THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D. MOSSENSON (CHAIRPERSON)

APPELLANT: GORDON WILLIAM O'DONNELL

APPLICATION NO'S: A30/08/263 and A30/08/264

DATE OF DETERMINATION: 22 DECEMBER 1995

IN THE MATTER OF the determination of the appeals made by Mr G W O'Donnell (against the decisions of the Western Australian Turf Club Stewards on 1 August 1995 imposing two penalties both of six months disqualification under Rule 175(h)(ii) to be served cumulatively) whereby the Tribunal ordered on 22 December 1995 that the convictions be confirmed but that the penalties be varied so as to be served concurrently.

Mr T F Percy with Ms D Davies, on instructions from David Geoffrey Price Solicitor, appeared for the appellant.

Mr R J Davies QC appeared for the respondent.

BACKGROUND

The Stewards of the Western Australian Turf Club conducted two separate inquiries, each of which commenced on 24 July 1995 and continued on 1 August 1995, in relation to two urine samples which were taken from FUBAR after it had raced at Belmont Park. Mr O'Donnell, who was the trainer of the horse, was then charged by the Stewards with two separate breaches of the Australian Rules of Racing Rule ("ARR") 175(h)(ii). ARR 175 states:

"The Committee or the Stewards may punish: -

... (h) Any person who at any 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 particulars of the respective charges against Mr O'Donnell were as follows:

"that sometime prior to the racing of FUBAR in the Turquoise Handicap at Belmont Park on 22nd of June, 1995, you by your own admission, administered Toradol which resulted in the prohibited substance ketorolac being detected in the post-race urine sample",

and

"that sometime prior to the racing of FUBAR in the Asteroid Handicap at Belmont Park on 5th of July, 1995, you by your own admission, administered Toradol which resulted in the banned substance ketorolac being detected in the post-race urine sample taken from FUBAR."

At the first of the Stewards' inquiries Dr P J Symons, the WATC Veterinary Surgeon, described ketorolac as being a prohibited substance which is *"a non-steroidal anti-inflammatory drug...primarily used in a horse for inflammation to the musculo-skeletal system."* Dr Symons stated that *"It's registered for humans only, not for veterinary use,..."* and that the equivalent common drugs used by veterinarians, of the same family, are drugs like phenylbutazone and flunixin. Toradol or ketorolac have a different potency to the common veterinary drugs, being described as *"...fairly potent..."* and *"One of the more potent ones of that group."* Dr Symons gave evidence to the same effect at the second inquiry.

In the course of both inquiries Mr O'Donnell stated that he injected the drug Toradol intra-muscularly in order to treat FUBAR for inflammation of the hind leg. The first administration took place approximately thirty six hours prior to racing the horse whereas the second was twenty four hours before. Mr O'Donnell claimed that he had misunderstood how long the medication would persist in the horse. Further, although he admitted to understanding that the drug was intended for human use only, he claimed that it was widely used in Western Australia by trainers and veterinarians. He admitted that he received no veterinary advice for the treatment of the horse or as to the appropriate dosage,

that he had no specific knowledge of the drug or its usage but that he had merely relied on word of mouth advice. Mr O'Donnell did co-operate at the Stewards' inquiries save that he refused to answer questions relating to the supply of the drug.

Mr O'Donnell's explanation at the first inquiry as to why the post-race urine sample taken from FUBAR reported the presence of the drug was as follows:

> *"Like all other trainers I have horses that suffer ongoing soreness problems, mainly due to arthritic joints. While these problems are not serious enough to put the horse out of work, they probably prevent a horse from running to the best of its ability. Like all other trainers I'm walking the tightrope between keeping the horse going on medication and risking the possibility that some medications persist in the horse. I did not break any rules by giving the horse this medication. The treatment sheets no longer exist, so I had no obligation to report the treatment of the horse. The reason that I'm here today is that the medication that I used persisted in the animal for a longer period of time than I thought it would. My only mistake, if you like, is that I misunderstood the pharmacology of the medication, or I was misinformed...It is a mystery to me why my horse should return a positive swab the first time I use the medication."*

Although Mr O'Donnell pleaded not guilty to both charges, the Stewards found him guilty in each case. In relation to the penalty imposed with respect to the first charge the Stewards stated as follows:

> *"...the Stewards have considered all matters you have placed before us. Further, the Stewards believe that any breach of the Racing Drug Rules to be a serious matter. The Stewards consider the following to be pertinent to the penalty to be imposed. One, at no time did you seek veterinary advice on the administration and use of Toradol. Two, Toradol is a human medication, there are suitable equine preparations available with documented withdrawal times. Three, the medication was administered some 36 hours prior to the race to FUBAR, a horse which had some fitness problems. Four, the Stewards are of the opinion that you have not co-operated fully in their inquiries by refusing to answer certain questions posed to you. Namely, the purchase or supply of the drug. Accordingly, we have decided to disqualify you for a period of six months."*

The reasons given for the imposition of the other period of six months disqualification for the second offence were in identical terms. The penalties were ordered to be served cumulatively.

The relevant penalty provision in the Rules is ARR 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."*

THE ISSUES

The appellant's amended grounds of appeal are as follows:

"1. The Appellant does not pursue the appeal against conviction.

2. The Stewards erred in imposing a period of disqualification on either charge as such penalty was not in accordance with penalties imposed for similar offences in this State and in other States of Australia. An appropriate penalty in respect of each offence would have been a fine.

PARTICULARS

(i) The Stewards erred in considering that the following factors were aggravating features of this case:

- *(a) the drug was not an equine specific substance;*
- *(b) the drug was not administered under veterinary advice;*
- *(c) the Appellant did not name the source of his supply;*
- *(d) the case involved administration of a drug rather than the simple presentation of a horse found to contain a prohibited substance.*

(ii) The Stewards erred in failing to place sufficient weight on the mitigating factors of the case, namely:

- *(a) the non-performance enhancing effects of the substance;*
- *(b) the previous good record of the Appellant;*
- *(c) the absence of any mala fides on the part of the Appellant, and absence of significant betting on the horse;*

(d) that a penalty of disqualification ought to be reserved for the worst cases of any kind of offence;

(e) the modest personal financial circumstances of the Appellant.

3. *In the event that a period of disqualification was warranted (which is denied) the two cumulative periods of six months disqualification were clearly excessive, for the reasons referred to in 2(i) and (ii) above.*

4. *In the event that a period of six months disqualification was warranted (which is denied), the two periods of disqualification ought to have been concurrent.*

PARTICULARS

(i) The two offences were closely proximate in time.

(ii) The two offences were virtually identical in type.

(iii) The two offences were detected, charged and dealt with at the same time.

5. *The combination of a fine together with the period of disqualification served to date would in all the circumstances constitute an appropriate penalty in all the circumstances of the case".*

Mr Percy for the appellant submits that the decision of the Tribunal in relation to Robert Charles McPherson (Appeal 208); 12 RAR 1135 should be followed. That appeal was ultimately determined on 1 May 1995. Counsel argues that whereas the traditional starting point in Western Australia in relation to penalty had been disqualification, now it was a fine for non-performance enhancing drugs. This proposition is supported by reference to the fining in New South Wales of the trainer of the horse SEINFELD in November 1994 for what was said to be the only other such case in Australia involving the use of ketorolac. Unfortunately no details in relation to the circumstances which led to that conviction and fining were able to be supplied by Counsel.

