THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/517**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR S PYNT (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATES OF HEARING:	**11 SEPTEMBER & 13 NOVEMBER 2001**
DATE OF DETERMINATION:	**26 MARCH 2002**

IN THE MATTER OF an appeal by Mr Nolan against the determination made by the Stewards of the Western Australian Trotting Association on 14 November 2000 imposing 12 months disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Dr B J Stewart was granted leave to represent the appellant.

Mr B J Goetze, instructed by Minter Ellison, appeared for the Stewards of the Western Australian Trotting Association.

BACKGROUND

Mr Nolan was the registered trainer of GRECIAN FELLA when it competed in Race 5 at Gloucester Park on 10 December 1999. Pre-race blood samples were taken from GRECIAN FELLA. The Racing Chemistry Laboratory in Western Australia reported to the Stewards of the Western Australian Trotting Association a total carbon dioxide concentration (TCO_2) of 35.5 millimoles per litre in the sample it tested after subtracting 1.4 mm/l for uncertainty of measurement. This gave *'...a 99.95% confidence that the actual concentration is not lower than the reported results'* according to both the Centre's principal laboratory technician and the acting principal chemist. The laboratory also reported to the Stewards *'The samples were received in good condition. The seal on the referee sample was intact.'* Racing Analytical Services Ltd in Victoria reported a TCO_2 level of 37.8 millimoles per litre in the control portion of the same sample. This result was subject to an uncertainty of measurement of + or – 1.2 mm/l.

By registered letter dated 20 December 1999 the Stewards of the Western Australian Trotting Association charged Mr Nolan under the provisions of Rule 190(2) of the Rules of Harness Racing. The specifics of the charge were:

> *'As the trainer of Grecian Fella you presented the horse to race at Gloucester Park on the 10th December 1999 where the pre-race blood samples taken from the horse have a plasma total carbon dioxide concentration in excess of 35.0 millimoles per litre in the plasma.'*

Rule 190 states:

> *'(1) A horse shall be presented for a race free of prohibited substances.*
>
> *(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.*
>
> *(3) If a person is left in charge of a horse and the horse is presented for a race otherwise than in accordance with sub rule (1), the trainer of the horse and the person left in charge is each guilty of an offence.*
>
> *(4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.*
>
> *(5) A horse is presented for a race during the period commencing at 8.00 a.m. on the day of the race for which the horse is nominated and ending at the time it is removed from the racecourse after the running of that race.*
>
> *(6) Where a person is left in charge of a horse the trainer must give notification to the chairman of stewards, and the notification must be in the manner, within the time, and containing the information determined by the Controlling Body or the chairman of stewards.*
>
> *(7) A person can only be left in charge of a horse by a trainer with the approval of the chairman of stewards.*
>
> *(8) A trainer who fails to comply with sub rule (6) or sub rule (7) is guilty of an offence.'*

Local Rule 188(1) specifies the types of substances which are prohibited substances for the purposes of the Rules. Local Rule 188(2) at the time of the race specified:

> *'The following substances when presented below the levels set out are excepted from the provisions of sub-rule (1):*
>
> *(a) Total carbon dioxide (TCO_2) at a level of 35.0 millimoles per litre in plasma.*
> *...'*

At the commencement of the Stewards' inquiry on 1 February 2000 Mr Nolan pleaded not guilty to the charge. He sought and obtained permission for Dr Stewart, an equine practitioner, to assist '*by doing all the talking for him*'. The Rules do contemplate an expert adviser assisting with the process when technical issues arise (Rule 182(e)). The inquiry proceeded for some time before being adjourned. It resumed on 30 August 2000. At the conclusion of that sitting the Chairman of Stewards advised Mr Nolan that the Stewards would consider all the evidence put to the inquiry and determine the charge.

In their letter dated 2 October 2000 the Stewards in advising Mr Nolan that they had found him guilty stated amongst other things:

> *'The Stewards do not believe that your evidence proves that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed. We are satisfied that the procedures and protocols adopted by the respective laboratories in issuing their reports were reliable. We accept Dr Vines evidence that the difference in the reported levels in the samples was within acceptable range of agreement.'*

In so stating the Stewards were no doubt referring to the provisions of Rule 191(7) which state:

> *'Notwithstanding the provisions of this rule, certificates do not possess evidentiary value nor establish an offence, where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of a certificate, was materially flawed.'*

Mr Nolan was then invited to make written submissions to the Stewards in respect of the penalty. Finally the Stewards reconvened on 14 November 2000 when they announced Mr Nolan was disqualified for the then mandatory minimum period of 12 months after having found that there were no extenuating circumstances pursuant to the then Rule 256 to cause them to decide the matter otherwise. That Rule, which now no longer applies, at the relevant time stated:

> *(1) A person who is convicted of an offence under:*
>
> *(a) Part 12 of these Rules, other than LR196; or*
>
> *(b) Part 42 of the Rules of Harness Racing repealed by these Rules (other than Rule 499) which offence was committed on or after 21 October 1994,*
>
> *is liable to a penalty which is not less than:*
>
> *(c) in the case of a first such offence, a period of 12 months disqualification;*
>
> *(d) in the case of a second such offence, a period of 2 years disqualification;*

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

(f) 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.

