in certain circumstances an absolute offence created under the Rules of Racing. That risk is a huge one and carries with it the potential for devastating consequences. Mr Harrison showed a lack of prudence and indifference in not obtaining specific advice from his veterinarian as to the treatment of the animal on the occasion in question. Mr Harrison clearly did not consult Dr Symons the veterinary Steward. It was foolhardy to base a treatment

regime based upon an understanding of what was stated at the ROKEBY ROAD Steward's inquiry. All of these factors coupled with what I have already said regarding the approach in determining the appropriate time to treat his horses and the lack of records lead me to conclude that Mr Harrison's belief cannot be said to be reasonable.

Nothing which was submitted on Mr Harrison's behalf causes me in any way to change my views, as expressed in detail in O'Donnell (supra), that a disqualification rather than a suspension or a fine is the correct penalty to be imposed in respect of the administration of a substance of this type. This is despite the additional cases which senior counsel for the appellant referred the Tribunal to which were not dealt with in McPherson (Appeal No. 208 determined 1 May 1995). I accept the submissions put to me by Mr Davies QC in regard to the application and importance of the O'Donnell decision to the outcome of this matter. I see no need to repeat the analysis of the numerous cases referred to and to restate my reasons in order to determine this matter. I consider that many of the relevant circumstances, including the nature of the drug involved in Mr O'Donnell's matter, are of sufficient similarity in relation to the key issues in order to have application to this matter.

Without the benefit of the fresh evidence produced on Mr Harrison's behalf I would have remained satisfied that the period of 10 months was an appropriate period of disqualification. Initially after hearing Dr Adams' evidence and before I had time to analyse its impact I did feel some sympathy for the view that the 57 days said to have already been served was a sufficient disqualification in all the circumstances. However, mature consideration has led me to conclude that despite having previously offended the same rule not so much earlier, Mr Harrison did consciously elect to take a chance and race SAMMY THE BULL. Unfortunately for him this gamble did not come off and a serious breach of the Rules has resulted.

What period has already been served? As far as I can assess Mr Harrison has served from 15 July 1994, being the date of the first conviction by the Stewards, to 22 August 1994 when the penalty was quashed by the Tribunal, and the period 3

November 1994, when the appeal was dismissed by the Tribunal, to 18 November 1994 when the order nisi was made. Collectively I calculate this to be slightly shorter than the 57 days referred to by both counsel.

As Judge Goran stated in V P Sutherland and the Owners of The Horse "Red Poco" (referred to in NSW Racing Appeals Record of Decision Vol 1 at p.146) dealing with the drug rules in racing:

*"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 drug free racing policy, which is encapsulated in the relevant Rules of Racing is designed to prevent positive swabs on race day occurring and are intended to punish those who offend. As stated by Owen and Anderson JJ in Harper v The Racing Penalties Appeal Tribunal of Western Australia (1995) 12 WAR 337 at 347 in the context of a drug offence:

*". . . the need to maintain integrity in horse racing and to do so manifestly, is easily seen to be imperative and of paramount importance."*

The seriousness with which I deal with drug offenders in racing should be clear from my reasoning in O'Donnell (supra).

Trainers are not just answerable to the Stewards in relation to drugs. They also owe a duty to the owners who place horses in their care to ensure that the Rules are complied with. In this context too, the failure to maintain records which can be produced to satisfy owners of treatment regimes involving their horses is not a practice to be encouraged. In this matter Mr Harrison's explanation for destroying such records that he did have was that he did not need them because he did not

charge his clients for administering drugs to their animals. In my opinion such an explanation is not a satisfactory one.

The damage to the racing industry occasioned by this offence clearly warrants a much greater penalty than that which has already been served. I do agree with senior counsel for the respondent that the actual period of disqualification served to date has in reality been somewhat ameliorated by the benefits of the suspension of the operation of the penalty.

The two negative conclusions to be drawn from the fresh evidence which are previously identified, namely the state of Mr Harrison's memory and the uncertainty as to the taking on board of Dr Adams' advice, should weigh heavily in the equation in arriving at an appropriate period. They are both factors adverse to the appellant's position regarding penalty. Despite this the new evidence does put matters in a somewhat different light and one which is helpful to the appellant's position. For example, based on what Dr Adams has told the Tribunal it would appear that the safe withholding period for an injection of a 20 millilitre dose of Butasyl is now in fact more like 7 days whereas previously it was 6. This consideration should be taken into account in favour of the appellant as it can be said that it makes his belief less unreasonable in all of the circumstances.

The Act requires the Tribunal to "*act according to equity, good conscience and the substantial merits of the case*" (s11(1)(b)). Unfortunately, with the way the Rules are framed, there can be no exactitude in coming to these penalties. No minimum penalty, and for that matter no maximum, are prescribed by the Rules and no guidance is given in the case of repeat offenders. Usually in referring to penalties imposed in other cases, particularly in jurisdictions outside this State, all of the surrounding facts and circumstances which have influenced the ultimate outcome in relation to the penalty are not known. Accordingly, one must do the best one can with whatever relevant material is available. The need for consistency must be recognised at the same time as the need to balance justice for the individual with the wider interests of the industry as a whole. In weighing up Mr Harrison's personal circumstances, including the consequential

impact on others associated with him, as well as all of the other relevant factors I consider that a 10 month disqualification in this case is somewhat severe.

I conclude that a further period of 6 months disqualification, to be served in addition to the disqualification already served, is the appropriate penalty which should be imposed on Mr Harrison.

*Dan Mossenson*

DAN MOSSENSON, CHAIRPERSON



**THE RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR L B ROBBINS**  
**(MEMBER)**

**APPELLANT:**

**DAVID HARRISON**

**APPLICATION NO:**

**A 30/08/215**

**DATE OF HEARING:**

**8 May 1996**

**DATE OF DETERMINATION:**

**10 July 1996**

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IN THE MATTER OF the remission hearing ordered by the Full Court of the Supreme Court of Western Australia in relation to the appeal made by Mr D Harrison against the decision of the Western Australian Turf Club Stewards on 26 August 1994 imposing a penalty of 10 months disqualification under Rule 175(h)(ii)

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Mr MJ McCusker QC, on instructions from Karp & Monaghan, appeared for the appellant

Mr RJ Davies QC appeared for the respondent.

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**BACKGROUND**

This matter has been remitted to this Tribunal by order of the Supreme Court made on the 8 May 1996 whereby it was ordered that:

IN THE MATTER of an Application for a Writ of Certiorari against the Racing Penalties Appeal Tribunal of Western Australia:

"This return of an Order Nisi coming on for hearing on the 11th day of October 1995 and upon reading the Application Book herein and hearing Mr R J Nash of Counsel for the Applicant and Mr A N Van Merwyk of Counsel for the Second Respondents and the Court having ordered that the Order Nisi stand for judgment and the order Nisi standing for judgment this day THE COURT ORDERS THAT:

1. The Order Nisi be made absolute.
2. The Order of the Second Respondents disqualifying the applicant for 10 months be quashed.
3. The matter be remitted to the First Respondent for further consideration.
4. The Second Respondents pay the Applicant's costs of the application including all reserved costs, to be taxed.

BY THE COURT  
P Johnson  
REGISTRAR"

It is to be observed, at once, that this Order as extracted, and under the hand of the Registrar is to the effect that the Order of the Stewards (Second Respondents) whereby they disqualified the Applicant for 10 months is thereby quashed and the matter is remitted to this Tribunal (First Respondent) for further consideration.

This Order of the Supreme Court, as extracted, directed as it is to the Stewards, quashing their Order (sic) disqualifying Mr Harrison for 10 months means that this Tribunal must now consider what function it performs upon the remission from the Supreme Court.

The Order Nisi for a Writ of Certiorari was directed to the First Respondent ("the Tribunal") for the removal into the Supreme Court, for the purpose of being quashed, the decision of the Tribunal (my underlining) made on 3 November 1994, whereby it dismissed an appeal against the conviction made against the Applicant on 26 August 1994.

The decision of His Honour Mr Justice Kennedy reveals that the ground for the Order Nisi which was upheld was:

"(g) that the first respondent has made an error of law on the face of the record by failing to disclose its reasons for confirming the 10 month disqualification imposed by the second respondent and failed to consider the issue of penalty for itself."

In the particular circumstances of this case and taking into account:

- (i) the Order Nisi for a Writ of Certiorari to quash the decision of the Tribunal;
- (ii) the ground of appeal (g) which was upheld including as it did that the First Respondent (the Tribunal) failed to consider the issue of penalty for itself;
- (iii) the extracted Order of the Supreme Court quashing the Order of the Stewards disqualifying the Applicant for 10 months;
- (iv) paying particular regard to the direction of His Honour Mr Justice Kennedy that it is important to know whether the Tribunal considered that the Applicant acted knowingly or negligently, and to what extent the Tribunal believed he was influenced by the remarks made by the veterinary steward at the earlier inquiry, it is necessary to decide whether the Tribunal is really reviewing the exercise of discretion by the stewards or whether the Tribunal is deciding the case de novo.

