THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**MAXWELL JOHN JULIEN**
APPLICATION NO:	**A30/08/444**
DATE OF HEARING:	**6 APRIL 1999**
DATE OF DETERMINATION:	**15 JUNE 1999**

IN THE MATTER of an appeal by Mr MJ Julien against the determination made by Western Australian Greyhound Racing Authority Stewards on the 20 January 1999 imposing a 9 month disqualification for breach of Rule 234(7) of the Rules Governing Greyhound Racing in Western Australia (1973).

Mr RE Birmingham QC, instructed by DG Price & Co, appeared for the appellant.

Mr RJ Davies QC, assisted by Mr JM Woodhouse, instructed by Watts & Woodhouse, appeared for the Western Australian Greyhound Racing Authority Stewards.

On the 23 November 1998 the Stewards of the Western Australian Greyhound Racing Association commenced an inquiry into a report received from the Australian Racing Forensic Laboratory confirming the presence of caffeine, theophylline and theobromine which were detected in a urine sample taken from the greyhound PROMENADE after it competed in Race 8 at Cannington Greyhounds on the 13 October 1998. Mr Julien, as trainer of PROMENADE, and Mrs Julien, as owner of the greyhound, were both present at the inquiry. Mrs Julien is a registered trainer with the Association. The inquiry continued

on 14 December 1998, 13 and 20 January 1999. Towards the end of the initial proceedings the Stewards laid a charge against Mr Julien under the following Rule:

> *'**Breaches of the Rules***
> *234. A person may be found to be guilty of the breach of any provision of these Rules not specified in this rule but without prejudice to the generality of that liability a person who -*
> ....
> *(7) had at any relevant time the charge or control of a greyhound brought to compete in a race or a qualifying trial which is found by the Stewards to have had any apparatus used upon it, or any drug, stimulant or deleterious substance administered to it, for any improper purpose;*
> ....
> *commits a breach of these Rules.*

The Stewards particularised the charge in these terms:

> *'...you , Mr Julien as the Trainer, had control of the greyhound PROMENADE when it was brought to compete in Race 8 run over 530 metres at Cannington Greyhounds on 13 October, 1998 and upon analysis the greyhound was found by the Stewards to contain the stimulant caffeine; theophylline and theobromine having been administered to it for an improper purpose.'*

After lengthy discussion as to what the charge meant and whether Mr Julien understood the charge the Stewards proceeded with the matter on the basis that Mr Julien was pleading not guilty. The inquiry continued with the Stewards receiving a considerable amount of further evidence. They eventually adjourned the hearing on the 20 January in order to consider their findings. The adjournment lasted 1 hour and 34 minutes. When the Stewards returned and reconvened Mr Martins, the Chairman of Stewards, read out the following typed statement to the Juliens:

> *'The Stewards have carefully considered all the evidence presented through the course of what has been an extensive inquiry. You, with the assistance of Mrs Julien, have put forward to us a number of possibilities as to how the caffeine, theophylline and theobromine have appeared in the urine sample, some of which are of little relevance in determining the matter. At the outset of this inquiry your explanation for the presence of caffeine, theophylline and theobromine in the urine sample taken from PROMENADE on 13 October 1998 was*

