APPEAL – 650

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT:	**LINDSAY BRETT HARPER**
APPLICATION NO:	**A30/08/650**
PANEL:	**MR J PRIOR (PRESIDING MEMBER)** **MS K FARLEY (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**30 JANUARY 2007**
DATE OF DETERMINATION:	**9 MAY 2007**

IN THE MATTER OF an appeal by Lindsay Brett HARPER against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 9 March 2006 imposing a seven year disqualification for breach of Rule 231 of the Australian Rules of Racing and a five year disqualification for breach of Rule 243 of the Australian Rules of Racing. Both disqualifications were to run concurrently.

Mr G R Donaldson SC and Mr J McGrath appeared for the Appellant.

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

Background

1. On 27 and 28 September 2005 this Tribunal constituted by Mr Mossenson, the Chairperson of the Tribunal, Member Ms K Farley and myself heard an appeal by the Appellant against a decision of the Racing and Wagering Western Australia Stewards of Harness Racing delivered on 5 May 2005 imposing a 7 year disqualification for assault in breach of Rule 231 and a 5 year disqualification for behaviour detrimental to the Industry in breach of Rule 243 of the Rules of Harness Racing.

2. The Appellant was (until disqualified) a licensed driver/trainer. The charges arose out of an alleged incident at the Appellant's premises at which Adrian Taylor, a farrier, who had known and been involved with the Appellant through the Harness Industry, was severely

beaten. The Stewards found that the Appellant had arranged for himself and others to commit a severe assault on Adrian Taylor.

3. On 10 February 2006, the Chairperson published comprehensive reasons dismissing the Appeal. It is unnecessary for the factual background set out in the Chairperson's reasons for decision to be repeated again. Member Farley and I in a joint judgment agreed with the reasons for decision of the Chairperson in all respects save for one aspect of the decision. We considered that new evidence from Detective Sergeant Marshall ("DS Marshall") heard by this Tribunal during the course of the September 2005 appeal hearing, which evidence the Stewards had not had before them when making their findings, may have been evidence which, if known to the Stewards, could have led to a different result. Accordingly, we considered the appropriate course was for the matter to go back to the Stewards to reconsider their decision in light of the further evidence of DS Marshall. I attach to this determination the joint decision of Member Farley and myself in *RPAT Appeal No 635 ("the Majority Decision")* for ease of reference

4. The matter went back before the same Stewards as had made the original decision and after hearing further evidence the Stewards reaffirmed their original findings and determination by their decision of 9 March 2006.

5. The Appellant by Notice of Appeal dated 23 March 2006 appeals again to this Tribunal against the further decision of the Stewards of 9 March 2006. The Appellant appeals against both the convictions of breaching the Rules and the penalty imposed by the Stewards. The Notice of Appeal sets out the grounds of appeal as follows:

   "(1) That the panel of stewards hearing the matter on 7th March 2006 misdirected themselves as to the Orders of the Racing Penalties Appeal Tribunal of 10th February 2006 in that they erred in:

   (a) their definition of "stewards";
   (b) their definition of "re hearing";
   (c) in conducting the hearing as if a continuation of the previous stewards hearing successfully appealed against;
   (d) in determining that their previous findings were provisionally correct unless it was seen fit to change any aspect of them.

   (2) The stewards denied in conducting the hearing as they did procedural fairness to the Appellant in that:

   (a) the inability of DS Marshall to appear before the hearing was concealed from the representatives of the Appellant;
   (b) the fact that it was intended to have DS Cramp give evidence as a substitute witness to DS Marshall and this matter was concealed from the representatives of the appellant;
   (c) the intention to hear evidence from DS Cramp by telephone and not require his attendance in person;
   (d) the refusal to entertain any application to have the entire video of the interview of original complaint between Adrian Taylor and O'Reilly played
   (e) the refusal to release the entire video of the interview between Adrian Taylor and O'Reilly to the appellant;
   (f) the refusal to entertain any re-visiting of any evidence given in the first stewards inquiry;
   (g) the confining of the hearing to the evidence of Cramp and Taylor's response to same;
   (h) the concealing from the appellant of dealings between O'Reilly and Adrian Taylor subsequent to the determination of the Racing Penalties Appeals Tribunal regarding the informing of Taylor of the evidence that had been given

by DS Marshall and so "forewarning and forearming" Taylor as to the proposed questioning;

(i) the refusal to give weight in their deliberations to the "forewarning and forearming" of Taylor;

(3) The stewards erred in failing to give full allowance to the time the appellant has been stood down pending the determination of the hearing when determining the commencement date of the penalty.

(4) The stewards panel as comprised erred in not disqualifying themselves from the hearing on the basis of reasonable apprehension of bias.

(5) The conduct of the panel of stewards comprising this hearing demonstrated actual bias or in the alternative gave rise tot the circumstances where "in all the circumstances the parties or the public might entertain a reasonable apprehension that it might not bring an impartial and unprejudiced mind to the resolution of the question involved in it".

