REASONS FOR DETERMINATION OF MR P HOGAN (MEMBER)

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**HECTOR MCLAREN**
APPLICATION NO:	**A30/08/529**
PANEL:	**MR D MOSSENSON (CHAIRPERSON)** **MR P HOGAN (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**17 JULY 2001**
DATE OF DETERMINATION:	**17 JULY 2001**

IN THE MATTER OF an appeal by Hector McLaren against the determination made by the Stewards of the Western Australian Turf Club on 22 May 2001 imposing a six month disqualification for breach of Rule 178 of the Australian Rules of Racing.

Mr M J McCusker QC, assisted by Ms B Lonsdale, instructed by Dwyer Durack, appeared for the appellant.

Mr RJ Davies QC appeared for the Stewards of the Western Australian Turf Club.

At the conclusion of the appeal hearing the Tribunal announced that by a unanimous decision, the appeal against penalty is dismissed. These are my reasons for joining in that decision.

BACKGROUND

THE TIN MAN won Race 7, the Paul Murray Handicap over 1,400 metres at Ascot on 28 October 2000. The Australian Racing Forensic Laboratory in Sydney detected the presence of methamphetamine in a post race urine sample. The Chemistry Centre (WA) in Perth reported the presence of methamphetamine in the reserve sample.

The Stewards commenced an inquiry into the presence of the prohibited substance on 22 December 2000. The inquiry continued on 9 and 15 March 2001. On the 18 May 2001 THE TIN MAN was disqualified from the race in question pursuant to Rule 177 of the Australian Rules of Racing. On the same day Mr McLaren was charged with a breach of Rule 178 of the Australian Rules of Racing in the following terms:

> *"The charge in terms of 178 Mr McLaren is that you, the trainer of THE TIN MAN, brought that gelding to the Ascot Racecourse on the 28th October 2000 with intention of, and indeed running in the Paul Murray Handicap over 1400 metres, a subsequent urine sample taken from Tin Man (sic) having detected in it methamphetamine."*

Rule 178 states:

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

Mr McLaren pleaded not guilty.

After adjourning to consider all the evidence, the Stewards reconvened the inquiry on 22 May 2001 and announced a finding of guilt as follows:

> *"Mr. McLaren in relation to the charge under Australian Rule of Racing 178, the Stewards considered all the evidence and the, it is on record that THE TIN MAN raced in the Paul Murray Handicap at Ascot on the 28th of October, 2000. The horse was trained by you at that particular stage and presented to race by you as the Trainer on that particular day. The horse was subsequently sampled following the race and the result of the analysis revealed the presence of methamphetamine.*
> *Stewards are satisfied in relation to the evidence that the methamphetamine is a prohibited substance in terms of the Australian Rules of Racing.*
> *Now there is no evidence of a specific administration by any one person or persons. The feeding procedure for the horses stabled at 15 Aurum Street, which prior to the 28th of October, 2000 included THE TIN MAN, is well documented and effectively not disputed. There is abundant evidence that the feeds are made up or were made up at Number One Aurum Street and left unattended and indeed accessible to all sorts of persons for a lengthy period throughout the day. The name tagging of unattended feeds by way of placing a piece of cardboard with a stable name, in the opinion of the Stewards, gives a grand assistance to any person desiring to "target" any one of your horses to be fed at 15 Aurum Street. Indeed it is common ground that THE TIN MAN's tag clearly identified him through the use of his stable name.*
> *Pre-race security at your stables appears to, sorry there appears to be ample opportunity for someone to access the stables at 15 Aurum Street on the race, day of a race prior to a horse racing. An example of this evidence is in part from Les Allen's statement on page 118 and 119*