It is desirable that something be said about the usual function of this Tribunal in proceedings before it. Mr Davies QC for the Stewards was at pains to point out that:

"this remains now, as it was then a review process",

and this Tribunal was:

"required pursuant to their decision to consider the findings of fact in relation to the matters that they mentioned, amongst others, but in a review context (emphasis added). And you are required to say what you believed to have been proper findings open on the evidence on those and whether the findings the stewards made on those were properly open to them and therefore not to be disturbed and you are required to say why you believe, as you did in your decision way back on whenever it was, why you took the view that Eastern States tables of statistics

notwithstanding disqualification can be, in this case, regarded by those required to make the decision in the first place, a proper determination."

It was further submitted that:

"to read what they said literally would be to suggest that you have to say, 'We think disqualification is right for these reasons.' "

"What you have to say is whether or not you believe disqualification to be a proper option open on the facts of this case, as you find justified findings on them to have been made; whether disqualification was an option properly open to the primary tribunal in the exercise of its discretion which you now review. Those distinctions will never go away. They are important. Anarchy reigns otherwise. I say that advisedly. This tribunal has been consistent on that, from the word "go". It said in the Maynard case, "We as a review tribunal are equally able to judge on the accepted facts, the found facts, the question of reasonableness." We have no quibble with that. That's clear law. A review body is equally able to view the judgments for itself and the inferences for itself. But without exception, this tribunal has consistently adhered to the fact that it is an appellate tribunal, reviewing the discretion. To change that would be anathema to the word "appeal". One would have a situation where the stewards say, "Considering all these matters, we exercise our discretion and we say disqualification and the appeal tribunal would be saying, "Well, yes. We can see why you did that. We think that wasn't all that bad, but we don't like disqualification." I'm not saying you've ever done it. I'm not saying you should. But if you harkened directly to why the Full Court sent the matters back to you, they really seemed to be speaking of it as your decision to choose disqualification as a method of disposition, and it isn't with respect. It was your decision in reviewing the imposition of the penalty, to determine it to have been properly open and all the facts you found to have been justifiably found to the primary tribunal. It's upon that that you were told to give reason -- not to reconsider your whole decision. I don't for a moment suggest you don't have to take into account the way that my learned friend, Mr McCusker, has ably put it; of course you do. But you have to guard against the idea that this is a re-argument of the whole question of penalty, because a Supreme Court has said you were wrong

in the first --- it has not. Had it said you were wrong and inevitably wrong, it would have quashed the penalty, full stop, and not sent the matter back to you. It said, as it said in McPherson, "Give us reasons because they really are essential in the circumstances." They are our submission, if you please."

Mr McCusker QC submitted that:

"The Full Court considered the tribunal erred in law in failing to give its reasons."

"It referred the matter back to this tribunal for consideration and to give its reasons for the penalty which this tribunal considered to be appropriate."

"This tribunal is in a totally different situation from an appellate court in that the basis upon which it may determine an appeal is virtually at large."

"It is indeed... a rehearing"

"Its a matter of a proper rehearing. It therefore means that when the re-hearing is concluded this tribunal has to, as the Full Court has said, reach its own determination, etc... at the end of the day, its this tribunal's determination on a rehearing, which is what it was, and on the basis that (sic) the further evidence produced before it and the arguments put to it. As the Full Court said, that determination must be supported by reasons, because it is the tribunal's determination."

"So, its not a simple matter of saying, 'Well, we'll now give our reasons why we thought that the stewards were within the discretionary range of penalty.' It's really not that simple. The reasons must be reasons for the determination by this tribunal based on everything that went before it and was put before it, including but not limited to, the material that was before the stewards."

These diverse submissions make it necessary to examine the nature and function of this Tribunal in these particular circumstances. The preamble to the Racing Penalties (Appeals) Act 1990 reveals that this is an Act to constitute the Racing Penalties Appeal Tribunal of Western Australia, to confer jurisdiction in respect of appeals against penalties imposed in disciplinary proceedings arising from, or in relation to, the conduct of...horse racing....., and for related purposes.

An appeal is a remedy given by statute (in this case Section 13 of the racing Penalties (Appeal) Act 1990) and the nature of the appeal must be considered and determined in the context of the Racing Penalties (Appeal) Act 1990 itself. Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v. Dignan (1931) 46 CLR 73 at p.108; Commissioner for Railways (NSW) v. Cavanough (1935) 53 CLR 220 at p.225. Where there is an appeal stricto sensu the question is whether the judgment the subject of the appeal was correct when it was delivered that is to say whether the order appealed from was correct based upon the material which the lower court had before it. There is a distinction to be drawn between an appeal stricto sensu and an appeal by way of rehearing. An appeal by way of rehearing is by trial over again on the evidence used in the Court below but there is special power to receive further evidence. In re Chennel Jones v. Chennell (1978) 8ch.D. 492 at p.505 per Jessel MR.

In Powell v. Streathan Manor Nursing Home [1935] AC 243 at 249 Viscount Sarkey C.C. said that:

"there are different meanings to be attached to the word 'rehearing'"

and in Builders Licensing Board v. Sperway Constructions (Syd) Pty Ltd [1976] 135 C.L.R. p.616 at 621 Mason J said:

"Where a right to appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect. Despite some suggestion in argument to the contrary, I do not read *Ex parte Australian Sporting Club Ltd*,; *Re Dash*(20) as enunciating such an absolute rule. There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and I exclude for present purposes the case of an appeal to a Federal Court exercising the judicial powers of the Commonwealth under Ch.III of the Commonwealth Constitution. The nature of the proceedings before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before

the authority. There may be no provision for hearing at first instance or for a record to be made of what takes place there.

The authority may not be bound to apply the rules of evidence or the issues which may arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo. On the other hand the character of the function undertaken by the administrative authority in arriving at its decision may differ markedly from the instances already supposed. The authority may be required to determine justiciable issues formulated in advance; to conduct a hearing, at which the parties may be represented by barristers and solicitors, involving the giving of oral evidence on oath which is subject to cross examination; to keep a transcript record; to apply the rules of evidence; and to give reasons for its determination. In such a case a direction that the appeal is to be by way of rehearing may well assume a different significance.

But in the end the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive or quasi-judicial function, clarifications which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent, a question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing."

Further examination of the provisions Racing Penalties (Appeal) Act 1990 reveals wide powers given to the member presiding to determine any question relating to jurisdiction Section 11(3)(a)(i); to admissibility of evidence Section 11(3)(a)(ii) and law and procedure Section 11(3)(a)(iii), furthermore an appeal shall be heard and determined upon the evidence at the original hearing (my underlining) 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 (my underlining) Section 11(3)(c). In addition, the Tribunal may inform itself on any matter in such manner as it thinks fit, and admit any evidence considered by the

member presiding to be relevant, notwithstanding that that evidence would not be admissible in a court of law; Section 11(3)(e)(ii). A determination of the Tribunal in relation to an appeal shall be taken to be, and given effect to as though it had been also the determination of the ... stewards from which the appeal was made; Section 14(1)(a) Racing Penalties (Appeals) Act 1990.

In Strange-Muir and another v. Corrective Services Commission of New South Wales and another 1986 5 N.S.W.L.R. p.234 at 249 McHugh JA. said:

"When the legislature gives to a court the power to review or hear an "appeal" against the decision of an administrative body, a presumption arises that the court is to exercise original and not appellate jurisdiction: *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; 64 WN 63. The court hears fresh evidence and determines the case as at the date of hearing on the materials and the law then applicable. The rule is not an absolute one and gives way to any contrary indication in the terms of the statute conferring jurisdiction: *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621. The position with respect to the hearing of an appeal by one administrative body against the decision of another administrative body is perhaps not so clear. No doubt the matter must ultimately be determined by the terms of the statute which confers the right of appeal. Unfortunately, however, legislation rarely gives any definite indication as to the nature of the hearing.

In *Horne v Lock* [1978] 2 NSWLR 88, Sheppard J held that an appeal to an Appeals Board by an employee against the failure of his employer to promote him had to be determined on the facts which existed at the time of the employer's decision. His Honour reached this decision notwithstanding that the Board had power to hear evidence. He held that the Board could hear evidence of events up to the date of the employer's decision whether or not they were before the employer but could not hear evidence of events after that date. No doubt the learned judge's decision in confining the evidence to the date of the employer's decision was influenced by the terms of the legislation in question. But I think that his Honour was also influenced (at 101) by the inconvenience which might occur if

an administrative decision of the employer could be set aside by relying on facts which did not exist at the date of the original decision. *Horne v Lock* also decided that the issue for the Board was whether the decision of the employer was objectively correct and not whether it was reasonably open on the facts. (my underlining) The decision was approved on this point by Smithers J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 430; 24 ALR 577 at 599. In that case the Full Court of the Federal Court considered the nature of the jurisdiction of the Administrative Appeals Tribunal in reviewing an administrative decision. That Tribunal has power to admit evidence on the review. Bowen CJ and Deane J said (at 419; 589):

"The question for the determination of the Tribunal (my underlining) is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal."

