THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/438**
DATE OF HEARING AND DETERMINATION:	**21 JANUARY 1999**

IN THE MATTER of an appeal by Mr R Harvey Jnr. against the determination made by Western Australian Turf Club Stewards on the 27 November 1998 imposing a disqualification of 7 months for breach of Rule 175(h)(ii) of the Rules of Racing.

Mr JC Hammond, on instructions from Hammond Worthington Prevost, represented the appellant.

Mr RJ Davies QC represented the respondents.

After hearing this appeal the Tribunal announced its unanimous decision to dismiss the appeal and indicated it would publish reasons shortly thereafter. These are my reasons.

On the 31 August 1998 the Stewards began an inquiry into a report received from the Australian Racing Forensic Laboratory in Sydney that the urine sample taken from VANITY ROSE after it had won Race 1 over 1000m at Belmont Park on the 18 July 1998, had detected in it betamethasone.
Mr Harvey appeared at the inquiry as the trainer of VANITY ROSE. Prior to the commencement of the hearing the Stewards had received a letter from Mr Hammond. In it he advised that his firm acted for Mr Harvey and he was instructed to appear at the Stewards' inquiry to seek an adjournment for at least

14 days to enable Mr Harvey to obtain legal advice. The Chairman of Stewards referred to this letter. Mr Harvey indicated to the Stewards that he had been advised not to comment by his solicitors and he too sought an adjournment in order to obtain legal advice. As a consequence the Stewards only proceeded on that date to put on record the formal information which led to the convening of the inquiry, namely the analytical and scientific reports. Accordingly, The Australian Racing Forensic Laboratory report as well as the confirmatory analysis completed by Racing Analytical Services Limited were produced in evidence. Both reports revealed that the urine sample taken from VANITY ROSE was found to contain betamethasone.

During the proceedings comments were made by Mr FJ Powrie, the Chairman of the Stewards, that the *'belated requests'* seeking an adjournment did cause some difficulties to the Stewards in terms of their staffing movements. Despite that the matter was adjourned until the 21 September 1998 at which stage Mr Harvey presented a statement prepared by his legal advisor in support of an application for legal representation and a further adjournment. The Chairman of Stewards informed Mr Harvey that Australian Rules of Racing 199B specified that a person attending or required to attend an inquiry conducted by the Stewards shall not be entitled to be represented by any other person (save in the case of an apprentice jockey). Further Mr Powrie pointed out the obligation on the Stewards is *'to try and inquire into all the information from analysts, vets and indeed trainers, strappers and part owners or whatever'*.

There was some discussion of the fact that the best person to answer any questions regarding the stabling arrangements was clearly Mr Harvey. Mr Harvey sought a sample to be independently tested. After considering the matter the Stewards announced that they did not permit legal representation but would agree to a short adjournment during the continued inquiry if it was a reasonable request to enable Mr Harvey's legal counsel to be consulted if he were available. The Stewards also concluded they were not prepared to allow Mr Harvey to have a further analysis of the sample. Some evidence was presented by Ms Tonia Harvey, who leases VANITY ROSE, after which the matter was adjourned until the 30 October 1998.

At the resumed inquiry both the appellant and Ms T Harvey were present in addition to Dr P Symons the veterinary steward. A few minutes after the inquiry was due to commence the Stewards received a letter from the appellant's solicitors confirming the request for yet a further adjournment to allow further testing of the sample. The Chairman expressed concerns lest the matter should become open ended. The Stewards again considered the request for the further analysis of the sample and refused on the basis that both laboratories were NATA credited, being official racing laboratories as prescribed by the Rules.

The matter was adjourned to the 23 November 1998 at which time the Stewards foreshadowed that they expected to bring the inquiry to finality. As it happened Mr Harvey did not arrive at the inquiry and arrangements were made for it to be continued on the 27 November 1998. When the hearing reconvened Mr Harvey produced a bound submission of documents prepared by his solicitors supported by some correspondence and other written material, all of which were introduced into evidence. Included in this was correspondence from Professor Kenneth F Illett of the University of Western Australia which dealt with the nature of the offending substance and its effects. Dr Symons also gave evidence that betamethasone is a prohibited substance as defined by the Rules. He stated that *'its a corticosteroid and it can act on any system in a horse that's got any inflammation or it's got any allergic condition'*.