(2) Rule 256(6) shall not apply to an offence found proven under Part 12 (other than LR196).

...'

Mr Nolan lodged a Notice of Appeal and sought a suspension of operation of the penalty. The **grounds of appeal** as stated in the appeal notice are:

'Convictions 1. There is no evidence of any wrong doing as the range of levels reported are within the range of levels occurring naturally.

2. There is evidence of a material flaw in analysis both in accuracy and provision.

Penalty: Extenuating circumstances as above.'

The Tribunal convened a formal hearing on 21 November 2000, with the Member Mr Prior presiding, to determine the application for suspension of operation of the penalty. On 30 November 2000 Mr Prior refused the application for a stay. Mr Prior was unable to find the appeal had strong prospects of success.

Although it goes without saying the appeal needs to be determined on its merits, that is, depending on the specific facts and circumstances relevant to Mr Nolan's case, there are a number of peripheral matters which it was suggested on the appellant's behalf need to be closely considered. It appears neither the appellant nor the Stewards actively pursued the listing of the appeal due to a variety of events on foot both locally and elsewhere in Australia at the time. Some reference needs to be made to those matters to do justice to the argument presented on Mr Nolan's behalf and to put the appeal proceedings in their true context.

At the time the inquiry which led to this appeal was being handled by the Stewards there was throughout Australia a dramatic increase in the number of Stewards' inquiries as a result of elevated TCO_2 levels being detected by the official laboratories. Dr Stewart argued in several jurisdictions that the results from those laboratories could no longer be relied upon as conclusive evidence of an administration of a prohibited substance. Late in 1999 the official laboratories changed from the Casco standard to the ASE standard to measure the quantity of substance revealed by the analyses. The Australian Harness Racing Council held a lengthy inquiry into the issue and as a result, recommended that the violate level be increased from 35 to 36.0 mm/l. This new level happens to be the level proscribed under the Australian Rules of Racing for the thoroughbred racing industry. In Western Australia the Committee of the Western Australian Trotting Association took a

number of initiatives. Firstly, on the 1 September 1999 it amended the local rules relating to mandatory penalties for drug offences. Secondly, on 10 December 1999 it too increased the violate level for TCO_2 offences to 36.0 mm/l. Thirdly, on 25 May 2001 it prescribed the apparatus known as the Beckman EL-ISE auto analyser as the only approved instrument for measuring the plasma total carbon dioxide level in a horse.

To add to the complicated background to the appeal prior to this matter coming on before the Tribunal for hearing, the Committee of the Western Australian Trotting Association by letter dated 31 January 2001 gave Mr Nolan 2 options on penalty. Mr Nolan's penalty was subsequently varied to 6 months suspension coupled with a $5,000 fine. The power to alter the penalty appears to have been or was purportedly exercised pursuant to Local Rule 256A which was introduced on 22 February 2000, approximately 10 weeks after GRECIAN FELLA's race in question. Under that Rule the Committee may alter Stewards' penalties of its own volition or pursuant to an appeal. It is not clear whether Mr Nolan had appealed or not.

THE APPELLANT'S CASE

Other than on 14 November 2000, Dr Stewart, who argued this appeal on behalf of the appellant, was present throughout the Stewards' lengthy inquiry into this matter. On the 14 November the Stewards were considering the question of the penalty. Dr Stewart had prepared the submission on penalty which had been sent to the Stewards to consider prior to reconvening on that date.

When the appeal first came on before the Tribunal on 11 September 2001 Dr Stewart produced detailed written submissions accompanied by a substantial amount of supporting material. When boiled down to their bare essentials these detailed written submissions allege:

1 The conviction was recorded in the absence of reliable evidence that Mr Nolan failed to take all reasonable steps to guard against an offence under WATA Rule 190 as:

> *'He could not be expected to guard against a naturally occurring overage of an arbitrary threshold, nor against variability in laboratory accuracy (or an understated uncertainty of measurement).'*

2 The Stewards erred in applying the rule as an absolute liability rule '*Because there are 'no words of clear intendment' within the delegating legislation... giving a clear directive to the WATA to either construct absolute liability rules, or construe any of its rules as being absolute liability. Absolute liability rules are contrary to natural justice, basic human civil rights and common law.'*

3 *'...if the WATA Rule 190 is applied as an absolute liability by-law it is contrary to the more recent RPAT Act, in as much as the RPAT Act limits liability.'*

4 *'If, as we believe, the TCO $_2$ Rules are of 'strict liability, then Mr Nolan's state of mind is relevant and the Stewards must satisfy this Tribunal that Mr Nolan either intended to commit an offence or he failed to take such steps as the Tribunal may consider reasonable to prevent the offence from occurring.'*

This approach raised some complex legal issues which the Tribunal had not previously been confronted with. This fact was pointed out to Dr Stewart who eventually sought and was granted an adjournment to engage legal counsel to address the complications.