(a) the transcript (not available at time of drafting) discloses statements by the Chair which clearly indicate a closed mind as to:

i. the proper constitution of the panel of stewards for the purpose of the re-hearing;
ii. the proper approach to be taken upon a re-hearing regarding the status of the previous determination of the stewards;
iii. the concealing from the appellant that DS Marshall was unavailable until after the application that the panel as constituted disqualify themselves and a predetermination that the fact that stewards Zucal and Skipper were in a different evidentiary position regarding this evidence as steward Austin was of no consequence;
iv. the concealing from the appellant that DS Marshall was unavailable;
v. the concealing from the appellant that it was intended to take evidence from DS Cramp
vi. as the panel purported that the evidence of the police was the <u>only and vital material</u> on which they may revisit the findings as to the credibility of Taylor of the first stewards hearing, to hear his evidence by telephone in the circumstances as they unfolded rendered the hearing a farce in that:

1. Cramp was at home;
2. Cramp was giving evidence of conversations and investigations of some antiquity;
3. Cramp had not refreshed his memory from his file;
4. Cramp had no access when giving his evidence to the working police file or any other contemporary (to the events) documentation from which he could refresh his memory;
5. Cramp was unaware of the evidence that Marshall had given before the tribunal and could not comment on that;
6. In their determination in these circumstances the stewards highlighted inconsistencies between the police.

vii. the failure of the stewards to inquire as was their duty adequately or at all of Taylor his responses to the vast majority of the issues rising from the evidence of DS Marshall before the Tribunal;
viii. the approval of the conduct of O'Reilly in "forewarning and forearming" Adrian Taylor as to what DS Marshall had said to the Tribunal when as an experienced ex-police officer O'Reilly and knew or ought to have known that such conduct ought not be undertaken;

ix. *the criticism of counsel for the appellant for pursuing this matter*
x. *the refusal to revisit the issue of the original interview between O'Reilly and Taylor as the issue as to what Taylor had previously said as Taylor's credibility was the issue to be determined in the hearing;*
xi. *the indication that the whereabouts of the original video tape was unknown to remove that matter from further discussion;*
xii. *the finding that the police were inconsistent in their evidence and therefore not accepting their version of events particularly as to the lucidity of Taylor.*

(6) The appellant reserved his position as to further grounds until after receipt of the transcript of the hearing."

6. The Chairperson did not sit on the hearing of this further appeal, but Ms Farley and I (along with Mr Prior, sitting as the Presiding Member) did on the basis and understanding that the parties considered it appropriate for us to sit again. The parties at the outset of the appeal affirmed that there was no objection to either of Ms Farley or myself sitting.

7. The hearing of the appeal was delayed for some months because, following the decision of the Stewards at the re-hearing, the Appellant made an application to the Supreme Court for prerogative relief and accordingly requested the hearing of this appeal be deferred. Ultimately, the application to the Supreme Court was discontinued.

8. At paragraph 29 the Appellant's Outline of Submissions the appeal grounds were revised as follows:

"(29) The Appellant's Grounds of Appeal can be distilled into a complaint in respect of:

(i) the Stewards erred in that, having regard to all the circumstances in which the re-hearing was conducted, a reasonable observer would have had a reasonable apprehension, that the Stewards would not have undertaken the rehearing without bias.

The circumstances giving rise to an apprehension of bias were:

a) the hearing was conducted by the same Stewards who had conducted the earlier hearing and who had made findings in respect to credibility of the Appellant and Taylor.
b) The Stewards disregarded the directions given by Tribunal in respect to conduct of rehearing.
c) The Stewards failed to give notice that DS Marshall was not to give evidence and that DS Cramp was to give evidence.

(ii) the Stewards erred in that they failed to conduct an adequate rehearing, and in particular that the Stewards did not undertake the hearing directed by the Tribunal, in that they did not receive oral evidence from DS Marshall.
(iii) the Stewards erred in that they denied procedural fairness to the Appellant in that they:

a) failed to give the Appellant prior notice of the intention not to call DS Marshall, and of their intention to call DS Cramp and in the alternative, that they refused to adjourn the hearing to permit DS Marshall to be called;
b) permitted DS Cramp to give his evidence by telephone.

(iv) *The Stewards erred by failing to properly undertake the task of reconsidering the previous evidence received by the Tribunal in light of the evidence of DS Marshall and DS Cramp.*

(v) *The Steward's erred in that they failed to conclude in light of the evidence of DS Marshall and DS Cramp, and the balance of the evidence, that the evidence of Taylor should be rejected and the charges against the Appellant dismissed.*

(vi) *The penalty imposed is excessive and outside the range of a fair sentence."*

9. Ground (i) of the revised grounds asserts that there was a reasonable apprehension that the Stewards in undertaking the re-hearing were biased.

10. Mr Davies QC, appearing for the Stewards, conceded that the rule against reasonable apprehension of bias applies to decisions of the Stewards. The concession is consistent with the decision of the Full Court in *Julien v Racing Penalties Appeal Tribunal of Western Australia & Anor [2001] WASCA 345 per Malcolm CJ at p 35 to 36* and the assumption made by Owen J (as he then was) in *Stampalia v The Racing Penalties Appeal Tribunal of Western Australia& Ors [2000] WASCA 24 at p 21.*

11. The nature of the "reasonable apprehension of bias" test was stated by Mason J of the High Court in *Re JRL; Ex parte CJL (1986) 161 CLR 342 at 351 as follows:*

"The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues (Reg. v. Watson; Ex parte Armstrong (1976) 136 CLR 248, at pp 258-263; Livesey v. New South Wales Bar Association (1983) 151 CLR 288, at pp 293-294). This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. This concern is expressed in the cognate principle that, not only must justice be done, it must be seen to be done."