that the greyhound may have consumed coffee beans as a result of Mrs Julien placing hessian sacks which contained coffee beans in PROMENADE'S kennel. You initially went to great pains to present evidence to this panel that would support this proposition. Part of this evidence involved a demonstration before this panel where you randomly removed two hessian sacks from a pile of uncleaned sacks and proceeded to empty the contents onto the floor. Having witnessed first hand your demonstration it was immediately apparent to us that the bags contained such a quantity of beans that they could be heard rattling in the bag as soon as you picked it up. We therefore have some difficulty in accepting that Mrs Julien would proceed to place at least four such sacks into a racing greyhound's kennel and not notice there were beans in them. We find that the series of events surrounding this explanation is difficult to accept. In the process of clarifying this evidence several areas of concern were raised and your explanations were less than convincing. There is no firm evidence which states when PROMENADE consumed the beans, how much it consumed or in fact whether any were consumed at all. It is also illogical to us that Mrs Julien, who is fully aware that the bags are not supposed to contain coffee beans were being placed into a greyhound's kennel, is concerned enough to sweep the kennel out, but does not check the rest of the bags for contamination and makes no mention of the incident at all to the trainer of the greyhound. From this point the coffee beans are said to have remained in the greyhound's kennel up until the time that the stewards notified Mr Julien of the return of the urine sample. It is offered that once you were aware of the irregularity you soon became aware of this unlikely chain of events in regard to the coffee bags. You were so concerned that at 5.30 a.m. on the 5 November 1998, the morning after becoming aware of this, you contacted Mr Glenny to warn him about this problem. You, however, were apparently not concerned enough to conduct a thorough examination of your own kennels. This is said to result in you withdrawing two of your three greyhounds from their engagements at Mandurah on 9 November, 1998. Astonishingly, these withdrawals did not include the greyhound concerned namely PROMENADE. After questioning you about these withdrawals (Pages 69-74) we find your answers are most unsatisfactory and illogical. It would appear that if you genuinely believed that the greyhound PROMENADE had consumed coffee beans as described by you, then it would follow that if any greyhound had to be withdrawn it should have been PROMENADE. You have stated at Page 70 that the reason you left PROMENADE in the race was because she had the red box and wanted to see what she could run without the assistance of coffee beans or whatever. We find it hard to believe that a trainer of your experience, who according to your evidence was of the belief that coffee beans may have been ingested by your racing greyhounds, would run the risk of making a and I quote ... "bad error of judgement" and race the greyhound. Following the

laying of the charge and the resumption of the inquiry on the 14 December 1998 you appeared to come to the conclusion that the and I quote ... "coffee beans saga" (Page 64) was not being accepted and you therefore decided to offer any possible explanation which could be used as a defence if required at some later stage (Page 146). Given the circumstances of this case we are of the view that all submissions in relation to the use of anabolic steroids are of no assistance to this inquiry. Anabolic steroids are a complex issue, however, the same cannot be said about caffeine. What may or may not have occurred with other samples is irrelevant. After speaking with the analyst Mr Reilly, on two occasions, we are satisfied that PROMENADE'S urine sample was analysed correctly. We have thoroughly considered your suggestion that the greyhound may have been improperly interfered with once arriving at Cannington. Having consideration of the security measures at Cannington, as well as your own evidence after viewing the security video and in particular the evidence of Mr O'Reilly (sic) which states that metabolites of caffeine do not appear in a sample until after six to seven hours following administration (Page 37) we are satisfied that nothing occurred at Cannington which has produced this result. Having given due consideration to all matters raised by you and the evidence before us we find that there is no evidence to confirm that the caffeine, theophylline and theobromine was in fact introduced by any of these possibilities, they are no more than a series of conjectures. What the evidence shows is that you as the trainer of the greyhound PROMENADE had control of the greyhound when it was brought to compete at Cannington Greyhounds on 13 October 1998 and was found by the stewards upon analysis to contain the stimulant caffeine, theophylline and theobromine, administered to it for an improper purpose. On page 41 and 42 Dr Brigg states and I quote ... "Yeah, they're basically classed as stimulants" ... "Um ... so as I said ... the Xanthine compounds are basically stimulants and they have effects on three major organs the first one being the brain, it's a fairly potent stimulator of the sensory part of the brain so it makes the dog fairly excited ... what will do is ... is often override normal fatigue syndromes so the dog may be coming tired during the race, will still be fairly excited and it will keep going when it would normally get tired ... it also has an stimulatory effect on the respiratory system so that breathing becomes more efficient and also has a stimulatory effect on the heart, it causes an increase in the heart rate, also an increase in the contraction of the heart and an increase in the blood flow around the heart vessels, so it makes the heart pump more efficiently and this combined with the effect on the respiration system means that there's a better flow of oxygen to tissues and for these three effects ... that's why it's a pretty lethal substance in racing because it can have a performance enhancing effect on a dog."

This satisfies us that in the absence of any other evidence, the only inference which is open to the stewards after considering

our findings is that the administration of the caffeine, theophylline and theobromine could have only been for an improper purpose. We are therefore satisfied that all the components of Rule 234(7) have been made out and accordingly we find you guilty as charged.