Counsel for the appellant summarises the appellant's position as follows:

"...the essence of our submission is this: having regard to all factors the Stewards considered to be aggravating, it could not be said that this is a worse case scenario; not even being close to it. We would say there is some degree of recklessness - agreed. It may not be

the most compelling case. It may not be the case at the very bottom end of the scale, but we say it does not approach halfway and it does not approach the top end. "

It is also submitted for the appellant that there is no distinction between the penalty which should be applied for administering a prohibited substance under ARR 175 and that for presenting a horse to race with a drug in it under ARR 178. Further *"...there is nothing that would persuade anyone to the view that one is any more heinous than the other."*

ARR 178 states:

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

Counsel for the appellant also referred the Tribunal to its decisions in two appeals by Joseph Charles Byrne.

The submissions of Mr Davies QC for the Stewards in response can be summarised as follows:-

1. the actions of the Chairman of the Stewards in this inquiry could not be criticised in any way;

2. that the appellant was a person to whom the privileges of holding a licence to train and present horses for racing was given contractually by virtue of the Rules of Racing;

3. in the McPherson appeal the Tribunal had erroneously attempted to equate the now well known proposition in relation to criminal law and imprisonment, that incarceration is very different from disqualification;

4. the Stewards applied the proper approach to the separate penalties in arriving at a cumulative penalty; and

5. the McPherson decision has no relevance as that was a case where the feeding system "went haywire".

Mr O'Donnell's appeals, which involve important considerations of principle and questions of philosophy, have not been easy to determine in the light of the 1 May 1995 McPherson decision. Their outcome has the potential to influence significantly the penalties which will be imposed for drug offences by the Stewards in this State in the future.

In order to resolve these appeals and with a view to making it clear to both the appellant and the racing industry precisely what my attitude is as to drug penalties it is necessary to analyse a significant number of the cases and appeals which have involved the administration of drugs in racing and to go into much more than the usual detail in reaching conclusions.

THE McPHERSON APPEAL

The appropriate starting point is the appeal of McPherson, which was first heard on 27 July 1994 by a panel of this Tribunal comprising the Acting Chairperson Mr P Hogan, and the Members J Prior and T Mulligan. Briefly, the facts of that case are that oxyphenbutazone was detected in a post race urine sample which resulted in Mr McPherson being convicted by the Stewards of an offence against ARR 178 and resulted in him being disqualified for a period of $2^1/_2$ years. Mr McPherson claimed that the administration of the drug to the horse had been a mistake. There was evidence that the feeding system was imperfect and the Stewards found that the system employed was not satisfactory in order to prevent mistakes being made.

The panel initially unanimously upheld the conviction by the Stewards after determining that the defence of honest and reasonable but mistaken belief was excluded by the subject matter of ARR 178. It was further held in the 1994 appeal

proceeding that it had not been shown that the Stewards had made any error of fact or law which would warrant interference with the penalty. In its determination it is stated that:

> *"We are of the opinion that no error has been made by the Stewards and the exercise of their discretion in this case. In particular the penalty has not been shown to be so outside the range as to demonstrate error.*
>
> *We point out that the maximum penalty available was for permanent disqualification. Further the appellant has been dealt with in the past for previous drug offences. Whilst it does not operate so as to increase an otherwise appropriate penalty it does indicate that the appellant is not entitled to the lower penalties available to first offenders."*

Mr McPherson subsequently obtained an order nisi to review this decision. On 3 March 1995 the Full Court of the Supreme Court (Appeal No 1768, SCL No. 950085) unanimously discharged that part of the order which sought to quash the conviction, but made absolute the order nisi by quashing the penalty. The matter was sent back to the Tribunal to be dealt with in light of the reasons given by the Court, as expressed by Rowland J, as follows:

> *"The penalty imposed in this case, where it seems to be accepted that the substance did not in fact affect the performance qualities of the horse and where the substance apparently got into the horse because of some slack supervision or feeding practices, would seem to me to be heavy. I say that because the only information we have is a range of penalties emanating from Eastern States stewards where the maximum appears to be a suspension of up to six months and this type of case is often dealt with by way of fine. If there is some reason why penalties for this type of offence should exceed those given in another State when the Rules of Racing seem to be similar, then one might expect that reason to be exposed. Unfortunately, the stewards did not give any reasons as to why they imposed a penalty of 2 1/2 years' suspension. (sic)*
>
> *With respect, it seems to me that the Tribunal, which is obliged to give reasons under s21 of the Act, should at least identify the range of penalties usually adopted for the offence and the circumstances of this offence. Its finding was that the penalty imposed was within the range.*

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

We are here dealing with the livelihood of a trainer. As there is a right of appeal given to a person who claims to be aggrieved with a decision of the stewards, it is implicit, in my view, that there is an obligation on the appellate body to give sufficient findings or reasons so as to explain to the recipient and all others in the industry the basis on which the penalty is given or how it is arrived at. Also, the Tribunal is expressly required by statute to give reasons...

...In my view, it is impossible for this Court to say that the penalty imposed was manifestly excessive. On the other hand, on the material before us, it appears to be far outside the range of penalties apparently imposed for similar offences in the Eastern States. As no reasons have been delivered by either the stewards or the Tribunal as to what the local penalties are that have been usually imposed, then there is an inference that, at least insofar as the Tribunal is concerned, it has failed to consider this issue for itself. If it be the fact that there is a range of penalties which has been imposed in this State, which is greater than those which apply in New South Wales, then it seems to me that both that fact and the reasons for such a large discrepancy should be identified. The failure to give the type of reasons I have indicated, in the circumstances, discloses error of law. I would accordingly discharge that part of the order which seeks to quash the conviction, but make absolute the order nisi by quashing the penalty and sending the matter back to the Tribunal to be dealt with in accordance with these reasons."

The Tribunal comprising the same panel, re-heard the matter on 22 March 1995. In the Determination and Reasons handed down on 1 May 1995 ("The McPherson Reasons") the panel referred to the penalties imposed in relation to a large number of New South Wales (Australian Jockey Club, South East Racing Association, Western Racing Association and Southern District Racing Association), Victorian Racing Club, Tasmanian Turf Club, South Australian Jockey Club, Queensland and Western Australian Turf Club decisions of stewards in relation to breaches of ARR 175(h)(ii) and ARR 178 as well as to the outcome consequent upon appeals. The panel confined itself to a reference to *"...only those*

penalties relating to drugs which are found in Class 4 of the Uniform Classification Guidelines." In its summary of the range of penalties (at p11) the panel stated:

> *"New South Wales invariably imposes a fine. Victoria imposes suspension. Queensland has shifted away from disqualification in favour of fines. Tasmania and South Australia favour disqualification. The types of penalties imposed in New South Wales and Victoria remain the same, even when the person is a repeat offender...In Western Australia, the stewards favour disqualification. There has been a trend away from disqualification in favour of fines at appeal level.*
>
> *In our opinion, the necessary consistency in punishment is to be achieved in this case by applying the type and level of penalty commonly imposed in New South Wales, Queensland and, more recently, Western Australia itself. A fine is the appropriate penalty for the type of offence committed in this case.*
>
> *We are persuaded to this position for a number of reasons.*
>
> *Disqualification is the most severe penalty available against a trainer under the Rules. It ought to be applied only in the most serious cases. If there is another type of penalty available which would meet the ends of justice in the case, then it ought to be applied. Put simply, disqualification ought to be a penalty of last resort.*
>
> *The question next is whether that principle can be accommodated in this case within the range of penalties commonly imposed for this type of offence. Clearly it can, by reference to the penalties disclosed above in New South Wales, Victoria, Queensland, and Western Australia in its appellate jurisdiction.*
>
> *Further, there is no evidence before us which indicates a particular prevalence of this type of offence in Western Australia, such as would justify the range of penalties remaining at a level higher than the other States mentioned."*

The panel then unanimously concluded that:

> *"For all of the above reasons, we are now of the opinion that the penalty imposed by the stewards in this case was so outside the range of penalties commonly imposed as to manifest error. Because the sentencing has miscarried, we are now required to exercise the discretion afresh. We set aside the penalty of $2\frac{1}{2}$ years disqualification. In lieu of that penalty, we impose a fine of $5,000.00. The penalty imposed takes into account the factors*

previously mentioned, the category of the drug, the particulars personal to the appellant, and the fact that he has already served 6 weeks disqualification."

