THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON

(CHAIRPERSON)

APPELLANT:	CHRISTOPHER GEORGE WILLIS
APPLICATION NO:	A30/08/309
DATE OF HEARING:	10 JULY 1996
DATE OF DETERMINATION:	6 SEPTEMBER 1996

IN THE MATTER OF an appeal made by Mr CG Willis against the decision of the Western Australian Turf Club Stewards on 2 July 1996 imposing a disqualification of 3 months for contravening Australian Rule of Racing 175(h)(ii).

Mr R Maumill was given leave to represent Mr Willis.

Mr LA Wagener, assisted by Messrs F Powrie and M Boyd, appeared for the Western Australian Turf Club Stewards.

THE STEWARDS' INQUIRY

On 2 July 1996 the Stewards of the Western Australian Turf Club conducted an inquiry into a report which they had received from the Australian Jockey Club Laboratory that clenbuterol was detected in the urine sample taken from KING KUSH after it had won Race 7, the Heatlock Handicap at Belmont Park on the 29 May 1996. Mr Willis is a licensed trainer with the Western Australian Turf Club with some 28 horses in work including KING KUSH.

In view of the issues and the novel arguments which were presented to the Tribunal it is necessary to set out the relevant facts of the matter in more than the usual detail.

After the Stewards received the Laboratory report, Mr P Criddle, one of the Stewards, visited Mr Willis at his training establishment on 21 June 1996 and advised him of the detection of clenbuterol by the Laboratory. Mr Criddle reported to the inquiry the conversation which ensued as follows:

> *"I advised him* [Mr Willis] *that clenbuterol had been detected in the sample taken from KING KUSH when it raced and won at Belmont on the 29 May 1996, and the sample had been forwarded to another analyst for confirmation. I then handed Mr. Willis some correspondence from the analyst.*
>
> *I said "clenbuterol is commonly known as Ventipulmin".*
>
> *Mr. Willis said "I have only been feeding this stuff Broncopulmin".*
>
> *I said "yes, Broncopulmin is another name for clenbuterol".*
>
> *Mr. Willis said "Well I have been feeding it to my horses with runny noses for 12 months".*
>
> *I said "Have you been feeding clenbuterol to King Kush".*
>
> *Mr. Willis said "Yes I have. I feed it to all my horses that are showing signs of a cold or a runny nose that sort of thing".*
>
> *I said "When did you stop using clenbuterol before King Kush raced".*
>
> *Mr Willis said "I fed it to King Kush the night before it raced, just like I have done with a few of my other horses, Bar Dreamer to name one".*
>
> *I said "Did you get any advice from anyone relating to the cut off period".*
>
> *Mr Willis said initially that he had not sought any advice and had been guided by the label on the container. After a short time he explained that he may have asked Veterinarian Trevor Lindsay for some advice, he recalled having been told he could use it right up until raceday but was unable to confirm this.*

I said "How much have you been feeding King Kush.

Mr. Willis said "Two 10ml scoops in the night feed".

I said "We will contact you when or if we receive a confirmation of the other sample".

Dr S Richardson, a veterinary surgeon, gave evidence at the Stewards' inquiry that *"...clenbuterol is a bronchodilator effecting the respiratory system and so it is a prohibited substance and contravenes the Racing Rules"*. Dr Richardson explained the effect of the substance on a horse in these terms:

> *"...., although the administration of clenbuterol to a normal horse, it probably doesn't have, necessarily have, any effect on enhancing the performance, but since, most of our horses, as I say, have got colds or some respiratory infection and I believe that the medication of that horse then must enhance the wellbeing of the horse, and when it's enhanced the wellbeing, then consequently, it has the potential to enhance performance."*

Mr Willis accepted the fact that clenbuterol is a prohibited substance.

Evidence was given before the Stewards by Dr A Duffield, the Official Analyst of the Australian Jockey Club, that on the scale of low, medium or intense the amount of substance which was detected was between low and medium. This was consistent with feeding Broncopulmin the night before the race which was conducted on 29 May 1996.

Dr Richardson told the Stewards that the substance had not been registered in Western Australia for a long period of time although it had been on the market for some years. In relation to it Mr Willis stated to the Stewards that:

> *"... , I fed the horse on a product called Broncopulmin which I was of the opinion was the same as a drug called Bromotrimidine which you could feed right up to the last feed the night before and any horse does not swab positive. As it happened about six months ago, I ordered Bromotrimidine*

from Biojohn, and his vet Mr Lingham handles that, and they couldn't supply it and he sent me this stuff Broncopulmin without any notification of any change or any clenbuterol in it and I've been using this stuff for the last six months like Bromotrimidine. When Mr Criddle arrived and told me about the clenbuterol, well I just thought why hadn't it happened before? Because we had been feeding anything with a cough, anything with a cough gets a couple of scoops of this in its night feed for two days, and then it's normally cleared up. So as I was using it just like Bromotrimidine. I didn't really think it was, basically, what it is, it's another Ventipulmin under a different trade name and as you can see, the Ventipulmin from my place has still got dust in the top. If I wanted to use clenbuterol, knowingly use clenbuterol, that's the product I'd use. Because I was unaware this contained clenbuterol, and that's basically how it happened and I rang Mr Lingham, I spoke to Mick Johns and he said he'd speak to him about writing me a letter saying that he provided me with this product and no guidelines on usage and dosage, but after a phone call this morning, he's reneged on that due to ramifications from the AVA, that may go his way and as I said to him on the phone, what it all boils down, it's really my responsibility anyway, so rather than him have to that we've, I've just come here to defend myself on a mistaken honest belief, that's all."

In answer to the question from the Chairman of Stewards *"Did you initially read the label, or seek any advice on it?"* Mr Willis answered *"No. No, sir."* This was despite what Mr Willis had told Mr Criddle. When asked by the Chairman why not, his explanation was as follows:

"Well, as I say, it was just sent out as a substitute for Bromotrimidine, so therefore I thought it was a suitable substitute for Bromotrimidine. Like there was no, as I say there was nothing - there's the container and it just doesn't say anything. You know, so unless, you've read it."

Mr Willis conceded that *"... I should have read the label"*. He later claimed that he had *"Not sufficiently"* read the label after it was put to him by Mr Boyd that *"The label clearly states active constituent 16 ug/g clenbuterol hydrochloride equivalent to 4.1 ug/g clenbuterol. Very clearly printed - the clenbuterol is in large lettering."* Even though the label from the clinic states that the product should be used *"strictly as directed"*, and he was not given any pamphlet or directions for the use of the product, Mr Willis did not seek any

veterinary or other professional advice as to the use of the product. Mr Willis told the Stewards that he administered two ten mil scoops of Broncopulmin in the night feed, that is 20 grams daily. Mr Willis also told the Stewards that he was not the only person who had fed the horses Broncopulmin and Ventipulmin as Dean Campbell had also done so. The following exchange between Mr Boyd and Mr Willis took place:

"BOYD: *The dose shown on the container. The enclosed measure holds 10 grams when level. Administer 5 grams per 100 kilogram body weight twice daily for 10 to 14 days. Now this presumably is for a long term use with a horse which has a persistent problem.*

WILLIS: *Yeah, that does..*

CHAIRMAN: *There is no reference to its use for horses which are racing.*

WILLIS: *No.".*

When asked how he arrived at the 20 grams which was administered Mr Willis explained:

> *"... that's what we feed Bromotrimidine at to clear up colds, and as I've said, on more than one occasion, that is exactly the same way I used this drug because I was under the impression it was a substitute for Bromotrimidine. Had I realised that it had clenbuterol in it, I wouldn't have used it because I've got the Ventipulmin there that we respect and don't go any closer than seven days because I know the ramifications of that. I know exactly what's in Ventipulmin. Whether it be due to my ignorance or whatever, I didn't realize that Broncopulmin contained clenbuterol."*

When asked as to whether he had ever read the label of Bromotrimidine, Mr Willis responded, *"Ah, probably not really, not at length".*

Mr Willis agreed with the following proposition made by Mr Boyd:

> *"Do you not believe it incumbent on you if you get a product made by a different manufacturer as a substitute for something that you have ordered, to either seek further advice from the*

supplier or, preferably from a veterinary surgeon, on that specific product?"