In the submission on behalf of Mr Harvey there was a clear admission from Mr Harvey that he administered the substance known as Celestone to the horse. Mr Harvey stated he had done so approximately 24 hours prior to the race in question for the purpose of reducing inflammation in the horse's joint.

There was no disagreement between Dr Symons and the information produced by Professor Illett regarding the fact that the drug was not a stimulant. Dr Symons was of the view the drug could do more than simply remove the effects of inflammation in a joint as there is a possibility it could affect inflammation somewhere else in the horse prior to being eliminated. As he stated *'Enhance performance, means provide stimulation, certainly not, but it would certainly help a horse if it had some inflammation, it would certainly remove that and make it sound, the horse, because of the treatment'*.

Apparently Mr Harvey had been administering the drug for long periods and claimed he had never had a problem with it. Mr Harvey administered 1 ml on this occasion and Dr Symons agreed that the level of the drug found in the horse was *'a low amount'*.

At the conclusion of the inquiry VANITY ROSE was disqualified by the Stewards and Mr Harvey was:

> *'...charged under Australian Rule of Racing 175(h)(ii) and I'll read you that particular rule it states:- "The Committee of any Club or the Stewards may punish, 175(h) Any person who administers, or causes to be administered to a horse any prohibited substance, subsection (ii) which is detected in any sample taken from such horse prior to or following the running of any race." The charge in terms of that rule is that by your own admission you administered to VANITY ROSE Celestone, which has resulted in the prohibited substance betamethasone being detected in the urine sample taken from VANITY ROSE after the mare had won the Hyperical Handicap over 1000m at Belmont Park on Saturday the 18th July, 1998.'*

Mr Harvey was asked whether he understood the nature of the charge. He agreed that he did and when asked to plead an answer admitted his guilt. In regard to the penalty the written submission produced to the Stewards specifically addresses the penalty question and contains a plea in mitigation. The Stewards sought elaboration directly from Mr Harvey in regard to some of the points made in that submission.

The Stewards acknowledged that they were empowered under Australian Rule of Racing 196 to fine, suspend or disqualify. In the submissions it was suggested a fine would be appropriate. Mr Harvey was asked to elaborate on how each of those penalties would impact. The Stewards deliberated and then concluded as follows:

> *'...after considering all the matters in relation to penalty, the Stewards are satisfied that indeed it is a low level of a therapeutic substance. However, you advised that at no stage did you use or consult a Veterinarian in relation to administration of Celestone and due to the fact that you believe the use of the treatment was simple. You did not consult or ask advice from Veterinary Steward Dr. Peter Symons. Your record shows that besides riding infringements as a Jockey and*

Apprentice, you have one conviction under the same rule as this particular charge related to the administration of a prohibited substance to the mare NOBLE BARONESS in February of 1995. That penalty on that particular occasion was one of a four month disqualification. Stewards have considered all the points as outlined in your submission and your elaboration on some of those points. Stewards are also mindful of your submission in relation to the impact of a disqualification on yourself, your family and the stable. We've considered all forms of punishment available to us and believe that a monetary penalty would be inappropriate. The Stewards believe that after taking into consideration all the aspects of this case and your submission and your record, that a period of disqualification of nine months would be appropriate. However, after considering your plea of guilty and the candid nature in which you have put forward your submission in writing and indeed verbally, the Stewards propose that a discount of two months period be applied and a total period of disqualification of seven months be the penalty in this particular case.'