where he states in answer to the question from Deputy Chairman of Stewards Mr. Lewis: "From a security point of view, does the stable do anything differently when horses are in that particular day. Anything done differently around the stable, is there any more supervision."
Allen, "No."
From, again from Mr. Lewis: "Could someone have had access to THE TIN MAN on that particular day?"
Allen: "Someone could have yeah, but I wouldn't have a clue."
This statement comes from the Foreman from you Mr. McLaren namely, Mr. Allen. Now the surrounding security of 18 (sic) Street and in particular THE TIN MAN's yard was evidenced on the video exhibit as taken by Racecourse Investigator Mr. Phil O'Reilly. Mr O'Reilly advised in relation to his investigations that there is a gate, but is very easy to access. This was in reference to the RSL adjoining property, which is adjacent to the perimeter fence of 15 Aurum Street and indeed adjacent to THE TIN MAN's yard. In his initial statement Foreman Les Allen stated that: "...the back of the stables can be accessed over the back fence if you want."
When questioned regarding this on page 121 and asked by the Chairman of the Inquiry: "So THE TIN MAN's yard, someone could get over the back fence."
Allen replied: "Oh I suppose so, if they were good if you know where you've got the back fence and the RSL Club, there's no one there during the week until Wednesday's and Friday's."
Further when the question was put to Mr. Allen that THE TIN MAN's yard would be "vulnerable", he stated: "Oh yeah."
This evidence came from a person that had been (sic) trusted employee of you Mr. McLaren and having worked for you off and on since 1968. On page 147 Stable Employee Joanne Madaffari stated: "In regards to the security at Hec's stables, at the top stable, there is a couple of dogs, it's fenced in, but it wouldn't be hard to jump any fence around the stables. I don't know whether the dogs would detect someone in the stable area or not."

The question of the polygraph was of some interest to the Stewards and from a Stewards point of view, it isn't the initial foray into this area of evidence. In treating it as such, the, the Stewards acknowledge that the polygraph test was conducted by an expert. The Stewards accepted the findings of the polygraph test, and you do not know who administered any prohibited substance to THE TIN MAN. However, the polygraph test does not assist the Stewards in determining what precautions Mr. McLaren, you took to prevent the administration of a prohibited substance to THE TIN MAN.
As such, Mr. McLaren after considering all the evidence and for the reasons that we've annunciated, we find you guilty of the charge. It remains Mr. McLaren for us to impose a penalty, before we do that would you care to address us with regards to a penalty?"

After hearing submissions from the appellant, the Stewards announced penalty in these terms:

"Mr. McLaren the Stewards have considered all your evidence and indeed, your submission related to penalty and in considering that, the Stewards are conscious of what the Supreme Court said in, (Justice

Owen/Anderson) said in the Harper versus the Racing Penalty Appeal Tribunal of 1995, Justice Anderson said Owen/Anderson said that, "The need to maintain integrity in horse racing and to do so, manifestly easily seen to be imperative of paramount importance."

The spectacle and indeed the disqualification of a metropolitan winner such as THE TIN MAN is an issue that the Stewards believe and has been rightly said in the Tribunal as having the ability to undermine public confidence and perception in, with, in the Industry or the Racing Industry. The Stewards have considered all your, that you put before us and we're also conscious of the fact that amphetamine or methamphetamine at least, is a potent stimulant, central nervous system stimulant which increases levels of adrenalins, this is put forward by Dr. Symons and is the or has the ability to performance enhance an animal and indeed has the ability to performance enhance a Racehorse.

MCLAREN Mr Powrie.

CHAIRMAN Sorry?

MCLAREN If we had the, the levels of the drug that was in the horse at the time, we could have arrived at a different conclusion there.

CHAIRMAN Well Mr McLaren if you can just permit me to continue the, the situation is this, is that from the Stewards point of view, that I'm not saying that this horse was performance enhance (sic), I'm saying that this substance itself is quite undisputedly a performance enhancing substance from that point of view. That's what I say there.