The appeal came back before the Tribunal on 13 November 2001 with Dr Stewart again representing the appellant. Shortly after the recommencement Dr Stewart abandoned Mr Nolan's appeal against penalty. As the penalty of 12 months disqualification imposed by the Stewards had previously been varied by the Committee of the Western Australian Trotting Association I sought clarification from the parties as to the impact of that action on the appeal. Mr Goetze for the Stewards was of the view that this situation did not stop the Tribunal from dealing with the matter. Clearly the Tribunal is empowered to deal with the appeal by virtue of s15 of the Act. Accordingly, the appeal proceeded in relation to the conviction. Dr Stewart tabled a further detailed document which incorporated the legal advice he had received following the adjournment. The written advices covered the following issues:

> *'1. The conflict between absolute liability under the Rules and requirements of the RPAT Act.*
>
> *2. Denial of Procedural Fairness.*
>
> *3. Outline of the evidence put before the Stewards.*
>
> *4. The exceedence (sic) of the threshold did not, and does not provide reliable evidence of failure to take all steps that might be deemed reasonable to prevent an offence under the rules.'*

At an early stage in the reconvened proceedings leave was granted to the appellant for a **third ground of appeal** to be added which reads:

> *'The Western Australian Trotting Association Act does not empower the Western Australian Trotting Association to construct a rule such as Rule 190(4). Rule 190(4) cannot be applied with the denial of procedural fairness.'*

The legal propositions in support of the first matter contained in the written advices, namely the conflict between absolute liability under the Rules and the requirements of the Racing Penalties (Appeal) Act, are best dealt with by quoting in full from pages 1 to 4 inclusive of Dr Stewart's written advices:

> *'1. The Western Australian Trotting Association ("WATA") is empowered by the Western Australian Trotting Association Act 1946 ("WATA Act") to make rules to foster and extend the sport of trotting ("Rules"). Clearly the Act did not intend to empower the WATA to construct and apply Rules which denied procedural fairness to harness racing personal (sic).*
>
> *2. Prior to 1 September 1999, any horse found to have 35.0 millimoles of total carbon dioxide ("TCO_2") per litre in plasma was deemed under the Rules to have been administered a drug and, when any such horse was presented to race, the trainer of the horse was deemed to have committed an*

offence of strict liability. The Rules provided in Rule 479(2) a defence to this offence if the trainer could prove he had taken reasonable and proper precautions to prevent the administration of the drug.

3. *Mr K Nolan paid for the renewal of his trainer's licence prior to 1 September 1999. Up until that date the defence of "reasonable and proper precautions" was available to the offence of strict liability.*

4. *On 1 September 1999 the WATA repealed the old Rules and enacted new Rules according to which it became an offence of absolute liability for a person to be the trainer of a horse that was presented for a race with greater than 35.0 millimoles of TCO_2 per litre in plasma. Rule 190(4) provided that such an offence is committed "regardless of the circumstances" in which the prohibited level of TCO_2 came to be present in the horse. The defence of "reasonable and proper precautions" was abolished.*

5. *On 10 December 1999, 4 months after the new Rules were enacted, the horse Grecian Fella was found to have a level of 35.5 millimoles of TCO_2 per litre in plasma on presentation for a race and Mr Nolan, his trainer, was accused of committing an offence. Mr Nolan was not permitted to show that he had taken all steps considered reasonably necessary to prevent an offence. The WATA Stewards found Mr Nolan guilty and imposed a penalty of 12 months disqualification on him, the penalty that was provided at that time for a first offence under Part 12 of the Rules.*

6. *Section 11 of the Racing Penalties (Appeals) Act 1990 ("RPA Act") provides that, in hearing an appeal against a finding of the WATA Stewards, the RPAT is obliged to "act according to equity, good conscience and the substantial merits of the case; and observe the principles of natural justice". The requirements to consider the substantial merits of the case and to observe the principles of natural justice, including procedural fairness, is in direct conflict with the provisions of the WATA Rules that impose absolute liability and deny the accused person a defence. By necessary implication, because of the hierarchical superiority of RPAT the WATA Stewards were required to apply these same principles.*

7. *Since 10 December 1999, the Rules have been amended substantially. On 25 May 2001, the rules were amended to allow a horse to have 36.0 millimoles of TCO_2 per litre in plasma, and on 10 August 2001, the penalty for a first offence was reduced to either a fine of $5,000, or 6 months suspension.*

8. *The substantial merits of this particular case include the historical accident of timing. If the "offence" had occurred 4 months earlier Mr Nolan would have been able to mount a defence under the old Rules that he had taken reasonable and proper precautions to prevent the administration of a drug to Grecian Fella. On the other hand, if Grecian Fella had been tested after 25 May 2001 there would have been no offence at all since the prohibited level of TCO_2 is now higher than that found in Grecian Fella.'*

Over and above these statements much of the rest of Dr Stewart's written submissions were very far reaching. They addressed such issues as matters of broad principle including involving human rights under the United Nations Charter, the history of the reports and reviews dealing with TCO_2 as well as technical scientific considerations and arguments. The written submission concludes by stating:

> *'On the matter of restitution of lost income, character defamation and recovery of costs for legal fees and scientific advice we pass no comment but we do request the Tribunal to provide guidance.'*

THE STEWARDS' CASE

Mr Goetze began his reply to this wide ranging approach by reference to the New South Wales decision of Judge Thorley in Hunter (12 July 2000) p3:

> *'The stewards, on several occasions during the course of their inquiry, observed, in careful terms, that they had no part to play in the formulation of this proscribed figure of 35 mmole/litre, pointing out that it was a figure that had been approved by the Australian Harness Racing Council and one which had been adopted by the several statutory and other bodies that control harness racing within the various States of the Commonwealth. They pointed out that they were bound by that figure, as indeed this Tribunal equally is bound. Those observations did not seem to discourage Dr Snow in his advocacy. He persisted, to a large extent, in trying to develop arguments which would suggest that the prohibited level should be not less than about 37 mmole/litre.*
>
> *However, this Tribunal is happy to report that counsel who appeared before it on behalf of the Appellant did not endeavour in any one way to make the same approach. Submissions put at the appeal on behalf of the Appellant were limited to the very issues which were at stake in the conviction of the Appellant. This Tribunal has no view, one way or the other, as to whether or not the figure of 35 mmole/litre is an appropriate figure. It is content to accept that that is the figure so prescribed and proscribed.'*

Counsel for the Stewards argued the only defence open is to show there is something wrong with the testing and the sampling. Statistics do not help. Counsel then referred to

what happened to the sample by reference to the relevant pages of the transcript. Having examined all those references I am satisfied as to the integrity of the process.

Counsel then dealt with the difference between the local and the Victorian laboratory results. The Chairman of Stewards at the Stewards' inquiry asked Dr Vine, Director Racing Analytical Services Victoria *'...is there any reason why the stewards should be concerned at the difference in the two levels, the one reported by Mr Russo and the one reported by you?'* to which Dr Vine replied *'...the difference between the two values is larger than we'd usually get between two laboratories. My view on that difference is that, while that is the case, it is large – we usually get better agreement than that. It is just within the acceptable range of agreement'.* Dr Stewart then argued there should not have been that large a discrepancy to which Dr Vine replied:

> *'...is that I believe that the agreement between those two values, while larger than what we'd normally accept – or sorry, expect, is just within the bounds of that is acceptable. There could be some reasons for that. It's not impossible that the first tube that was tested in the Western Australian laboratory may have suffered some loss of carbon dioxide through leakage through the cap. I mean, I'm only throwing that in as a possibility but I don't believe that a difference of .9 is sufficient to say that, therefore both values are unreliable. I believe the values are close enough that you can be confident that the value is over the threshold, certainly.'* (T28 & 29).

Next the explanations given regarding the problems with the Standards was referred to (T6-13) although I see no need to go into that issue.

The natural justice argument was addressed and answered on the basis that Dr Stewart was in attendance and presenting matters on the appellant's behalf at the inquiry.

The Tribunal was then referred to the NSW Appeals of AD Turnbull and J Donohoe, a joint decision of Judge Thorley of 27 September 2000 (issue 28 Racing Appeal Reports P3026). Each appellant was found guilty of a breach of Rule 190(1) in that each presented a horse for a race which was not free of a prohibited substance being a level of plasma total carbon dioxide in excess of permissible limit. It is helpful to quote many of the passages of that case:

> *'Rule 190(1) provides for an offence which is of its nature absolute. The question which is remaining in respect of the absolute terms of Rule 190(1) is: How do you prove that the horse has been so presented not free of the prohibited substance? The answer to this is to be found in the provisions of Rule 191 of the new rules. To the provisions of this rule, we made wide reference in the decision of Hunter, and we do not propose to reiterate all that we there said. It is sufficient to say that a confirmatory certificate has been issued by a second drug testing laboratory; that certificate then must be regarded as conclusive evidence of the matters which are certified within that certificate. The only escape from this result is that subparagraph (7) of Rule 191 – which clearly casts the onus of proving the contents of that subparagraph upon the appellant – does enable the evidentiary effect of any such certificate to be avoided if the person alleged to have*

committed the offence can demonstrate a material flaw in either the certification procedure or any act or omission which forms part of or is relevant to the process which resulted in the issue of that certificate. As we said in Hunter's appeal, that onus of proof may be discharged upon a civil onus. (p3027)

'The blood testing undertaken at the Australian Racing Forensic Laboratory and also by its counterpart in Melbourne is performed by a machine described as a Beckman EL-ISE.

Both laboratories adopt a common practice in their use of the standards employed to measure the quantity of substance revealed by the analyses. At one stage the standard used was one known as Casco. This was changed in more recent time to a standard described as ASE. During the twelve months prior to the ASE standard being introduced some 1,413 horses were tested in New South Wales for plasma total carbon dioxide. ...

...An examination of these figures comparatively indicates to us quite graphically that with the use of the ASE standard for the relevant period there was a significant reduction in the number of horses that measured in the up to 29.9 bracket, with some reduction in the figure of up to 30.9, but thereafter a considerable increase in the ranges between 31.9 up to 36.1.

It is possible that there are perhaps three reasons which might be advanced for these statistical variations. First, it might be argued that the use of the new ASE standard has resulted in more accurate readings than those which obtained during the use of the Casco standard. Secondly, it might be argued that the quality of the feeding administered to horses and the use of supplements thereto have resulted in an overall change in patterns. Or, thirdly, it might be argued that there has been an increase in the use by trainers of bicarbonate of soda.