The appellant's notice of appeal was lodged on 1 December 1998. At the same time Mr Harvey applied for a suspension of operation of the penalty. On 3 December 1998 the suspension was granted by the Presiding Member Mr P Hogan. The notice of appeal contains a large number of grounds. It was prepared without the benefit of a transcript of the Stewards' inquiry. The full grounds are:

'1. *The Respondents erred in law in failing to consider the Appellant's early plea of guilty and full co-operation with the Respondents.*

2. *The Respondents failed to take into account that administration of Celestone to Vanity Rose ("the Horse") was for therapeutic purposes only and was given to the Horse 24 hours before the Hyperical Handicap on 18 July 1998; and that the Appellant reasonably expected the horse to be drug-free at the time of the race.*

3. *The Respondents failed to take into account that administration of Celestone was not, and on the evidence, could not have been for the purpose of the Appellant obtaining an advantage in the race.*

4. *The Respondents failed to take into account that Celestone is an anti inflammatory medication, and anti inflammatory medications are commonly used in the*

racing industry for the treatment of pain and inflammation.

5. *The Respondents failed to take into account the Appellant's good record in the racing industry, having been involved in the racing industry for nearly 22 years and having been a jockey for 13 years in considering an appropriate penalty.*

6. *The Respondents failed to consider that the Appellant had only been convicted of 1 prior offence in 22 years in the racing industry, which offence involved administering an anti inflammatory drug to the horse Noble Baroness approximately 3 and half years ago.*

7. *The Respondents failed to consider the effects of a penalty of disqualification on the Appellant's livelihood as:*

   (a) *the Appellant's income is generated solely by his activities as a trainer and owner of horses;*

   (b) *the Appellant has no other means of generating an income if he is disqualified from racing; and*

   (c) *the Appellant is not qualified to undertake any other type of work having left high school at the age of 14 years with no formal qualifications of any type.*

8. *The Respondents failed to consider the effect of disqualification on the Appellant's family, all three of the Appellant's children being employed at the stables and being totally dependent upon the stables for their income and the Appellant's wife also being an employee of the business, dependant upon the Appellant for her livelihood.*

9. *The penalty imposed by the Respondents is manifestly excessive having regard to:*

   (a) *the Appellant's early plea of guilty and full co-operation with the Western Australian Turf Club;*

   (b) *the Appellant administering the drug as an anti inflammatory only and not for the purpose of obtaining an advantage in the race;*

   (c) *the Appellant's disqualification being likely to result in the closure of the stables and the cessation of employment for his wife and 3 children as well as an apprentice;*

(d) *the fact that this is the Appellant's second conviction of an offence pursuant to Rule 177 of the Rules of Racing in 22 years of involvement with the industry; and*

(e) *the Appellant has a good reputation in the racing industry over 22 years and is part of a well established family with a long connection with racing in Western Australia and that reputation will be damaged by an excessive penalty.*

10. *The Respondents failed to exercise their discretion in respect of an appropriate penalty pursuant to Rule 196 of the Rules of Racing which states that:*

> *"Any person or body authorised by the Rules to punish any person may, unless the contrary is provided, to do so by disqualification, or suspension and may in addition impose a fine not exceeding $50,000.00, or may impose only a fine not exceeding $50,000.00".*

It is open for the Respondents to impose a fine only, without a period of disqualification or suspension if it is deemed appropriate, and that discretion was not exercised by the Respondents.

11. *Since the Appellant was unrepresented at the previous hearing and as a consequence, contends that he received an excessive penalty for a first offence, the Respondents erred in basing their penalty for this offence on that imposed on the Appellant in 1995.*

12. *The Respondents failed to take into account the financial commitments of the Appellant including a mortgage of approximately $1,500.00 per month to the ANZ Banking Group Limited, car payments of approximately $200.00 per month and general cost of living expenses for a family including a wife and 3 children and the effects of a period of disqualification on the Applicant's capacity to service these commitments.*

13. *The Respondents failed to consider relevant penalties for similar offences and similar charges for other Appellants when determining the penalty for the Appellant.*

14. *On 27 November 1998 the Respondents found the Appellant guilty of a charge under Rule 177 and failed to take into account any extenuating circumstances*

when imposing the penalty of 7 months disqualification.