When it was put to Mr Willis that it was *"like playing Russian roulette"* using a different product without seeking any advice from anyone on it, Mr Willis replied *"Well, it's probably putting faith in other people that supply you with things and probably not looking deep enough in to it myself and that's how it's happened."*

There was evidence before the Stewards that Bromotrimidine, Broncopulmin and Ventipulmin each come in completely different packaging.

Mr Willis stated to the Stewards that he did not keep any notes of feeding veterinary lines to his horses. When asked if he had a record of the treatment of any nature to a horse the following exchange occurred:

"BOYD: *So you do have a record for each horse?*

WILLIS: *Not so much each horse, it just goes in the diary if we do something with a horse that's close to racing, yes, it goes in. If the horse been in work two or three weeks, we don't bother, but if he's in the midst of racing or getting close to trialing and we're using a prohibited substance, then it is written in.*

BOYD: *But you have no record of treatment for this horse?*

WILLIS: *Not for this stuff, sir no, because I was under the impression whether it be, who knows, just an honest mistake on my part, that I thought I was feeding the substance Bromotrimidine which contained no prohibited substance. As I stated before, had I thought I was feeding a form of clenbuterol, I would feed Ventipulmin because I was unaware that clenbuterol was contained in that substance. So therefore, there is no record of the horse being fed this substance."*

The following evidence was presented by Mr Boyd as to the betting on the horse:

"The total of $38,570 was invested on KING KUSH for a return of $79,663. The individual bets of $500 or more totalled $31,800 which was 82% of total invested. The return on individual bets of $500 or more totalled $67,800 out of $79,600 total return which was 85% of the total payout. Of this amount $4,750 to $3,800 represented bookmakers bets back. Discounting those bets, the amount in large bets was significantly higher than the normal average over all through a day, or through a mid-week meeting and the investment and payout on this horse was greater than the average for mid-week meetings has been this year and in saying that, I have taken into account the fact that the horse was at a short price."

Mr Willis claimed that this betting was not out of the ordinary for this horse.

The Stewards charged Mr Willis with a breach of Australian Racing Rule 175(h)(ii). That Rule states:

"The Committee of any Club 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 charge were that:

"... the prohibited substance clenbuterol was detected in a post-race sample taken from King Kush at Belmont Park Racecourse on Wednesday 29th May 1996 and that you, the trainer of King Kush, had caused the adminstration of that substance through the use of a veterinary product Broncopulmin".

Mr Willis pleaded guilty. In relation to the question of the penalty he explained to the Stewards:

"... all I can say is that it was an honest and mistaken belief that the drug didn't contain clenbuterol because as I stated before, if I wanted to feed it, that's the product that I would buy because that's the product that I know it contains clenbuterol. I didn't know that contained clenbuterol, otherwise I could have come here and said I stopped feeding it at five and half days, but I've come in here and I've told you the complete truth of how everything happened. I admit it. The horse was fed on it the week preceding and the

night before. I m not hiding the facts that the horse was fed it, all I am saying was it was an honest but mistaken belief that the drug did contain clenbuterol."

In response to this explanation and the other evidence in relation to the penalty the Stewards made the following comments in handing down their sentence:

"Mr Willis, in assessing a penalty, the Stewards have considered all the evidence given. We have taken into account the fact that you have been licensed as a trainer for five and half years, during which time you have maintained a good record and that you have been co-operative and honest throughout this inquiry. We have noted your personal circumstances and have made allowance for your plea of "guilty". However, the Stewards regard any offence related to use of prohibited substances as a serious matter effecting as it does, the integrity of Racing. Further, on your own admission, you have failed to seek veterinary advice on the use of the product Broncopulmin, and you have failed to read the product description stating that the active constituent was clenbuterol and you have administered the product until the night before the race. Because of these factors, we cannot accept your defence of an honest but mistaken belief as being in any way a reasonable belief in the circumstances, and consider your actions to be grossly negligent.

We are also mindful of the statement on page 22 of the O'Donnell Determination which is Appeal 263, and 264 which I will read, and it's Section 5 here:

In the case of a therapeutic drug which has been administered close to race day in order to improve the health and wellbeing 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.

The Steward's decision is to disqualify you for a period of three months."

Mr Willis appealed against the three month disqualification penalty on the basis that it was *"...far too high and a fine would have been a better penalty as in other cases involving this substance."* He also applied for a suspension of operation of the penalty. I refused the application initially as this matter involved drug administration and the appeal was able to be listed for hearing fairly quickly on 10 July. A reasonably lengthy appeal hearing subsequently ensued at the end of

which the Tribunal reserved its decision. A suspension order was then granted in favour of Mr Willis pending the determination of the matter.

THE APPELLANT'S ARGUMENT

At the outset Mr Maumill asserted that I was *"...inflexibly locked into disqualification in all drug cases"* and expressed concern that in view of my past decisions *"Mr Willis will have a great deal of trouble,... "* of *"...convincing* [me] *that there should be a... reduction in the penalty that is received."* Despite that proposition, Mr Maumill did not appear concerned at the prospect of having me remain on the panel to determine the appeal. Rather he expressed misgivings that in my capacity as the Chairman I would influence the two members. The Stewards opposed Mr Maumill's application to have me stand aside.

By the terms of the *Racing Penalties (Appeals) Act 1990* the Chairman of the Tribunal in fact is only entitled to a deliberative vote on matters for substantive determination. The Chairman may have a casting vote in the event that votes are otherwise equal. The two members who constituted the panel with me to hear Mr Willis' appeal had on occasion expressed views on drug matters not dissimilar to what I had published in the more recent period. In those circumstances I was satisfied that there was no logic or justification in the argument that had been raised and I refused Mr Maumill's request to stand aside. As was announced at the hearing both members supported that ruling.

A letter written by Mr A R Taylor addressed to the Tribunal was produced by Mr Maumill at an early stage during the appeal hearing. In his letter, which Mr Taylor signed as President of Western Australian Racing Trainers' Association, he states:

> *"The WA Trainers Assn has a firm policy to support drug free racing in WA.*
>
> *With modern technology so finely tuned to detect drugs trainers have to be extremely cautious in using therapeutic medication in their stables - sometimes the advice of vets, the so called experts, can be in error.*

Mr Willis has been a licensed trainer for about 6 years with no previous convictions for drug related offences. He has trained 29 winners this season in the metropolitan area plus many more on the country circuit. All of these winners were swabbed and free from drugs.

At the moment Mr Willis is heavily committed to the racing industry with his business, numerous staff employed, the building of his house and more stables, and the recent purchase of a large horse float.