THE RANGE OF PENALTIES IMPOSED BY STEWARDS

It is clear to me from the Australian Jockey Club and the other New South Wales decisions referred to in The McPherson Reasons that, over the period covered by those decisions, namely since 1985, Stewards in New South Wales have consistently imposed fines for offences involving the type of drug considered by the Tribunal in McPherson.

The Victorian Racing Club decisions identified in The McPherson Reasons reveal that since 1984, being the period covered by those decisions, in Victoria, many cases of suspensions of up to six months have been imposed in addition to fines. In a few of the more recent cases on appeal to the Victorian Racing Club Committee, fines have been substituted for suspensions, whereas in others suspensions have been confirmed.

So far as the Queensland decisions considered in The McPherson Reasons are concerned, whilst some fines have been imposed, over the period covered, namely since 1983, there have been a number of disqualifications as well as suspensions.

In the Tasmanian Turf Club decisions listed in The McPherson Reasons, since 1986 a majority resulted in disqualifications (of up to eighteen months) and some in fines. Some of those disqualifications on appeal were upheld and some reduced.

In Western Australia's case, the decisions dealt with in The McPherson Reasons reveal that since 1979 in virtually every matter, disqualifications of up to five years have been imposed by the Stewards. Some of the Stewards' decisions have been reduced on appeal, in one case to a suspension and in some cases to fines.

In The McPherson Reasons, none of the actual reasons for the many Stewards' findings which are referred to are in fact spelt out or explained. Further, none of the relevant facts and circumstances of each offence in relation to each decision is identified. Unfortunately supporting information of this type was not presented to the Tribunal in the course of the present appeals in relation to the matter involving the horse SEINFELD and nor was the Tribunal given any additional information which would help elaborate and clarify any of the decisions referred to in The McPherson Reasons.

I consider that without knowing all of the relevant facts and circumstances surrounding the imposition of a particular penalty one cannot carry out any meaningful analysis and draw any reliable conclusions as to the ultimate outcome of a drug-related case. Such a case may be significantly affected by a large number of potentially relevant considerations and it is not sufficient simply to know the name and nature of the drug in question. Usually it is crucial in order to arrive at an appropriate penalty to take into account the quantity of the substance detected, the dosage in an administration case, the circumstances of the administration including whether professional advice was sought and if so whether it was acted upon, whether records of administration were maintained or not, whether the offender is a repeat offender or not, the extent of the co-operation with the authorities, the personal circumstances of the offender and so on. Without all of this information, that is the relevant facts and circumstances, I believe that one often cannot draw any worthwhile conclusions from simply knowing the outcome of other cases. Further, such conclusions without the relevant information may serve little useful purpose in the process of arriving at an appropriate penalty in a particular case.

I do agree with the observation, which is contained in the summary of the range of penalties in The McPherson Reasons (at p4), that in this State *"...Stewards favour disqualification"* but, as I will explain later, I respectfully disagree with the comment that follows, that *"There has been a trend away from disqualification in favour of fines at appeal level."*

In dealing with "territorial considerations" as to range of penalties (at p4 of The McPherson Reasons) it is stated:

> *"Because these [ARR 175(h) & 178] are Australian Rules rather than Local Rules, it can be seen that the drug regime operates as a uniform code across the States and Territories.*
>
> *In our opinion, having considered the matter again as required by the order of the Supreme Court, we can see no reason why the penalty imposed in this case should be outside the range of penalties commonly imposed on an Australia-wide basis".*

The latter proposition in principle and theory cannot be challenged. The practical difficulty I have with it is that it seems to me at least that there is simply no meaningful range of penalties commonly imposed across the country. The McPherson Reasons contains material that clearly establishes that the penalties imposed by the Stewards in the different jurisdictions vary significantly from state to state. Further, even within each of the types of penalties imposed (that is disqualifications as distinct from suspensions and/or fines) there is a big range.

RACING APPEAL CASES

In order to address this range of penalties predicament and with a view to helping to resolve the present appeals and to assist in achieving consistency in this State for the future, I have examined the Racing Appeals Reports in relation to those drug appeal cases which I believe have some similarity and relevance to Mr O'Donnell's position. It is important to note two things in relation to these drug appeal cases. Firstly, none of them is referred to in The McPherson Reasons. Secondly, in The McPherson Reasons, no Northern Territory decisions are referred to at all.

The earliest relevant appeal decision referred to in the Racing Appeals Reports is the case of W J Green I RAR 41, which is a decision of the Tasmanian Racing Appeal Board in September 1990. The drug phenylbutazone was found to have been administered by Mr Green in breach of ARR 178 and the Stewards disqualified him for a period of twelve months. The Board stated that:

"...there have been a number of decisions in this jurisdiction relating to drugs. There have also been a number of decisions in other jurisdictions relating to breaches of Rule 178. A careful reading of those decisions discloses that there is a different approach in this State to the imposition to penalty in respect to breaches of Rule 178 to that in some other States, the most obvious distinction is that in this State almost inevitably disqualification rather than a suspension will be imposed.

This Board is of the view that its previous policy of imposing disqualification in respect of breaches of Rule 178 is a correct policy and in this case the penalty which will be imposed will be a disqualification. We have given careful consideration to the observations of Mr Cullinane QC the Galloping Appeals Authority of Queensland, and to the observations of their Honours, the Chairmen of the Racing Appeals Tribunal of Victoria, in respect of this issue but nevertheless we remain convinced that in respect of a breach of ARR 178, disqualification is the appropriate penalty."

The Board quoted with approval the passage in Rattray, No 6 of 1984 *"...at the end of the day the question of the appropriate penalty must depend upon the circumstances of each particular case."* Due to the mitigating circumstances, Mr Green's period of disqualification was reduced to six months.

The case of N T Pike 4 RAR 312, a decision of the Northern Territory Racing Appeals Tribunal in July 1992, involved a breach of Australian Rule of Racing 175 for the drug heptaminol. The Stewards sentenced Mr N T Pike to two periods of three months disqualification, to be served cumulatively. In considering the penalty the Tribunal held that:

*"We find that the vast majority of racing clubs, their Stewards and Racing Appeals Tribunals have adopted a deliberate policy of regarding the use of prohibited substances (whether or not they affect the running of the horse in the race) as a serious danger to the integrity of the racing industry and, **save in exceptional circumstances, disqualification is the appropriate penalty*** (emphasis added). *There is a powerful need to deter such conduct. We are mindful of the fact that the stewards of the AJC take a different view, but we must be conscious of the vulnerability of the local racing scene and we endorse (but not without some qualification) the view of the Darwin Racing Club stewards that the proven presence of a prohibited substance should result in disqualification. There may arise cases where on the facts found the stewards may be convinced that the presence of a prohibited substance did arise by accident without negligence and that the substance could not affect the*

performance of the horse. In such a case, without limiting the circumstances, disqualification may be too harsh. Such cases will be rare."