The, the Stewards are conscious of the fact of your age and indeed that you have been training since the early 60's. You made reference to a previous drug related issue. The Stewards consider that you advised us that it was 27 years ago, it is not our intention to a) refer to it, or b) include it in our and indeed the Stewards have taken the conscious decision to exclude it from any issue in terms of this particular case so from that point of view, it doesn't become and has not been considered at all as an issue Mr. McLaren. The Stewards in considering also that available penalties have considered that a suspension would not be appropriate. The, the Stewards in considering that what was said in the, some of the Tribunal cases in Western Australia are conscious of what the Tribunal through their Chairman Mr. Mossenson said in the O'Donnell case of Appeals 263 and 264 that he said that, "Further, I consider that unless special circumstances justify the imposition of a less severe type of penalty, a disqualification should be the norm in the case of drug offences." Trying to get some parallel with the Eastern States not with the Eastern States, but with other penalties for performance enhancing substances and indeed for other amphetamine or methamphetamine cases, we see there is only one that we can draw anything from and that was an amphetamine for a horse called STRATEGIC at Randwick in 1994 when Trainer John Hawkes was fined the sum of $40,000. The Stewards turned their mind to whether it was appropriate to issue a fine Mr. McLaren and considering also what the Chairman has said which I've just quoted from Appeal 263, the Stewards do not believe that a fine would be appropriate.

It remains with the Stewards then to consider that the appropriate penalty for this particular offence is one of a disqualification. In arriving at a period of disqualification the Stewards believe that there are some mitigating circumstances and one of the first mitigating circumstances we would believe that hasn't been spoken about is the, the manner in which you've dealt with this Inquiry Mr. McLaren, it's from, whilst it has been

lengthy, the Stewards do not consider that as a real problem, rather than they're trying to get to the, the bottom of a, a serious issue. Your age and the fact that you've been involved with the Racing Industry for 40 years plus, is something that we consider is of some significance. However, in considering what would be appropriate, without going into an exercise of mathematics by way of additions and deductions Mr. McLaren, the Stewards believe that a penalty of disqualification for six months is appropriate."

Mr McLaren abandoned his appeal against conviction prior to the appeal hearing. The grounds of appeal in respect to penalty were:

2. The penalty imposed by the respondents was manifestly excessive in all the circumstances of the case having regard to previously imposed penalties for similar offences under Rule 178.

Particulars

(a) The respondents failed to take into consideration the fact that the result of the race had been unaffected by the administration of the substance.

(b) The respondents failed to take into account the uncontradicted evidence of the witness Craig Staples that there was no change in the demeanour or behaviour of the Tin Man at the time of the race.

(c) The respondents failed to take into account the uncontradicted evidence of Stephen Van Aparen and the appellant that the appellant did not administer or know who administered the prohibited substance to the Tin Man.

(d) The respondents failed to take into account the possibility that the presence of the prohibited substance could have been a result of accidental contamination.

3. The respondents erred in that they failed to consider the appropriateness of alternative penalties other than a period of disqualification.

4. The respondents did not consider the fact that the failure to take proper precautions, if any, would have not prevented the prohibited substance being found in the urine sample of the Tin Man.

5. There is no evidence that the Tin Man had any prohibited substance in him at the time that he was brought to the racecourse.

6. The respondents failed to take into account the very low levels of the prohibited substance found in the urine sample of the Tin Man.

7. The respondents failed to consider that, in light of the evidence of the witness Staples and the low levels of the prohibited substance, that the substance could not have had any performance enhancing effect.

8. The stewards failed to consider the evidence of Dr Shawn Stanley that he could not conclude that the horse had been ministered (sic) methamphetamine and not some substance which was metabolised as methamphetamine.

GROUNDS OF APPEAL GENERALLY

The grounds of appeal can conveniently be dealt with in categories. In my view, there are three identifiable categories.