He was, until the disqualification, vying of the lead in the racing trainers premiership - an honour and privilege that every trainer strives for. That honour, because of this untimely event, looks extremely remote now.

Our industry is desperately in need of consistency with penalties especially in relation to therapeutic medication.

In respect to Mr Willis, with his clear record as a trainer, his co-operation and frankness with the recent inquiry I feel that a 3 month disqualification is a far too excessive penalty in comparison to other recent cases concerning the same drug."

In order to clarify whether the letter was the personal view of Mr Taylor or that of the Association Mr Taylor was in fact called on behalf of the appellant to give evidence in the proceedings. It became clear that the comments contained in Mr Taylor's letter had not been formally put to and were not adopted by a duly convened meeting of the Committee of his Association. Rather the letter was written by Mr Taylor after he had solicited the views of approximately half of the Committee by telephone.

In the course of giving evidence, Mr Taylor explained that his Association was seeking uniformity in penalties, particularly in regard to therapeutic drugs. The convictions of Mr Matthews and Mr Luciani were referred to. Both of these trainers were fined for their first offences. Mr Taylor did not think that there had been any disqualifications with this particular drug in Australia and he claimed that generally fines were imposed for a first offence. Mr Taylor indicated that he was comfortable with the Stewards' assessment in the Greig case (Appeal 308 heard 21 June 1996) when a 6 month disqualification for the admitted administration of Ventipulmin was imposed. The amount of the drug detected was of the same order as in Mr Willis' case. Administration was by means of a

feed supplement. Mr Greig had asserted that he ceased administration 5½ days prior to racing although the expert tests revealed the drug was administered within 3 days of racing. Based on the facts and circumstances of that case, including the lack of keeping of records of treatments and the fact that it was a third offence, the Tribunal considered that the six month disqualification was appropriate.

Mr Taylor referred to the fact that Mr Willis co-operated with the Stewards and Mr Willis had *"...a swab in the hands of the analyst on almost every week of the year in the last 12 months and...that...he's gone 12 months without a positive swab and all of a sudden one bobs up through his own stupid negligence,... "* Mr Taylor went on to state *"...I would say that for the particular drug in question and other Australia-wide cases regarding this drug are thought in my opinion that the 3 months disqualification was excessive."*

I am satisfied that the statements contained in the letter, other than the subjective comments of Mr Taylor in regard to Mr Willis, do reflect the genuine concerns of many members of the Committee of the Racing Trainers' Association as to the apparent inconsistencies in penalties and their desire, which I believe is entirely reasonable and appropriate, for those penalties to be seen to be consistent and equitable.

Mr Maumill forcefully argued on Mr Willis' behalf. The argument did not suggest that there was any mistake or misunderstanding on the part of the Stewards other than in relation to the length of the disqualification which was imposed and the fact that the appropriate penalty should have been a monetary one. Mr Maumill emphasised that Mr Willis was a first offender who had co-operated fully with the Stewards, was a married man with 3 children whose only source of income was as a horse trainer and who had openly admitted that he had fed the offending substance but erroneously thought the substance was the same mixture he had previously used. He relied on the fact that the level was medium to low and that it was a relatively new product in Western Australia. Mr Maumill claimed that the horse in question was the red hot favourite which Mr Willis observed was facing a potential problem with a runny nose and wishing to

keep his horse as healthy as possible gave it something to clear up any respiratory problems that may have existed. In other words he enhanced the well being of the horse by improving its health. Accordingly he asserted that Mr Willis should be fined rather than have his livelihood taken away.

Mr Maumill claimed that professional trainers were being frustrated by the attitudes of the Stewards in this State. He cited the *"ludicrous situation"* with Bart Cummings in New South Wales who he said had a clenbuterol problem in 1990 and another in 1992 in respect of which he received fines of $5,000 and $2,000. Penalties varied from State to State yet professional racing administrators who meet on a regular basis, should be able to agree on a variety of things and have uniform policing. This, according to Mr Maumill, was damaging to the image of racing.

In addition Mr Maumill referred to the fact that jockey James Barnett was suspended for 2 months for his fifth careless riding offence in 12 months. This was said to be incompatible with the penalty imposed on Mr Willis. Mr Willis did not cause anyone to be injured. Mr Maumill argued that as neither the drug offence nor the riding offence was worse than the other, this revealed there was a bias against trainers. When there is reprehensible, dangerous, careless or negligent riding performance, the public demand action. The image of racing is damaged more by poor riding than a *"skerrick"* of clenbuterol in a swab. The case of Mrs K Miller (Appeal 137 determined 16 July 1993) was also referred to where Mrs Miller had been disqualified for 3 months for breach of Rule 178 where the prohibited substance clenbuterol had been detected.

Mr Maumill relied on MacMillan v Pharmaceutical Council of Western Australia (1983) WAR 166 where Kennedy J at 175 stated:

> *"..... I have reached the conclusion ... that the offence of which the appellant was convicted was not such as to justify the respondent's forming the opinion that it rendered him unfit to continue to be engaged in carrying on the practise of a pharmaceutical chemist"*

Mr Maumill expressly stated that he had refrained from *"regaling the Tribunal with a proliferation of seemingly contradictory penalties from around the country"*.

THE STEWARDS' ARGUMENT

Mr Wagener claimed that the Stewards did in fact discount the penalty to take into account the fact that Mr Willis had been co-operative, although the basis for it was not explained and the amount of the discount was not specified.

Mr Wagener argued that the penalty which had been imposed was appropriate in view of the fact that:

- Mr Willis failed to read the label, failed to seek advice from his veterinarian, failed to seek advice from his supplier and simply fed the product until the night before the race in question.

- *"The detection of a prohibited substance in a sample taken from a very well supported winner strikes at the very heart of racing, that being the integrity of the sport. Also that it is due to the gross negligence of a very experienced trainer heightens the offence... "*

- In the cases of Messrs Tapper and Donovan no appeal was heard. Some of the cases referred to by Mr Maumill were distinguishable. In the case of Mrs K Miller, there was evidence of an error in feeding by staff members which was accepted on appeal and the penalty was varied to $2,500. In the case of Miss V Ferrier, evidence was produced of use of a human preparation which should not have been used as equine treatment. A penalty of 6 months disqualification was confirmed on appeal. In the case of Mr I Greig, a repeat offender, a penalty of 6 months disqualification was confirmed. In the case of Tapper it was 4 months and Donovan 3 months. In Darwin in November 1993, a 6 months disqualification was reduced to 3 months on appeal in the case of Mrs P Barron who prior to this offence enjoyed an unblemished record.

In light of these examples, it was said that Mr Willis' penalty of 3 months disqualification cannot be regarded as manifestly excessive.

- As to the Matthews matter, the Stewards had imposed a fine for detection of a low level of methyl prednisilone acetate which had been administered by a veterinarian surgeon. The horse raced after Mr Matthews checked both with the veterinarian who administered the treatment as well as another veterinarian in order to satisfy himself as to the appropriate withholding period. This case was completely distinguishable from Mr Willis' case as caution, rather than gross negligence, was exercised by Mr Matthews.