We shall now proceed to the consideration of a penalty as a result of the guilty findings made by us. You are entitled to call any evidence, produce any documents or make any submissions on the question of penalty. If you require time to prepare these submissions then you are entitled to make an application for an adjournment. Alternatively, the stewards may proceed in this matter immediately.

What would you like to do Mr Julien?'

After indicating a desire to proceed Mr Julien questioned the Stewards regarding the typed statement which had been read out. Mr Julien sought to ascertain whether it had been pre-typed or was prepared during the adjournment. The Stewards indicated they made their decision after Mr & Mrs Julien had left the room and that it has *'...been typed up while we left the room'*. Mr Julien expressed his concern that it had been made up before the adjournment. This was denied by the Stewards. Mr Julien then asked the Stewards to take into account the fact that in his 20 years as a registered trainer this was Mr Julien's first problem with drugs.

Next Mr Julien argued that caffeine offenders in New South Wales had penalties imposed mainly ranging from $200 to $800, although one D Richards who is a trainer attendant at Wagga was disqualified for 3 months and fined $500. The circumstances of the New South Wales offences were not known. The Stewards in response referred to the range of Western Australian penalties of disqualification which had been imposed for breaches of the same rule. These can be summarised as follows:

•	Bradshaw	21/10/97	9 months	1st offence	no appeal
•	Collard	25/4/96	9 months	1st offence	no appeal
•	Collard	7/7/98	2 years	2nd offence	no appeal
•	Edwards	18/12/81	1 year	1st offence	appeal dismissed
•	Ferguson	20/12/96	9 months	1st offence	no appeal
•	Franklin	1/1/82	1 year	-	appeal dismissed
•	Jeffries	4/8/94	6 months	1st offence	no appeal
•	Kaltsis	6/1/97	9 months	-	appeal dismissed
•	McBride	18/12/91	1 year	-	appeal dismissed

•	Mills	15/7/98	9 months	-	no appeal

Discussion then ensued regarding the new Greyhound Racing Rules which had been introduced subsequent to the race in question.

Finally, the Stewards, after deliberating, amended the placings, disqualified PROMENADE, ordered the return of the stake money and imposed a 9 month disqualification on Mr Julien. Mr Julien appeals against the latter determination both as to the conviction and the penalty. On the 20 January 1999 an order was made suspending operation of the penalty pending determination of the appeal or as otherwise ordered.

The amended grounds of appeal are:

> *'1. The Stewards were wrong in law in finding the charge proved insofar as there was no evidence that the caffeine had been administered to the greyhound Promenade within the meaning of Rule 234(7) of the Rules. The Stewards should have found on the evidence that the ingestion of caffeine by Promenade was accidental.*
>
> *2. The Stewards did not afford the Appellant natural justice or procedural fairness in that:-*
>
> *(i) notwithstanding the request from the Appellant to view the place whereat the greyhound was kennelled and the bags containing the coffee beans were situated, the Stewards did not receive such evidence by the taking of a view;*
>
> *(ii) they drew adverse inferences as to the credibility of the Appellant in relation to what could be heard when Mrs Julien placed the bags in the kennel without first putting such matter to the Appellant or Mrs Julien for explanation or giving the Appellant the opportunity to rebut any suggestion by evidence in respect thereof, namely:-*
>
> *(a) that all bags did not have the same number of beans as those shown to the Tribunal;*

(b) *that the beans would not be heard unless the bags were shaken - the Appellant did not shake out the bags and in any event was not then aware that the bag being used had beans in it and had no reason to shake the bag;*

(c) *the influence of noise of radio and other dogs in the kennel.*

(iii) *they pre-judged the guilt of the Appellant without first waiting to hear all of the evidence and submissions to be adduced on the Appellant's behalf;*

(iv) *they declined the Appellant's request to have tests conducted to demonstrate that the ingestion of coffee beans could produce the result found by the Stewards and thereby support the Appellant's explanation;*

(v) *the Stewards found that it was illogical that Mrs Julien overlooked to inform the Appellant of noticing beans in the kennel when such matter was not put to her in evidence for explanation.*

3. *The Stewards misapprehended the evidence:-*

(i) *in finding that the Appellant's answers concerning the withdrawal of the greyhound Promenade from a race meeting at Mandurah on 9th November 1998 was unsatisfactory and illogical, such that any inference drawn as to the Appellant's account was wrong;*