12. In the matter of *Julien, supra,* the Full Court held that the fact this Tribunal had referred a matter back to the same Stewards to reconsider did not of itself give rise to a reasonable apprehension that any reconsideration of the issues earlier determined by those Stewards would be attended by bias.

13. Having regard to the above cited authorities, in particular *Julien* and *Stampalia,* a reasonable apprehension of bias does not necessarily arise where this Tribunal refers a matter back to the same Stewards for further consideration, even if the Stewards are asked to review a finding of credibility made in the first instance. It will depend on an analysis of the circumstances, the reasons why the matter was referred back to the Stewards, and how the Stewards approached their task when it was sent back to them.

14. There will be circumstances where the limited nature of the task for reconsideration directed by this Tribunal is such that it is both just and expedient for the Stewards who originally heard the case to undertake the reconsideration.

15. In this case this Tribunal referred the matter back to the Stewards because it became aware of new evidence, namely the evidence given by DS Marshall to this Tribunal on 27 September 2005, in which DS Marshall stated that when Mr Adrian Taylor was interviewed by DS Marshall and Detective Sergeant Cramp ("DS Cramp") in relation to the alleged assault involving the Appellant, he gave a number of inconsistent versions of the events. In particular, Mr Taylor had denied that Mr Harper had physically assaulted him, albeit he stated that Mr Harper was present: *see page 51 of the Transcript of RPAT Appeal No 635.*

16. The Majority Decision does not suggest that the additional evidence of DS Marshall would necessarily to lead to a different conclusion as to the credibility of Mr Taylor. The Majority Decision went no further than to state that the Tribunal could not be satisfied that the new evidence would not have altered the Stewards' finding of credibility.

17. It needs to be emphasized that the Majority Decision made no criticism of the Stewards as to the manner in which they went about their determination of the credibility of Mr Taylor and Mr Harper during the original Stewards Hearing. In contrast, it is worthy of note that in *Julien* the WAGRA Stewards had been criticized by this Tribunal for drawing adverse conclusions of credibility without having properly agitated and explored the potentially available evidence.

18. There was no suggestion in the Majority Decision that the matter should have gone back to a differently constituted panel of Stewards. If this Tribunal had expressed a concern about the manner in which the Stewards had gone about their task in assessing the credibility of Mr Taylor and Mr Harper during the original Stewards Hearing, the matter may have been different.

19. During the course of argument before this Tribunal, senior counsel for the Appellant, Mr Donaldson SC, stated that the fact the matter was reconsidered by the same Stewards did not of itself give rise to the asserted reasonable apprehension of bias, but was rather one factor which in combination with other factors gave rise to a reasonable apprehension of bias.

20. In the Appellant's Written Outline of Submissions dated 25 January 2007 the other factors were particularized to be:

    "b) The Stewards disregarded the directions given by the Tribunal in respect of rehearing; and
    c) The Stewards failed to give notice that DS Marshall was not to give evidence and that DS Cramp was to give evidence"

21. At paragraph 34 of the Appellant's Outline it is submitted:

    "*What is required is an assessment of purpose and manner in which the Stewards undertook the rehearing – that is what is said and done during the inquiry.*"

22. During the hearing, Senior Counsel for the Appellant also drew particular attention to the fact that Mr Taylor had given apparently false evidence during the re-hearing before the Stewards which factor, as I understood the submission, the Stewards did not adequately address in their reasons for decision when reaffirming their acceptance of Mr Taylor as a credible witness.

23. It was, in effect, submitted that the manner and approach of the Stewards in the re-hearing together with the inadequacy of their reasons for decision, when combined with the fact that it was the same Stewards rehearing the matter, reasonably gave rise to an apprehension that in undertaking the rehearing the Stewards decision was tainted by bias.

24. The Stewards began the re-hearing by reading out the Majority Decision of this Tribunal. The Stewards were then addressed by Mr Sheales, Counsel for Mr Harper, in relation to a submission that they should disqualify themselves on the ground of reasonable apprehension of bias. That submission was rejected by the Stewards on the basis that they interpreted the Majority Decision as directing that the same Stewards undertake the re-hearing. For my part, I think that was the correct interpretation of the Majority Decision by the Stewards.

25. There was then a discussion between Mr Sheales and the Stewards about whether it was necessary for all relevant evidence relating to the charges to be given again or whether the Stewards could proceed on the more limited basis foreshadowed in the second sentence of paragraph 7 of the Majority Decision where it was stated:

    "We anticipate the Stewards will need to hear oral evidence from DS Marshall and that Mr Taylor would need to be recalled to be questioned in relation to the matters the subject of DS Marshall's evidence"

26. I interpolate at this point that it is common practice for the Stewards to undertake an inquiry into a matter and at the end of that inquiry to then inform a party of whether the Stewards intend to charge that person with a disciplinary offence. The evidence of the Inquiry is then incorporated as part of the evidence considered in relation to the charge.