Firstly, grounds 8 and 5. These grounds require an examination of Dr Stanley's evidence in particular. If they be made out factually on the evidence, then it could be that the offence was a less serious type, and deserving of a lesser penalty. Ground 8 in particular suggests that the substance which was administered (as opposed to found) was not proved to have been methamphetamine

Secondly, grounds 2(a), 2(b), 2(c), 2(d), 4, 6 and 7. These grounds amount to an argument that the Stewards erred in not finding that the offence was of a less serious type. Ground 7 is in effect the same as ground 2(a), and those two grounds assert as facts the propositions contained within grounds 2(b) and 6.

Thirdly, ground 2 (without its particulars) together with ground 3. These both seek to argue that the penalty was outside the range of penalties commonly imposed for offences of this type.

FIRST CATEGORY

GROUNDS 8 and 5

Dr Stanley was the analyst who detected the methamphetamine in the sample. Grounds 8 and 5 assert misleading facts as their basis, in that they do not refer to all of Dr Stanley's evidence on the subject of the analysis result. In order to properly understand why these grounds are not made out, reference must be made to all of the evidence. I repeat below much of what I said in my reasons for decision in the appeal by the owners of the horse. (Appeal 533 Stanley David Hughes and Lillian Emily Hughes, delivered 2 August 2001). The place to begin is at the question and answer which came at the end of Dr Stanley's evidence, because that is the only piece of evidence on which the appellant relies for grounds 8 and 5. Dr Stanley was being questioned by Mr J D Hughes, who is the son of the horse's managing part owner. By coincidence, Mr J D Hughes is also qualified in pharmacology, being a pharmacist and senior lecturer in clinical pharmacy at Curtin University.

> ***"HUGHES*** *OK. But you cannot definitively say that methamphetamine was given to the horse.*
>
> ***STANLEY*** *No, I'm saying methamphetamine was present in the urine sample."*

That particular answer thus was evidence that that methamphetamine had been detected in the urine sample of THE TIN MAN. Strictly speaking, it was not evidence that methamphetamine had been administered. In layman's terms, the appellant's submission is that there could have been some other substance given to the horse, and that substance was metabolised so as to produce the methamphetamine found in the urine. That assertion however ignores the relevant evidence which went before the question and answer referred to above, which came at the very end of Dr Stanley's evidence. Some of the relevant evidence which went before Dr Stanley's last answer is as follows:

"STANLEY *What, in what of sort of, you're saying that this is pro, that the horse was given a pro drug, which is then changed to methamphetamine and amphetamine?*
HUGHES *That, that that's one possibility..."* (T269)

The questions went on to further explore that possibility with Dr Stanley. Dr Stanley replied in a number of different ways, as follows:

"STANLEY *...(Inaudible) explain to you that it is, it is not a possibility that there was, are you suggesting that there was selegiline there, present for example?"* (T269)

Mr Hughes then gave to Dr Stanley a list of all the known pre-cursor molecules for amphetamine. That was at T270.

Dr Stanley went on to say:

"STANLEY *I don't see anything on that list would present too much of a problem for us at this laboratory."* (T270)
"STANLEY *All I can say to you, I don't see there is a problem. If you, if the urine had come through with any of those compounds in the list, we do have the screening which will pick those up, yes."* (T271)

Mr Hughes then went on to ask questions about the methodology, and then returned to the subject of the possibility of ingestion of pre-cursor molecules. Dr Stanley continued to give answers as follows:

"HUGHES *OK, so we go back and you said that there shouldn't be any reason that you couldn't find all of those pre-cursor molecules, but in realistic terms there would be some of those pre-cursor molecules that you wouldn't look for because they're currently not available here in Australia. Is that reasonable to... (Inaudible)* (T273)
STANLEY *That would be an incorrect assumption. ...* (T273)
STANLEY *What I said to you was that the substances that you gave to me on the list which are known pre-cursors of methamphetamine, we will pick those up. I'm, I'm, that is, that is a statement that I'm prepared to make. ...* (T275)
CHAIRMAN *Is there anything further on that list he hasn't confirmed that he can or can't detect, I think the words you used was he didn't think the laboratory would have a problem in detecting.* (T277)
HUGHES *That's right.* (T277)
CHAIRMAN *Is there anything else on there?* (T277)
HUGHES *No."* (T277)