(ii) *in relying on the Appellant's offer of other explanations as evidence of guilt. In offering explanations of the circumstances that were not known to the Appellant, the Stewards sought to rely on explanations proffered by the Appellant of an event to which he was unaware as being evidence of guilt;*

(iii) *of the Appellant's description of the circumstances surrounding the coffee beans as the "the coffee bean saga". Such phrase was not a term of art nor intended to imply anything other than a frank explanation as to the circumstances such that any adverse inference drawn as to the Appellant's account of events was wrong.*

4. *The Stewards were wrong in finding that the only inference open was that the caffeine had been administered for an improper purpose. The Stewards having made no finding as to the circumstances in which the caffeine was found in the urine sample of the greyhound Promenade or how it had been administered, could not draw the inference contended in the face of the evidence before it.*

5. *That the penalty imposed was, in all the circumstances, excessive having regard to the circumstances of the case and the antecedence of the Appellant. Further, the Stewards failed to have regard to the circumstances under which any period of disqualification or suspension has become more onerous since 1st January 1999.'*

At the appeal hearing leave was given for Mr Ron Lee and Mrs Julien to give evidence on behalf of the appellant. Further, Mr Martins gave evidence on behalf of the Stewards.

The evidence from Mr Lee revealed that Mr Martins had asked him at the Cannington Greyhounds what he knew Mr Julien *'was using on his dogs'*. After having also heard Mr Martins' version of the conversation I find nothing untoward with this aspect of the case.

Some of the grounds of appeal have no merit and can be disposed of first. Ground 3(iii) does not raise an issue of any moment. The description given is of no importance. The second ground dealing with breach of natural justice and lack of procedural fairness raises a number of different issues. Ground 2(i) as to the refusal to conduct a view in my opinion is of no moment. The descriptions given of the appellant's property, the location of the bags on the property, the kennel which housed PROMENADE and all other surrounding physical aspects at the site were quite clear. I cannot see how anything material would have been gained in the circumstances of the case had the Stewards conducted a view. Equally I cannot imagine how Mr Julien may have been prejudiced by the Stewards not having done so. Accordingly I am satisfied the Stewards did not err in this aspect.

Equally there is no merit as to ground 2(iv) relating to the refusal to conduct tests to demonstrate the ingestion of coffee beans *'could produce the result found by the Stewards and thereby support the Appellant's explanation'*. The Stewards clearly are aware of the inevitable outcome of such tests and would have appreciated its relevance in the context of the explanation offered without there having been any need to carry out such a test.

Ground 2(iii) alleges pre-judging without first hearing all of the evidence. After carefully considering the cross examination of Mr Martins in relation to the other evidence I am satisfied that, whilst the Stewards clearly did have some prepared typed material which was relied on and formed part of their final typed statement which was read out in pronouncing on Mr Julien's guilt of the offence, this in itself is not reflective of the fact that the Stewards had predetermined the matter as alleged. I am satisfied that the actions of the Stewards in summarising some of the relevant material of this lengthy inquiry, which was broken up over a number of days and was spread out over a 3 month period, of itself did not amount to a breach of natural justice or involve any procedural unfairness.

By way of contrast grounds 1, 2(ii)(b), 3(ii) and 4 do raise some valid considerations. Ground 2(ii) is as to the inappropriateness of drawing inferences adverse to the appellant's credibility without putting the matter to Mr Julien or affording him the opportunity to rebut. The common factor in the 1st and 4th grounds relates to the nature of the administration, that is whether it was for an improper purpose or accidental. During the hearing of the appeal, the Tribunal, unlike the Stewards, did have the benefit of hearing Mrs Julien's explanation from the witness box of what had taken place in the kennel relating to the coffee bags. Despite the full circumstances not having been ventilated before the Stewards the Stewards did make adverse findings regarding Mrs Julien's failure to inform Mr Julien at the time. During the course of the appeal hearing the Tribunal was told by Mrs Julien of her serious injuries and her poor state of health at the time the kennel incident occurred. Mrs Julien did not lack credibility whilst giving evidence to the Tribunal as to what happened in PROMENADE's kennel in relation to the coffee bags and why Mr Julien was not told about the situation when it occurred. The fresh