THE STEWARDS' DISCRETION AS TO PENALTY

As Mr Willis pleaded guilty to the charge the only issue before the Stewards was as to the appropriate punishment to be imposed. The penalty which may be imposed for this type of offence is set out in Australian Rules of Racing Rule 196 which states:

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

As no rule relevant to this type of offence provides to the contrary it is clear that Rule 196 gives the Stewards a very wide discretion in the matter. They must choose between a disqualification, a suspension or a fine of up to a maximum of $50,000. Also they may impose a fine of $50,000 in addition to one of the other types of penalties. Unlike the third type of punishment, which is limited to a specified monetary amount there is no stated limit to the length of disqualification or suspension which may be imposed. Being such an open ended penalty provision Rule 196 can be contrasted with the equivalent provision under the Rules of Trotting where the Trotting Stewards must impose minimum penalties unless special circumstances apply. Rule 55A of the Rules of Trotting states that:

"A person who is convicted of an offence under Part 42 of these Rules, or under Part XXXII of the Rules of Trotting repealed by these Rules, is liable to a penalty which is not less than-

(a) in the case of a first such offence, a period of 12 months disqualification;

(b) in the case of a second such offence, a period of 2 years disqualification;

(c) in the case of a third such offence, a period of 5 years disqualification; and

(d) in the case of a fourth or subsequent such offence, disqualification for life,

unless, having regard to the extenuating circumstances under which the offence was committed the Controlling Body or the Stewards decide otherwise."

Clearly the task of determining drug penalties in trotting under that code's equivalent Rule is a far less onerous one.

The issue for the Tribunal to decide here is whether it may interfere with the decision of the Stewards.

In Norbis v Norbis (1986) 161 CLR 513 at 518-519 Mason and Deane JJ discuss the question of providing guidance for the exercise of wide discretionary powers. They point out that the development of appropriate principles or guidelines promotes consistency in decision-making and diminishes the risk of arbitrary and capricious adjudication. They go on to state:

"The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines."

In Australian Workers' Union (NSW Branch) v Pickard 1991 Supreme Court, NSW - 15 March 1991 ALD No. 030014 90 Carruthers J stated that:

> *"It is established that where a statute confers a discretion which in its terms is unfettered or unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard."* (see Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1985-86) 162 CLR 24 at 40). "

I can see no good reason why these principles should not be applied to the exercise of the discretion vested in the Stewards under the Rules. In deciding as to the appropriateness of the exercise of this wide discretion by the Stewards some guidance is to be found in the decision of House v The King (1936) 55 CLR 499 at 504-505 where Dixon, Evatt and McTiernan JJ state:

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

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

> *"An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or*

excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."

Two considerations emerge from the arguments presented by Mr Maumill which are not only relevant to this appeal but which do have considerable importance to the industry generally, namely:

- the inconsistency of penalties Australia wide, and
- the penalties imposed on jockeys compared to those imposed on trainers.

Inconsistency Of Penalties

In broad principle I do agree with the proposition that where uniform racing rules apply Australia wide then one might expect that the penalties imposed will be consistent. I believe however, as is clearly spelt out in O'Donnell (Appeals 263 and 264 determined 22 December 1995), that the penalties do vary greatly from state to state and, over time, do in fact vary within jurisdictions. In reality there are differences to the racing scene in each state from an adjudication perspective. This is, for example, reflected in the fact that there are Local Rules unique to each state which supplement the Australian Rules. It is understandable that with the passage of time, Stewards in different jurisdictions develop their own particular attitudes to offences. This is especially so in the case of offences of a serious nature such as drug offences, which may adversely affect the industry in each jurisdiction differently depending on the actual circumstances prevailing locally from time to time.

Penalties On Jockeys Versus Trainers

It is difficult to make meaningful comparisons or to try and equate penalties imposed on trainers with those imposed on jockeys. The roles and responsibilities of the two categories of licensees are so different. The nature of the offences usually committed by each can also be so different. Trainers operate

largely outside the racecourse and are not subject to direct and immediate scrutiny. They have the potential, either through their action or inaction, to affect the performance of a horse without being under the ever watchful eyes of the Stewards or the critical gaze of the public, compromising punters and other interested onlookers. On the other hand a jockey's every move and reflex action is watched by thousands of pairs of eyes both on the race track and on television. Once a competing racehorse is in the hands of a jockey the extent to which its performance is aided or impeded by that jockey can be and is closely scrutinised and evaluated. Speaking generally, there is far less scope for jockeys to engage in unscrupulous conduct and avoid both observation and detection than there is for trainers. The exigencies of all that is happening in the heat of a race can hardly be compared with the deliberative and prolonged course of conduct of a trainer who may have the uninterrupted care and custody of horses owned by other people or himself for lengthy periods of time.

All of these distinguishing features mean that the exercise of equating or comparing riding offences with training offences from a punishment perspective serves no useful purpose.

THE DETERMINATION

Speaking broadly, the Stewards in this State do impose disqualifications of varying lengths as punishment for drug offences ranging from disqualifications for those involving gross negligence to fines for the less serious including those where extenuating circumstances exist. Rarely, if ever, are suspensions imposed. The reason for this escapes me. To the best of my recollection this aspect has not been the subject of any comment or submission by or on behalf of the Stewards in appeals which I have chaired.

In handing down the penalty, Mr Willis was told by the Stewards that they *"...have made allowance..."* for the plea of guilty. The extent of that allowance was not explained. It would have been helpful if the Stewards had elaborated their reasons and explained the basis upon which such a factor was influential in the ultimate period arrived at.

It would be desirable for the Stewards to explain in the course of sentencing the more serious cases including the present one, precisely why it is considered that a fine and/or a suspension is not appropriate. Had the Stewards done this in relation to Mr Willis' matter then some of the concerns expressed by Mr Taylor may not have arisen.

Based upon the judgment in The Queen v Tait (supra) it is clearly not appropriate for the Tribunal to interfere with the exercise of a penalty discretion by Stewards simply because the penalty imposed is more harsh than I may have been inclined to impose had I dealt with the matter in the first instance. The Stewards are the appointed experts who are charged with the duty of ensuring that participants in the industry do not offend, or when they do that suspected trangressions are investigated fully and offenders are punished appropriately. In performing that role Stewards have the duty to conduct inquiries and to receive evidence. In so doing their position is somewhat different from that of the Tribunal in that they have the advantage of receiving the evidence first hand and of observing the demeanour of the witnesses who come before them. In order for the Tribunal to interfere, an error of principle or a substantial mistake of sentencing *"so excessive or inadequate as to manifest such an error"* must be demonstrated.

As is stated by Mason and Deane JJ in Norbis v Norbis (supra) at 518 - 519:

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

It is clear from the cases cited and from other examples of penalties in relation to the administration of therapeutic drugs that the range of penalties imposed both

in this State and elsewhere is very wide. For the most severe cases it extends to disqualification for much longer periods than that imposed on Mr Willis. In part this highlights that a wide range of opinion can be formed in relation to these matters according to the particular facts and circumstances. This wide range is not limited to the Stewards at first instance but also extends to determinations made by Tribunals on appeal Australia wide.