This passage brings out the point that, although the Administrative Appeals Tribunal may hear evidence which was not before the administrator, nevertheless it is the correctness of his decision which remains the focus of review. That is to say, the Tribunal does not itself make a new decision but reviews the original decision of the administrator. (my underlining)

It is true that these two decisions were not uninfluenced by the terms of the legislation which they were considering. Nevertheless they are consistent with the principle that, in the absence of a contrary legislative indication, the conferring of a right of appeal to an administrative tribunal against an administrative decision is not a grant of jurisdiction to make a fresh or original decision. (my underlining) Uniformity of approach in this area of the law is highly desirable. Accordingly, I think that those two cases should be taken as establishing that there is a presumptive rule that in an administrative appeal to an administrative body the issue is whether the decision was correct when it was made. The hearing is not de novo. This is so whether or not the tribunal is empowered to hear additional evidence.

Moreover, in a case such as the present, there are strong policy reasons in favour of the presumptive rule. The decision to appoint or recommend is the decision of the Department Head or appropriate officer of the "employer". His decision is to be made on facts and opinions which he has or ought to have. If the Tribunal had power to make a fresh and independent decision on the material in existence when it heard the appeal, the "decision" of the Department Head or other officer would be but a preliminary step in the selection process.

The Tribunal in the present case is not a judicial body. It is engaged in the task of reviewing an administrator's decision as to whether one employee is more entitled to a position than another. In some cases every member of the Tribunal may be a layman. The Tribunal does not enforce the legal rights or duties of any party to the hearing although, of course, the employer is bound to give effect to the Tribunal's decision. The Tribunal is, therefore, an administrative body. Prima facie its duty is to determine whether, on the materials before it, the original decision of the employer to appoint or recommend an appointment was correct. I can see nothing in the terms of the Act which displaces the presumptive rule.

In the case of Re Coldham; Ex parte Brideson (1990) 170 C.L.R 267 at 273, Dean, Gaudron and McHugh JJ. said:

"In *Strange-Muir*, the Court of Appeal of New South Wales held that, on an appeal to the Government and Related Employees Appeal Tribunal, whether an appellant-employee was "more entitled to be appointed to the vacant office than the employee in whose favour the decision is made" had to be determined on the evidence that existed at the date of the employer's decision. In his reasons for judgment in that case, McHugh J.A. said (20) that it should be taken as established that there is a presumptive rule that in an administrative appeal to an administrative body the issue is whether the decision was correct when it was made". His Honour considered that in this respect an appeal to an administrative tribunal against an administrative act was to be contrasted with an appeal to a court against an administrative act. Be that as it may, it is well settled that, when the legislature gives a court the power to review or hear an "appeal" against the decision of an

administrative body, a presumption arises that the court is to exercise original jurisdiction and to determine the matter on the evidence and law applicable as at the date of the curial proceedings: see *Ex parte Australian Sporting Club Ltd.; Re Dash* (21). Nevertheless, whether the right of appeal against an administrative decision is given to a court or to an administrative body, the nature of the appeal must ultimately depend on the terms of the statute conferring the right: *Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.* (22).

In my opinion given the whole legislative scheme of the Racing Penalties (Appeals) Act the presumptive rule ought to apply. The Tribunal is set up under statute as an appeal Tribunal, it is the determination of stewards that becomes the subject of appeal, this essentially involves a review of the exercise of discretion. Whilst it must be said that the answer to the question of what is the nature of the hearing is not entirely free from doubt, in my opinion the purpose of the legislation and the legislative scheme itself suggests that the Tribunal is generally to review the exercise of the discretion of the stewards, and not make a decision de novo. I have come to that view notwithstanding the wide powers of the Tribunal to inform itself on any matter in such manner as it thinks fit, and the wide power to admit further evidence and to act according to equity, good conscience and the substantial merits of the case. If the Tribunal were to act de novo in relation to appeals before it, then the determination of the stewards would be a mere step in the decision which the Tribunal then makes for itself. The whole legislative scheme and the purpose of the Act in my opinion suggests that the Tribunal is not to act de novo but is to review the exercise of discretion made by the stewards.

In my opinion the power to receive further evidence ought not to be regarded as determinative of this question as to the nature of the hearing but rather the circumstance that the appeal is to be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was made suggests that the role of the Tribunal primarily is to review the exercise of discretion residing in the stewards.

The particular circumstances of the form in which this matter has been returned to this Tribunal (ie the quashing of the stewards Order (sic) of disqualification for 10 months, and the apparent direction of His Honour Mr Justice Kennedy for the Tribunal to identify whether "the Tribunal" considered the applicant acted knowingly or negligently and to what extent "it" (sic) believed he was influenced by the remarks made by the veterinary steward at the earlier inquiry place this Tribunal in the position that there is at present no determination of the stewards. That determination is quashed. The Tribunal legally speaking has nothing to review. In my opinion one course open would be for this Tribunal to refer the matter back to the stewards for them to impose an appropriate penalty and request that they identify with some precision the reasons for such penalty. Assuming that course to be followed and even assuming the further evidence of Dr Adams was made available, and the other documentary evidence was made available that was admitted before this Tribunal, in my opinion the likely result is that there would be a re-imposition of a period of disqualification of 10 months. That would place upon Mr Harrison the burden of appealing again to this Tribunal from that determination. That would be an unreasonable burden and ought to be avoided. There is in this case the added difficulty that the stewards did not identify what factors they took into account in arriving at a disqualification as the appropriate penalty as against other penalties (save for saying that breach of the Rule was a serious matter) or why the period of 10 months was chosen in all the circumstances.

For the purposes of this particular case, I am prepared to assume that were the matter to be remitted back to the stewards they would inevitably impose the same penalty of 10 months disqualification even with the new material now made available. There would be ample and sound and proper reasons for so doing. In taking this approach I consider the Tribunal would be acting according to equity, good conscience and the substantial merits of the case.

It is clear now in Western Australia that following the analysis of the range of penalties for this type of offence in O'Donnell that the stewards favour disqualification.

In my opinion this matter should now be approached by the Tribunal upon the basis that the stewards would if the matter were returned to them necessarily re-impose a penalty of not less than 10 months disqualification but taking into account the various periods of disqualification already served.

Mr Harrison trained a horse named SAMMY THE BULL which won a race on 11 June 1994. A urine test conducted after the race showed it to contain 0.3 micrograms per millilitre of an anti-inflammatory agent, oxyphenbutazone. Oxyphenbutazone is a prohibited substance within the meaning of Rule 175(h) of the Australian Rules of Racing. It was admitted by Mr Harrison that he injected the horse with 20 millilitres of Butazyl of which oxyphenbutazone is the active metabolite. (See Dr Symons at p.9 Stewards Inquiry 15th July 1994). At the same inquiry Mr Ronald Goddard gave evidence in the following terms.

CHAIRMAN: Right thanks. Mr Goddard you are the Turf Club Investigator?

GODDARD: Yes Sir.

CHAIRMAN: And you attended Mr Harrison's property?

GODDARD: Yes.

CHAIRMAN: Could you please report to the inquiry please?

GODDARD: "Ronald Joseph Goddard states: - I am the Race-course Investigator with the Western Australian Turf Club and a Special Police Officer with the Western Australian Police Force. At about 4.30pm Friday 8 July 1994 in company with Mr Gregory Mackintosh, Assistant W.A.T.C. Investigator, I attended the home and training establishment of W.A.T.C. licensed trainer David Robert

Harrison situated at Lot 36 Surf Road, Secret Harbour. There I handed a letter to Mr Harrison from Chairman of Stipendiary Stewards Mr F J Powrie. Mr Harrison opened and read the letter. He said "I cannot believe this". I said "Have you been treating the horse SAMMY THE BULL before he raced on 11 June, 1994?" He said "yes". I said "Did you treat the horse with Bute?" He said "yes". I said "How long before it raced on 11 June, 1994 did you treat the horse?" He said "6 1/2 days, Peter Symons said one shot 20 ml 6 days before race would be clear. I thought 6 1/2 days would be safe, it can build up with powder". I said "How did you treat the horse?" He said "injection". I said "How much Bute did you inject into the horse?" He said "20ml one shot". I said "Where did you inject the horse?" He said "Into the vein". I said "Both front joints". I said "Have you any of the Bute here?" He said "yes", then took us to his feed room where he removed a bottle named Butazyl from his refrigerator and handed it to me and stated "that's it". I marked the bottle for identification. Mr Mackintosh and I then left Mr Harrison's property. On Monday the 11th July, 1994 I attended the Racing Chemistry centre, 125 Hay street, East Perth, where I handed the bottle to Ms Jean Ralston, veterinary Officer and Senior Research Officer, who took a sub-sample from the bottle for analysis. I now produce that bottle. On Thursday the 14th July, 1994 I received a report from Mr Sam Ngo a Chemist and Research Officer with the Racing Chemistry Centre. I now read and produce that report. (A copy of the report was produced).

The report showed that as a result of examination the presence of phenylbutazone and salicylate was confirmed in the sample.

The Deputy Chairman of Stewards then said.

CHAIRMAN: Right Mr Harrison, you have heard the evidence so far, can you give an explanation why oxyphenbutazone has been detected in the post race sample taken from SAMMY THE BULL?

HARRISON: Can I give any explanation why it was there?

CHAIRMAN: Yes.

HARRISON: I gave him one shot sir.

The Appellant went on later to say that:

HARRISON: It's not the same..... but still. All I can say is I just did that shot didn't, I don't remember saying six and half days, but I must have said six and half days because I gave the shot on the Sunday morning, preceding the next Saturday afternoon, so I suppose I just said six and half.