The Board substituted two periods of six months disqualification to be run consecutively.

D Green 6 RAR 463 is a decision of the Northern Territory Racing Appeals Tribunal in February 1993. Mr Green was the trainer of 2 horses who tested positive to testosterone, an anabolic steroid. Mr Green was found guilty of a breach of Australian Rule of Racing 178 and sentenced by the Stewards to a six month and a nine month disqualification. The Tribunal stated:

"It has been said again and again by this and other Tribunals just how serious is a conviction in relation to a prohibited substance. In fact, it has probably got to the stage where it has become trite to keep repeating it.

We have reviewed as extensively as possible the decisions of other Tribunals and of stewards panels in relation to testosterone. One thing stands out - if the trainer or person found guilty has been involved in the administration of the prohibited substance the penalty is normally disqualification. If, on the other hand, the person found guilty was not personally involved, as we have found was probably the situation here, then the range of penalties is much wider-ranging from a fine, to suspension, to disqualification - without the great majority of more recent decisions involving fines or suspensions."

The Tribunal concluded that:

"Had the appellant been involved in the administration of the drug, a period of disqualification would have been almost inevitable."

The Queensland Racing Appeals Authority decision of Standfield 7 RAR 577 in May 1993, was an appeal against a six months disqualification for the administration of the drugs phenylbutazone and oxyphenbutazone. Reference was made to Dickson's case where it had been said that *"...we prefer the penalty option of disqualification as a general rule to drug-related offences."* However, the breach was seen to have arisen from inexperience and not intent. Mr Standfield had been totally truthful and co-operative and had not sought to profit from the

experience. The penalty was reduced to two months disqualification and a fine of $2,000.

The Tasmanian Racing Appeal Board decision of G E Blacker 7 RAR 594 in August 1993 involved an appeal against a penalty of four months disqualification for a breach of ARR 178 for the administration of the drug nandroline. The period was reduced to three months but, disqualification was recognised as the appropriate penalty even although the appellant had an impeccable record and had acted on the instructions of a veterinarian who had prescribed the drug. The Board stated:

> *"We recognize that in some other States a different view has been taken, but that is the view that this Board takes of this drug offence, and it is the view we will give effect to."*

The appeals of T O'Sullivan & D.L. Brunton 8 RAR 681 before the Victorian Racing Appeals Tribunal in 1993 concerned the drug caffeine and involved a breach of ARR 178. For various reasons, all irrelevant to the present appeals, they involved unusual circumstances which resulted in suspensions being reduced to fines. In the Victorian appeals Judge McNab stated:

> *"It was common ground, as appears from the transcript, that the amount of caffeine in the positive was very small; that it would not have affected the performance of the horses at all; and that less than therapeutic dose was administered. It was conceded by the stewards that both trainers acted in good faith and in the belief arrived at through a lack of proper precautions - as I have found - but in the genuine belief that it was not a prohibited substance that was being administered. The Tribunal considers that those circumstances are very different from those in normal cases of administration of drugs; that is, the administration close to race day of a therapeutic dose to improve the health and well-being of the horse so that it would at least run to the best of its ability.*
>
> *The decisions of a Tribunal are not binding on any other Tribunal, but it was said by Nixon J in Sant - and I think I have said much the same thing - that each case depends on its own circumstances. In the case of Sant, Nixon J said, in effect, that in the ordinary case a fine was not appropriate for a drug offence, and that while a fine is not excluded and is expressly provided for by the rules, may be imposed depending on the specific*

circumstances but that in effect it would need to be a case that was exceptional or out of the ordinary.

As I understand the position up till this stage, no Tribunal in Victoria has considered that a fine was appropriate for any drug-related offence. It is the view of the Tribunal that in the normal case a drug positive would result in a substantial period of disqualification or suspension. I see no reason to deviate from that general proposition. It is crucial for the confidence of the public in the administration of racing and for its proper control that racing be drug free. That is certainly the situation in the normal case. It is a question here whether, in the special circumstances of this case - which is a case conceded by the stewards to be an unusual case - a period of suspension is appropriate."

Finally I refer to the appeal of R J Caught 11 RAR 941 which is a decision of the Queensland Racing Appeals Authority in September 1994. The appellant was a trainer who was disqualified for 6 months. He had administered the drug heptaminol on being informed that it was safe to do so up to 48 hours before a race. The penalty was varied to 3 months suspension and 3 months disqualification on appeal to the Stewards' Appeals Committee. Ultimately, the appellant appealed to the Authority who in dismissing the appeal stated that the Stewards' original sentence *"...is not and cannot be classified as manifestly excessive. "* and that the sentence of three months suspension and three months disqualification *"...seems to be unduly generous ..."*

As I believe that these cases do provide an appropriate basis upon which decisions in this State should be approached, they should generally be followed.

DRUG PENALTIES IMPOSED BY WATC STEWARDS

It is clear from the decisions of the local Stewards which are referred to in The McPherson Reasons that the penalties imposed in this State since 1979 range from disqualifications of three months to five years with the majority being either six months or twelve months. The only fine imposed by the Stewards, namely $10,000 in relation to K C Leach (Appeal 013) for presenting with phenylbutazone, was on appeal in 1990 and prior to the creation of the Tribunal, changed to three months disqualification. A number of the disqualifications

were successfully appealed prior to the creation of the Tribunal. Of these some were reduced, but remained disqualifications, whilst others were reduced to fines.

I am satisfied that, based upon the penalties imposed by the Stewards as recorded in The McPherson Reasons, that the Western Australian Turf Club Stewards consistently have not followed the New South Wales approach. I am also satisfied that over the period covered in The McPherson Reasons the Stewards in this State have in the main part been consistent and compatible with their counterparts in the smaller States and Northern Territory in relation to the type of penalty they have imposed for drug offences.

WA RACING PENALTIES APPEAL TRIBUNAL DECISIONS

I now turn to decisions of this Tribunal involving ARR 175(h)(ii) and ARR 178 in the context of the assertion made in The McPherson Reasons that in Western Australia *"...there has been a trend away from disqualification in favour of fines at appeal level."*

As previously mentioned The McPherson Reasons are expressly confined to those drugs which met the description Class 4 of the Uniform Classification Guidelines. Whilst we were not addressed by counsel in the present appeals on which drugs meet that classification, and I cannot recall previously ever having been informed as to what that classification is, I can best deal with the assertion by starting with a reference to those cases which have gone to the Tribunal and were successful in having disqualifications reduced to fines. Those cases are summarised in The McPherson Reasons as follows:

Date	Horse	Trainer	Prohibited Substance	Rule	Steward Penalty	Appeal Penalty
12.07.91	ROAD EXPRESS	K C LEACH	METHYLPRED-NISOLONE	175(h)(ii)	1 YRDISQ	$7,000
19.07.91	TEST OF STRENGTH	R T BRANSBY	FLUNIXIN PHENYLBUTAZONE	178	3 MTHS DISQ	$1,000
1993		B R HARRISON	OXYPHENBUTAZONE		6 MTHS DISQ	$5,000