Finally, it might be argued that the statistical variation could be attributed to a combination of one or more of these factors.' (p3028)

'As this Tribunal said in the appeal of Hunter, it is not for the Stewards or indeed for this Tribunal to question the proscription at the level of 35 mmole/litre. We accept that this is the measure against which a breach of Rule 190 has to be regarded. We are aware that there has been agitation throughout the Commonwealth about this level. We would merely add that there does appear to be, for whatever reason, a significant increase in the levels which have been detected on analysis. What be the reason for this, we are unable to say. It clearly is a matter, however, we think, which should be the subject of further evaluation and research.

In the short term, however, these concerns do not, it appears to us, add any particular comfort in either appeal for either appellant. Mr Donohoe

also referred to us a newspaper report of a decision of an appeal court in New Jersey, apparently indicating that the court was not disposed to accept a finding produced on exactly the same analytical machine, although we are unaware as to what standards were used in the usage of that machine. So far as we could read from a copy of the newspaper article which was provided to us, that decision provided no authority for saying that the machine itself is unreliable in a total sense. The most that can be read from the newspaper report is that that appeal court, on the evidence which was before it, simply pronounced itself as not being satisfied to the requisite level as to the reliability of the particular findings made in the particular case. Despite Mr Donohoe's efforts to suggest to us that that was some authority that the Beckman EL-ISE machine is unreliable, the case cannot be regarded as any authority for any such proposition.

...

...The only escape to the evidentiary provisions now set out in Rule 191 is, in either case, for the appellant to point to some material flaw as I have already described. Neither appellant, it seems to us, can do this at all.' (P3029)

'In the result, however, neither appellant has discharged the onus of demonstrating there has been any flaw in the certification or in the steps which led to the certification. It follows, then, that the appellants will have to be unsuccessful in their appeals.

Over the years this Tribunal has consistently said that a period of disqualification for twelve months is not an untoward result for a breach of Rule 190. We do not retreat from this approach at all. We recognise, and have always recognised, that a disqualification presents for the person upon whom such an imposition is made a considerable handicap and, in many cases, considerable hardship. The rule is meant to be stern. The penalty is meant to be stern.' (p3030)

The argument then moved to an examination of the Western Australian Trotting Association Act 1946 as amended and its by-laws. That Act established the Western Australian Trotting Association and declared its objects, functions and powers. As to its objects by-law 2 states:

'The main object of the Association shall be to foster and extend the sport of trotting throughout Western Australia and the importation and breeding of trotting horses, and to keep the sport of trotting clean and free from abuse, and also to regulate and control that sport wherever carried on in the State.'

Clearly the Association is authorised to keep the sport clean and to regulate and control the conduct of its participants (by-law 59(a), (b) and (c)) to determine penalties (by-law 59(d)). Further, everyone who participates in the sport including trainers who are referred to in the Rules *'...shall be absolutely bound thereby, whether the same is or is not irregular or is or is not ultra vires of the Committee'.* (by-law 5a)

The present rules were amended to remove the previous defence of taking reasonable precautions. Stampalia v The Racing Penalties Appeal Tribunal [1999] WASC 7 was referred to. The Committee in its wisdom determined it was an offence at a particular level. As the analyst said in the course of giving evidence before the Stewards during the Nolan inquiry GRECIAN FELLA's sample would not have been forwarded to the second laboratory had the concentration found by the Perth laboratory not exceeded 35 mmol/litre.

The rules are not part of the 'statute law' of this State. Criminal and common law defences do not apply to the contractual or consensual relationship that applies in trotting. (Harper v Racing Penalties Appeal Tribunal of Western Australia & Another [1995] 12 WAR 337). This case was based on the previous rules but equally applies to the rules in force at the time of Mr Nolan's offence. The Committee had deliberately taken away the defence and therefore made it an absolute offence and there is good reason for mere presentation being an offence. One is deemed guilty irrespective of any act done if the objective circumstances are shown to have been present.

DETERMINATION

I have carefully considered the submissions from both parties and all of the materials presented to the Stewards initially and the Tribunal subsequently, including the documentation forwarded to the Tribunal after the appeal hearing concluded. I am satisfied there is no merit in the case advanced for the appellant. On the other hand I do accept and adopt all of the arguments raised on behalf of the Stewards. I find the propositions put by Mr Goetze on all the key issues to be compelling.

Nothing has been presented to demonstrate there were any errors in the way the sample was taken, handled or analysed. According to the uncontradicted evidence the discrepancy in the results was within the range of what is regarded as acceptable by those conducting the chemical testing of the sample in question. There is no merit in the first of the initial detailed written submissions (referred to earlier under the heading The Appellant's Case).

The rules governing trotting were intended and did make it obligatory at the relevant time for trainers not to present horses with levels of TCO_2 of 35 millimoles per litre or more. Irrespective of an actual administration or any intentional behaviour on the part of trainers at the time, it was a serious breach of the rules for horses to compete with high levels of the substance above the specified threshold in their systems. A failure to comply resulted in an automatic penalty of 12 months under the Rules unless the actual circumstance of the commission of the offence itself were able to be shown by the trainer to be extenuating. The Tribunal is not dealing with the question of the actual penalty imposed. But even if it were none of the arguments brought to bear would satisfactorily or usefully address the mitigation aspect of the penalty. The threshold set at the time by the authority in charge of the sport, is the threshold. The laboratory results prove the threshold was exceeded. The offence had been committed.