Dr Stanley's evidence, was of a scientific nature. However, the Stewards were engaged in a fact-finding exercise which went beyond the scientific evidence. Further, the Stewards were not obliged to find the facts according to any scientific standard of proof. The standard of proof which the Stewards were bound to apply was the balance of probabilities, paying due regard to the seriousness of the issue. (***Briginshaw v Briginshaw (1938) 60 CLR 336***)

In my opinion, the various answers given by Dr Stanley amount to sufficient evidence such that grounds 8 and 5 have no substance. The apparent concession made by Dr Stanley in his last answer was a concession made in the context of proof of a scientific matter to a scientific standard. Whatever the standard of that proof, it is not the same standard of proof to be applied by the Stewards in their fact-finding exercise. The Stewards had available to them the evidentiary presumption in Rule 178D(3). Following that, it was incumbent on the appellant to demonstrate, on all the evidence, the hypothesis he now puts forward in grounds 8 and 5. No evidence was led or called by any party at the inquiry to prove, to any standard, the administration or even possible administration, of the pre-cursors discussed. No evidence was led or called to demonstrate what those substances were in their common forms and why or how they could have been ingested by the horse. Even more, the evidence of Dr Stanley discounted the possibility of ingestion of those substances, because the effect of his evidence was that they would have been found if they were there. Mr Hughes extracted the apparent concession from Dr Stanley in what appears to me to have been an argumentative exercise in scoring points about strict scientific matters. There was no attempt to relate the evidence to the other facts and the real merits of the case.

I add that the arguments raised by the appellant here before this Tribunal were not relied on by him at the inquiry before the Stewards. Mr J.D. Hughes made the argument on behalf of the owners. At the inquiry, the appellant was assisted at the time of Dr Stanley's evidence by Dr Rieusset, a veterinary surgeon. Dr Rieusset's questions to Dr Stanley covered a range of subjects, but not the points raised in grounds 8 and 5.

In my view, there was ample evidence on which the Stewards could find that there had been an administration, and that it was of a prohibited substance.

For these reasons, grounds 8 and 5 are not made out.

SECOND CATEGORY

GROUNDS 2(a), 2(b), 6 and 7

The Stewards began their reasons on penalty by saying that they had considered all the appellant's evidence. I am prepared to assume that they meant that they had considered all the evidence in favour of Mr McLaren, no matter who had called it. That is, the nature of an inquiry of this sort. It is an inquisitorial, not an adversarial exercise. They went on to say that they had considered everything that Mr McLaren had put before them.

Ground 2(b) *The respondents failed to take into account the uncontradicted evidence of the witness Craig Staples that there was no change in the demeanour or behaviour of the Tin Man at the time of the race.*

Craig Staples was the Jockey who rode the horse on the day. His evidence was to the effect that there had been no change in the demeanour of the horse on the day. The evidence was in fact unchallenged. However, for reasons which will appear later, I am of the view that the Stewards did consider this fact in coming to their conclusion.

Ground 6 *The respondents failed to take into account the very low levels of the prohibited substance found in the urine sample of The Tin Man.*

There was no quantitative level, and that fact assumed some large importance on behalf of Mr McLaren. However, Dr Stanley did agree that the level was low. (T56). Again, I am of the view that the Stewards took this into account.

These two grounds, 2(b) and 6, provide the basis for the real proposition put up by the appellant. They simply repeat the evidence. The substantive proposition put by the appellant on the basis of that evidence is that the result of the race had been unaffected. That proposition is contained in grounds 7 and 2(a). In my view, the two grounds assert substantially the same thing.