27. By the time of the re-hearing DS Marshall was not available to attend as a witness. The Stewards had attempted to secure his attendance but were advised by letter from a Detective Senior Sergeant Bryson dated 21 February 2006 that DS Marshall was on indefinite sick leave from the Western Australian Police Service. Accordingly, the Stewards had arranged for DS Cramp of the WA Police Service to give evidence at the rehearing instead. DS Cramp was the other police officer involved in interviewing Mr Taylor at Armadale Hospital with DS Marshall when Mr Taylor was interviewed about the alleged assault on 30 December 2003, being the day after the assault had allegedly occurred.

28. The Stewards were made aware of the unavailability of DS Marshall by letter dated 21 February 2006. It was perhaps unfortunate that the Stewards did not alert the Appellant's legal representatives to this fact before the hearing on 9 March 2006. However, I do not accept the Appellant's contentions that there was a denial of procedural fairness in relation to the very late notice of the unavailability of DS Marshall and the late substitution of DS Cramp. In relation to the claim of reasonable apprehension of bias I do not consider this matter to be one of significance in that assessment.

29. Amongst other things, DS Cramp referred to the fact that when the Appellant was interviewed by DS Marshall and himself, at one point he referred to there being present at the assault a member of an "outlaw motor cycle gang" who for the purposes of these reasons will be described as MH. This was substantially consistent with DS Marshall's evidence that one of the versions given by Mr Taylor was that "bikies" were present during the time of his beating, albeit there does not appear to be a reference by DS Marshall to Mr Taylor naming MH specifically.

30. Senior counsel for the Appellant drew the Tribunal's attention to the fact that Mr Taylor, when cross-examined during the rehearing before the Stewards, had denied knowing MH. A review of the transcript shows that Mr Taylor was steadfast in that denial despite being vigorously pressed by Counsel for the Appellant during the rehearing.

31. The Stewards heard evidence from DS Cramp by telephone and Mr Taylor was then recalled. Since DS Marshall was not available the transcript of his evidence before this Tribunal in Appeal 635 was also received as an exhibit. The Stewards also received into evidence a copy of the exhibits put into evidence by DS Marshall during the hearing of Appeal 635 including Mr Taylor's police record and the police reports. Mr Harper also answered some further questions put to him by the Stewards.

32. DS Cramp gave evidence that when he and DS Marshall interviewed Mr Taylor he was in the Armadale Hospital suffering from injuries as a consequence of a beating he had received from others. DS Cramp said when he got to the hospital, which was the

morning after Mr Taylor had been admitted, Mr Taylor told him that he'd been assaulted at an address in the suburb of Martin by:

"various instruments, including an iron bar, a machete, baseball bat, stating that he had been handcuffed with black tape and hung up by his ankles and been kicked in the face" (T39).

33. DS Cramp stated at T39 that when he attended on Mr Taylor:

"Mr Taylor was very upset, obviously injured, skin abrasions to the facial area, finding it difficult to walk, extremely concerned about his own welfare and the welfare of his family at that time"

34. When DS Cramp was asked by the Chairman of Stewards whether anything was said in relation to Mr Harper he responded at T40:

"He advised the incident occurred at Mr Harper's home address in the company with (sic) other persons, who Mr Taylor considered maybe (sic) members of outlaw motor cycle gangs."

35. There were differences in the evidence of DS Marshall and DS Cramp when it came to certain aspects of detail. For example; DS Cramp did not recall Mr Taylor ever mentioning aboriginals being present whereas DS Marshall had stated that in his evidence. They were, however, both consistent in their evidence that Mr Taylor said the assault occurred at Mr Harper's house, that Mr Harper was present, but was not physically involved in assaulting him. According to DS Cramp, Mr Taylor asserted that Mr Harper organized the assault by other persons who were present.

36. DS Cramp stated that Mr Taylor did not allege that he was covered by a substance. This is in contrast to what DS Marshall recalled Mr Taylor had said and to what Mr Taylor had previously told the Stewards at the original hearing when he claimed he was doused in a fluid.

37. DS Cramp stated in cross-examination:

"Mr Taylor was quite upset at the time and on a number of occasions changed his mind as to whether he wanted Police involvement that police commence an investigation

....

"The reason that the investigation didn't proceed was that it was his regard for the welfare for (sic) himself and his family and he decided not to proceed with any police investigation

....

"He was sketchy regarding initial details, due, due to injuries suffered and the fact that he was quite, still quite upset"

38. However, DS Cramp described Mr Taylor as being "lucid" during the interview with Police on 30 December 2003 (T49).

39. When asked about what Mr Taylor said about MH, DS Cramp said at (T45.7) that Mr Taylor had indicated he was extremely scared of MH and that MH was a friend and confidante of Mr Harper's. DS Cramp agreed that MH was the person about whom Mr Taylor had said he was most concerned. It is noteworthy that Mr Harper at T62 agreed

that he knew MH, that they "were kids together" and that they were friends who "catch up two or three times a year".