15. *These grounds of appeal have been prepared without the benefit of the transcript of the reasons of the Respondents.*

At the outset of the appeal proceedings so called ground 15 was *'deleted'* by counsel for the appellant as was ground 14. It was clarified at the commencement of the appeal proceedings in regard to ground 13 that the list of repeat offenders produced by the Stewards dated 18 December 1998 should include Mr George Daly who was given a fine of $2,000 for a second offence. The Daly matter however was not in any way elaborated or pursued by counsel for the appellant in the course of his submissions. It will assist by quoting the document of the 18 December 1998. This list was prepared by the Stewards at the request of the appellant and deals with *'DRUG RELATED OFFENCES - multiple offenders since 1/1/90'.*

NAME	DATE	STEWARDS PENALTY	DRUG	HORSE
Watson A.J	17/01/92	$5,000	DI-ISOPROPYLAMINE	IRON ORE LAD
	29/01/93	12 months	FLUNIXIN	PROUD COSSACK
	29/01/93	6 months (conc)	OXPHENBUTAZONE	PROUD COSSACK
	31/01/94	2 1/2 years	OXPHENBUTAZONE	CHANTE SON
Byrne J.C	18/01/92	6 months	OXPHENBUTAZONE	LARWOOD'S GIFT
	10/02/92	6 months (conc)	FLUNIXIN	EVIL LAD
	7/04/98	12 months	FENSPIRIDE	LUSTY LUKA
	5/05/98	18 months (conc)	ETHACRYNIC ACID	WINNIE THE BOO
Tapper T.G	11/12/92	4 months	TERBUTALINE	LEGAL ADMIRAL
	30/07/93	15 months	FLUNIXIN	PALACE INTRUDER
Yeates B.G.P	25/03/91	6 months	DEXAMETHASONE	THELMA JEAN
	3/02/93	2 years	DEXAMETHASONE	THELMA JEAN
Bamford A.R	5/02/93	12 months	DEXAMETHASONE	NO BOTHER
	27/09/94	3 years	CAFFEINE	BRECHIN REIGN
Bamford P.R	25/03/91	6 months	DEXAMETHASONE	MOSSMOSA
	9/01/96	12 months	DEXAMETHASONE	SMOOTH SAILING
Maynard F.H	16/03/90	2 years	FLUNXIN	PAKLANI
	7/05/93	3 years	METHYLPREDNISOLONE	PALATIOUS
	23/08/96	18 months	ISOXSUPRINE	COUNT THE CASH
Harrison D.R	30/11/93	6 months	OXYPHENBUTAZONE	ROCKEBY ROAD
	15/07/94	12 months	OXYPHENBUTAZONE	SAMMY THE BULL
Moore K.L	30/09/94	4 months	PHENYLBUTAZONE	KING'S RANSOM
	1/09/97	15 months	OXYPHENBUTAZONE CAFFEINE THEOPHYLLINE	POMPEII GEM
O'Donnell G.W	1/08/95	6 months	KETOROLAC	FUBAR
	1/08/95	6 months (conc)	KETOROLAC	FUBAR

The transcript of the Stewards inquiry reveals that the Stewards clearly went out of their way to be helpful and to assist the appellant. The criticism of their

handling of the matter by counsel for the appellant is entirely unwarranted in my opinion. I entirely agree with the comments of senior counsel for the Stewards as to the high quality of the chairing and fair conduct displayed by the Stewards in relation to this matter.

I also agree entirely with the propositions of senior counsel for the Stewards that there is no merit at all in relation to many of the grounds of appeal. The transcript makes it abundantly clear that the Stewards did in fact address all of the issues which, in the appeal grounds, it is alleged the Stewards ignored.

Not only does the first ground of appeal contain an allegation that is clearly incorrect, but, in fact, it is entirely clear that in taking into account the appellant's admission of guilt and his cooperation, the Stewards actually did discount the penalty by 2 months.

The first assertion in ground 2 regarding failure to take in to account the fact that the substance was a therapeutic substance only also cannot be sustained. The other assertions in ground 2, in all the circumstances where there was a failure to consult or use a veterinary surgeon in regard to the administration of the substance, can hardly be said to be helpful to Mr Harvey's position. As Mr Davies QC points out, this administration which took place 24 hours before the race is more of an exacerbating than a mitigating circumstance.