There is no merit in the second detailed written submission. There can be nothing wrong in principle with an absolute liability rule applying in racing. Such a rule is an effective way of regulating and controlling the sport. The continuity of the sport depends largely on the betting public's confidence in how the sport operates and is administered. This regulation contributes to that end. The entitlement to train is a privilege, not a right. The privilege is only extended consensually and may be removed in the event of failure to conform with the

lawful requirements of the authority which conducts and regulates the sport. The case of Hunter referred to earlier and other cases clearly support that proposition. If the proposition were unsupportable there would be uncertainty leading to potential chaos in the industry.

Equally, there is no merit in the third detailed written submission which suggests the Act which established this Tribunal outlaws absolute liability rules. Merely by referring to the statutory manner in which appeals should be determined (according to equity and good conscience) cannot possibly have the effect suggested on the appellant's behalf regarding absolute liability rules, when those rules are properly made by the duly authorised Committee of the Association.

There is also no merit in the argument regarding the appellant's state of mind (detailed written submission 4). In most cases the state of mind of a trainer in a drug context may well be irrelevant except in the case of a deliberate administration which is rarely admitted. Steven Raymond Matson v The Racing Appeals Tribunal & the Stewards of the Harness Racing Board (Vic S/Ct No 6582 of 2001) is clear authority for the proposition that intention or inadvertence is irrelevant in the case of this absolute rule. *'The offence occurs by the presentation of a horse for racing with a level of prohibited substance above the maximum permitted level'.* (p33 para 174)

As to the 4 points covered by the written advices received by Mr Nolan and produced following the adjournment at the reconvened appeal hearing (which are referred to earlier under the heading The Appellant's Case) I am not persuaded by any of them. There is no conflict between the Act and the Rule as alleged. I am satisfied the Stewards handled this complicated technical matter quite sensibly and fairly. Even the most cursory examination of the transcript and the substantial wad of supporting material reveals that Mr Nolan was not denied the opportunity to present a huge amount of material, including scientific evidence and even some rather extravagant assertions. There was limited checking or interruption by the Stewards who displayed considerable patience even when it was claimed by Dr Stewart that *'...the systematic extermination of trainers when they are essentially innocent, by blind application of the rules is very comparable'* to the systematic extermination of Jews in the holocaust. (T90). Whilst it is true at times the Stewards did not give the appellant's spokesman a completely free hand it was appropriate from time to time to keep Dr Stewart in check and to exclude some evidence which would have been irrelevant. On the evidence before them the Stewards were entitled to come to the conclusions which they did. Had I been determining the matter I too would have arrived at the same conclusions on that evidence. Finally, as to the argument relating to exceeding of the threshold and the taking of reasonable steps to prevent the offence this defence was simply not available to Mr Nolan on the 10 December 1999 when the presentation occurred. The defence had been repealed over 3 months earlier.

Whilst the facts contained in paragraphs 1 to 8 inclusive of Dr Stewart's written submissions quoted earlier all appear to be accurate, I disagree with the legal propositions contained in paragraph 6.

From one perspective Mr Nolan is a victim of timing. It was bad luck for him that his offence occurred at the time when it did in the shifting arena of attitude and rule changes by the authorities. That, however, does not exonerate the offence when all the elements contained in the Rules to create the offence have been proven. Arguably, and

hypothetically in this case, only the coincidence of timing may have had some relevance to the penalty imposed had a mandatory penalty not applied.

Despite having been caught by the unfortunate coincidence of timing Mr Nolan was correctly charged and properly convicted with breaking the Rules as they existed at the time he brought the race horse trained by him, GRECIAN FELLA, to Gloucester Park to compete on 10 December 1999. Divorced of all of the peripheral arguments and the background surrounding circumstances the essential merits of this matter can be simply summarised and concluded in these terms:

1 GRECIAN FELLA was presented by Mr Nolan to race (Rule 180(1) and (5)).

2 Two independent laboratories recorded high levels of TCO_2 in the horse's blood at the time of presentation.

3 The horse had a higher level of TCO_2 in it than the Rules then allowed. The horse was not free of prohibited substances (Rule 190(2) read with LR 188(1)(a)).

4 Nothing has been advanced to detract from the evidential value of the results of the laboratories nor to disprove the offence (Rule 191(7)).

5 Irrespective of the circumstances in which the TCO_2 came to be present in the horse an offence had been committed (Rule 180(4)).

6 The Stewards were obliged to impose the period of 12 months disqualification as they were entitled to conclude there were no extenuating circumstances under which the offence was committed (Rule 256(1)).

7 The Rules were validly made by the authority controlling the sport.

8 The Rules must be applied to Mr Nolan irrespective of the background controversy which happened to be associated with these type of drug offences at the time.

9 The changes to the rules which occurred subsequent to the offence taking place must be ignored. Equally the actions of the local committee in altering the penalty is irrelevant to the matter for determination by the Tribunal.