40. Mr Taylor was recalled by the Stewards and gave evidence that when he spoke to the Police he was under sedation (T51). He said he could not recall what he said to the Police at the time. The Stewards, at that stage, seemed content to leave it at that without testing Mr Taylor in relation to the Police evidence that he had told the Police that Mr Harper was present but had indicated to the Police that Mr Harper had not physically taken part in the assault. I would have expected the Stewards would have more rigorously tested Mr Taylor in relation to the apparent inconsistency between what he said to the Police and what he had previously told the Stewards, since that was the primary reason for the Stewards being directed to reconsider their earlier decision.

41. Mr Taylor was cross-examined by Mr Harper's counsel and denied that he knew the person MH and could not explain why he had told the Police that name. That evidence seems unlikely. A more likely explanation for the denial is that Mr Taylor was extremely fearful of even acknowledging he knew MH and chose to lie about it even before the Stewards.

42. Mr Taylor was asked by the Chairman of Stewards in re-examination (T59) whether it was true that he had been kicked by Mr Harper. His reply was that it was true. It is unfortunate that the Chairman chose to put the question to him in such a leading way, depriving it of the weight it may have had if the questioning wasn't so overtly leading. In saying that I am not suggesting that the Chairman was not entitled to ask a question in a leading way, but only seek to point out the significant loss of evidentiary weight in the answer by adopting that style of question.

43. At T60, under further cross-examination by Mr Sheales, it was put to Mr Taylor that he had been insistent when spoken to by DS Marshall that Mr Harper had not touched him. Unfortunately the transcript simply notes the answer of Mr Taylor to be inaudible.

44. In their reasons for decision the Stewards at T64 refer to the conflict between the evidence given by Mr Taylor that he did not know MH and the evidence of DS Cramp that he had stated to them that MH was present and took part in the beating. The Stewards seem to gloss over this inconsistency. It was not plausible to simply explain it on the basis that Mr Taylor was in an upset state of mind and not in a fit and proper state when he was spoken to by Police. It was a specific assertion made to the Police about who took part in the assault and on the Police evidence was stated in a lucid manner. Further, Mr Taylor had told the Police that MH was a friend and confidante of Mr Harper, which is consistent with Mr Harper's evidence that he had known MH from childhood and that their friendship had continued into their adulthood.

45. At T64 the Stewards made the following observations, amongst others, in relation to DS Cramp's evidence:

    " ... Sergeant Cramp advised that names [MH], Murray and Harper were mentioned as being present throughout the assault. Sergeant Cramp stated that Taylor had said Harper was involved and arranged the assault."

    It is apparent that the Stewards made specific mention of this aspect of the evidence as demonstrating consistency of Mr Taylor in his evidence that Mr Harper was present at the time of the assault. It was clearly reasonable for the Stewards to regard this as showing Mr Taylor's consistency in this critical aspect of his evidence.

46. The Stewards later in their reasons refer to DS Cramp's evidence that Mr Taylor the next day (after their initial interview) withdrew his statement as to what had occurred "as he was fearful of retribution to his family and himself".

47. The Stewards drew attention to the fact that there were inconsistencies in the evidence of DS Marshall and DS Cramp (T65). They made that comment immediately before making the following finding:

"The Stewards find that the alleged statements of Taylor made on the 30th of December 2003 of little assistance to the reconsideration of this matter. After consideration of our findings in light of DS Marshall's evidence, the Stewards confirm their original observations, accept Taylor's evidence and find LB Harper guilty as charged on both counts."

That finding does not fit comfortably with the apparent support the Stewards took from the fact that in his statement to the Police on 30 December 2006, Mr Taylor had been consistent about Mr Harper's presence during the assault.

48. It seems to me that the Stewards in their reasons seriously understated the significance of the fact that both DS Marshall and DS Cramp gave evidence that when they first interviewed Mr Taylor he was clear that Mr Harpers role was that of being present, but not physically involved in the assault. DS Cramp had stated that he believed that Mr Taylor was lucid when he spoke to him and understood the questions being asked (T49). DS Marshall was also clear that one thing Mr Taylor was consistent about was that Mr Harper was present but was not involved physically: (RPAT T51).

49. After examining transcript of the rehearing and the reasons for decision given by the Stewards it seems to me:

(a) that the Stewards did not adequately deal with the apparent untruthful evidence of Mr Taylor given during the rehearing before the Stewards when answering questions about whether he knew MH;
(b) the Stewards when recalling Mr Taylor failed to adequately test his evidence in relation to the inconsistency between what he said to the Police and what he had previously told the Stewards; and
(c) the Stewards, in my view, too readily dismissed the inconsistencies between what Mr Taylor had told the Police, namely that Mr Harper was not physically involved in the beating, and his evidence before the Stewards that he was kicked and punched by Mr Harper, on the basis that Mr Taylor was in an upset state of mind, fearful of retribution and not in a fit and proper state when he spoke to the Police.