CHAIRMAN: What time Sunday morning?

HARRISON: Well it'd be between eight and ten.

CHAIRMAN: And you gave it a shot of what Mr Harrison?

HARRISON: Butazyl, twenty mils.

CHAIRMAN: Twenty mils. of Butazyl, and where did you inject?

HARRISON: In the jugular.

CHAIRMAN: And why did you do that?

HARRISON: In, ever since that last inquiry when I had, I had a build up of powders and everything, which I've been using for all those years for therapeutic treatments for the, my horses which were a little bit jarry or something you know, maybe had a little tiny bit of swelling in the joints or whatever you know, I, if it's, that was the method, that was the treatment I was using before, since that inquiry when I was told that it was a build up of powders, which I wasn't aware of,

before that, since that, since that inquiry when I was told there was, there was a build up of powders and .....drag it on a bit longer, I asked Dr Symons well what can I do, if the horses are a little bit stiff or something I've got a week before, and so, I mean I'm not that stupid, I mean there wouldn't be anybody in the world that would be stupid enough to go close with that, with the same stuff what they went for six months ago.

CHAIRMAN: Right, when did you ask Dr Symons that?

HARRISON: In the last inquiry.

CHAIRMAN: In the last inquiry which was the ROKEBY ROAD inquiry?

HARRISON: Yes sir, and whether it was me (sic) or whether it was Dr Davies I can't remember I haven't got any..... and he said you can give one shot six days before, so, I wouldn't be stupid enough to go anywhere near close with that because I'd realise, anybody in their right mind would realise that, obviously if you are one of those people who don't, you know, you're going to scrutinise for that one, for that one stuff that I've already been picked up for, so I know people are going a lot closer and I'm running around telling them don't be stupid and don't, don't take the risks, and how stupid do I look now, I've gone further away than what, Dr Symons said I can give it, you can give it, you can give one shot six days before but when I say that I've got to be super conservative because I am the Turf Club Vet. so, with that I thought well obviously..... that before and because he's the Turf Club Vet. and acting under your rules and everything he's got to be super conservative and say six, so I haven't gone five, that's what they say, by a lot of vets. I haven't gone six where it's supposedly safe by the Turf Club, I've gone six and a third so.

One might be forgiven for thinking that in this answer given first, that Mr Harrison was intending to convey the fact that he (personally) had asked Dr Symons 'what can I do, if the horses are a little bit stiff or something I've got a week before.' On further questioning by the Chairman however he qualified his answer by saying, 'and whether it was me or whether it was Dr Davies I can't remember I haven't got any... and he said you can give one shot six days before, so I wouldn't be stupid enough to go anywhere near close with that etc."

The Tribunal was given an extract of the transcript of the hearing before the Stewards in the matter of Rokeby Road which reveals that neither Dr Davies nor Mr Harrison asked any question which remotely resembled asking what Mr Harrison could do if the horses are a little bit stiff or something that he had a week before (the race presumably). The Tribunal was given pp 42, 43 which were marked as exhibit 3 from the Inquiry Rokeby Road.

The whole of those two pages from that inquiry are as follows:

"INQUIRY - TRAINER MR D R HARRISON "ROKEBY ROAD" 42

administering phenylbutazone in the feed, how many days would you expect the drug to have an anti-inflammatory affect for?

SYMONS: It would definitely have its strongest affect closest to administration because there's more drug, a higher concentration of drug there. How long that affect last for, I don't know, there must be some stage where it is relatively ineffective, I don't know where that stage is and I know of no reference that I can find, that does state what is an ineffective concentration.

DAVIES: Do you think the duration of its affect might be related to the plasma half life of the phenylbutazone or its metabolites?

**SYMONS:** Well it's more likely to be related to the fact that anti-inflammatory agents get concentrated in the inflammatory fluids surrounding an area. They get concentrated there and they are excreted more slowly from there, that would be where it is more likely to, where we would be more likely to be able to judge how long it is effective for.

**DAVIES:** Do you think the levels of oxyphenbutazone found in this particular case are consistent with the powders and the Tomanol and the prior powders given in this case?

**SYMONS:** Happy to say that it looks like it is towards the end of the administration and it probably fits with what was given, and it could be at those levels that its having very little affect. I can't say for sure, I accept those propositions.

**DAVIES:** What would you consider a reasonable withdrawal period for multiple dosing of phenylbutazone?

**SYMONS:** Well I look at this regime and I agree with you that you can give a six day treatment with phenylbutazone and when I do that I say an I.V. injection, one single injection. I get worried when I look at this and say, it's been fed because phenylbutazone binds to the fibrous part of the feed and extends the excretion time. It has a course, it is a four day treatment so then again I would extend the treatment time again, and also the Tomanol I have a reference here that says, with the two anti-inflammatories in Tomanol, it also extends the excretion time for phenylbutazone. So I have got to be super conservative in my job and I would be giving a recommendation longer than seven days, but...

**CHAIRMAN:** But. Sorry.

**SYMONS:** ...Because I have to be so conservative.

**CHAIRMAN:** Mr Harrison, this horse when you fed him in the morning, who else put these sachets in his feed, just yourself?

**HARRISON:** Yes sir.

- CHAIRMAN: And when you fed him in the morning, you said he sort of eats up all right getting towards a race but sometimes he leaves a bit of it. On the last feed which was the two grams on the Thursday morning, right. What would his next feed be, do you give him a lunch feed, lunch time feed?
- HARRISON: We tip a different feed in about 11 o'clock.
- CHAIRMAN: Yes, so he's a bit of a slow feeder is he or what, this horse?
- HARRISON: During the day most horses are yes.
- CHAIRMAN: Yes.
- HARRISON: Once they're racing, they seem to eat the night feed, not much during the day when it's a bit hotter.
- CHAIRMAN: So just give me some hint, say for instance on the morning that you put his feed in with the two sachets and he's eating away. The dipper that he gets at 11 O'clock, just on top of the rest of the feed, on top of it?
- HARRISON: Yes just throw it in, give it a quick mix.
- CHAIRMAN: Yes but I mean you don't take the morning feed out and then put the one dipper?
- HARRISON: No sir.
- CHAIRMAN: So the 11 o'clock top up that just sits there until when?
- HARRISON: Until they go to the races or until the night feed comes.
- CHAIRMAN: No well on the Thursday he wasn't going to the races, so the night feed.
- HARRISON: Yes, until they get fed that night, he would have been fed that night, yes it just stays there.
- CHAIRMAN: So is it feasible that this morning feed, bear in mind that he might not eat it up all at, like he's fed after he's worked in the morning I presume, was he?"

The extract shows that the question was to do with the reasonable withdrawal periods for MULTIPLE DOSING OF PHENYLBUTAZONE, and that Dr Symons' answer referred to a six day treatment with Phenylbutazone. Dr Symons went on to say that when phenylbutazone has been fed as a four day treatment, feeding it per se extends the excretion time, and the four day period extends the excretion time, and he had a reference to the effect that Tomanol because it had two anti-inflammatories also extended the excretion time for PHENYLBUTAZONE. Dr Symons went on to say that he would be giving a recommendation longer than seven days because he had to be super conservative in his job. The only substance referred to was PHENYLBUTAZONE not BUTAZYL.

CHAIRMAN: Alright, well tell me about SAMMY THE BULL, he's got a history of soreness?

HARRISON: No, the horse...

CHAIRMAN: The horse races in bandages?

HARRISON: Just for precaution sir, because he's my best horse and he's a little bit straight in front and he's not sore, he's never been sore.

CHAIRMAN: Right, well has the horse had a history of soreness?

HARRISON: No sir.

CHAIRMAN: It hasn't

HARRISON: No.

CHAIRMAN: Has it had treatment before this?

HARRISON: No sir.

CHAIRMAN: It's had no treatment prior to the injection?

HARRISON: No treatment leading up to the injection?

CHAIRMAN: Yes, well are you....

HARRISON: No.

CHAIRMAN:...you say that six day, on the Sunday you gave it twenty mils. Of Butazyl?

- HARRISON: Yes sir.
- CHAIRMAN: Prior to that in SAMMY THE BULL's racing history has it had treatment?
- HARRISON: Oh yes, well, see what happened sir, how, how I train horses, I know that a lot of people gallop...
- CHAIRMAN: Well that, that, not to interrupt you Mr Harrison but, I want to know the history of SAMMY THE BULL?
- HARRISON: Well, the way I used to train my horses before, I had them on treatment before, if they, you see I gallop them a week before they race, and if, I know a lot of people gallop them about three or four days before they race but I gallop them a week before and if they happen to pull up a little bit stiff or fraction of a bit of fluid in the joints which most horses will, after a gallop, and like yourself if you, if you do a bit of hard exercise you pull up a little bit stiff or something you know, it takes a few days to get it out of your system, so, before he was on those other treatments like most of my horses, if, if...
- CHAIRMAN: Well tell me those treatments?
- HARRISON: What the treatments I used to use before sir, the nine days of powders leading up to the six, six and half days sir.
- CHAIRMAN: Nine days you had equipalazone?
- HARRISON: Yes the same as ROKEBY ROAD. I forget it went right out of my mind till now.....
- CHAIRMAN: Right.
- HARRISON: It was nine days when I was leading up, the same, the same sir, regime as the last one.
- CHAIRMAN: Well can you tell me that?
- HARRISON: Well I think it was, I think it was nine days, four sachets I can't, you know.... nine days, eight days, and then I think seven days, 15 of Tomanol and two powders in the morning, just off the top of my head.