I am not persuaded that anything presented on Mr Nolan's behalf supports ground of appeal one which alleges there was no evidence of wrong doing and that the recorded levels were within the naturally occurring range. Evidence of wrongdoing and being beyond naturally occurring levels are not conditions precedent to an offence occurring under the Rule. As Anderson & Owen JJ state in Harper v Racing Penalties Appeal Tribunal of Western Australia & Another (supra at 349):

> *'Counsel for the applicant made much of the fact that a literal construction of the Rules could conceivably result in a trainer guilty of no wrong conduct being disqualified. He tried to persuade the court that no such intention should be attributed to the committee of the Trotting Association which drew up the Rules. We do not see why. It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that*

to ensure the integrity of racing and to maintain public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken from them if for any reason, even without actual fault on their part, they present a doped horse for racing.

That this may be a legitimate approach to take with regard to the proper control of horse and greyhound racing is implicit in a number of cases, the most recent of which is R v Disciplinary Committee of Jockey Club; Ex parte Aga Khan [1993] 1 WLR 909; [1993] 2 All ER 853; see also Law v National Greyhound Racing Club Ltd [1983] 1 WLR 1302; R v Brewer; Ex parte Renzella.'

Whilst the anomaly between the 2 results may be unusual I am not persuaded by the evidence and the argument that the discrepancy amounts to any material flaw. Accordingly, ground of appeal two also fails. Ground three, dealing with lack of statutory empowerment, for reasons already explained, has no merit.

The questions of restitution of lost income, character defamation and recovery of costs raised by Dr Stewart do not arise for consideration, although it is worth commenting in passing one would be hard pressed to find any basis for indemnification in any case where the Stewards have bona fide undertaken their duties in accordance with valid rules.

For these reasons I would dismiss the appeal.

DAN MOSSENSON, CHAIRPERSON

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

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR S PYNT (MEMBER)

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/517**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR S PYNT (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATES OF HEARING:	**11 SEPTEMBER & 13 NOVEMBER 2001**
DATE OF DETERMINATION:	**26 MARCH 2002**

IN THE MATTER OF an appeal by Mr Nolan against the determination made by the Stewards of the Western Australian Trotting Association on 14 November 2000 imposing 12 months disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Dr B J Stewart was granted leave to represent the appellant.

Mr B J Goetze, instructed by Minter Ellison, appeared for the Stewards of the Western Australian Trotting Association.

I have read the draft reasons of Mr Mossenson, Chairperson.

I agree with those reasons and conclusion and have nothing to add.

STEVEN PYNT, MEMBER

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

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/517**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR S PYNT (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATES OF HEARING:	**11 SEPTEMBER & 13 NOVEMBER 2001**
DATE OF DETERMINATION:	**26 MARCH 2002**

IN THE MATTER OF an appeal by Mr Nolan against the determination made by the Stewards of the Western Australian Trotting Association on 14 November 2000 imposing 12 months disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Dr B J Stewart was granted leave to represent the appellant.

Mr B J Goetze, instructed by Minter Ellison, appeared for the Stewards of the Western Australian Trotting Association.

I have read the draft reasons of Mr Mossenson, Chairperson.

I agree with those reasons and conclusion and have nothing to add.

WILLIAM CHESNUTT, MEMBER

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

APPEAL - 517

DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/517**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR S PYNT (MEMBER)** **MR W CHESNUTT (MEMBER)**
DATES OF HEARING:	**11 SEPTEMBER & 13 NOVEMBER 2001**
DATE OF DETERMINATION:	**26 MARCH 2002**

IN THE MATTER OF an appeal by Mr Nolan against the determination made by the Stewards of the Western Australian Trotting Association on 14 November 2000 imposing 12 months disqualification for breach of Rule 190(2) of the Rules of Harness Racing.

Dr B J Stewart was granted leave to represent the appellant.

Mr B J Goetze, instructed by Minter Ellison, appeared for the Stewards of the Western Australian Trotting Association.

This is a unanimous decision of the Tribunal.

For the reasons published the appeal is dismissed.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of WA

APPEAL - 517

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**KEVIN ALAN NOLAN**
APPLICATION NO:	**A30/08/517**
PANEL:	**MR J PRIOR (PRESIDING MEMBER)**
DATE OF HEARING:	**21 NOVEMBER 2000**
DATE OF DETERMINATION:	**30 NOVEMBER 2000**

IN THE MATTER OF an application by Mr K A Nolan for an order suspending the operation of a 12 month disqualification for breach of Rule 190(2) of the Rules of Harness Racing imposed by the Stewards of the Western Australian Trotting Association on 14 November 2000.

Dr B J Stewart was granted leave to appear for the appellant.

Mr B Goetze, instructed by Minter Ellison, appeared for the Western Australian Trotting Association Stewards.

On 14 November 2000 Mr Nolan, a registered trainer, lodged a Notice of Appeal against a 12 month disqualification imposed on him by the Stewards of the West Australian Trotting Association for breach of Rule 190(2) of the Rules of Harness Racing. At the same time Mr Nolan applied for an order suspending the operation of his penalty. The application was accompanied by a letter from Mr Nolan that sets out reasons in support and a letter from B J Stewart requesting a hearing on the stay application. The Registrar referred the application and letter to the Stewards in the usual way and sought a response. The Stewards replied in writing. In opposing the application the Stewards referred to the serious nature of the offence and sought to be heard on the application for a stay.

At the hearing of this application on 21 November 2000 I was provided with a transcript of the various Stewards' hearings. I also heard oral submissions on behalf of the Appellant from Dr B J Stewart who was given leave to appear for the Appellant and from Mr B Goetze of Counsel who appeared for the Stewards.