From reading the transcript of the re-hearing and the reasons given by the Stewards I am left with a degree of unease as to the open mindedness of the Stewards in their reconsideration of the credibility of Mr Taylor primarily in respect of his evidence that Mr Harper was physically involved in the assault on Mr Taylor in contradistinction to being present and supporting others to commit the assault.

50. The finding by the Stewards at T65 that "*the alleged statements of Taylor made on the 30th of December 2003 [to the Police] is of little assistance to the reconsideration of [the] matter*", is difficult to understand. It seems the Stewards were saying that the prior inconsistent statement to the Police was not, in their view, a significant matter in the assessment of Mr Taylor's credibility. This, in my view, seems to almost trivialize the significance of the statements made to the Police. The Stewards were being asked to reconsider their findings in light of the fact that Mr Taylor had told Police that Mr Harper was not physically involved in the beating but was present at it, which contradicted, in a material respect, what Mr Taylor was saying to the Stewards. It was not a peripheral matter but went to the heart of the finding by the Stewards that Mr Harper was guilty of assault contrary to Rule 231, which finding was reliant on the Stewards acceptance of Mr Taylor as a credible witness in relation to his assertion that Mr Harper was physically involved in assaulting him.

51. In making the above observations I am not suggesting it was not open for the Stewards to re-affirm their original finding that Mr Taylor was a credible witness in relation to his recital of the events which occurred at the Appellant's property. However, it seems to me that it was incumbent on the Stewards to very carefully scrutinize the evidence of Mr Taylor and fully test his explanations for why he had related a different story to the Police in what was a fundamental and material respect.

52. The Stewards are the body entrusted to make the judgments on the evidence and unless there is some discernibly significant error in the manner in which they go about their task, this Tribunal ought not simply substitute its own views of the evidence. I do not interfere lightly. However, where the Stewards are asked to reconsider an earlier finding of fact based on credibility in light of new evidence which has come to light, they must not only bring an open mind to that task, but they must be seen to be palpably doing so. There is always a concern that they might not be open minded enough to be ready and willing to be persuaded to a different conclusion to that they originally arrived at; so it is particularly important that in such circumstances the Stewards adopt a procedure and a process of reasoning which clearly demonstrates they are open minded and unfettered by their earlier finding of fact. A failure to fully and properly deal with issues raised by the new evidence in a re-hearing will more readily give rise to concern about open-mindedness than might otherwise be the case in the context of the original hearing.

53. In my view, a reasonable person would, after reviewing the entire transcript of the re-hearing, have been left with a reasonable apprehension that the Stewards were biased in their reconsideration of Mr Adrian Taylor's credibility in respect of his claim that Mr Harper had been physically involved in the assault committed upon him. Accordingly, having regard to all the circumstances of the case, I find that there were reasonable grounds to apprehend that the Stewards were not open minded to reconsidering their finding that the Appellant had physically participated in the assault on Mr Taylor. In that respect he was denied natural justice.

54. Accordingly, I find that the first ground of the revised grounds of appeal is made and should be upheld.

55. In making the above finding, I wish to emphasise that it is not a finding of actual bias nor has that ever been alleged in this case. The Stewards who sat on this case have an exemplary reputation. They are highly regarded by this Tribunal and neither they nor the Racing Industry in general ought construe this finding as a slur on their excellent reputation and high standing. There is no doubt from this Tribunal's observations that Racing Industry of WA enjoys the service of an outstanding group of Stewards, most ably led by Mr Zucal. It is fair to add that the Stewards were confronted at the re-hearing with a difficult situation with which they dealt, for the most part, in their usual professional and even handed manner. Mr Sheales, Counsel for the Appellant, adopted a rather antagonistic approach in which he wrongly, in my view, maintained throughout the re-hearing (even after the Stewards had ruled upon the matter) that the same Stewards ought not be re-hearing the matter.

56. The second revised ground, ground (ii), is that the Stewards failed to conduct an adequate re-hearing, in particular did not undertake the re-hearing directed by this Tribunal. This ground relates to the failure to call DS Marshall to give oral evidence as had been envisaged by the Majority Decision.

57. In my view this ground is not made out. DS Marshall was simply unavailable to give evidence for medical reasons. He was on indefinite sick leave. The difficulty was overcome by the fact that DS Cramp was able to give evidence by telephone and the

Stewards accepted into evidence the transcript of the evidence of DS Marshall before this Tribunal on the original appeal.

58. Mr Sheales who was counsel for the Appellant at the re-hearing before the Stewards submitted that the Majority Decision necessitated there be a permanent stay of the re-hearing until such time as DS Marshall was medically fit and able to give evidence. In my view, the Majority Decision did not necessitate that.

59. Ground (iii) of the revised grounds contends that the Stewards denied procedural fairness to the Appellant in failing to give the Appellant prior notice of the intention not to call DS Marshall and of their intention to call DS Cramp instead and by allowing DS Cramp to give evidence by telephone. The ground adds in the alternative that the Stewards refused to adjourn the hearing to permit DS Marshall to be called.