27.06.94	REIGNCINE	G P POLETTI	FLUNIXIN	5 MTHS DISQ $5,000

In order to understand the reasoning of the respective Tribunal panels who decided those appeals, I need to resort to the determinations of those panels where the reasons are expressed as I did not sit in relation to any of these four appeals. Mr Bransby's disqualification was reduced because the Tribunal took into account the extent of administration of the substance despite precautions having been taken, his previous good record and the fact that the horse was not apparently adversely affected. The reference to Mr B R Harrison, I assume, relates to Appeal 166. Mr Harrison's penalty was reduced for the reason that it was likened to that of Luciana's case (Appeal 146); 8 RAR 690 where the appellant had relied on the advice of his veterinary surgeon as to the safe with-holding period after administration of the drug. Accordingly the disqualification was set aside and a fine of $5000 was imposed. Mr Poletti's was reduced for a number of reasons which included the fact that the drug was not performance enhancing but rather was a common anti-inflammatory drug, the appellant took steps to safeguard his position by administering a lower therapeutic dose and did have an unblemished record of 18 years.

In all of the other appeals since the establishment of the Tribunal in April 1991 that involve drugs and breaches of ARR's 175 and 178, the penalties of disqualification were not upset by the Tribunal save for S M Treloar (Appeal 102); 5 RAR 398 and J MacMillan (Appeal 106); 5 RAR 395. In Treloar the disqualification for presenting a horse for racing which had 19-Nortestosterone, a prohibited substance, administered to it under rule 178 was set aside due to complex and unusual circumstances including the fact that the appellant's long standing vet administered a drug outside the authority of the appellant and that the appellant had taken *"...the level of precautions which the rule [ARR 178] contemplates in order for her to be exonerated of the charge."* In MacMillan a three month disqualification for a breach of rule 178 was reduced to a 14 day disqualification plus a fine of $500 upon appeal. The fact that the appellant did not administer the drug, the appellant was completely forthright in assisting the stewards, the drug was non-performance enhancing and the appellant's good background and record were all positive factors in his favour. Another important consideration was the

fact that there were apparently no guidelines regarding the question of supervision, particularly by part-time and hobby trainers.

In relation to drug appeals, with few exceptions, I have concluded that disqualification was the appropriate penalty. This approach is also consistent with the approach I have always adopted in relation to applications under s.17(7) of the *Racing Penalties (Appeals) Act* 1990 for the suspension of operation of penalties. Paragraph 7 of the Tribunal's Practice Direction No. 1 of August 1993, in setting out the principles applicable to the granting of stays, states that: *"The severity of the offence will also be taken into account. For example, drug related offences will require a higher degree of persuasive argument."* Rarely have I granted a stay to an appellant who was convicted of a breach of the drug rules.

Appeals to this Tribunal where I have been involved and where disqualifications have prevailed, even although some reductions to the period in some cases occurred, include: G L Way (Appeal 017); 4 RAR 284, J C Byrne (Appeals 064 and 074), A Bamford (Appeal 117), B G P Yeates (Appeal 118); 7 RAR 591, F H Maynard (Appeal 133); 7 RAR 559, R N Leach (Appeal 152); 8 RAR 690, G Harper (Appeal 165); 9 RAR 756, V Ferrier (Appeal 200), A R Bamford (Appeal 226) and R N Harvey (Appeal 243); 12 RAR 1170.

As previously mentioned, the appellant in the matters under consideration sought to rely on the appeals of J C Byrne. I chaired both of those appeals which were unanimously decided. It is worth highlighting the fact that in the first of those appeals, namely 064, the disqualification of six months in relation to detection of flunixin was reduced to a disqualification of three months because, in the circumstances of that case, *"...the appellant has evoked some sympathy"*. However the Tribunal, expressly stated that it *"...does not believe that this is an appropriate case to substitute a fine for a disqualification"*. In that case, the Tribunal in referring to the purpose behind the rules relating to prohibited substances, namely to achieve a drug free racing industry, referred to the New South Wales Racing Appeals Record of Decision Vol 1 at p. 146 in trainer V P Sutherland and the Owners of The Horse "Red Poco" where Judge Goran stated:

"Yet it is the natural consequence of the definition of prohibited substances in the rules, which not only describes the nature of the substances, but also their prohibition in actual racing, as part of that same definition.

What the racing legislators were doing was setting up a method of controlling drugs in racing. They made no attempt to control the use of therapeutic substances. They simply forbade their use in races. In doing so they threw the onus upon trainers to ensure that when horses came to race they were completely free of such substances even though they had been used in therapy. In this context the question of whether, or to what extent, the substance affected the performance of the horse, becomes completely irrelevant and misleading."

In the second Byrne appeal (074) we stated that *"It is the unanimous decision of the Tribunal that a fine is not appropriate in the circumstances of this appeal."*

Having gone to these lengths in the examination of the history of the handling of these drug cases by the Tribunal in this State, I have come to the conclusion that the record does not support the proposition that there is a trend away from disqualification at appeal level in Western Australia.

CONCLUSIONS IN RELATION TO THE CASE LAW

I am satisfied from the analysis of these appeal cases as well as from having studied the penalties imposed in the cases referred to in The McPherson Reasons that a number of firm conclusions can now be stated:

1. As a result of the Australia-wide policy of drug-free racing, which is reflected in the uniform Rules of Racing, all drug-related offences in racing are serious matters which clearly do endanger the integrity of the racing industry. The importance of the public impression in the racing and gambling industry is seen in no clearer terms than in the joint judgment of Owen and Anderson JJ in the case of *Harper v. The Racing Penalties Appeal Tribunal of WA,* (1995) 12 WAR 337 where their Honours said that:

"...the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting."

2. As the Rules of Racing which are framed to promote drug free racing do not distinguish between performance enhancing and non-performance enhancing drugs under the definition of a "prohibited substance", this consideration must be taken into account by the Stewards and the Tribunal when considering the circumstances of each case as a whole and then again when determining an appropriate penalty.

3. The Rules of Racing do not distinguish between the different types or categories of prohibited substances in any way. This fact must indicate that the regulators of the industry consider that once a particular category of penalty is found to be appropriate for a performance enhancing drug, then, without more, that category should be applied to an offence involving a therapeutic drug. The judgment of Judge Goran in V P Sutherland and the Owners of The Horse "Red Poco" provides complete support for this proposition.

4. Despite what is stated in the previous two conclusions, the fact that the word 'may' appears a number of times in ARR 196 does allow for some scope to vary a penalty, depending on all of the relevant circumstances.

5. In the case of a therapeutic drug which has been administered close to race day in order to improve the health and well being of a horse so as to enable it to run at least to its best ability, the performance of the animal during the race is enhanced by the presence of that drug.

6. Despite the uniformity in the Rules of Racing Australia wide there are different individual considerations which appear to be relevant to each state or territory from a racing industry perspective. These considerations which may justify or explain the fact that different attitudes have been

adopted in relation to the imposition of drug penalties. Each of the more populated States, which presumably support larger racing industries, in general have adopted a less harsh approach to sentencing than the other States and the Northern Territory. It should also be noted that the appellate processes and the jurisdiction of the appeal tribunals in each state and territory are not identical. Whether this fact in any way influences the different approaches to the penalties applied to drug offences in the face of the uniform rules, I cannot comment.