Mason and Deane JJ at 519 went on to state:

> *"It has sometimes been said by judges of high authority that a broad discretion left largely unfettered by Parliament cannot be fettered by the judicial enunciation of guidance in the form of binding rules governing the manner in which the discretion is to be exercised... .However, it does not follow that, because a discretion is expressed in general terms, Parliament intended that the courts should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well-settled principles... It has been a development which has promoted consistency in decision-making and diminished the risks of arbitrary and capricious adjudication. The proposition referred to at the beginning of this paragraph should not be seen as inhibiting an appellate court from giving guidance, which falls short of constituting a binding rule, as to the manner in which the discretion should be exercised... And despite the generality of some of the statements to which we have referred, there may well be situations in which an appellate court will be justified in giving such guidance the force of a binding rule by treating a failure to observe it as constituting grounds for a finding that the discretion has miscarried.*
>
> *The point of preserving the width of the discretion which Parliament has created is that it maximizes the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines."*

Authoritative pronouncements such as this I believe puts paid to any of the misgivings expressed by Mr Maumill at the outset of this appeal as to the statements of guidance and principle that I have made from time to time in my reasons for determination in relation to drug penalties. Those statements should

not be treated as final and binding as each case must be determined on its respective merits. Whilst they are intended to be helpful to all participants in the industry by being an aid to achieve consistency, they are not intended to fetter the exercise of the penalty discretion. Such statements should not dissuade lenient sentencing in appropriate cases.

Arguing narrowly as Mr Maumill did, it superficially could be said to be harsh that due to Mr Willis' one mistake of omitting to read the label on the container which was sent to him as the substitute drug that Mr Willis should be deprived of his livelihood for 3 months. Further, by being obliged to cease his racing operations it will be difficult at the conclusion of that period for Mr Willis to pick up the pieces and to rebuild his business. However, such a simplistic assessment of the present matter is inappropriate. The conduct of a person who is charged with so much responsibility as a licensed trainer should not be examined from this subjective and limited perspective alone. One cannot properly narrow down such matters as to ignore all of the surrounding relevant facts and circumstances. One relevant consideration is the general obligation on trainers to exercise great skill and care in training the animals which are entrusted in their care and on which the public invests money. The public is entitled to expect the outcome of a race to be based upon all participants having performed on their respective merits unaided or unhindered by any outlawed drug or unfair physical means. Implicit in the duties of a trainer is the need to adopt responsible feeding and administration practices to ensure horses perform to their optimum but always within the methods sanctioned by or not outlawed by the Rules. If a horse is not fit to race and cannot be placed in a reasonable state of health without the aid of medications that will offend the drug free racing rules, such animal simply should be allowed to recuperate. It should only be raced after it has recovered and when all trace of the treatment is out of its system.

This matter involves a case of drugging a well supported race winner. Consequently it badly damages the integrity of the sport. Anderson and Owen JJ in Harper v Racing Appeal Tribunal of Western Australia & Anor (1995) 12 WAR 337 at 347 made the following comments in relation to trotting, which equally apply to racing:

"...the very survival of the industry as well as substantial government revenue would seem to depend on encouraging the public to bet on horse racing, that is, to bet on the outcome of each race.

If it is correct to think that the financial well-being of the industry depends significantly on the maintenance of betting turnover, the need to maintain integrity in horse racing, and to do so manifestly, is easily seen to be imperative and of paramount importance. It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by peremptory means."

Their Honours further stated at 348 that:

"...the Stewards are ... required to try to stop doping. That is plainly an objective which is for the good of the industry as a whole, including all other licensed persons who depend on it for their livelihood. The maintenance and the integrity of trotting as a "clean" sport naturally requires that malpractice be eliminated so far as is possible. The view may very well have been taken that the only practical way to achieve this is by stringent rules which place on persons who wish to participate in the industry quite onerous reponsibilities to present for racing only horses that are drug free.."

The Stewards were perfectly entitled to find that Mr Willis did not have an honest and reasonable belief and that he was grossly negligent. Mr Willis had received and began administering from a completely different container which housed a different substance from that which he had previously been using. I fail to see how anyone using the container in question with its clear bold labelling of essential information, could reasonably claim that it was not his fault but rather that of the supplier who changed the substance without formal notification and gave no reasonable notice or warning of the consequences of so doing. Indeed, as pointed out earlier, Mr Willis actually told Mr Criddle at the time of being confronted with the revelation of the positive swab, that*"... he had been guided by the label on the container."* This statement was not challenged or denied by Mr Willis during the Steward's enquiry. In view of the conflicting comments which Mr Willis did make subsequently in the course of giving evidence before the

Stewards as to his failure to read the label, it is somewhat surprising that the Stewards did not make more of this statement.

Mr Maumill's argument that there was some justification by virtue of the fact that this was a relatively new substance simply does not stand up to scrutiny. The substance was not particularly new to Mr Willis by the time of the offence. In any event in the case of a new substance extra caution should be exercised.

There can be no condoning or excusing Mr Willis' conduct on the basis that he should be entitled to a relatively mild sanction of a fine compared to the gravity of a disqualification simply because this was his first offence as all of the other facts surrounding the administration cannot be ignored. It is of no assistance for Mr Willis to argue as Mr Maumill attempted on his behalf that this problem arose because of a failure to read a label. Mr Willis actually knew, or should have known, that the container which he received from Biojohn contained something different from the product which he had previously been administering. The evidence clearly established that the bottles were different. Having received a different bottle Mr Willis should have diligently checked to ensure that what he had received was what he had ordered. If it proved to be a different substance, then reasonable diligence suggests that he should then have checked that it was suitable for the purpose which he had in mind when he placed the order and further that it had no other adverse consequences if he were to use it. This would not only include the ramifications of use in relation to the drug rules, if administered prior to racing, but also the affect of use following administration of the original substance if it formed part of an ongoing treatment. It is possible that he may have been sent the wrong substance. Imagine the terrible consequences had the container, for example, contained a poison which, upon administration killed or maimed a number of horses under his care. It was not the case that there was any emergency or other situation which could be said to have required action in the form of immediate administration which may have justified or condoned the use of it without prior enquiry from the supplier or a veterinarian as to its effects and adverse consequences.

As previously stated, the evidence reveals that Mr Willis was not the only person in his stables who fed the horses under his care and who administered substances of the type in question with the feed. Nothing was stated by Mr Willis to explain what, if any, instructions were given to Dean Campbell, the other person involved in the feeding and conceivably also involved in administration of Broncopulmin. Certainly neither of them kept any records. In this respect the systems were no more professional than those maintained by Mr Greig. There would appear from this aspect of the evidence to have been no great care or close attention to detail at Mr Willis' training establishment.

In considering the bigger picture of this offence and the surrounding circumstances, one must balance the subjective information and matters personal to Mr Willis, all of which I have carefully considered, with all of the other relevant information. As has already been stated the evidence before the Stewards was that the label on the Broncopulmin container clearly stated that it contained clenbuterol. This fact was specified in large lettering. Indeed, the quantity contained in the substance was also clearly specified. In addition the label clearly warned that the contents should only be administered as directed. As to dosage Mr Willis was in fact administering the quantity specified. As previously stated the evidence in fact indicates that such an amount was relevant to a long term treatment program and was not necessarily applicable to horses that were actually racing at the time.

I am satisfied in arriving at the penalty that the Stewards did take into account the range of factors which were spelt out to Mr Willis, which I quoted earlier, which were all relevant and must collectively have some influence on the penalty which should be imposed.

I agree with the Stewards' finding that Mr Willis' conduct can in all of the circumstances properly be described as having been grossly negligent. For that reason most if not all of the cases which are referred to previously as being the ones which were relied upon by Mr Maumill are clearly distinguishable. Whereas a fine could be said to have been appropriate in those other cases, it was inappropriate in the circumstances of this case. Some of the cases are not

explained. Little is known as to all of the relevant circumstances which makes the drawing of any meaningful conclusions from them very difficult. For example why did Bart Cummings receive a fine of $5,000 for his first offence followed by a fine of $2,000 for his subsequent offence? Without more detail such cases do not make much sense and can assist little in the determination of this matter. In view of this conclusion it would have been helpful had Mr Maumill in fact *"regaled"* the Tribunal *"...with a proliferation of seemingly contradictory penalties from around the country"* rather than expressly refraining to do so.