60. Although I consider it was unfortunate that the Stewards did not give earlier notice to the Appellant of the fact that DS Marshall was unable to give evidence due to health reasons and that they were calling DS Cramp instead, I do not think this ground is made out. The Appellant was represented by experienced counsel at the re-hearing. If the Appellant had felt he was at a disadvantage by the last minute notice of the change, he ought through his counsel to have made a clear and unequivocal application to adjourn the hearing for such time as was reasonable to enable the Appellant to deal with the change in the witness proposed to be called. That did not occur. Instead Mr Sheales, after making a broad ranging attack on the process of the re-hearing and suggesting there ought be a different group of Stewards hearing the matter, stated that the hearing ought simply proceed (T36.8; T37.1). Further, in my view, after reviewing the transcript of the evidence of DS Cramp, I do not regard the fact that DS Cramp gave his evidence at the re-hearing by telephone led to a denial of procedural fairness to the Appellant.

61. A further procedural defect pointed to by the Appellant was that the Stewards, namely Mr Zucal and Mr Skipper, sought to rely on their recollections and impressions of the evidence of DS Marshall when he gave evidence before this Tribunal at the hearing of the original appeal in September 2005. The Appellant contends that since one of the Stewards, Mr Austin, was not present at that hearing, the other two would effectively be acting as witnesses in a hearing in which they also constituted part of the decision-making body.

62. After considering the Stewards' reasons for decision, I am of the view that little turns on this alleged procedural defect. The full transcript of DS Marshall's evidence was accepted into evidence by the Stewards. The Stewards in their reasons identified that there were some areas in which the evidence of DS Marshall and DS Cramp were in conflict. That observation could be made from a comparison of the transcript of DS Marshall's evidence with the evidence of DS Cramp. Apart from noting the areas where the evidence was not consistent with that of DS Cramp, the Stewards made no adverse finding in relation to the credibility or honesty of DS Marshall.

63. Ground (iv) of the revised grounds contends that the Stewards failed to properly undertake the task of reconsidering the previous findings in that the Stewards failed to undertake the task of re-assessing the evidence at the original hearing before the Stewards in the context of the further evidence received at the re-hearing.

64. In my view it cannot be said that the Stewards did not re-assess their original findings in light of the additional evidence heard at the re-hearing. On my reading of the reasons for decision given by the Stewards at the re-hearing, they did precisely that, albeit I have found the manner in which they went about it left one with a reasonable apprehension that they did not approach the task in an unbiased manner.

65. Ground (v) of the revised grounds contends that the Stewards erred in that they failed to conclude in light of the evidence of DS Marshall and DS Cramp, and the balance of the evidence, that the evidence of Mr Taylor should be rejected and the charges against the Appellant dismissed.

66. For my part, it is difficult to divorce from the consideration of this ground my finding that there were significant inadequacies in the manner and approach taken by the Stewards in undertaking the re-hearing which inadequacies have in part led to my finding that there was a reasonable apprehension of bias. Had the re-hearing been conducted in a manner that did not give rise to a finding of reasonable apprehension of bias, it may well have been that the finding of the Stewards in re-affirming their acceptance of the evidence of Mr Taylor in relation to the assault, after considering the evidence of DS Marshall and DS Cramp, was reasonably open. This Tribunal will not usually substitute its own view for that of the Stewards, where the Stewards' finding is reasonably open on the evidence since the Stewards are vested with the primary role of making the findings of fact and this Tribunal will only interfere with factual findings where there are strong and cogent grounds for grounds for doing so. Since I have found that the Stewards decision was one which gave rise to a reasonable apprehension of bias, strong and cogent grounds exist in this case.

67. The Appellant invites this Tribunal to reconsider the evidence heard by the Stewards and this Tribunal and to make a final determination. Ordinarily, I would be minded to refer the matter back to a new panel of Stewards to rehear it, especially since the findings are based on assessments of credibility. But the long history of this matter and the fact that there will be considerable further delay involved in the ultimate determination of the matter if it was referred back, leads me to accept that this is an appropriate circumstance in which this Tribunal ought exercise its power under section 17 (9)(c) of the Racing Penalties (Appeals) Act 1990.

68. In my view the evidence of the two Police officers, namely DS Marshall and DS Cramp, made it extremely difficult for any reasonable trier of fact to be satisfied on the Briginshaw standard that the Appellant had physically assaulted Mr Taylor, in contradistinction to simply being present during the assault. The only witness the Stewards had to support the assertion that the Appellant was physically involved in the beating was Mr Taylor himself, and Mr Taylor, in that respect, was clearly demonstrated by the evidence of the two Police officers, to be unreliable and inconsistent.

69. In my view the finding that the Appellant assaulted Mr Taylor by participating with others in physically beating him, in contradistinction to a finding that the Appellant was present during the beating, should be set aside because it is not adequately supported by evidence which is of the necessary quality and reliability that is required to make out such a serious allegation.

70. Accordingly, to the extent that ground (v) relates to the conviction in respect of the charge under Rule 231 I would uphold this ground.