- CHAIRMAN: So SAMMY THE BULL.....
- HARRISON: I've tried to block all that out.
- CHAIRMAN: SAMMY THE BULL had that treatment regime, he had that treatment regime?
- HARRISON: I can't tell you, sure sir I'd say he would've done because most of the horses were getting that before, before I found out that it was a build up in the system.
- CHAIRMAN: Right, well Mr Harrison,...
- HARRISON: He's always, because he's so straight in front, he's not, he's never ever been sore, but after he galloped he pulled with a little bit of, tiny bit of swelling or something.
- CHAIRMAN: Yes.
- HARRISON: And you just get rid of the swelling. Because it's allowable, you think it's allowable and safe, a safe distance from the race.
- CHAIRMAN: SAMMY THE BULL raced on the eleventh, the Sunday before makes it the fifth of June.
- HARRISON: Yes sir.
- CHAIRMAN: That's when you have said that you injected the twenty mils. of Butazyl, right?
- HARRISON: Yes sir.
- CHAIRMAN: Prior to that what treatment did this horse have?
- HARRISON: Never ever had any treatment, the horse isn't sore sir, never, never has any treatment.
- CHAIRMAN: But what have you been talking about for the last five minutes about after galloping?
- HARRISON: I only gallop a week apart, and they, a week before "he may get, he may get an injection, one injection sir..
- CHAIRMAN: Well I need to know when, did he, on the fifth of June he received the treatment right, which was a Sunday morning you gave him twenty mils. I.V.?
- HARRISON: Yes sir.

CHAIRMAN: Right.

HARRISON: Yes sir.

CHAIRMAN: When was the last time SAMMY had treatment?

HARRISON: I've rarely ever given him a horse treatment unless it's a week before the race, I don't, because of the build up of powders and everything the last time, I very rarely give him any treatments because, I just take him to the beach and all that sort of stuff and he's, the only really time they give him any treatment, any of my horses, is a week before or six days before the race because I'm not going to take any chances.

CHAIRMAN: Can you recall SAMMY THE BULL?

HARRISON: Or if that, if a horse is going shin sore or something and I want to find out if they're worth bringing back, I might give them one shot just in the last gallop or something.

CHAIRMAN: Right.

HARRISON: If they're going to go sore or before they're ready to race, and I just freshen them up, whatever, whatever happens you know like..

CHAIRMAN: Right.

HARRISON: I'd ease right up on them, but if it's a week before the race then they just get they're one injection because it's, only ease up because they've got to get ready for the race.

CHAIRMAN: Can you recall then if SAMMY THE BULL did have anything further before the fifth of June?

HARRISON: No sir, only, only the week before he raced at this first start.

CHAIRMAN: Yes. Did he receive anything, any therapeutic treatment after that, after that run?

HARRISON: Not after the, sir, no.

CHAIRMAN: Nothing after that run?

- HARRISON: No sir, because he didn't pull up sore or anything, he's not, he's not a sore horse he's just, the week before Lark hill was a bit rough, just for precautionary, more than anything.
- CHAIRMAN: Mr Harrison how many horses do you have in your stable?
- HARRISON: I've got twenty two there.
- CHAIRMAN: How many do you have?
- HARRISON: Twenty five, at the moment I've got twenty.
- CHAIRMAN: Twenty.
- HARRISON: At the moment I've got twenty two, I had, I had up to twenty six or something.
- CHAIRMAN: Alright, you have got twenty two horses, are other horses receiving treatment?
- HARRISON: Only if they're just before they race sir, only for six days or six and a third days they race.
- CHAIRMAN: So how many horses have you got racing?
- HARRISON: Racing?
- CHAIRMAN: Yes.
- HARRISON: I wouldn't, I don't know sir, you'll probably know that, probably half a dozen I suppose, at the moment.
- CHAIRMAN: Do you keep any documentation or cards, a card system on the treatments?
- HARRISON: Not on treatments sir, no because....
- CHAIRMAN: So how do you know you, you tell us you gave SAMMY THE BULL treatment on the fifth, how do you know that happened?
- HARRISON: Because there's no way in the world that I'd given him anything, anything different or try and go any closer than what the Turf Club Vet has told me to do, and I make sure, when, I make the list out for the morning when I'm, how I'm going to run the horses, how they're going to work and everything, and when I have finished the list I have a look to see which horses I've got to give, if it's a Wednesday or something, Thursday or something

whatever it is, I have a look, if today's Thursday, I see what I have got racing next Wednesday, so I see what I have got nominated for next Wednesday and if they've got a tiny little bit of swelling or they're feeling a little bit jarry or anything I'll give them one injection and I'll have it written on top of my, on top of my work list.

**CHAIRMAN:** Right, but you have no cards or records of such, you don't record it?

**HARRISON:** No sir because I just look at my racing calendar and I make the list up in the morning and see which horses are racing the following week, the week after like that day of the week, if they pull up when I go to nominate them whether they get a start or whether they don't I'm going to nominate them and, they happen to have a little tiny bit of swelling or feel a little bit rough or something, they'll get that one injection, and I have it written on top of the, on top of the work list.

**CHAIRMAN:** So, you rely on your memory, if you are treating horses then you write it on that day list but you have no catalogue of it do you?

**HARRISON:** Well I've got it written down on my list, it's not on my memory because I look in the racing calendar and see which ones he's going to be nominated for.

**CHAIRMAN:** Is that work list filed?

**HARRISON:** No it's just on a bit of one of these and just screw it up.

**CHAIRMAN:** You screw it up and throw it away.

**HARRISON:** But I, I do everything that's on the work list though, so always absolutely always, before I come up for breakfast at 10 o'clock.

**CHAIRMAN:** Right.

**HARRISON:** Whereas you know, once the horse has finished in the yard and feeds and all that he's..... it's after that, it's nearly always between eight and ten.

CHAIRMAN: Right, did you consult your veterinary surgeon, I think it's Dr Davies, is that correct?

HARRISON: Dr Davies yes, Rob Davies or Phil Adams, the vet just comes in on Tuesdays but nearly always just has a cup of coffee you know and leave some vitamins for me.

CHAIRMAN: Did you consult with them that you were going to or did inject SAMMY THE BULL?

HARRISON: Well I have, I have asked him how close to the date you're allowed to go and they've told me people are going a lot closer, so, and I haven't specifically asked him, to try and find out how close I can go or anything like that it's just.....but I haven't, you see, when you have got the vets out there I know that we all know..... that if you ask a vet they, they know people are getting, they are going too close and closer to the day using, using the injection or something you know so, you don't know whether they're telling you..... treatment or not, or just saying everything's sweet you know like, so, I, I can't afford to take notice of the outside world so I don't bother asking him any questions unless it happens to be just ask him, I just took notice of that one thing in the inquiry because I didn't think that Dr Symons would muck around with anyone's livelihood because he couldn't afford to, because he's a Turf Club Vet., so I don't ask him you know, because it's, no reason, no need to.

CHAIRMAN: Dr Symons I think we will get a comment from you, you have heard what Mr Harrison has said, do you care to comment?

SYMONS: I did mention in the inquiry to a question from Dr Davies. He asked about Mr Harrison's treatment regime in the ROKEBY ROAD inquiry which was with powders and Tomanol over a period of four days, and I did make a

comment then, well I look at this regime and I agree with you that you can give a six day treatment with phenylbutazone and when I say that I say an I.V. injection, one single injection, and I went on to say I get worried when horses have courses and that sort of thing, and I think that's the statement that Mr Harrison's taken note of.

CHAIRMAN: Is that the one Mr Harrison?

HARRISON: Yes sir.

SYMONS: I just add the comment that I graduated nearly fifteen years ago and that was the recommendation for a single shot of phenylbutazone when I graduated, and it's still basically the recommendation now. There has been no evidence I've checked with my compatriots in other states, no evidence to change that, certainly in the last couple of years or prior to that.

In answer to further questions from Mr Zucal, Mr Harrison said:

CHAIRMAN: And just to follow up, just a little further from Mr Bennier's question, I think it came out in evidence, Dr Davies or Dr Adams didn't know that you injected SAMMY THE BULL with Butazyl?

HARRISON: No.

CHAIRMAN: And did you tell Dr Symons?

HARRISON: No sir, because i just don't need to.

CHAIRMAN: No.

HARRISON: It's....safe....it's just a preventative treatment, etc...

BENNIER: You have elected to change your treatment regime from say powders and Tomanol to Butazyl, I would have thought it might have been prudent of you to inquire as to, from a vet as to the effects that might have, in light of the two compounds?

HARRISON: Sir I've just always been led to believe that if you get, if some one says you've got to give them a shot of Bute then it's either Tomanol or Butazyl and I just thought that was it, like it's Tomanol or Butazyl and I know you're not allowed to use Tomanol so I didn't, didn't enter my head to think anything like that because that was the only other available one.