7. Whilst it appears in every jurisdiction that the Tribunals and Stewards place the utmost importance on the health and integrity of the Racing Industry and all agree that drug use is not acceptable in any form, there clearly is no universal application of the penalties that are available. The variations, which are significant, must stem from the individual perceptions that each Tribunal has in relation to what is appropriate in its own jurisdiction in order to keep the industry free from drugs.

8. The appropriateness of a particular category of penalty, for example a disqualification versus a suspension, should not necessarily vary according to whether the offence is a breach of ARR 175(h)(ii) or ARR 178 if the facts and circumstances are in all other respects the same. To this extent I agree with counsel for the appellant. However, the length of the disqualification or severity of the other penalty which may be imposed in the particular circumstances, may vary according to the very nature of an "administration" offence as distinct from a "presenting to race" offence so long as the facts surrounding the introduction of the drug into the horse are unknown and that introduction has not been due to any deliberate act or omission on the part of the trainer concerned.

9. Each case involving drugs should only be determined after a careful analysis of all of the relevant facts and circumstances. Usually little reliance can be placed on previous decisions without knowing all of the relevant surrounding facts and circumstances applicable to them.

10. I do not agree with the proposition expressed in The McPherson Reasons that:

> *"Disqualification is the most severe penalty available against a trainer under the Rules. It ought to be applied only in the most serious cases. If there is another type of penalty available which would meet the ends of justice in the case, then it ought to be applied. Put simply, disqualification ought to be a penalty of last resort."*

The category of disqualification is obviously harsher than the other categories of penalties that are available under ARR 196. However, only in the case of disqualification for life can it be said to be the most severe of penalties. Further, I consider that unless special circumstances justify the imposition of a less severe type of penalty that disqualifications should be the norm in the case of drug offences. In this regard I go along with the reasoning and approaches which were adopted in such cases in other jurisdictions as W J Green (supra), N T Pike (supra), D Green (supra), G E Blacker (supra) and R J Caught (supra). Those cases should be followed by the Tribunal in this State. I believe a fine for Mr O'Donnell's type of offence would be totally inappropriate, unless special circumstances could be said to justify it. In my respectful opinion, no such special circumstances existed in McPherson.

11. In The McPherson Reasons comment is made that there is no evidence to demonstrate that the prevalence of drug offences in Western Australia justify larger penalties than elsewhere. In the absence of such evidence it becomes possible to speculate generally. For example, one wonders whether there are relatively fewer drug offences in those jurisdictions that impose harsher penalties compared with the prevalence in the more lenient states.

GROUNDS OF APPEAL 2 & 5

I can now deal with the specific allegations contained in grounds of appeal 2 & 5. After a close analysis of the case law and for the reasons stated above I am satisfied that a period of disqualification was entirely appropriate for both of

Mr O'Donnell's charges as distinct from suspensions or fines. The penalty of disqualification is in accordance with the penalties imposed in many similar cases decided in this State as well as in some of the other authorities in other states previously identified.

Particular (i) of ground 2 alleges that:

"The Stewards erred in considering that the following factors were aggravating features of the case:-

(a) the drug was not an equine specific substance;

(b) the drug was not administered under veterinary advice;

(c) the Appellant did not name the source of his supply;

(d) the case involved administration of a drug rather than the simple presentation of a horse found to contain a prohibited substance.

The actual description which was in fact used by the Stewards in relation to matters (a) to (d) was that these matters were *"...pertinent to the penalty imposed."* I agree with the appropriateness of those words.

The Stewards properly took into account each of the factors referred to in (i) of ground of appeal 2 as each was relevant to the determination of the matter. Such matters are commonly considered as they are often key elements to be taken into account in making a determination.

Further I am not satisfied that the Stewards committed any error in relation to the mitigating factors referred to in (ii). Each factor was addressed by the Stewards and due weight was given to it.

Unlike the situation which prevailed in McPherson, the Stewards in arriving at the penalty for Mr O'Donnell spelt out precisely what their reasons were for imposing the 6 month disqualifications.

I agree with senior counsel for the Stewards that McPherson is distinguishable as it involved a feeding system that "went haywire". I also agree that the privilege to train is contractually given and a licence may be taken away for a breach of the

Rules. I am entirely satisfied that the disqualifications for the periods imposed were within the range of periods that were appropriate for these offences in this State. Further, it is my respectful belief that the panel in McPherson on their first determination of the matter were correct in having concluded that *"...the penalty has not been shown to be outside the range as to demonstrate error"*.

For these reasons I consider these two grounds of appeal should be dismissed.

GROUNDS OF APPEAL 3 & 4

Some of the cases referred to above considered the issue of whether cumulative or concurrent penalties were appropriate. In Way (Appeal 017); 4 RAR 284 the decision of the WA Tribunal was to run the sentences cumulatively. The relevant facts briefly were that Mr Way was convicted of four offences, three relating to ARR 178. The drug offences related to the detection of the drug etorphine in two separate horses on two separate occasions in a relatively short time span. The drug in question, which was a powerful performance enhancer, was one of the worst varieties. It is entirely inappropriate to equate Mr O'Donnell with Mr Way.

However in Pike (supra), a decision of the Northern Territory Racing Appeals Tribunal, the drug heptaminol, was detected on two occasions, approximately one week apart when the horse was swabbed on each occasion after winning a race. The Tribunal there decided that it was appropriate to make the penalties concurrent as the appellant's behaviour amounted to one course of conduct in the circumstances.

In I C Byrne (Appeal 074) the Stewards determination was varied so that the disqualification ran concurrently, partly for the reason that what had occurred amounted to a first offence.

In Oldfield 9 RAR 715, another decision of the Northern Territory Racing Appeals Tribunal, the Tribunal specifically stated:

> *"...there is no sound basis upon which to accumulate the penalties as it is the same horse, the same stables, the same offence and nothing of significance altered between 18 April and 3 May such that the course of conduct to be punished should properly be broken into two. Legal principles relevant to criminal penalties support this conclusion."*

It can therefore generally be said that whether penalties should be run cumulatively or concurrently depends upon whether the facts amount to only one continuous course of conduct, or whether the actions of the appellant can be safely split into two or more courses of conduct in the circumstances.

Mr O'Donnell's case clearly involves a situation where one course of conduct occurred in the space of a short period of time. The same drug was administered in precisely the same way by the appellant to the same horse for precisely the same therapeutic reasons. The two offences were detected, charged and dealt with identically.

Although the six month disqualification in each case should stand, as this length of time is within the range of penalties open to the Stewards, I am satisfied that the Stewards have erred in making these penalties cumulative.

Accordingly I consider the penalties in Mr O'Donnell's case should be served concurrently.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

9 / 2 /1996

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

960011.jrp

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS P. HOGAN (MEMBER)

APPELLANT: **GORDON WILLIAM O'DONNELL**

APPLICATION NO'S: **A30/08/263 & A30/08/264**

DATE OF DETERMINATION: **22 DECEMBER 1995**

IN THE MATTER OF the determination of the appeals made by Mr G W O'Donnell (against the decisions of the Western Australian Turf Club Stewards on 1 August 1995 imposing two penalties both of six months disqualification under Rule 175(h)(ii) to be served cumulatively) whereby the Tribunal ordered on 22 December 1995 that the convictions be confirmed but that the penalties be varied so as to be served concurrently.

Mr T F Percy with Ms D Davies, on instructions from David Geoffrey Price Solicitor, appeared for the appellant.