Ground 3 does not assist the appellant. In D Harrison (Appeal 215 at 22) I observed:

> *As Judge Goran stated in V P Sutherland and the Owners of The Horse "Red Poco" (referred to in NSW Racing Appeals Record of Decision Vol 1 at p.146) dealing with the drug rules in racing:*
>
> > *'What the racing legislators were doing was setting up a method of controlling drugs in racing. They made no attempt to control the use of therapeutic substances. They simply forbade their use in races. In doing so they threw the onus upon trainers to ensure that when horses came to race they were completely free of such substances even though they had*

> *been used in therapy. In this context the question of whether, or to what extent, the substance affected the performance of the horse, becomes completely irrelevant and misleading.'*

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

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

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

Some of the issues raised in this matter have previously been ventilated and dealt with in G W O'Donnell (Appeals 263 and 264). I adopt and for the purposes of dealing with this appeal apply the relevant parts of my reasons in that matter.

The Stewards took into account the nature of the substance and its use in racing, contrary to what is alleged in ground 4. There is no obligation on the Stewards to set out exhaustively the basis upon which they arrived at their determination. Whilst there is no compulsion on the Stewards to produce reasons it is always helpful if they do so as to enable a review of their deliberations. The Stewards on this occasion have been precise and most helpful in the manner in which they have explained how they have arrived at their determination. Be that as it may the Rules of Racing prohibit bringing a horse to a race course to perform with any prohibited substance in it. The Rules do not distinguish or discriminate between performance enhancing and therapeutic substances. Whilst the substance may commonly be used in racing for treatment of pain and inflammation that fact on its own does not mean that a fine must necessarily be imposed instead of a disqualification. The discretion to be exercised by the Stewards must be exercised reasonably and properly in the light of all surrounding facts and circumstances.

Grounds 5 and 6 clearly lack merit. It is completely inappropriate to assert the Stewards failed to take into account the appellant's good record over many years in the industry when the Stewards in fact do make specific reference to Mr Harvey's record in their reasons. In the light of these and other unsustainable grounds I feel compelled to comment generally on the drafting of the grounds and the general approach adopted in this matter. At the point in time when the grounds were drafted, if instructions had not yet been received in relation to the matter, then it is clearly understandable why grounds such as 5 & 6 plus some others may have been included in the appeal notice. But, after having the benefit of a transcript, why such inappropriate grounds should remain is difficult to comprehend. Had they remained through some oversight that would be an explanation. However, the fact that they were addressed and pressed by counsel on behalf of the appellant at the appeal hearing clearly puts the matter into a different perspective.

In regard to grounds 7 and 8, counsel for the appellant claims that he *'most heavily relied on ground 7'* . Despite what is asserted in the grounds of a *'failure to consider the effects of disqualification on both the appellant's livelihood and his family'* it is clear that the Chairman of Stewards was at pains not simply to rely upon the written plea in mitigation which was produced at the hearing. After all he stated *'before we consider an appropriate penalty first of all I'd say that we would take into account the plea of guilty Mr Harvey, but we would also be interested to hear from you in relation to some of these points contained in 6. Right through, there's quite a few of them and indeed 7 and also...'*. The Chairman of Stewards asked *'Mr Harvey would you like to elaborate on any of these at all'*. After Mr Harvey gave a short answer the Chairman persisted *'You know well the repercussions on livelihood?'*. The Chairman acknowledged that he was well aware of the fact that the appellant had 3 children and specifically asked *'Of those three children, which ones rely on you?'* Tonia Harvey answered that all children rely on Mr Harvey. The Chairman then asked *'You are not employed yourself?'* to which she replied *'Yea I am, sorry I am'*. This is not how it is put to the Tribunal during the course of the argument by counsel for the appellant. The Chairman of Stewards then proceeded *'Alright okay well maybe we could just go back to 6.8 and take us through any points. We can leave them, but certainly if you wish to elaborate on any of them or highlight any of them again?'*. Mr Harvey

replied *'Not really Sir as you have read them, I don't think I can really elaborate on anything that's here. As you are well aware of that...'*. Mr Harvey was asked to speak in relation to his previous conviction, which he did.