BENNIER: But as you have heard there are other one's available and maybe your veterinary doctor Davies, your veterinary officer Dr Davies could have perhaps spelt out to you that there was some problem with this?

HARRISON: Mm, no one ever has.

BENNIER: But you didn't ask?

HARRISON: No I never asked, I never even thought to.

It is quite clear from this evidence that Mr Harrison made no effort to seek expert veterinary advice which was readily and regularly available to him. When he first answered the Chairman's question "And why did you do that?" he replied inter alia .

"I asked Dr Symons well what can I do, if the horses are a bit stiff or something etc...". He told the Chairman he asked Dr Symons that in the last inquiry. In fact he did not ask Dr Symons any such question.

The transcript of the enquiry before the Stewards on the 15 July 1994 also records that Mr Harrison said:

"Yes sir, and whether it was me (sic) or whether it was Dr Davies I can't remember I haven't got any... and he said you can give one shot six days before, etc..."

CHAIRMAN: Right, did you consult your veterinary surgeon, I think is Dr Davies, is that correct?

HARRISON: Dr Davies yes, Rob Davies or Phil Adams, the vet just comes in on Thursdays but really always has a cup of coffee you know and leave some vitamins for me." This was followed by the question

CHAIRMAN: Did you consult with them that you were going to or did inject SAMMY THE BULL?

HARRISON: Well I have, I have asked him how close to the date you're allowed to go and they've told me people are going a lot closer, so, and I HAVEN'T SPECIFICALLY ASKED HIM, TO TRY AND FIND OUT HOW CLOSE I CAN GO OR ANYTHING LIKE THAT etc and later I CAN'T AFFORD TO TAKE NOTICE OF THE OUTSIDE WORLD SO I DON'T BOTHER ASKING HIM ANY QUESTIONS UNLESS IT HAPPENS TO BE JUST ASK HIM. I JUST TOOK NOTICE OF THAT ONE THING IN THE INQUIRY... SO I DON'T ASK HIM YOU KNOW BECAUSE ITS NO REASON, NO NEED TO.  
(Emphasis and underlining added)

From this it is clear that Mr Harrison did not ask Dr Symons about injecting SAMMY THE BULL because there was as he saw it no reason to do so.

Dr Symons had been giving evidence in relation to phenylbutazone not Butazyl.

The Chairman then asked.

CHAIRMAN: "... DR DAVIES OR DR ADAMS DIDN'T KNOW THAT YOU INJECTED SAMMY THE BULL WITH BUTAZYL?

HARRISON: No

CHAIRMAN:: And did you tell Dr Symons?

HARRISON: No sir, because I just don't need to.

CHAIRMAN:: No.

BENNIER: You have elected to change your treatment regime from say powders and Tomanol to Butazyl, I would have thought it might have been prudent of you to inquire as to, from a vet as to the effects that might have in light of the two compounds?"

HARRISON: (It) "didn't enter my head to think any thing like that.

It is clear from these passages that he sought no specific advice from Dr Davies saying as he did that he never even thought to ask. He told the stewards in effect that he sought no specific veterinary advice on injecting SAMMY THE BULL in the manner he did. This was not a sore horse on the evidence and this injection was given because the horse was a little jarry and was more of a precautionary measure.

At the hearing before the Tribunal evidence was led from Dr Adams. We were told by Mr McCusker Q.C. that Mr Harrison did not refer to Dr Adams specifically about this horse (SAMMY THE BULL) but was talking about therapeutic drugs and the appropriate excretion period. When Dr Adams gave evidence to the tribunal he said that Mr Harrison after the Rokeby Road enquiry asked questions about the excretion time of butazolidin and why Rokeby Road got a positive to butazolidin, to which Dr Adams responded to Mr Harrison that it (butazolidin) should not show after six days. However when asked if he gave any advice regarding the use of Butazyl Dr Adams was very much less certain saying "I would say that I would have said its not to be used within six days of the race." Having regard to the way in which this answer was elicited (see all of p.7 of Transcript 8 May 1986) and taking note of the answer itself, I place little or no weight on the answer given. It was patently obvious that after the Rokeby Road enquiry Mr Harrison was asking

Dr Adams about the excretion times of Butazolidin, and not Butazyl. In the context of the questions previously asked and what Dr Adams was saying in response, the question about Butazyl per se was most leading and the answer given quite vague and uncertain. I remain totally unconvinced that Mr Harrison asked Dr Adams about using Butazyl. Dr Adams said that he could not recall definitely that Mr Harrison mentioned SAMMY THE BULL. Dr Adams did say that he probably would have advised Mr Harrison that there was a deal of lack of certainty in this area and that it was hard for any one to be sure what might turn up. Dr Adams said to the Tribunal that the risk was not his risk but was the risk of anyone who asked him.

It was Mr Harrison who took the risk which in my opinion was an extraordinary thing to do given what had occurred only six months previously in the case of Rokeby Road.

Having examined the transcripts of the hearings before the Stewards and having heard the evidence of Dr Adams I am of the opinion that Mr Harrison sought no specific advice from Dr Adams on whether he could without risk of detection inject SAMMY THE BULL with 20ml of Butazyl. I am of the opinion that Mr Harrison did not ask about SAMMY THE BULL at all.

### RECORD KEEPING

The appellant spoke of his record keeping in the following terms.

MACLEAN: Mr Harrison you told Mr Bennier that you inject the horses, or SAMMY THE BULL,, yourself. Do you ever let the vet. come and treat the horses at all, ever?

HARRISON: I try and keep away from vets. as much as possible, especially after the evidence before, I just try and keep the cost down for my owners, don't try and cheat in any way. So what's the point of having a vet. you know if I've got

to get one x-rayed for maturity or something, then I'll take them over to Dr Davies.

MACLEAN: And the week leading up to SAMMY THE BULL racing did any other horses on your property have to be injected, were they injected?

HARRISON: Some days I suppose there would have been because if a horse was racing on the Thursday after the Sunday, if a horse was racing on the Thursday after the Sunday, there would have been. If they looked a bit jarred or stiff or whatever on the Friday, I would have given them their injection, if they didn't I wouldn't. So I would have had all the names written on top of the work list of that particular day, six days before they are going to race,..... how they work and everything and on top.....racing Thursday.

CHAIRMAN: Mr Harrison just following up Mr MacLean's question, you said there would have been but you can't remember. You can't remember?

HARRISON: I can't remember right now sir no, not right now I mean..

CHAIRMAN: Well it gets back, you don't keep records of treatments you give your horses, you don't have a card on a horse to say SAMMY THE BULL received 20 mils of whatever on such and such a date, you don't have that?

HARRISON: No sir because there's no need for me to have that sir, because I'm not going to, there's no need for it ever to be, have any trouble with it because that's it six and a third days before. I never ever go any closer, so there's no need, if they're going to race on the Thursday, if they're a bit stiff or something on the Friday I do it because it's allowable as far as I know.... And I have it written on the work out list, on the top of the work out list which horses are racing six days later and I check them and if they're a

little bit stiff I'll give them one then, if they don't they don't get one.

CHAIRMAN: Mr Bennier?

BENNIER: Mr Harrison you talk about a work sheet, I guess that's done on a daily basis?

HARRISON: Yes sir.

BENNIER: Do you keep copies of those?

HARRISON: No sir, it's just written on a bit of paper like this (indicates) and you just rip it up and throw it in the bin.

BENNIER: Right.

HARRISON: I've got, I have got cards on the horses on how they've raced and all that sort of thing, I keep records of all that but there's no reason for me to keep records on...

BENNIER: Why wouldn't you keep a record of your work sheet because I mean you obviously bill owners and wouldn't you transfer the work sheet, if you've had to inject a particular sheet. I guess you would charge the owner for that particular injection?

HARRISON: No I don't.

BENNIER: You don't?

HARRISON: No, never have, just put that in the fees, I never have.

CHAIRMAN: Well that was the question Mr Wason to you, did you know anything about this, that SAMMY THE BULL received treatment?

WASON: No, no I didn't.

CHAIRMAN: And in the accounts and the bills that you received there was no...

At the inquiry of 26 August 1994 the appellant said:

HARRISON: Sir there's no need to because I've already had that advice from Dr Symons six months prior, and he said he's been, he graduated fifteen years ago and six days was the

recommended treatment then and it is still now. So what's, why should I, and I know other people that are going five days so if it's completely safe, why should I ring the vet up all the time or get him to come round here and charge the owners another fifty or sixty dollars.

CHAIRMAN: Well Dr Symons wouldn't charge the owners another fifty or sixty dollars. You see him at the race day, just about every race meeting. He's accessible through the phone.

HARRISON: If it's been the same for fifteen years sir, what would be the point in ringing him and asking him, if it's still the same when...

CHAIRMAN: For confirmation?

HARRISON: There's no need to sir, if he's already told me that you're allowed to use it at six days, surely it's his job as a Turf Club Steward...

CHAIRMAN: Phenylbutazone.

HARRISON: ...To let me know that it's not all right at six days, if he's got that advice now.

SYMONS: Mr Chairman I made a comment to Dr Davies in the inquiry, it wasn't a consultation or advice given to Mr Harrison at all. I would just like to make it clear there was not advice sought specifically from Mr Harrison by me. I was making a comment at the inquiry and that was all.