Ground 7 *The respondents failed to consider that, in light of the evidence of the witness Staples and the low levels of the prohibited substance, that the substance could not have had any performance enhancing effect.*

Ground 2(a) *The respondents failed to take into consideration the fact that the result of the race had been unaffected by the administration of the substance.*

Again, the proposition put up by these two grounds ignores the other relevant evidence on the subject. In particular, the Stewards had before them the evidence of Dr K Steel, a veterinary surgeon. She gave evidence at T285 to T286 as follows:

> *"**CHAIRMAN** Dr Symons said it was a central nervous system stimulant, does a central nervous system stimulant necessarily predispose to outward behavioural changes in the horse?*
> ***STEEL** I would anticipate that normally it would.*
> *...*
> ***CHAIRMAN** Dr Symons says it's a potent stimulant that acts on the brain to increase the level of adrenalin.*
> ***STEEL** Mm.*
> ***CHAIRMAN** And adrenalin itself is theoretically that would predispose to a horse being enhanced in its performance ability.*
> ***STEEL** Potentially, yes..."*

It is true that the Stewards had no direct evidence before them that there was any effect on the horse, but there was an inference available to them on the evidence, and they were entitled to draw that inference. They had available to them prima facie evidence that the prohibited substance did affect the horse. That is because the prohibited substance was in the urine sample, and there was an inference available that it had got there in the normal manner, namely from the cardiovascular system. The inference back from there, equally open, was that the substance had had its effect on the central nervous system. In short, there was an evidentiary presumption that the result of the race had been affected by the methamphetamine which had been administered to the horse.

The Stewards said at T318:

> *"The Stewards have considered all your, that you put before us and we're also conscious of the fact that amphetamine or methamphetamine at least, is a potent stimulant, central nervous system stimulant which increases levels of adrenalins, this is put forward by Dr. Symons and is the or has the ability to performance enhance an animal and indeed has the ability to performance enhance a Racehorse."*

The Stewards referred to the pharmacological evidence in their reasons on penalty. They referred to the effect of the prohibited substance. The assertion of fact contained in grounds 7 and 2(a) is not correct. For these reasons, grounds 2(a), 2(b), 6 and 7 are not made out.

Ground 2(c) *The respondents failed to take into account the uncontradicted evidence of Stephen Van Aparen and the appellant that the appellant did not administer or know who administered the prohibited substance to the Tin Man.*

In my view, this ground of appeal can be dealt with shortly. The Stewards did take that fact into account. At T315, on their decision on conviction, the Stewards said:

> *"The Stewards accepted the findings of the polygraph test, suggests that you Mr. McLaren did not administer and does not know, and you do not know who administered any prohibited substance to THE TIN MAN. However, the polygraph test does not assist the Stewards in determining what precautions Mr. McLaren, you took to prevent the administration of a prohibited substance to THE TIN MAN."*

For these reasons, ground 2(c) is not made out.

Ground 2(d) *The respondents failed to take into account the possibility that the presence of the prohibited substance could have been as a result of accidental contamination.*

I have dealt with a similar ground in my reasons for determination in the appeal against disqualification by the owners of the horse. I repeat here part of what I said there. In an effort to establish possible accidental contamination of the horse by humans, Mr McLaren requested the Stewards interview and call various people whom he thought could have been involved with the use of illicit drugs, and who had contact with the horse. These people were called and gave evidence on 15 March 2001. There was an apprentice, a trackrider, a former stable employee, a licensed jockey, and a stablehand. Broadly speaking, the evidence from those people explored the possibility of amphetamine in some form being transferred from someone to the horse by some sort of accidental touching.

Mr McLaren, and those representing him addressed the possibility of accidental contamination. The issue of possible accidental contamination was put to Dr Stanley at T251:

> *"**CHAIRMAN** ...if someone was a user and happened to have amphetamines under their fingernails or*

something in their mouth and dropped a capsule or, is it possible that a person as a user of illicit preparations could contaminate a horse by way of orally or its feed or whatever to the extent that you might see a low level of methamphetamine?