71. The Appellant was also found guilty by the Stewards of breaching Rule 243 of the Rules of Harness Racing, which provides:

    "A person employed, engaged, or participating in the harness racing industry shall not behave in a way that is detrimental to the industry"

72. In *Zucal v Harper [2005] WASCA 76,* Steytler P, with whose judgment Wheeler and Pullin JJA agreed, was called upon to consider the ambit of Rule 243 and stated at page 21 of his judgment:

"...in a sport such as harness racing, involving public participation through betting on races, there is plainly a need for those administering the sport to maintain public confidence in its integrity and standards. If a person who is prominent in the harness racing industry engages in conduct which has the potential for being made public and which if made public, will cause people to lose confidence in his or her integrity or standards (even if the conduct is unconnected with the racing industry), then it may very well be the case that that conduct will, as a consequence, have a flow on effect as regards the manner in which the industry itself is perceived."

73. Steytler P went on to say it is a question of fact and degree whether it can be said that particular conduct engaged in by a particular person is detrimental to the industry.

74. Mr Harper was at the relevant time a person engaged in the harness racing industry, enjoying a high profile in it as one of the State's leading reinspersons. The events surrounding the assault on Mr Taylor not surprisingly attracted prominent media coverage, albeit there was a degree of sensationalism in the media reports for which the Appellant cannot be responsible.

75. It was well and truly established on the evidence that Mr Taylor was the victim of a savage assault.

76. In my view the Appellant's claim that he was acting as a "Good Samaritan" in taking Mr Taylor in when he arrived injured and beaten on his doorstep on the night of 29 December 2003 is not believable. It is inconsistent with his refusal to answer questions at the early stages of the original inquiry on the basis that his answers might incriminate him. When he subsequently agreed to give evidence, there was nothing about his evidence which would suggest he had a basis to consider his answers may incriminate him in some way.

77. Mr Harper's evidence was that Mr Taylor did come to his house on 29 December 2003 already bashed and beaten asking Mr Harper for help. Mr Harper said he cleaned Mr Taylor up, gave him a towel, a cigarette and a drink. He said that Mr Taylor suggested, when his mother arrived at Mr Harper's house, that Mr Harper should tell her a lie, namely that he wasn't there but had gone "for a ride with a couple of mates", because he didn't want his mother to see him in the state he was in. Mr Harper says he went along with that, but when he went outside Mrs Taylor wasn't going to accept that. According to Mr Harper he went back into the house and told Mr Taylor he should go out and see his mother. He said that Mr Taylor ultimately came out telling his mother that the assault didn't happen there, and that it wasn't Mr Harper. Mr Harper said he was never told by Mr Taylor who had assaulted him.

78. Mrs Taylor's evidence was in stark contrast to that of Mr Harper. Her evidence was that when her son Mr Taylor came out of the front door of Mr Harper's house he was limping and crying with Mr Harper following behind. Mrs Taylor said she asked Mr Harper what he had done to her son. She said Mr Harper walked back into his house and then came back out and said: *"It didn't happen here".*

79. The Stewards accepted Mrs Taylor as a credible witness. From my reading of the transcript I agree with the Stewards assessment of her. I also accept her version of events as to the discussion which took place outside of Mr Harper's residence. It is simply not believable that Mr Harper would have conducted himself and the conversation with Mrs Taylor in the manner that he did if he was truly acting as the "Good Samaritan" as he asserts.

80. After considering all of the evidence that was given in the original hearing before the Stewards, the additional evidence given before this Tribunal, and the further evidence given at the re-hearing by the Stewards, I have little hesitation in coming to the

conclusion that the Appellant was present and involved in the assault on Mr Taylor, albeit I have found that the evidence of him actually being physically involved in the assault was unsatisfactory in light of the significant inconsistencies between what Mr Taylor told the Police and what he told the Stewards.

81. Having regard to the evidence as a whole, and the fact that Mr Taylor's evidence to the Stewards and his statements to the Police were consistent to the extent that he claimed he was assaulted by others in the presence of and at the instigation of the Appellant, I am satisfied that the evidence strongly supports a finding that the Appellant had organized and was present when a savage assault was inflicted on Mr Taylor by others and accordingly I support and join in that finding of fact. In my view that finding, combined with the high profile of the Appellant in the harness racing industry and inevitable subsequent publicity the incident was going to attract, more than justifies the determination that the Appellant had acted in breach of Rule 243 by engaging in behaviour which was detrimental to the industry. In the circumstances, I would dismiss ground (v) to the extent that it relates to the conviction under Rule 243.

82. In summary, I uphold ground (i) and upon my review of the evidence I find that the charge against the Appellant under Rule 231 is not made out, but that the charge against the Appellant under Rule 243 is made out and I accordingly affirm the decision of the Stewards in that respect. Further I uphold ground (v) to the extent that it relates to the Stewards finding that the Appellant breached Rule 231, but not in relation to their finding of guilt in respect of Rule 243. I would dismiss all the other grounds of appeal.

83. The final ground of appeal, being ground (vi) of the revised grounds, contends that the penalty imposed was excessive and outside the range of a fair sentence.

84. In light of the findings made above, I would propose that the parties have the opportunity to present further submissions in relation to penalty before proceeding to make a final determination in respect of that ground of appeal.

Seal of the Racing Penalties Appeal Tribunal of WA

ROBERT NASH, MEMBER