These exchanges together with other aspects of the transcript clearly reveal the fact that the Chairman of Stewards went out of his way to be fair and helpful to the appellant in order to assist the appellant present any supportive material in the best possible light. This heightens the fact that a significant number of the grounds of appeal pursued in this matter have no credibility and do not assist the appellant's cause. Some of the submissions presented purportedly in support were no better. For example, it was alleged by counsel for the appellant that the appellant was caught by Rule 182, being a disqualified person who was not able to enter a training complex in circumstances where his stables were alongside his house and also he could not be employed or engaged in any capacity in any racing stable. In fact at the time in question, Mr Harvey was enjoying the benefits of the suspension of operation of his penalty.

I am not persuaded that there is any merit in ground 9 alleging that the penalty is manifestly excessive. Indeed, despite having the benefit of the list produced by the Stewards of the so called *'multiple offenders'* and having been referred to the George Daly matter nothing of substance was presented which supported the assertions. Nothing is said or elaborated on in relation to those offences by reference to their relevant facts and circumstances which could be helpful to the appellant's cause. On the face of the list by itself, I am satisfied that the penalty for the second offence is clearly within the range of penalties. The penalty was open to the Stewards on the basis of how matters have been handled in this State in the current decade.

Counsel for the appellant puts the proposition that the penalties were out of kilter with other jurisdictions. Nothing was advanced which supported that proposition. Counsel was not able to present any cogent argument which would justify a departure from the approach which has been followed by the Stewards and supported by the Tribunal in this State. The Tribunal on numerous occasions has observed that discrepancies exist on a State by State basis (see for example O'Donnell (supra)). There was no analysis or argument put forward in any way to convince the Tribunal to depart from its now

established approach to drug offences. The mere fact that Rule 196 authorises the respondents to impose 1 of 3 penalties or a combination of penalties is of no material assistance in supporting the appellant's position. Ground 10 addresses this rule but nowhere does it spell out or specify why it could be *'deemed appropriate'* for the discretion of a fine to be exercised on this occasion. I am satisfied that a fine is inappropriate in all of the circumstances. I am not persuaded by ground 11 and ground 12 has already been commented on.

Senior counsel for the Stewards argues that the voluminous grounds are offensive. I am satisfied that the grounds, looked at collectively, clearly are inappropriate with so many unarguable propositions having been thrown up and unsupported assertions having been cast on the Stewards.

DAN MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

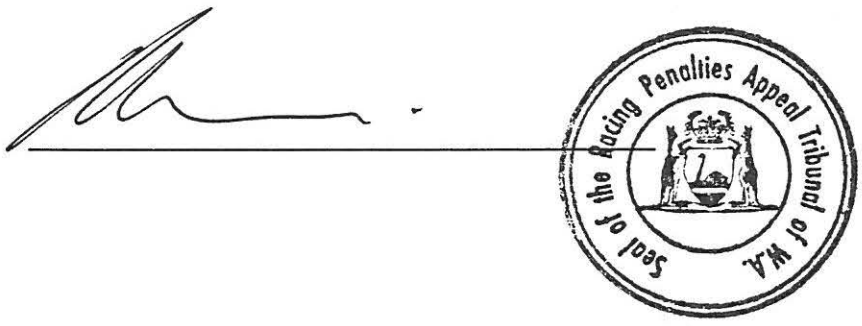
APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/438**
DATE OF HEARING AND DETERMINATION:	**21 JANUARY 1999**

IN THE MATTER OF an appeal by Mr R Harvey Jnr. against the determination made by Western Australian Turf Club Stewards on 27 November 1998 imposing a disqualification of 7 months for breach of Rule 175(h)(ii) of the Australian Rules of Racing.

Mr J Hammond, on instructions from Hammond Worthington Prevost, represented the appellant.

Mr R J Davies QC represented the respondents.

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



ROBERT NASH, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR S PYNT (MEMBER)

APPELLANT:	**ROBERT HARVEY JNR**
APPLICATION NO:	**A30/08/438**
DATE OF HEARING AND DETERMINATION:	**21 JANUARY 1999**

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Mr J Hammond, on instructions from Hammond Worthington Prevost, represented the appellant.

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

STEVEN PYNT, MEMBER

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