HARRISON: But Dr Davies was acting on my behalf, asking the questions, we had already worked all the questions out and Dr Davies was acting on my behalf to find out what we could do. Not what he can do specifically, he knows what he can do he's a vet. So what is he supposed to do, what are you supposed to do?

CHAIRMAN: Mr Harrison getting back to the no records kept. No records of when the administration took place and you've got no records to dosage?

HARRISON: No sir, not now I haven't no, I always just give them 20ml. Have forever, never ever given a shot more than 20ml, or less than 20 mil because that was the recommended dose, 20 ml, by Dr Symons.

CHAIRMAN: Are you sure it was 20 mil on this occasion?

HARRISON: Yes sir.

CHAIRMAN: How can you be so sure?

HARRISON: Because I never ever give anything any different sir. All through, all through my career if I ever had to give any Tomanol or Butazyl or anything, it's 20 mil except for when I was giving those powders and everything, where I cut it down because I thought it might be something what's going to happen. You know like..

SYMONS: Mr Chairman I made no comment about dose rate in that inquiry.

HARRISON: You did say one single injection and I thought you'd said 20mil, isn't it?

SYMONS: No.

CHAIRMAN: Are there any questions from the Stewards?

BENNIER: No not at this stage.

CHAIRMAN: Mr Harrison is there anything further you wish to put before us?

HARRISON: Not really sir, I've got a card here on SAMMY THE BULL which just shows that he had a gallop the week before that's all. And sir I write down all that, when they gallop. There's no need for me to write down when they are getting any Bute leading up to a race because I don't ever bill the owners, so.

CHAIRMAN: But why wouldn't there be any need to write that down Mr Harrison?

HARRISON: Because it's six days sir, it's allowable at six days, as far as I was concerned.

CHAIRMAN: It wouldn't matter if it was given at twelve days, wouldn't you document it?

HARRISON: No need to sir, I don't charge my owners and I can get all my books and you will see there will never ever be, you can subpoena all my books if you like, there will never ever be any phenylbutazone written on my books. I just cover that cost because it saves a lot of arguments with all my owners when they ring up and say, oh what's this horse got phenylbutazone for, or what's this horse got this, you know.

CHAIRMAN: See Mr Harrison, you look at Local Rule 70A which says "it is the responsibility of the trainer, or his representative, to ensure that any horse presented for racing is free of any prohibited substance as defined in ARI". Now were you aware of that Rule, it is the responsibility of the trainer..

HARRISON: Ye sir.

CHAIRMAN: To present his horse drug free.

HARRISON: Yes sir.

CHAIRMAN: How would you comment, if I said to you that why didn't you seek vet advice, specific veterinary advice. Why don't you keep records in regards to treatment. Is that reasonable?

HARRISON: I don't think so sir because, I've forgotten the first part of the question now, what was the first part of it?

CHAIRMAN: Just your comments, I mean to say LR.70A says that it's up to you to present your horse drug free.

HARRISON: Yes.

CHAIRMAN: And why wouldn't you consult your veterinary surgeon for specific treatments knowing, knowing what the drug Rules are like and with the Australian Rules of Racing, and Western Australia. Say it's fairly, it's common knowledge that a breach of drug Rules is looked upon dimly by Racing Officials. We have had, the press has been covering the

Maynard case and all the other cases that have cropped up over the time. I thought it would have been reasonable for you to ask your vet, and say, look this is what I've done to SAMMY THE BULL. I thought you would keep records and indeed if you viewed or took Dr Symons' comments as such, I thought you would do a double check.

**HARRISON:** Sir there is no reason for me to double check with Dr Symons because he has already given that, me that advice and there is no reason for me to check with other vets because they all go a lot closer so this.....I can only take notice of the Turf Club vet and as far as.....

**CHAIRMAN:** Well the only thing is...

**HARRISON:** ...As far as keeping records go sir, as far as keeping records, I do keep that record for about a week or 10 days just so that I don't, if I'm doubly engaged and all that sort of stuff. So that they don't get a double lot of Bute. If they're a little but jarry, I give them a bandage or take them to the beach or something, if they have already had one shot. So there's no reason for me to keep the records any longer if it's completely safe, if it's a completely safe period and he says he's got to be ultra conservative when he says this. If it's safe by five days by all the reference and he says it's completely safe at six, then it's, just no need to keep any records at six and a third, apart from my own records because why would I need to keep any other records, unless I was going to charge the owners which I don't. And why would I need to keep any records to show any of you because you've stopped all those treatments since, where we used to have to keep records so if you tell me to keep records, I'll keep records but there's no need for me to keep records for longer then those 10 days.

CHAIRMAN: Well as you see it, as you see it there's no need for you to keep records. I think there is every need for every trainer to keep records of what they administer to their horses.

HARRISON: But why would I have to keep a record sir?

CHAIRMAN: Well why not?

HARRISON: As I said Dr Symons says it's completely safe at six days, it should be out of the system at five, it's completely safe at six. So six and half days there's no need to keep records except for my own personal, my own personal records. And there's no need to keep them after 10 days because they can't build up in the system after 10 days.

CHAIRMAN: Is there anything further you wish to place before us Mr Harrison?

HARRISON: No sir.

CHAIRMAN: Any questions from the Stewards?

BENNIER: Yes, I just want to refer to a, basically page 51 and 52 of the transcript, where Mr Harrison you were questioned regarding the use of phenylbutazone and you were aware of phenylbutazone, you were aware that Tomanol could be dragged on a bit longer.

CHAIRMAN: Just to interrupt Mr Bennier, what part of page 51?

BENNIER: Sorry 51, area 7 and we were talking about phenylbutazone powders and as a result of a previous inquiry, you were aware that phenylbutazone couldn't be administered within six days, or as defined by that inquiry. We spoke about phenylbutazone powders and I think you made mention here at area 7, about Tomanol, which is phenylbutazone and also that it could be dragged on a bit longer because of the isopyrin that it contained. And further on page 52, the area just below 1, and "Right and the point I make here is that Butazyl, which contains phenylbutazone and sodium salicylate." And then further down in that particular area "Did you ever inquire as to

what affect that might have, I mean you have got two compounds, did that ever worry you?" The point I make here is why didn't you check that particular area. I mean you are talking about phenylbutazone, you knew that there was problems associate with that but here we have got two compounds. Why wouldn't you explore that?

HARRISON: I'm not expected to be a chemist sir, if you get a, if you know he's a doctor and if you go to the doctor and he said listen you're lacking in Vitamin A, and he says here's some pills for you take three a day and all this sort of stuff. And I take one after each meal not with alcohol and all that, if he says that you take his word and that that's Vitamin A. If he's got Vitamin A on the bottle, preservatives, salt and all this other stuff, you don't go into that and say wonder if that can, wonder what that is; you just take the word of the vets an everything and if you ask for Bute..

BENNIER: Right, the point I'm making here..

HARRISON: ..When you ask for Bute they give you that because it's cheaper.

BENNIER: The point I'm making here is that you were doing the administration of the treatment. It wasn't the vet that was doing the administration so you were using Butazyl, which basically had the compound, had the other compound sodium salicylate.

HARRISON: Mm.

BENNIER: You made reference of a product Tomanol and it could have been dragged on a bit longer because of the isopyrin. Wouldn't it have been logical to sort of assume that maybe sodium salicylate might have had some of the same effect?

HARRISON: I don't think so sir because I was told by Dr Symons in the last inquiry and the Analysts that Tomanol with the isopyrin in it may extend the excretion time of phenylbutazone. So when I asked..... they are the only

two phenylbutazones I know, it Tomanol and Butazyl. So when I ask for some Bute, they say do you want Tomanol or Butazyl and I said no I don't want Tomanol because I know it extends the excretion time. So there's no, so I use the other one and I know ninety percent of all vets just use Tomanol, I mean Butazyl I'm sorry.

CHAIRMAN: Well did you ask anybody when you bought the Butazyl who did you buy the Butazyl from?

HARRISON: I buy them from a variety, I buy them from the vets, sometimes I get them from Bio-John.

CHAIRMAN: I think that's the point Mr Bennier is making, it's got two compounds. You knew about Tomanol, did you ever ask about Butazyl?

HARRISON: Did I ever ask about it?

CHAIRMAN: Did you ever ask a veterinary surgeon?

HARRISON: I might have made mention to them that I don't want Tomanol because it can extend the excretion time but I never, so they say well you have Butazyl and like I say I've checked up with Bio-John and all them, and the Butazyl is the most common phenylbutazone used in WA by a long way, because it's cheaper and because Tomanol can extend the excretion time. And I think there's, they say, I didn't even know they say here something like there's two, in one of these pages here. There's two products that are just phenylbutazone alone and I think there is something like four hundred that are phenylbutazone with other stuff, products and everything. So how am I supposed to, you don't look on a bottle and say this here, this here, you don't even understand the words so you know there's proof, there's proof that isopyrin can extend the excretion time, so.

CHAIRMAN: Well that's exactly the point Mr Harrison.

HARRISON: There's no proof that the other...

CHAIRMAN: You said how are you to know, I would have thought that would have been reasonable to ask your veterinary surgeon.

HARRISON: About Butazyl?