evidence clearly was potentially available to the Stewards at the time of their inquiry. The Stewards did not raise the matter and Mrs Julien was not forthcoming. The allegations in ground 2(ii)(v) are quite valid in my opinion. All of these considerations should have been agitated and explored by the Stewards during the course of their inquiry before adverse conclusions were drawn relating to them. Without having gone into these matters so and in the light of their findings as to Mr Julien's credibility, I consider the Stewards did fall into error and their determination is tainted as a consequence. The facts of this appeal are distinguishable from P Kaltsis Appeal 342 to this extent and the matter therefore cannot at this stage be dealt with simply by applying *Western Australian Greyhound Racing Association Inc v Williams & Williams* (F.CT Sup Ct Appeal No 64/87, unreported Library No 6930).

In carrying out their inquiries the Stewards should have comprehensively investigated all the relevant aspects of the matter. The considerations which were overlooked were readily available and were directly relevant to a central issue being decided by them. (*Tickner v Bropho* (1993) 114 ALR 409 at 423- 424 and *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 65 ALR 549).

This only leaves ground 3(i). It is not entirely clear what is meant by that ground. It was open to the Stewards to find the answers by Mr Julien regarding withdrawal of the greyhound from the Mandurah meeting were *'unsatisfactory and illogical'*, But, having said that it certainly is not clear that as a consequence, the Stewards inferred the rest of Mr Julien's evidence was of that quality.

I am satisfied this is not a case where the Tribunal should simply quash the conviction and uphold the appeal. Rather I am of the opinion it is appropriate for this matter to be sent back to the Stewards to redetermine in the light of the fresh evidence before the Tribunal and all other fresh material the Stewards may elicit or which may be presented on behalf of the appellant.

Having come to this conclusion it is unnecessary to deal with the final ground as to penalty other than to say I am satisfied on the basis of the Western Australian decisions relied upon by the Stewards the penalty imposed arguably

is within the range. The New South Wales decisions are not helpful as some of the circumstances of the offences and other relevant information has not been made known. Should Mr Julien ultimately be convicted after proper inquiry and once all of the relevant circumstances are known the penalty then to be imposed will depend on the outcome of full exploration and evaluation of the additional issues. In other words if ultimately the Stewards do decide to convict precisely where, within the wide range, or for that matter whether a lesser penalty should be imposed will depend on the impact of all the fresh evidence.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS P HOGAN (MEMBER)

APPELLANT:	**MAXWELL JOHN JULIEN**
APPLICATION NO:	**A30/08/444**
DATE OF HEARING	**6 APRIL 1999**
DATE OF DETERMINATION:	**15 JUNE 1999**

IN THE MATTER OF an appeal by Mr MJ Julien against the determination made by the Western Australian Greyhound Racing Authority Stewards on the 20 January 1999 imposing a 9 month disqualification for breach of Rule 234(7) of the Rules Governing Greyhound Racing in Western Australia (1973).

Mr RE Birmingham QC, instructed by DG Price & Co, appeared for the appellant.

Mr RJ Davies QC, assisted by Mr JM Woodhouse, instructed by Watts & Woodhouse, appeared for the Western Australian Greyhound Racing Authority Stewards.

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

PAMELA HOGAN, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY (MEMBER)

APPELLANT:	**MAXWELL JOHN JULIEN**
APPLICATION NO:	**A30/08/444**
DATE OF HEARING	**6 APRIL 1999**
DATE OF DETERMINATION:	**15 JUNE 1999**

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Mr RE Birmingham QC, instructed by DG Price & Co, appeared for the appellant.

Mr RJ Davies QC, assisted by Mr JM Woodhouse, instructed by Watts & Woodhouse, appeared for the Western Australian Greyhound Racing Authority Stewards.

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

Kaye Farley

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

KAREN FARLEY, MEMBER

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**MAXWELL JOHN JULIEN**
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Mr RE Birmingham QC, instructed by DG Price & Co, appeared for the appellant.

Mr RJ Davies QC, assisted by Mr JM Woodhouse, instructed by Watts & Woodhouse, appeared for the Western Australian Greyhound Racing Authority Stewards.

By a unanimous decision the appeal is allowed and the conviction is quashed.

The matter is remitted to the Stewards for further determination in accordance with the reasons published.

Dr Mossenson

DR IAN MOSSENSON, CHAIRPERSON

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