I have attempted to examine the relevant cases referred to in such decisions as McPherson (Appeal 208 determined 1 May 1995), O'Donnell (supra) and Harrison (Appeal 215 determined 10 July 1996) . From my examination I fail to see how it can fairly be said that the 3 month disqualification imposed in this case is outside the range of penalties that in some cases extends to 12 months and beyond for therapeutic drugs. As I explained in my reasons in O'Donnell and Harrison the Rules of Racing do not discriminate between therapeutic and performance enhancing drugs in that both types are outlawed in respect of horses that are racing. Some of Mr Maumill's argument seems to have overlooked this simple fact.

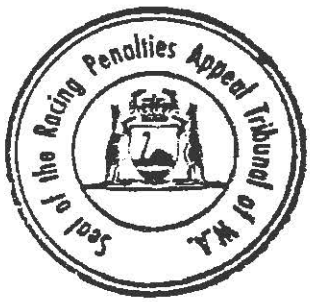
As already explained I am also not persuaded by Mr Maumill's approach that it is appropriate to equate the penalties imposed on jockeys for riding offences with those that have been imposed on trainers for drug offences.

Had I been deciding this matter and not the Stewards it is possible that by virtue of Mr Willis' impeccable record and the impact on him, I may well have been inclined to impose a lesser period of disqualification than the Stewards. Indeed it is possible I may even have seriously considered imposing a suspension rather than a disqualification. The authorities make it clear however that it is not appropriate for an appellate body to substitute its opinion for that of the Stewards. This matter must be decided according to proper legal principles and on the basis of the pronouncements contained in those authorities. In other words for me to conclude that the penalty imposed by the Stewards should be interfered with I must be satisfied that there has been a legal or factual error on the part of the

Stewards. I find no such error occurred. Not only am I satisfied that there has been no mistake committed by the Stewards but also on the facts, the decision does not appear to me to be unreasonable or plainly unjust. It is not so excessive, for the reasons that I have enunciated, as to indicate any manifest error.

For these reasons, I would dismiss the appeal.

Dan Mossenson DAN MOSSENSON, CHAIRPERSON



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THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

APPELLANT: CHRISTOPHER GEORGE WILLIS

APPLICATION NO: A30/08/309

DATE OF DETERMINATION: 6 SEPTEMBER 1996

IN THE MATTER OF an appeal made by Mr C G Willis against the decision of the Western Australian Turf Club Stewards on 2 July 1996 imposing a disqualification of 3 months for contravention of Australian Rule of Racing Rule 175(h)(ii).

Mr R Maumill was given leave to represent Mr Willis.

Mr L Wagener, assisted by Messrs F Powrie and M Boyd. appeared for the Western Australian Turf Club Stewards.

The appellant was the trainer of the horse KING KUSH, which raced in and won the Heatlock Handicap at Belmont Park on 29 May 1996. A urine sample taken after the race reported the presence of clenbuterol, which is a prohibited substance.

An inquiry was held on 2 July 1996. At the conclusion of the inquiry, the Stewards charged the appellant with an offence against Australian Rule of Racing (ARR) 175(h)(ii). The particulars of the charge were that:

> *"..the prohibited substance clenbuterol was detected in a post-race sample taken from KING KUSH at Belmont Park Racecourse on Wednesday 29th May 1996 and that you, the trainer of KING KUSH, had caused the administration of that substance through the use of a veterinary product Broncopulmin."*

The appellant pleaded guilty and was convicted. He was disqualified for 3 months. The penalty was imposed under ARR 196 which is in the following terms:

> *"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 appellant now appeals against that penalty on the ground that:

> *"The penalty of the disqualification was far too high and a fine would have been a better penalty as in other cases involving the substance."*

Facts

The appellant gave evidence at the inquiry. The truthfulness of his evidence was not put in issue by the Stewards. The conclusion is, therefore, that the Stewards accepted what he had to say.

The appellant said that he had been in the habit of using a feed additive called BROMOTRIMIDINE. That substance is commonly used to treat colds, and for viruses. It is not a prohibited substance, nor does it contain any prohibited substance. The appellant's veterinary supplier could not continue to provide BROMOTRIMIDINE, and supplied BRONCOPULMIN instead. BRONCOPULMIN contains the prohibited substance CLENBUTEROL.

The appellant thought that BRONCOPULMIN was simply a substitute for the previous feed additive. He knew that the previous additive was safe to use, even up to the night before racing. He continued on using the BRONCOPULMIN in the same way. Inevitably the urine sample from KING KUSH tested positive to CLENBUTEROL, the prohibited substance contained in BRONCOPULMIN.

The appellant did not take any precautions in his use of BRONCOPULMIN. He did not read the label of the container, which clearly had the word "CLENBUTEROL" in large lettering. He did not seek veterinary advice on the use of he product. The Stewards categorised the appellant's actions as *"grossly negligent"*.

An analysis of the betting on the race showed that the investment and pay-out on KING KUSH was greater than the average for mid week meetings throughout 1996. As well the amount in large bets was significantly higher than the normal average over all through a mid-week meeting.

Further evidence was given by the Stewards at the hearing of the appeal before this Tribunal. The betting analysis was extended to the next race by KING KUSH. Again, the investment, the price and the amount collected were somewhat higher than the average. On each day, 37 percent and then 32 percent of the total investment in the horse came from a person who was a strong supporter of Mr Willis' stable.

Further evidence was also allowed on behalf of the appellant. Mr Alan Taylor, President of the West Australian Racing Trainers Association, gave evidence. His evidence was to the effect that the Association supports drug free racing. His evidence also went to the appellant's good record and character. To that extent, on behalf of the Association, Mr Taylor's evidence was relevant. I take no account of the Association's view on penalties generally, or specifically in relation to Mr Willis' case.

Law

It can be seen from the terms of ARR 196 that the imposition of the penalty on the appellant was an exercise of discretionary power by the Stewards. That is apparent from the use of the word "may". The correct approach to be taken on an appeal against a decision involving discretion is as follows:

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If*

the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is

unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred".
House v. The King (1936) 55 CLR 499 at page 404-505 per Dixon, Evatt and McTiernan JJ.

This approach has been maintained in subsequent cases. In ***The Queen v. Tait*** (1979) 46 FLR 386 at page 388, Brennan, Deane and Gallop JJ said:

"An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, ***Skinner v. The King; R. v. Withers, Whittaker v. The King; Griffiths v. The Queen****".*

In my view, this is the correct approach to be taken in this case.

The decision appealed against, once it is seen to be discretionary in nature, leads to an application of the principles mentioned in the cases above.

The appellant himself does not complain that the Stewards mistook the facts, or failed to take into account some relevant fact, or anything of that nature. Rather, his ground of appeal seeks to rely on the principle expressed in TAIT's case that:

"...the sentence itself may be so excessive or inadequate as to manifest such error."

The measure of what is an excessive or inadequate penalty is difficult to find. Often it can only be found by reference to penalties imposed in other cases in similar circumstances. That there should be consistency in the imposition of punishment is a principle which is well accepted. There is a high authority for that principle:

"Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration Justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community".