CHAIRMAN: About Butazyl.

HARRISON: Well sir I just ask him for some Bute and they give me that because that's the most common one used. I'm not a veterinary surgeon, like they give it to me and like I say you don't look at the labels of Vitamin A and everything and see what else it's got in it. You just take it for granted that it's Vitamin A.

It can be seen that Mr Harrison knew from his previous experience at the enquiry regarding Rokeby Road that there was considerable doubt and debate as to whether isoprin might have the effect of extending the excretion time for phenylbutazone, but notwithstanding that he knew this could possibly occur with Tomanol, he made a conscious and deliberate choice to take no specific veterinary advice before he injected SAMMY THE BULL with Butazyl. Common sense suggests that Mr Harrison knowing as he did that "Tomanol can extend the excretion time" should have made a specific enquiry with regard to Butazyl. He admitted that he did not even understand the words on the bottle, and just took it for granted that he was getting some 'Bute'.

The reason given by Mr Harrison as to why there was no need for him to write down when the horses were getting any Butazyl was because he didn't ever bill the owners. In my opinion and bearing in mind the obligation of the trainer pursuant to Local Rule 70A to ensure that any horse presented for racing is free of any prohibited substance, as defined in A.R.1, the explanation given by Mr Harrison is particularly weak. He must have appreciated there was some risk of detection, but he nevertheless chose not to take the simple step of

keeping a permanent record of the time and amount of administration in order to show to either an owner, a veterinarian, or an official should they ask for it. In my opinion this failure to keep a record, coupled with the weak explanation for not so doing, notwithstanding Local Rule 70A, is indicative of a somewhat cavalier attitude to the requirement to present SAMMY THE BULL drug free on race day.

I am of the opinion that having regard to all the circumstances of this case that Mr Harrison made a conscious and deliberate decision to take a risk with injecting SAMMY THE BULL with 20 ml of Butazyl; that he was prepared to take that risk on his own volition without seeking specific veterinary advice but relying on "that one thing that I took notice of" in the Rokeby Road inquiry. In my opinion this amounted to wilful blindness. I find that he did not consult the owner of the horse before or after he administered the Butazyl. It was extremely foolhardy for Mr Harrison to act in the way he did by injecting the horse without specific veterinary advice, and this foolhardiness was exacerbated by the lack of reasonable record keeping so that others having an interest could have the capacity to see for themselves what had been happening to the horse.

In summary, to have injected the horse SAMMY THE BULL, bearing in mind what he certainly knew about possible excretion times for other drugs being extended, and without taking specific veterinary advice, was not only foolhardy but as the evidence unambiguously reveals he deliberately shut his ears to taking specific advice which a reasonable man in the position Mr Harrison found himself ought to have done.

As was pointed out in the matter of O'Donnell, in the Western Australian decisions identified in McPherson's case, in nearly all the cases involving drugs disqualifications have been imposed by the stewards. In my opinion and for the survival of the racing industry there is a strong need for the existence of

deterrent penalties. There are already disturbing trends in the eastern states of some significant declines in such indicia as betting turnover which might possibly reflect either a decline in interest or worse still a decline in the public confidence. It is incumbent on those who control parts of the industry to do what is in their power to stop people presenting horses that are not drug free. In my opinion nothing can be a more serious danger to the integrity of the racing industry than the use of prohibited substances. In my opinion save in the most exceptional circumstances disqualification is the appropriate penalty. Each time a winning horse is found to have had in its system a prohibited substance and is thereby disqualified public confidence in this industry is shattered. The damage to the industry is incalculable. Mr Harrison heard a 'conversation' between two experts in another hearing, where they were talking about phenylbutazone. The interchange between Dr Davies and Dr Symons was of a highly technical nature, for example the question about the duration of the effect of phenylbutazone as it might relate to the plasma half life of the phenylbutazone or its metabolites is enough to indicate that Mr Harrison could not have truly understood anything about the conversation.

There was enough in the interchange to alert any reasonable person to the fact that the whole area of excretion times is clothed in uncertainty, and fraught with danger.

Notwithstanding his previous experience and all that he heard at the enquiry into Rokeby Road he decided to take the risk. He knew that in certain circumstances the excretion time for phenylbutazone might become extended because he had heard about that at the Rokeby Road enquiry. He made no enquiry as to whether Butazyl might contain something such as sodium salicylate which apparently can also extend the excretion time for the drug.

It is for all of the foregoing reasons that in my opinion the stewards not only made no error in the exercise of their discretion in deciding upon disqualification, and that the period should be 10 months but that decision was positively correct. In view of the particular way in which this matter reached the Tribunal it is also necessary to add that the same result is appropriate were this matter to be returned from the stewards upon the basis that notwithstanding the new material they would, having properly considered the matter, come to the determination that 10 months disqualification is the correct determination. In my opinion for the reasons now given disqualification would be the appropriate penalty given his previous conviction for a similar breach of the drug rule, and 10 months disqualification is the proper amount of time. Assuming that were imposed such penalty would not only not disclose error in the exercise of discretion but in my opinion would be the correct outcome.

We have been told that Mr Harrison has suffered financially with regard to his health and mental outlook, his health problems being diagnosed by a specialist as stress related. There are other dire consequences that flow from disqualification including losing excellent horses from his stable, apprentices who will need to be relocated, the isolation from those in the industry that follows. In my view it is not correct to say (as was submitted) that Mr Harrison was doing his level best to ensure that there would not be a breach of the rules of racing. In the particular position the appellant was; having been involved in the Rokeby Road enquiry, he knew that with certain drugs and in certain combinations (with powders) excretion times could be extended, but notwithstanding the immediacy of veterinary advice, as he said "I can't afford to take notice of the outside world - so I don't bother asking him any questions unless it happens to be just ask him. I just took notice of that one thing in the inquiry so I don't ask him you know because it's no reason, no need to".

In these circumstances it cannot be said he was doing his level best at all, rather he consciously and deliberately chose to close his eyes ("you don't look at the labels" "you just take it for granted it's Vitamin A") and his ears (... "I don't ask him you know because it's no reason, no need to"). In my opinion this amounts to a wilful blindness. This was not a sore horse, it was a little 'jarry', the Butazyl was administered so that it could stand up to training.

A reasonable person, clothed with the knowledge of the applicant, and placed in the position he in fact was as being responsible for a good size training operation, training horses belonging to other people, and given the grave responsibility to the general public, and in particular to the racing industry, would not have done as Mr Harrison did. There was absolutely no need to take this enormous risk and bring the horse back racing so soon after treatment. The public are entitled to believe that horses racing are drug free. This horse was not drug free and Mr Harrison has made a further contribution to damaging the racing industry. The stewards who are given the onerous and difficult task of supervision and policing to ensure inter alia drug free racing were entitled to reach the decision they did, and for all the aforementioned reasons that decision was correct, and would still be correct if reimposed.

I would dismiss this appeal and confirm the 10 month disqualification which should take effect having regard to the time spent under disqualification. By taking into account the periods of time that Mr Harrison had under disqualification the appropriate penalty is that Mr Harrison be disqualified for eight months.



LINDSAY ROBBINS  
MEMBER



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN  
(MEMBER)

APPELLANT: DAVID HARRISON

APPLICATION NO: A30/08/215

DATE OF HEARING: 8 MAY 1996

DATE OF DETERMINATION: 10 JULY 1996

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IN THE MATTER OF the remission hearing ordered by the Full Court of the Supreme Court of Western Australia in relation to the appeal made by Mr D Harrison against the decision of the Western Australian Turf Club Stewards on 26 August 1994 imposing a penalty of 10 months disqualification under Rule 175(h)(ii).

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Mr M J McCusker QC, on instructions from Karp & Monaghan, appeared for the appellant.

Mr R J Davies QC appeared for the respondent.

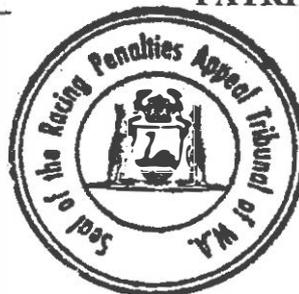
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I have read the draft reasons of Mr D Mossenson, Chairperson. I agree with the reasons and the conclusion and I have nothing to add.

*P. J. Hogan*

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PATRICK HOGAN, MEMBER



DETERMINATION OF  
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:                      DAVID HARRISON

APPLICATION NO:                A30/08/215

PANEL:                            MR D MOSSENSON    (CHAIRPERSON)  
   MR P HOGAN            (MEMBER)  
   MR L ROBBINS         (MEMBER)

DATE OF HEARING:              8 MAY 1996

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IN THE MATTER OF an appeal by Mr D Harrison against the determination made by Western Australian Turf Club Stewards on 26 August 1994 imposing a penalty of 12 months disqualification under Australian Rule of Racing 175(h)(ii).

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Mr T Monaghan, instructed by Karp & Monaghan, represented the appellant.

Mr J Zucal represented the WA Turf Club Stewards.

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The appeal be allowed. The penalty of 12 months disqualification shall be reduced. Mr Harrison shall serve a further period of disqualification of 6 months in addition to the periods already served. The fee paid on lodgement of the appeal be refunded.



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DAN MOSSENSON, CHAIRPERSON

10/07/96