Mr R J Davies represented the WA Turf Club Stewards.

Mr O'Donnell has appealed against penalties imposed upon him by the Western Australian Turf Club by way of two cumulative periods of six months' disqualification under Rule 175(h)(ii). The penalties relate to the fact that on 22 June 1995 and again on 5 July 1995 post-race urine samples taken from the horse Fubar revealed the presence of the prohibited substance Ketorolac.

The background circumstances of the two offences are dealt with in the Chairman's decision and need not be canvassed again here.

The Amended Grounds of Appeal which were provided to the Tribunal at the commencement of the hearing before it on 6 September 1995 disclose three separate grounds of appeal.

First Ground of Appeal

Counsel for the appellant submitted that:

> *"the stewards erred in imposing a period of disqualification on either charge as such a penalty was not in accordance with penalties imposed for similar offences in this State and in other States of Australia. An appropriate penalty in respect of each offence would have been a fine."*

The Amended Grounds of Appeal particularised this first ground of appeal. It is not necessary to make reference to those particulars at this point.

The first issue to be decided in relation to the first ground is whether one can establish a nation-wide trend with respect to the imposition of penalties in drug cases. As the provisions of the Rules in the racing of thoroughbreds, pacers and greyhounds vary, I propose to confine myself to an examination of penalties imposed in relation to thoroughbreds.

Counsel for the appellant placed much reliance upon this Tribunal's decision in *McPherson.* Full details on that case including reference to the decision of Rowland J in the Full Court of the Supreme Court, are provided in the Chairman's decision and are therefore not repeated again here.

Like the Chairman, I have carefully examined the Racing Appeals Reports, which are a digest of the rulings, observations and comments of Australian and New Zealand statutory appeals tribunals for thoroughbred racing, harness racing and greyhound racing. As one reads through those reports, it is clear that in the States of Queensland, South Australia, Tasmania, Western Australia and the Northern Territory, the relevant appeal bodies are generally of the opinion that disqualification in drug cases is almost inevitable. The Victorian Racing Appeals Tribunal favours suspension or disqualification. The reports contain only one decision of the Racing Appeals Tribunal of New South Wales where a trainer appealed against the imposition of a $10,000 fine in relation to the presence of phenylbutazone in the relevant horse. This was in the case of ***Maynes*** reported at 2 RAR 170 (that is, Issue 2 of the Racing Appeals Reports at p.170). The Tribunal affirmed the decision of the Stewards, previously confirmed by the Australian Jockey Club Committee. It appears that there are so few appeals to the New South Wales Tribunal because in that State the Stewards themselves impose fines rather than suspensions or disqualifications in drug matters.

The Tasmanian Racing Appeal Board has recognised that "there is a different approach in Tasmania to the imposition to penalty in respect of breaches of Rule 178 to that in some other States, and that the most obvious distinction is that in Tasmania almost inevitably disqualification rather than a suspension will be imposed": ***Green*** 1 RAR 41.

The Victorian Racing Appeals Tribunal stated in the case of ***Clarke*** 2 RAR 169:

> *"since December 1987 penalties have been imposed more consistently and severely than previously, this being at a time when a determined effort was made by racing authorities in all codes to stamp out the administration of prohibited substances, and it is important for public confidence in the administration of racing that persons found guilty of this offence should receive condign punishment and that suspension or disqualification for a substantial period should be the order of the day."*

In the case of ***O'Sullivan and Brunton*** 8 RAR 681, it was noted that the decisions of a tribunal are not binding on any other tribunal and reference was made to the comments of Nixon J of the Victorian tribunal in relation to a harness racing case. In ***O'Sullivan and Brunton*** the tribunal said:

> *"In the case of **Scant**, Nixon J said, in effect, that in the ordinary case a fine was not appropriate for a drug offence, and that while a fine is not excluded and is expressly provided for by the Rules, it may be imposed depending on the specific circumstances, but that in effect it would need to be a case that was exceptional or out of the ordinary. As I understand the position up to this stage, no Tribunal in Victoria has considered that a fine*

was appropriate for any drug related offence. It was the view of the Tribunal that in a normal case a drug positive would result in a substantial period of disqualification or suspension." (page 685).

In South Australia the Racing Appeals Tribunal observed in the case of ***Hall*** 3 RAR 198 that:

"in ordinary circumstances a suspension of 4 months would be unlikely to be considered excessive for a breach of Rule 178. It would in many instances be extremely lenient."

The Northern Territory Racing Appeals Tribunal in the case of ***Pike*** 4 RAR 312 found that:

"the vast majority of racing clubs, their stewards and Racing Appeals Tribunals have adopted a deliberate policy of regarding the use of prohibited substances (whether or not they affect the running of the horse in a race) as a serious danger to the integrity of the racing industry and "save in exceptional circumstances, disqualification is the appropriate penalty"".

In Queensland in the case of ***Standfield*** 7 RAR 577, the Racing Appeals Authority referred to ***Dixon's*** case which was a harness-racing case where it had been said that as a general rule:

"It seems to us to be desirable there should be a uniform approach in dealing with precisely the same problem in the different racing codes ... The effect of the administration upon the horse in each code is the same, yet the penalties imposed are now remarkably different ... In short, we prefer the penalty option of disqualification as a general rule to drug related offences".

In the case of ***Caught*** 11 RAR 941, the Stewards' Appeals Committee had reduced a disqualification period of 6 months to 3 months disqualification and 3 months suspension. The Authority refers to the examination of the question of penalty in cases of this kind in the Queensland harness racing case of ***Dixon*** again and concluded that the penalty imposed by the Stewards' Appeals Committee in the circumstances:

"... is not and cannot be classified as manifestly excessive ... In all of the circumstances, it seems to me to be unduly generous".

In the same decision it described a penalty of $2,000 which had apparently been imposed by stewards in another case for a positive swab of the drug Heptaminol as being manifestly inadequate.

Whilst there have been a number of cases where the West Australian Racing Penalties Appeal Tribunal has dismissed a disqualification period and imposed a fine, in the majority of cases the penalty has remained one of disqualification (although sometimes the period has been reduced). In ***McPherson*** the Tribunal had referred to a "trend away from disqualification in favour of fines at appeal level" (page 11). I do not agree that this is in fact the case.

A reading of reported decisions reveals that prior to the ***McPherson*** case this Tribunal had considered appeals against the imposition of disqualification periods in drug cases relating to thoroughbreds, on a number of different occasions. On some of those occasions the disqualification period was dismissed and a fine imposed. For example, in ***Bransby*** 2 RAR 113, the Tribunal reduced the penalty after considering the fact that the substance had been

accidentally administered, despite some precautions having been taken, and also took into account the appellant's previous good record and the fact that the horse was apparently not adversely affected by the substance. In the case of ***Miller*** 7 RAR 589, a 3 month disqualification period was varied to a fine of $2,500 on the basis that the appellant had no prior record, that she was not in good health at the relevant time, and that she was not the perpetrator of the offence. The Tribunal made it clear that the penalty was varied in light of the peculiar circumstances of this particular case. In the case of ***Harrison*** 9 RAR 750, a 6 month disqualification period was set aside and a fine of $5,000 imposed. It was considered that the circumstances of that particular case were similar to the case of ***Luciani*** (reported at 8 RAR 693) where the Stewards themselves had imposed a $5,000 fine after describing the special circumstances of the case. These were that the appellant had a good prior record and acted "on a degree of veterinary advice" and that the drug was a metabolite which was detected in small amounts. Inthe of case ***Poletti*** 10 RAR 891 a disqualification period of 5 months was set aside and a $5,000 fine imposed. Here the substance administered was a common anti-inflammatory. Although the appellant broke his regime in administering such a substance, he administered a lower therapeutic dose and was still operating within the guidelines of the relevant drugs. It was considered that his actions were an error of judgement. Furthermore he had an unblemished record of 18 years. On all other occasions, the penalty of disqualification has been confirmed by the Tribunal, although in some instances the period of disqualification has been reduced.