A stay application is made pursuant to the provisions of Section 17(7) of the *Racing Penalties (Appeals) Act 1990*. The Act empowers the Chairperson of the Tribunal (or appointed Presiding Member) upon, or prior to, the hearing of an appeal to suspend the operation of any order, or any pecuniary or other penalty imposed until the right of appeal is exercised or has lapsed. The Act is silent as to the basis upon which the important discretion should be exercised. The discretion is expressed to be in broad general terms.

By the Tribunal Practice Direction No.1 of August 1993, the Chairman of the Tribunal has set down a number of principles which will generally apply when considering whether a suspension of penalty should be granted. I am assisted by those principles in this matter.

In this matter, given that this is an appeal against conviction for an offence of an elevated $TC0_2$ level, I am assisted by some of the previous decisions of this Tribunal relating to appeals against convictions for similar offences, in particular the matters of HARPER (Appeal 479), BEECH (Appeal 474) and STAMPALIA (Appeal 435) and also the application for a stay in the matter of OLIVIERI (Appeal 510).

The Decision of His Honour Justice Owen in the matter of STAMPALIA in the Supreme Court of Western Australia being an Application for an *Order Nisi* and an application for a stay being Supreme Court No. 1434 of 1999 is also of some assistance and in particular I refer to pages 6 and 7 of the judgment delivered on 21 May 1999.

The appellant relies on a number of grounds for a stay of penalty.

Firstly, the Appellant submits the Stewards have already granted a stay. In relation to this the Stewards' letter of 14 November 2000 to the Registrar clearly sets out that they merely permitted the appellant to continue to train and race his horses pursuant to their powers under Rule 259(3) until oral submissions on the stay application could be heard. I am satisfied that the Stewards' attitude in allowing the appellant to continue to train and race is not a matter that I should take into account in consideration of this application. The Stewards have opposed the stay from the outset both in their written submissions and in their oral submissions at the hearing. My understanding is they have merely given the appellant the opportunity to continue to train and race horses in the interim period to allow the Stewards to brief Counsel.

Secondly, the Appellant submits the Stewards delayed the hearing of the case for an unreasonable period. I am satisfied that the time period over which the hearing of the case was held was not unreasonable and in any event many of the delays were to the benefit of the Appellant so that the Appellant had ample opportunity to consider his position in light of the evidence that was presented to the Stewards or present further evidence or submissions. In any event the total hearing time for this matter was not a longer period as opposed to other hearings before the Stewards for elevated $TC0_2$ readings.

Thirdly, the Appellant submits the requested stay of proceedings is for a short period. It maybe that this appeal can be heard expeditiously within a month or so but in any event I need to also consider the adverse implications to the industry of granting a stay. In particular, previous convictions and unsuccessful appeals for similar offences must be taken into consideration.

Fourthly, the Appellant submits the failure to provide a stay is a severe sanction. There is no doubt that the penalty imposed of a 12 month disqualification for most people who rely on the harness racing industry for their livelihood is a significant penalty. Against that I have to consider the seriousness of the offence. The offence of which the Appellant is convicted is one of the most serious breaches of the Rules of Harness Racing.

Fifthly, the Appellant submits he has a long and unblemished record. This is not in dispute but in my view is a matter which will always have minor significance when weighed with other general matters such as those set out in the Practice Direction, in particular items 5, 7, 8, 12 and 14.

Sixthly, the Appellant submits the appeal is likely to be successful. Having considered the oral submissions and considered the evidence in the transcripts of the proceedings before the Stewards I am unable to find that the appeal has a strong prospect of success given that essentially arguments raised in the appeal are a conflict in expert evidence which was before the Stewards as to the testing

procedures for TCO_2 readings, the variations in the two readings obtained and whether elevated levels could be achieved naturally. The wording in Rules 191(1) and (2) also create some difficulty for the Appellant to succeed in this matter. It is also suggested that the whole basis of the Rule which prohibits a TCO_2 level above 35.0 mmo/L is under question. At this point of time in considering this application I am obliged to work with the existing Rules of Harness Racing and the existing law as set out by this Tribunal or decisions of the Supreme Court of Western Australia and the High Court of Australia.

In summary I am not persuaded that the circumstances of this case make it appropriate to grant a suspension of the penalty and I am in particular influenced by the following factors:

1. The potential merits of the Appellants' appeal and the prospects of success are not strong.

2. The nature of the offence of which the Appellant was convicted is serious.

3. At this stage I am satisfied that this appeal against conviction is likely to be heard and disposed of by this Tribunal before a substantial portion of the 12 month disqualification penalty is served by the Appellant. (see HARPER v RACING PENALTIES APPEAL TRIBUNAL of WA (1995) 12 WAR 337)

4. In balancing the private interests of the Appellant and the hardship it would have on him if a stay was not granted I am satisfied that this is outweighed by the public interest and confidence in the industry being detrimentally affected if a stay was granted.

5. The power to grant a stay is to be exercised sparingly and in this matter I am not satisfied that the Appellant has been able to discharge the onus to justify a stay being granted.

The application is therefore refused.

JOHN PRIOR, PRESIDING MEMBER