Lowe v. The Queen (1984) 12 A. Crim. R 408 per Mason J at page 410.

"No doubt, consistency in the sentences imposed by the judges of the District Court is a desirable feature of criminal administration. Gross departure from what might in experience be regarded as the norm may be held to be error in point of principle."

Griffiths v. The Queen (1977) 137 CLR 293 per Barwick. C.J. at 310.

In recent times, this Tribunal constituted by different members has delivered conflicting judgements on the appropriate penalty to be imposed in drug offences. In ***McPherson*** (Appeal 208) 12 RAR 1135, it was said 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 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".*

In ***O'Donnell***, (Appeals 263 and 264) it was said that:

> *"...unless special circumstances justify the imposition of a less severe type of penalty that disqualification should be the norm in the case of drug offences".*

I adhere the view, expressed in ***McPherson***, that disqualification ought to be a penalty of last resort.

However, as to the range of penalties, or "tariff" to be found, I accept that disqualification does fit within the range. An analysis of the cases, as referred to in ***O'Donnell***, establishes that disqualification can be imposed without offending the principles expressed in ***Lowe*** and ***Griffiths***.

Much depends on the individual circumstances in each case. Indeed the respondent Stewards, responsible for imposing the penalties at first instance, often impose fines instead of disqualification. In the hearing of this appeal before us, Mr Powrie on behalf of the Stewards referred to four persons who were dealt with by way of fine instead of disqualification (transcript page 49).

As all of the options are open, the relevant penalty factors needed to be considered, by the Stewards, in order to decide what penalty to impose.

Honest And Reasonable But Mistaken Belief

In this case, the Stewards did not take issue with the appellant's truthfulness. They must, therefore, have accepted that he had an honest belief, in that he was mistaken in feeding the horse as he did. On the other hand, the Stewards found that his belief was not reasonable. That is because they found his actions to be *"grossly negligent"*.

In ***Harrison*** - unreported Supreme Court of WA appeal NO 2105 of 1994 27 February 1996 Library No 960097, Hennely ACT said:

> *"...a defence of honest and reasonable but mistaken belief was raised, and although the defence had no application as such. The circumstances which it was claimed gave rise to it could have been very material in the question of penalty."*

Nature Of The Drug

In my view, the nature of the drug is question needs to be taken into account in assessing penalty. The Rules of Racing, in prohibiting the various substances, does not differentiate between various drugs and classes of drugs. But there can be no doubt that there are different levels of seriousness between the use of different drugs. For example, the use of stimulants and depressants is a more serious matter than the use of anti-inflammatories, such as phenylbutazone or flunixin.

For my part, I would adopt as a useful guide The Uniform Classification Guidelines of Foreign Substances - Revised 14 October 1993, published by The Association of Racing Commissioners International. The five classes of drugs are as follows:

> *"Class 1: Stimulant and depressant drugs which have the highest potential to affect performance and which have no generally accepted medical use in the racing horse. Many of these agents are DEA (America)* (sic) *schedule II substances.*
>
> *Class 2: Drugs which have a high potential to affect performance, but less of a potential than Class 1. These drugs are 1) not generally accepted as therapeutic agents in racing horses, or 2) they are therapeutic agents that have a high potential for abuse.*
>
> *Class 3: Drugs which may or may not have generally accepted medical use in the racing horse, but the pharmacology of which suggests less potential to affect performance than drugs in Class 2.*
>
> *Class 4: This class includes therapeutic medication which would be expected to have less potential to affect performance than those in Class 3.*
>
> *Class 5: This class includes those therapeutic medications for which concentration limits have been established by the racing jurisdictions as well as certain miscellaneous agents as DMSO and other medications as determined by the regulatory body".*

It should be noted that Class 5 drugs may still be prohibited substances under the Rules provided they fit within the definitions.

The more serious stimulants and depressant drugs, for example cocaine and amphetamine are Class 1 drugs. The commonly used anti-inflammatories, such as phenylbutazone and flunixin, and others referred to in ***McPherson***, are Class 4 drugs. The drug in question is this case, CLENBUTEROL, is a Class 3 drug.

In my view, it is open and indeed proper to accept that a less serious penalty should be imposed for the use of a less serious drug. This does not offend the principle, as stated by His Honour Judge Goran in ***V.P. Sutherland*** and ***The Owners Of The Horse Red Poco***, that it matters not whether the drug in question had an effect on the performance of the horse.

Factors Personal To The Appellant

The Stewards took into account the appellant's previous good record. At the time of the hearing, he had been training for 5 1/2 years. He had (and still has) not been previously convicted of a drug related offence. He had 28 horses in work, and employed seven staff. He was co-operative and honest throughout the inquiry.

Deterrence

The Stewards were obliged to impose a penalty which reflected the seriousness of the offence. One of the objects of imposing punishment is to bring home to the offender, and to those who are minded to act in the same way, that punishment will be imposed which will protect the integrity of the horse racing industry.

This factor was expressly recognised by the Stewards in their remarks when imposing penalty.

Conclusion

Having considered all the matters referred to above, I am persuaded to the view that the Stewards discretion miscarried in this case, and that the penalty of disqualification ought to be set aside. The need for consistency in punishment can be met either by a fine or disqualification. However, no sufficient reason seems to have been given by the Stewards for imposing disqualification instead of a fine. I am of the view that the error made in the sentencing discretion was that insufficient weight was given to the principle that disqualification ought to be imposed in a case like this, only after a fine or suspension have been found not appropriate. The other factors in this case are that the administering of the drug came about by way of an honest mistake, the drug is a Class 3 substance, and the appellant is a first offender.

For all of those reasons, I am of the opinion that the penalty of disqualification for 3 months ought to be set aside. I would substitute a fine of $4,000, which takes into account that the appellant has already served some part of the disqualification.

PATRICK HOGAN, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DECISION OF MR L B ROBBINS (MEMBER)

APPELLANT:	CHRISTOPHER GEORGE WILLIS
APPLICATION NO:	A30/08/309
DATE OF HEARING:	10 JULY 1996
DATE OF DECISION:	6 SEPTEMBER 1996

IN THE MATTER OF an appeal made by Mr C G Willis against the decision of the Western Australian Turf Club Stewards on 2 July 1996 imposing a disqualification of 3 months for contravention of Australian Rule of Racing 175(h)(ii).

Mr R Maumill was given leave to represent Mr Willis.

Mr L A Wagener assisted by Messrs F Powrie and M Boyd appeared for the Western Australian Turf Club Stewards.

BACKGROUND

This matter comes on appeal to this Tribunal from a determination of the Stewards of the Western Australian Turf Club, who conducted an inquiry on 2 July 1996 into a report that showed that the drug CLENBUTEROL was detected in a sample of urine from KING KUSH after that horse won Race 7 the Heatlock Handicap at Belmont Park on 29 May 1996. CLENBUTEROL is a prohibited substance. As a result of the inquiry Mr Willis was charged pursuant to Australian Rule of Racing (ARR) 175(h)(ii) in the following terms:

> "the prohibited substance clenbuterol was detected in a post-race sample taken from KING KUSH at Belmont Park Racecourse on Wednesday 29th May 1996 and that you, the trainer of KING KUSH, had caused the administration of that substance through the use of a veterinary product Broncopulmin."

Mr Willis who is the appellant in these proceedings pleaded guilty was convicted and the Stewards imposed a penalty of disqualification of 3 months.