STANLEY *...but if the level was quite low I would say had the person had some on their hands and they had their hands licked, I, I don't know, I, I already, I've got no experience of those sort of levels and whether they actually produce a positive in the urine..."*

The absence of a quantified analysis hampered Mr McLaren in pursuing this possibility further within the pharmacological evidence. However, that is not to say that the Stewards failed to take the possibility into account in determining Mr McLaren's penalty. In my view they did so, for the following reasons. Firstly, they did so because of the volume of evidence which they themselves called on the subject. They were clearly alive to the possibility of accidental contamination having occurred. Secondly, this possibility is subsumed and discounted in the finding of the Stewards referred to earlier, to the effect that they accepted that Mr McLaren did not know who administered the prohibited substance. The Stewards took this possibility into account and did not apply it in favour of Mr McLaren. They were entitled to do so.

For these reasons, ground 2(d) is not made out.

Ground 4 *The respondents did not consider the fact that the failure to take proper precautions, if any, would have not prevented the prohibited substance being found in the urine sample of the Tin Man.*

This ground relies on the assertion of fact that the prohibited substance would have been present whatever precautions Mr McLaren took. The whole focus of the inquiry, from Mr McLaren's point of view was how the prohibited substance got into the urine sample and who was responsible for it getting in there. The short point is that it was found as a fact that Mr McLaren did not do it, and he did not know who did. However, the Stewards did find as a fact that the exculpatory provision of Rule 178 had not been made out. This ground of appeal invites us to decide a new fact on the evidence, namely the manner that the substance came to be in the urine sample. It is not the function of an appellate body to decide new facts.

For this reason, ground 4 is not made out.

THIRD CATEGORY

Grounds 2 and 3

Ground 2 *The penalty imposed by the respondents was manifestly excessive in all the circumstances of the case having regard to previously imposed penalties for similar offences under Rule 178.*

Ground 3 *The respondents erred in that they failed to consider the appropriateness of alternative penalties other than a period of disqualification.*

The appellant contends that a fine would have been an adequate penalty in this case. The respondent contends that only disqualification is sufficient. The appellant relies on the decision of this Tribunal in ***McPherson*** (Appeal 208 delivered on 1 May 1995) as authority for the proposition that a fine is within the range of penalties properly available for offences against Rule 178. The respondent relies on the decision of this Tribunal, differently constituted, in ***O'Donnell*** (Appeals 263 & 264 delivered on 22 December 1995) as authority for the proposition that disqualifications should be the norm in drug offences (Rule 178), unless special circumstances justify the imposition of a less severe type of penalty. Counsel for the appellant invited us to consider the conflict between those two cases, in deciding this case.

In my view, this is not an appropriate case in which to undertake that exercise. The prohibited substance dealt with in the ***McPherson*** case was oxyphenbutazone. Methamphetamine was the prohibited substance in this case. Oxyphenbutazone is a class 4 drug under the Uniform Classification Guidelines of Foreign Substances, referred to in ***McPherson***. It has the least potential to affect performance. Methamphetamine is a class 1 drug. It has a high potential to affect performance. It has no accepted medical use in a racing horse. ***McPherson*** was a decision confined to prohibited substances of the type in that case. It has no application to the facts of this case.

The Stewards were clearly aware that they had to consider a range of penalties in coming to their conclusion. They referred to the statements of principle in the case of ***Harper*** (1995) 12 WAR 337 and in ***O'Donnell*** referred to above. In my view, it cannot be said that the Stewards erred in reaching the conclusion that disqualification was the only appropriate penalty in this case.

In my view, grounds 2 and 3 are not made out.

Conclusion

For all of the above reasons, I joined in dismissing the appeal.

P J Hogan.

PATRICK HOGAN, MEMBER

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