It is interesting to note that when ***McPherson*** was first heard by the Tribunal (10 RAR 901), the 2½ years disqualification imposed by the Stewards was affirmed. The Tribunal on the second occasion was clearly influenced by the comments of Rowland J when the Full Court of the Supreme Court heard McPherson's application from that decision. In rehearing the case of ***McPherson*** the Tribunal went to considerable trouble to attempt to establish a tariff in relation to penalties in drug cases. Unfortunately the source materials used were not particularly informative in that the materials gave the relevant date, name of horse, name of trainer, name of prohibited substance, the penalty imposed by the Stewards and the appeal penalty, but did not give any information as to the circumstances surrounding the fact that a prohibited substance came to be found in the relevant horse.

Whilst I am of the opinion that the trend in most Australian States is to favour disqualification in drug cases, there are cases where such special circumstances apply which would result in the imposition of a disqualification period being a manifestly excessive penalty. Mr O'Donnell's behaviour was aptly described by Counsel for the Stewards as being in the realms of "cowboy country". He had administered a drug meant for humans without any veterinary advice. At one point during the Stewards' hearing the Chairman said to him:

> *"Well the whole thing is that you haven't sought advice. You were playing Russian roulette. Didn't it ever go through your mind that there would be a risk with the use of this Toradol?"*

and the rather disturbing answer was:

> *"Well no sir, because for the simple reason that I didn't know anything about this medication and no one else did either, and everyone said it was okay to use".*

He had kept no records of his administration. Counsel for the appellant conceded that there had been some recklessness, but submitted that that diminished the appellant's culpability in that he had

not taken a cold, calculated approach. I do not accept that such careless behaviour is a mitigating factor.

As a licensed trainer, Mr O'Donnell has contracted with the WATC to present his horses drug-free. A licensed trainer should take every effort to ensure that such is the case.

After carefully examining the reports of the statutory appeals tribunals throughout Australia, the first ground of appeal must fail. In my opinion the appellant has not shown such special circumstances apply to his case as to reveal that the Stewards erred in imposing the penalty of disqualification.

Second and Third Grounds of Appeal

The second and third grounds of appeal are interrelated to some extent. One ground is that the two periods of disqualification ought to have been concurrent, the other is that the two cumulative periods of 6 months disqualification were clearly excessive. I agree that the two periods of disqualification ought to have been concurrent, and find support for this in the reported cases. In particular I agree with the principle expressed in the Northern Territory Racing Appeals Tribunal decision in ***Oldfield*** (7 RAR 545), where the Tribunal stated:

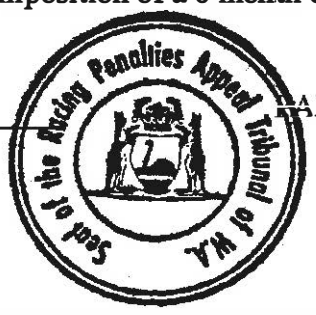
> *"There is no sound basis upon which to cumulate the penalties as it is the same horse, the same stables, the same offence and nothing of significance altered between 18 April and 3 May such that the course of conduct to be punished should properly be broken into two. Legal principles relevant to criminal penalties support this conclusion."*

That leaves me to consider whether the total period of 6 months disqualification is manifestly excessive in Mr O'Donnell's circumstances. This takes me back to the particulars provided in relation to the first ground of appeal. These particulars are extracted in the Chairman's decision and need not be repeated again. There is nothing within the Stewards' decision to indicate that they took into account an irrelevant consideration when arriving at the 6 months' disqualification period. The Chairman of Stewards specifically stated that they had considered all the matters that he had placed before him. It is true that the Chairman then listed as matters pertinent to the penalty to be imposed, those matters which prima facie appear to be negative factors rather than positive factors. However, there is nothing to indicate that these matters were given undue weight. Nor is there anything to indicate that the Stewards did not give sufficient weight to the mitigating factors which were clearly enunciated before them by Mr O'Donnell.

Finally, I have read the decision of the Chairman of this Tribunal, and agree with his conclusions regarding the appropriateness of the 6 month penalty decision.

Conclusion

I am of the opinion that the Stewards erred in making the disqualification periods cumulative but that no error has been shown in relation to the imposition of a 6 month disqualification period.



PAMELA HOGAN, MEMBER
9/2/96

APPEALS 263 & 264

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR L. ROBBINS (MEMBER)

APPELLANT: **GORDON WILLIAM O'DONNELL**

APPLICATION NO'S: **A30/08/263 & A30/08/264**

DATE OF DETERMINATION: **22 DECEMBER 1995**

IN THE MATTER OF the determination of the appeals made by Mr G W O'Donnell (against the decisions of the Western Australian Turf Club Stewards on 1 August 1995 imposing two penalties both of six months disqualification under Rule 175(h)(ii) to be served cumulatively) whereby the Tribunal ordered on 22 December 1995 that the convictions be confirmed but that the penalties be varied so as to be served concurrently.

Mr T. F Percy with Ms D Davies, on instructions from David Geoffrey Price Solicitor, appeared for the appellant.

Mr R J Davies Q.C. represented the WA Turf Club Stewards.

I have read the decision and the reasons for decision as given by Mr D Mossenson (Chairperson) and I am in agreement with that decision and the reasons for that decision.

I am also of the view that the six months disqualification in each case should stand, however I consider that the Stewards erred in making these penalties cumulative.

In my opinion and for the reasons outlined by Mr D Mossenson (Chairperson) the penalties should be served concurrently.

L. B. Robbins

LINDSAY ROBBINS, MEMBER
9/2/96

DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**GORDON WILLIAM O'DONNELL**
APPLICATION NO:	**A30/08/263 and A30/08/264**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MS P HOGAN (MEMBER)** **MR L ROBBINS (MEMBER)**
DATE OF HEARING:	**6 SEPTEMBER 1995**

IN THE MATTER OF appeals by Mr G W O'Donnell against the determinations of the Western Australian Turf Club Stewards on the 1 August 1995 imposing two penalties both of six months disqualification under Rule 175(h)(ii) to be served cumulatively

---

Mr T F Percy with Ms D Davies, on instructions from David Geoffrey Price Solicitor, appeared for the appellant.

Mr R J Davies QC appeared for the respondent.

In the absence of the two members I am authorised by them to publish this unanimous determination of the Tribunal.

Grounds of appeal 2 and 5, dealing with the severity of the two periods of six months disqualification, both fail and are dismissed.

Grounds of appeal 3 and 4, dealing with the cumulative periods of disqualification, both succeed. The two periods of disqualification ought to have been ordered to be served concurrently.

The decision of the Stewards is varied accordingly and the lodgement fee will be refunded.

DAN MOSSENSON, CHAIRPERSON

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

22/12/1995

950156.DXM ah