The penalty was imposed pursuant to (ARR) 196 which provides

> **"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."**

It can be seen at once that the Stewards had a discretion to exercise in relation to penalty which was within very wide parameters. It is part of the function of this Tribunal sitting as an Appellate Tribunal pursuant to the Racing Penalties (Appeals) Act 1990 to review on appeal the exercise of the discretion exercised by the Stewards. That this is so in my opinion follows from an examination of the provisions of the "Act" itself see Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v. Dignan (1931) 46 CLR 73 at 108.

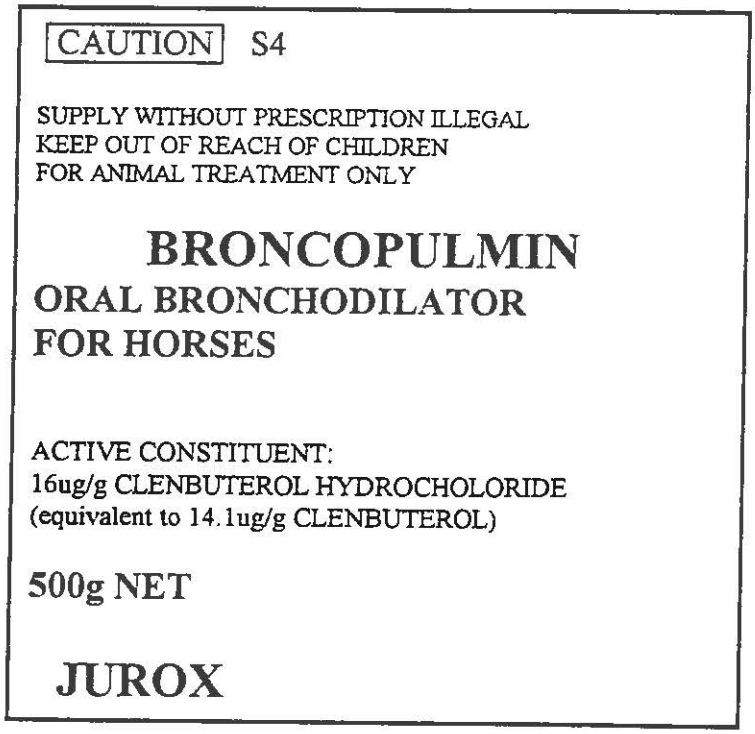
The provisions of the Racing Penalties (Appeal) Act reveal wide powers given to the member presiding to determine any question relating to jurisdiction Section 11(3)(a)(i); to admissibility of evidence Section 11(3)(a)(ii); law and procedure section 11(3)(a)(iii) and an appeal shall be heard and determined upon the evidence at the original hearing, when the decision or finding appealed against was made. There is ample authority to suggest that the proper characterisation of the function of the Racing Penalties Appeal Tribunal is to be determined by the terms of the statute which confers the right of appeal Strange-Muir and Another v. Corrective Services Commission of New South Wales and Another 1986 5 N.S.W.L.R. per 234 at 249 McHugh J.A. In that case McHugh J.A. said

> **"...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. 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 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."** See also Builders Licensing Board v. Sperway Constructions (Syd) Pty ltd (1976) 135 CLR 616 at 621.

In my opinion the whole legislative scheme and the purpose of the "Act" itself suggests that the Tribunal is not to act de novo but is to review the exercise of discretion made by the Stewards.

It is for this Tribunal now to review the Stewards exercise of discretion in imposing three months disqualification having regard to established principles for such a review. House v. King (1936) 55CLR 499; The Queen v. Tait (1979) 46 FLR 386 at 388 per Brennan, Deane and Gallop JJ.

Any review of sentence requires inter alia an examination of the facts as found showing what acts or omissions of Mr Willis came to be considered by the Stewards. In this case Mr Willis who had been giving certain of his horses who had colds or runny noses a substance called BROMOTRIMIDINE changed to BRONCOPULMIN when there were difficulties with supply of BROMOTRIMIDINE. The BRONCOPULMIN contained CLENBUTEROL which is a prohibited substance. Mr Willis apparently did not read the label on the container. The container in question was produced at the Appeal and upon examination was shown to have a label adhering to it which showed the word CLENBUTEROL in lettering which was quite large. A mere cursory glance at the label could not have failed to bring to ones attention the word CLENBUTEROL which showed it as an active constituent. The reproduction below is similar to part of the label and is sufficient to generally show how the word Clenbuterol was depicted.



Mr Willis did not ask for any veterinary advice before he administered the BRONCOPULMIN.

It must be understood generally that trainers bear an enormous responsibility which extends to all members of the public who bet or have some other interest in the racing industry to ensure as far as humanly possible that horses are presented and race free of drugs. There was considerable betting on KING KUSH that day and public confidence in the racing industry is put in jeopardy every time a horse is found to have a drug in its system. This was yet another such occasion. If support be necessary for the Stewards taking a firm stand on drug free racing it can readily be found in Harper v. Racing Penalties (Appeal Tribunal of Western Australia & Another (1995) 12 WIR 337 at 337 where it was said inter alia per Anderson and Owen JJ that:

> **"It may well be anticipated that unless racing is perceived to be fair and honest, people may be discouraged from betting. This might be thought to justify stringent controls in respect to the administration of drugs to horses and the enforcement of those controls by preemptory means."**

And further

> **"the Stewards are... required to try to stop doping. That is plainly an objective which is for the good of the industry as a whole, including all other licensed persons who depend on it for their livelihood. The maintenance and the integrity of trotting as a "clean" sport naturally requires that malpractice be eliminated as far as is possible. The view may very well have been taken that the only practical way to achieve this is by stringent rules which place on persons who wish to participate in the industry quite onerous responsibilities to present for racing only horses that are drug free."**

These remarks are equally applicable to all horse racing. Given the grave responsibility placed upon Mr Willis it is in my opinion simply not good enough to say by way of mitigation of penalty that he did not read the label. The stewards were entitled and it was open to them to find that Mr Willis' mistaken belief even if honestly held was not a reasonable belief in all the circumstances and in the particular circumstances of his alleged failure to read the label.

The cases of O'Donnell (Appeals 263 & 264 of 1995) and Harrison (Appeal 215 of 1996) are applicable in this case and in my opinion it cannot be said that three months disqualification as a penalty was so excessive that by itself it can be seen to manifest error in the exercise of discretion.

It is for all the foregoing reasons that I would dismiss this appeal.

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

LINDSAY ROBBINS
(MEMBER)

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APPEAL 309

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**CHRISTOPHER GEORGE WILLIS**	
APPLICATION NO:	**A30/08/309**	
PANEL:	**MR D MOSSENSON**	**(CHAIRPERSON)**
	MR L ROBBINS	**(MEMBER)**
	MR P HOGAN	**(MEMBER)**
DATE OF HEARING:	**10 JULY 1996**	

IN THE MATTER OF an appeal by Mr C G Willis against the decision of the Western Australian Turf Club Stewards on 2 July 1996 imposing a disqualification of 3 months for contravening Australian Rule of Racing 175(h)(ii).

Mr R Maumill represented the appellant.

Mr L A Wagener represented the Western Australian Turf Club Stewards.

By a majority decision, with Mr P Hogan dissenting, the appeal against penalty is dismissed and the period of disqualification of 3 months is confirmed.

The suspension of the operation of the penalty ceases immediately.

The fee paid on lodgement of the appeal is forfeited.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON
6/9/96

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